COLIN BIGGERS & PAISLEY LAWYERS

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PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

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

COLIN BIGGERS & PAISLEY LAWYERS

Our Planning Government Infrastructure and Environment group

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

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

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

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

Our specialist expertise and experience

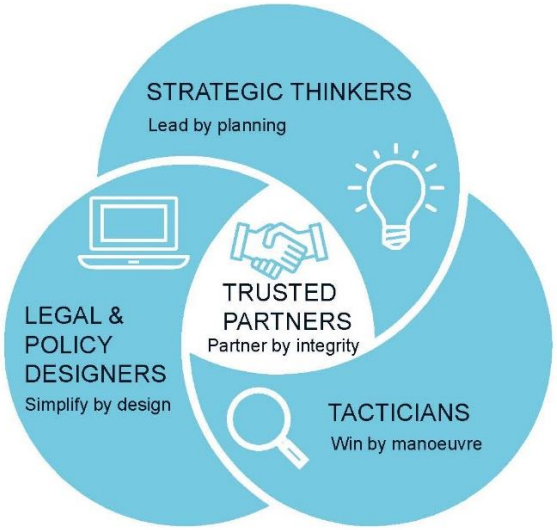
Our Planning Government Infrastructure and Environment group is recognised for our specialist expertise and experience:

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

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

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

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



Lead, Simplify and Win with Integrity

Our Team of Teams and Credo

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

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

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

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Key implications of the Draft South East Queensland Regional Plan (*ShapingSEQ*)

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the implications of the release of the Draft South East Queensland Regional Plan (*ShapingSEQ*)

January 2017

In brief

On 20 October 2016, the State government released the Draft South East Queensland Regional Plan (*ShapingSEQ*). *ShapingSEQ* sets out a 25-year strategy to manage the region's growth through to 2041. For the first time this strategy is guided by an overarching 50-year vision. Parties wishing to make a formal submission have until midnight 3 March 2017.

ShapingSEQ's vision is underpinned by five themes: grow, prosper, connect, sustain and live. While each theme includes several highlights such as the promotion of place-making initiatives and an extensive commitment to extending public transport networks, a deeper analysis highlights key land use and financial implications for local government and developers.

South East Queensland's population is anticipated to increase by approximately 1.98 million by 2041, with the bulk expected to occur in the western and southern growth corridors

South East Queensland (**SEQ**) is currently home to approximately 3.4 million people. This represents one in seven Australians and 70% of Queensland's population. A projected annual growth rate of 65,000 over the next 25 years is anticipated to see the region's population reach 5.35 million by 2041.

While every local government within SEQ is projected to experience growth over the next 25 years, those most drastically affected include Ipswich, Logan, Gold Coast and the Sunshine Coast. Projected growth rates in Ipswich and Logan are particularly noteworthy, achieving increases of 169.4% and 89.8% respectively. Such growth highlights the ongoing strategic importance of the western and southern growth corridors.

ShapingSEQ adopts a revised approach to identifying and calculating the urban footprint to accommodate projected population growth to 2041

While previous SEQ Regional Plans calculated the urban footprint on a theoretical basis, *ShapingSEQ* has refined the process so that the urban footprint now reflects realistic land supply. The new urban footprint now takes account of influencing factors such as land use, developer capacity, market forces and the timing of supporting infrastructure.

Critically, *ShapingSEQ* also requires all SEQ local governments to maintain at least a 15-year supply of zoned and potentially serviceable land. The State government is committed to monitoring planning schemes and land stock annually to ensure compliance.

The 25 years of land supply within the urban footprint is predicated on a new ratio of infill to greenfield development

To manage the region's growth to 2041, *ShapingSEQ* sets a ratio of 60% infill to 40% greenfield development. At first glance this ratio represents a complete reversal of the target set out under the state's first SEQ Regional Plan. However, *ShapingSEQ* has redefined both greenfield and infill development to produce a result that conflicts with traditional interpretations.

Whether development is classed as greenfield or infill is now entirely dependent on a site's position in relation to a statistical division's boundary. Development inside the statistical division's boundary will be classed as infill, while development outside will be classed as greenfield.

Aerial and land use mapping confirms that the statistical division's boundary is not reflective of whether land is in fact developed. Consequently, *ShapingSEQ* defines numerous areas such as land within Coomera as greenfield development, despite the fact they are largely developed.

This new interpretation disguises the fact that there is substantially less greenfield land remaining in SEQ than the 40% reported within *ShapingSEQ*. As a consequence, it is expected that emerging community greenfield land will be at a premium over the next 25 years.

The State's push towards increasing the proportion of infill development reflects ongoing development trends and the pressing need to increase housing diversity

State government statistics indicate infill development has become increasingly prevalent in recent years. For example, infill development accounted for 97% of all new development in Brisbane between 2011 and 2015. Between 2006 and 2015, 69% of SEQ dwelling approvals were granted within existing urban areas. Overall lot size also decreased from 640m^2 in 2007 to 477m^2 in 2015.

At the same time, factors such as the global financial crisis and the cost of infrastructure have seen slower than expected uptakes of residential land in key greenfield locations such as the Ripley Valley and Caloundra South, although there have been significant exceptions such as Yarrabilba.

To accommodate projected population growth, the state anticipates SEQ will require 907,200 new dwellings by 2041. Of these new dwellings, *ShapingSEQ* sets a benchmark of 548,700 within infill locations. To successfully achieve such a target, it will be necessary to gradually transition away from traditional detached houses to increase the proportion of alternative dwellings.

Changes to dwelling stock have traditionally occurred quite slowly. For example, in 2001 detached dwellings accounted for 75.5% of all dwellings. By 2011, a decrease of 1.1% was achieved. More recently the speed of this change has increased. For example, between 2011 and 2015 more than half of residential approvals were for dwellings other than houses.

In an effort to ensure affordable housing and design are not sidelined at the expense of ongoing densification and infill development, *ShapingSEQ* aims to address the "missing middle". This term refers to the lack of dwelling types between detached houses and high-rise units.

ShapingSEQ encourages developers to adopt increasingly diverse products, including "Fonzie" flats, "plexes", row houses, terrace houses and medium rise apartments. The State highlights Northshore Hamilton and Fitzgibbon Chase as positive examples of such development. Market demand and uptake will largely confirm whether such offerings become common place.

ShapingSEQ's timeframes conflict with those currently applied to local government

ShapingSEQ's timeframes are currently in conflict with those adhered to by local government. As noted, *ShapingSEQ* sets out a 25-year strategy to manage growth to 2041 and a 50-year vision to guide development through to 2066. It also requires local governments to maintain a 15-year supply of zoned and serviceable land through to 2031.

At the same time, the strategic frameworks of local government planning schemes prepared under the *Sustainable Planning Act 2009* (**SPA**) have a strategic planning horizon of 20 years (2031) and a land use (zoning) horizon of only 10 years (2026).

Local Government Infrastructure Plans (**LGIPs**) within SPA planning schemes also feature priority infrastructure planning areas with a planning horizon of 10 to 15 years (2026-2031). Recent history indicates that SEQ councils are choosing to adopt the minimum period of 10 years.

ShapingSEQ's requirement for councils to provide 15 years of zoned and serviceable land will increase the financial burden on local government

Given the timeframes currently adopted within the majority of LGIPs, *ShapingSEQ*'s requirement that 15 years of zoned and serviceable land be maintained effectively means that local governments must fund a further five years of local development infrastructure. This move has the potential to significantly increase the financial burden on local governments which are already managing tight budgets and increasing debt burdens.

This increased financial burden is also being imposed at a time when local governments are limited to capped infrastructure charges. The short-term implications of its capped framework include increased local government debt, increased rates and reduced services. Long-term implications include unsustainable financial markets and ongoing political instability.

Court allowed appeal against approval of multi-unit dwellings, finding conflicts with the Brisbane City Plan 2000 and insufficient grounds to justify an approval

Georgina Taylor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Kissane & Ors v Brisbane City Council* [2016] QPEC 57 heard before Everson DCJ

January 2017

In brief

The case of *Kissane & Ors v Brisbane City Council* [2016] QPEC 57 concerned a submitter appeal in the Planning and Environment Court against the decision of the Brisbane City Council to approve a development in Kuraby involving a development application for a development permit for a material change of use and preliminary approvals for building works for 68 multi-unit dwellings, together with a development permit for reconfiguring a lot to create a new road.

Mary Kissane, Arsil Nayyar Hussain and Shamile Hussain are neighbours of the site who commenced the appeal. The issues in dispute were narrowed during the appeal to the remaining issues of density, amenity and character impacts and bushfire risk.

The court found that the proposed development was in conflict with the *Brisbane City Plan 2000*, and that the extent of these conflicts were confirmed by the *Brisbane City Plan 2014*. In the absence of sufficient grounds to justify approving the proposed development despite the conflicts, the court allowed the appeal.

Court found obvious and significant conflict with the Brisbane City Plan 2000 with respect to the density, form and scale of the proposed development

The development application was lodged by Pacific Enterprises Pty Ltd and Noriba Pty Ltd with the council under the *Brisbane City Plan 2000*, shortly before the *Brisbane City Plan 2014* came into effect. Since the commencement of the appeal, the proposed development had changed and been reduced to 62 multi-unit dwellings of between two and three storeys, to be built over four stages.

Under the *Brisbane City Plan 2000*, the site was located in the Emerging community area, which was "*generally suitable for urban purposes at some future time*". Under the *Brisbane City Plan 2000*, the site was also included within a Potential Development Area in the Kuraby local plan, which relevantly provided that the site was generally intended for low density residential houses with dwelling densities of between 10 and 15 dwellings per hectare. The Kuraby local plan encouraged higher dwelling densities of up to 20 dwellings per hectare between 400 and 800 metres from Kuraby or Fruitgrove railway stations, where dwellings "*must be designed to ensure compatibility with the form and scale of detached housing*". Within 400 metres of Kuraby or Fruitgrove railway stations, dwelling densities of up to 25 dwellings per hectare were encouraged.

Kuraby railway station was the nearest station to the site, which was approximately one kilometre away. Pacific Enterprises and Noriba submitted that a flexible approach must be taken when considering the wording of the Kuraby local plan and that the strategic intent to provide increased housing densities close to public transport must be taken into account. Despite the site being located greater than 800 metres from Kuraby railway station, the court accepted that it was within walking distance, albeit not comfortable walking distance.

However, the court found that the requirement that dwellings greater than 400 metres from Kuraby railway station "*must be designed to ensure compatibility with the form and scale of detached housing*" was a mandatory requirement under the Kuraby local plan. In considering the evidence from the town planning experts, the court accepted the evidence of the town planning expert for the submitters that the proposed development was incompatible with detached housing, including the adjoining detached housing, in terms of its height, form and scale. The court also accepted the submitters' town planning expert's evidence that there was no support for development of the density proposed within the Kuraby local plan area. The court found that the nature and extent of the conflict with the *Brisbane City Plan 2000* was obvious and significant.

Court gave significant weight to the Brisbane City Plan 2014 as it represented a contemporaneous statement of planning intent for the site

Section 495 of the *Sustainable Planning Act 2009* relevantly provides that the court must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate. In hearing the appeal, the court considered the appropriate weight to be given to the *Brisbane City Plan 2014*.

As the development application was lodged ten days before the *Brisbane City Plan 2014* came into effect, the court was of the view that the *Brisbane City Plan 2014* represented a contemporaneous statement of planning intent for the site, and so should be accorded significant weight.

Under the *Brisbane City Plan 2014*, the site is located in the Emerging community zone and the purpose of the code for this zone is to "*identify land that is suitable for urban purposes and conserve land that may be suitable for urban development in the future*". The site is also subject to the Kuraby neighbourhood plan code, which the court found was generally in accordance with the provisions in the Kuraby local plan, but relevantly provided the restrictions on dwelling densities within 800 metres of Kuraby railway station in more mandatory terms. With respect to the issues of density, form and scale, the court was of the view "*that the relevant provisions of City Plan 2014 confirm the extent of the conflict of the proposed development with the planning intent for the area*".

Court gave significant weight to the Brisbane City Plan 2014 Bushfire overlay code as it represented a comprehensive response to a contemporary risk

The *Brisbane City Plan 2000* did not include provisions to manage bushfire risk. At the time the development application was made, *State Planning Policy 2013* applied and dealt with the issue of bushfire risk. Under the *Brisbane City Plan 2014*, the site is identified on the Bushfire overlay code map as being surrounded by predominantly medium hazard areas and some high hazard areas. The Bushfire code provides for a minimum building protection zone of 20 metres of reduced fuel and includes an inner 10 metre zone of very low fuel.

The parties' three bushfire experts all undertook an assessment of the proposed development against the Bushfire overlay code. They all agreed that the Bushfire overlay code was part of "*the most up-to-date instrument available*". The court took this evidence into account in determining that significant weight should be given to the Bushfire overlay code as "*it represents a comprehensive response to a contemporary risk in circumstances where City Plan 2000 did not address the issue*".

Court found part of the proposed development subject to unacceptable bushfire risk

The bushfire expert for Pacific Enterprises and Noriba downgraded the hazard level of the site from medium-high to low-medium based on his detailed site-specific analysis, including taking into account the low combustibility of Black Sheoak, which was found to be present in significant numbers adjoining the site to the south. Accordingly, the developers' bushfire expert was of the opinion that the use of fire retardant fencing and appropriate building design would provide "*appropriate levels of safety for people and property*" in those parts of the proposed development most at risk from bushfire threats.

The submitters asserted that the site was not suitable for the proposed development because it was subject to unacceptable bushfire risks. Their and the council's bushfire experts maintained the position that "*access and a total separation of at least 20 metres from the hazard to the nearest building are essential to provide a minimum acceptable risk position*". The court preferred this evidence to that of the bushfire expert of the developers and found that the Bushfire hazard overlay in the *Brisbane City Plan 2014* was accurate.

In applying this position, the court found that some of the buildings in stage one and all of the buildings in stages three and four of the proposed development failed to comply with the minimum 20 metre separation from the bushfire hazard. The court found that this risk could not be addressed through conditions and that only those parts of the proposed development not subject to unacceptable bushfire risks should be considered appropriate for approval.

In considering whether there were sufficient grounds to justify approval of the proposed development, the court found that there was need for the proposed development. However, in light of the significant conflicts with the *Brisbane City Plan 2000*, the court found insufficient grounds to justify approving the proposed development despite the conflict.

Legal professional privilege: when does the court determine to waive the privilege?

Nina Crew | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Conias Hotels Pty Ltd & Anor v Brisbane City Council & Anor* [2016] QPEC 59 heard before Jones DCJ

January 2017

In brief

The case of *Conias Hotels Pty Ltd & Anor v Brisbane City Council & Anor* [2016] QPEC 59 concerned a directions hearing in the Planning and Environment Court for a pending application for costs on the part of Conias Hotels Pty Ltd and City Commercial Holdings Pty Ltd against the developer, Ross Nielson Properties Pty Ltd, to recover the costs of Conias and City Commercial Holdings in relation to the originating application which was discontinued by Conias and City Commercial Holdings.

The main issue was whether Conias and City Commercial Holdings were entitled to documents directly relevant to the advice received by the developer on its prospects of success in the proceeding.

While the court determined that Conias and City Commercial Holdings were entitled to any document containing the prospects advice, the relief sought by Conias and City Commercial Holdings was too broad. Nonetheless, the court decided to allow the parties an opportunity to address the court in respect of the final orders being sought.

The originating application was discontinued on the basis that the development application the subject of the originating application was withdrawn by the developer

The developer intended to carry out a residential high-rise development at the edge of Brisbane central business district fronting Roma Street. Conias and City Commercial Holdings are the owners of commercial premises whose access would have been affected by the developer's proposed development.

The court made orders which allowed Conias and City Commercial Holdings leave under rule 15(1)(b) of the *Planning and Environment Court Rules 2010* to discontinue the originating application on the grounds that the development application the subject of the originating application was withdrawn by the developer.

The court made further orders in October 2016 requiring applications and supporting material and reply be filed by the parties with respect to costs.

Draft orders were sought requiring the developer to provide documents to Conias and City Commercial Holdings directly relevant to the prospects advice received by the developer

The court was provided with a draft set of six orders of which orders 2.1 and 2.2 were in dispute that were as follows:

> *(2) by 4pm on 30 November 2016 the third respondent shall either:*
>
> *(2.1) deliver to the applicants copies of all documents directly relevant to the allegations in paragraph 12 of the affidavit of Peter Gordon Green sworn on 10 November 2016 that the third respondent had advice on its prospects in the proceeding, including any note by the servants, agents or legal representatives of the third respondent in respect of any oral advice to the third respondent on its prospects in the proceeding, or*
>
> *(2.2) file and serve affidavits by both a servant of the third respondent having knowledge of the documents in the possession, power and control of the third respondent and the solicitor at Conner O'Meara having carriage of the matter for the third respondent attesting to the fact that the documents of the sort described in paragraph 2.1 do not exist.*

Paragraph 12 of Mr Green's affidavit stated that the developer made the decision not to proceed with the proposed development despite having received a favourable prospects advice.

On 15 November 2016, the solicitors for Conias and City Commercial Holdings wrote to the developer's solicitors seeking a copy of the prospects advice referred to in Mr Green's affidavit. The developer's solicitors replied on the same day stating that the advice provided to Mr Green with respect to the prospects of the developer in the proceeding was provided orally.

This formed the basis upon which the developer sought to oppose the draft orders and the developer contended that there was no duty or obligation to go any further.

Court determined that legal professional privilege was waived and Conias and City Commercial Holdings were entitled to the relief sought for its application for costs

However, the court was of the view that "*there might well be written advice underlying the substance passed on to Mr Green by Mr Nielson*". Accordingly, the relevant question was whether there was written advice in existence that had been provided to Mr Neilson which was then passed on orally to Mr Green.

The court considered the disclosure of the prospects advice in the context of legal professional privilege and whether or not that privilege had been waived.

The court found that the prospects advice was given and acted upon by the developer and it was "*in all probability, going to be a not insignificant or inconsequential "issue" in the cost proceedings*". The court adopted the words used by the Federal Court in *Bennett v The Chief Executive Officer Australian Customs Service* [2004] FCAFC 237 that:

- "*It would be inconsistent and unfair, having disclosed and used the substance of the advice…to now seek to maintain privilege in respect of the relevant parts of that advice which pertain to the expressed conclusion. …*"
- "*That for a client to deploy the substance of effect of legal advice for forensic or commercial purposes, is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.*"

For this reason, the court determined that Conias and City Commercial Holdings were entitled to any document containing the prospects advice. However, the court considered that the request for disclosure of copies of all the documents directly relevant to the allegation made in Mr Green's affidavit was too broad. Nonetheless, the court was inclined to leave the matter to the parties to resolve until such time the court was required to intervene.

Deemed approvals are not without risk

William Lacy | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Beerwah Land Pty Ltd v Sunshine Coast Regional Council; Woodlands Enterprise Pty Ltd v Beerwah Land Pty Ltd & Another and Sunshine Coast Regional Council v Beerwah Land Pty Ltd* [2016] QPEC 55 heard before Rackemann DCJ

January 2017

In brief

The case of *Beerwah Land Pty Ltd v Sunshine Coast Regional Council; Woodlands Enterprise Pty Ltd v Beerwah Land Pty Ltd & Another and Sunshine Coast Regional Council v Beerwah Land Pty Ltd* [2016] QPEC 55 concerned three proceedings for declaratory relief in the Planning and Environment Court in respect of a development application made by Beerwah Land Pty Ltd to the Sunshine Coast Regional Council for reconfiguring a lot to create 16 lots, a new road and access easements on land situated at Geordy Close and Lloyd Street, Beerwah. Woodlands Enterprises Pty Ltd was also a party to the proceedings and was the operator of a nearby poultry farm which had concerns about reverse amenity impacts arising from the proposed development.

The development application was processed on the basis that it required code assessment. However, due to an error in calculating the length of the decision-making period, the council did not decide the application within the decision-making period or extend the decision-making period for the development application. As a consequence, Beerwah Land gave a deemed approval notice which had the effect that the council was taken to have decided to approve the development application. The council exercised its powers under section 331 of the *Sustainable Planning Act 2009* and gave a decision notice for the development application which imposed conditions which "*in effect, denied approval for the majority of the lots sought and, in particular, those closest to the poultry farm*" (at [7]).

The court found that the conditions imposed on a deemed approval could not be used to effect a refusal of the development application. However, the court determined that its broad power under section 440 of the *Sustainable Planning Act 2009* to deal with matters of noncompliance was applicable where an assessment manager had failed to make a decision despite the application of the deemed approval provisions. The court found that there was a planning and public/community interest in the development application being subject to merit assessment and that it was appropriate to exercise the discretion under section 440 and return the application to the decision stage.

Court found that the development application was properly made and subject to code assessment

The development application was, with the council's agreement, made under the *Caloundra City Plan 2004* as a development application (superseded planning scheme).

The council and Woodlands submitted that there were a number of issues with the way the development application was made and processed as a code assessable application. The first being whether the development application made by Beerwah Land was the one which council had agreed to assess under the council's superseded planning scheme and the second being whether the development application required impact assessment.

Construing the application as a whole, the court found that the application was the one which council had agreed to assess under the council's superseded planning scheme and that the development application was code assessable.

Court found that conditions imposed on a deemed approval could not amount to a partial refusal of the development application

It was contended that the proposed development conflicted with certain provisions of the council's superseded planning scheme and that on this basis it could not be approved consistently with the decision rules under section 326 the *Sustainable Planning Act 2009* or that the council had power to subject the deemed approval to conditions directed at the conflict.

The court emphasised that the regime for deemed decisions did not provide for a decision based on an assessment of the development application. Instead the regime was such that the development application was deemed approved after the giving of a deemed approval notice due to the failure of the assessment manager to make a decision within the decision-making period.

From the point a deemed approval notice was given, the assessment manager's "*only remaining role is to give a decision notice which either… approves the application or… approves the application subject to conditions*" (at [26]). The court found that the power to refuse a development application was lost where the deemed approval regime of the *Sustainable Planning Act 2009* was enlivened and that "*the conditions power cannot be used to effect a refusal, even one which would be consistent with the planning scheme provisions*" (at [27]).

The decision notice given by the council included a condition which expressly stated that 13 of the 16 lots were "*not approved*" (at [7]). The court found that this was a partial refusal of the development application which was not within the council's powers under section 331 of the *Sustainable Planning Act 2009* in circumstances where a deemed approval notice had been given.

Court exercised its discretion under section 440 of the Sustainable Planning Act 2009 to return the development application to the decision-making stage

Section 440 of the *Sustainable Planning Act 2009* gives the court a broad discretion where a provision of the Act has not been complied with, or has not been fully complied with, to deal with that matter in the way the court considers appropriate.

The court found that there had been a failure to comply with section 318(1) of the *Sustainable Planning Act 2009*, in particular the requirement that the council would decide the development application within the decision-making period.

Beerwah Land submitted that section 440 should not apply on the basis that:

- the relief under that section was only available to an applicant and not an assessment manager; and
- the failure to comply with section 318(1) was not a non-compliance for the purpose of section 440 but rather generated other rights.

The court found no justification for these submissions in the language of the provision or in the statutory scheme otherwise. The non-compliance which gave rise to a deemed approval did not dictate a different application of section 440.

It was further submitted by Beerwah Land that the court should not exercise its discretion under section 440 in circumstances where the statutory scheme provided for other consequences, namely a deemed approval. The court relevantly stated (at [50]) as follows in respect of granting a remedy under section 440 where there is a deemed approval:

> *Certainly it should not be seen as a remedy to be applied whenever a deemed approval arises by reason of an assessment manager's honest mistake, but equally it should not be approached on the basis that the discretion should never be exercised in a way which interferes with a deemed approval. Nor do I consider that some disentitling conduct on the part of the holder of the deemed approval is required, before the exercise of the discretion under s 440 could be justified.*

In determining whether to exercise its discretion, the court noted the following:

- the council's non-compliance arose by accident;
- Beerwah Land had not acted to its detriment in reliance on the deemed approval;
- there was a significant planning and public/community interest in a merit assessment of the development application arising from concerns surrounding reverse amenity impacts arising from the proximity of the residential subdivision to the poultry farm.

On balance, the court decided that the discretion under section 440 should be exercised to return the development application to the decision-making stage, meaning that the deemed approval would no longer be of effect.

Court approves demolition of isolated pre-1947 house on busy arterial road

William Lacy | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ken Drew Town Planning Pty Ltd v Brisbane City Council* [2016] QPEC 62 heard before Bowskill QC DCJ

February 2017

In brief

The case of *Ken Drew Town Planning Pty Ltd v Brisbane City Council* [2016] QPEC 62 concerned an appeal in the Planning and Environment Court by Ken Drew Town Planning Pty Ltd against a decision of the Brisbane City Council to refuse a development application made for the demolition of a pre-1947 house and for a material change of use for a multiple unit dwelling on land at 392-396 Old Cleveland Road, Coorparoo.

In the hearing Ken Drew Town Planning only sought that the appeal be allowed in respect of the aspect of the development application for the demolition of the pre-1947 house, and did not persist in appealing the refusal of the material change of use for the multiple unit dwelling.

The court found that while the relevant part of the road in which the house was located maintained some traditional character, the demolition of the house would not result in the loss of traditional building character and the house did not contribute positively to the visual character of the road protected by the relevant demolition code. On this basis, the proposed demolition was found to comply with the disputed aspects of the relevant demolition code and the appeal in respect of the aspect of the development application for the demolition of the pre-1947 house was allowed.

Ken Drew Town Planning needed to establish that the proposed demolition met relevant acceptable or performance outcomes of the relevant demolition code of the Brisbane City Plan 2014

The house the subject of the proposed demolition was a pre-1947 Queenslander style house which was in the character residential zone and traditional building character overlay of the *Brisbane City Plan 2014*.

The issues in the appeal were such that to succeed in the appeal Ken Drew Town Planning needed to show that the proposed demolition complied with one of two acceptable outcomes, or a performance outcome of the traditional building character (demolition) overlay code. The relevant performance outcome and acceptable outcomes required that the house (at [3]):

> *(a) is a building which, if demolished, will not result in the loss of traditional building character (AO5(c)); or*
>
> *(b) is in a street that has no traditional character (AO5(d)); or*
>
> *(c) is a building which does not contribute positively to the visual character of the street (PO5(c)).*

Court found that an average visitor would leave the relevant part of Old Cleveland Road with an impression that it had a mixed character but that it maintained some traditional character

The visual character of the relevant part of the road had to be determined by reference to the perception of an average person walking along the road and by considering the whole of the relevant part of the road as opposed to considering particular houses or groups of houses.

The relevant part of Old Cleveland Road for the purposes of the appeal was limited to the part of the road which ran approximately from French Street in the west to Burke Street in the east, with the subject house being located on the northern side and towards the eastern end of this part of Old Cleveland Road. The subject house was set back 10 metres from the road and was flanked on each side by multiple unit dwellings with both of these multiple unit dwellings having been constructed sometime after 1946.

The relevant part of the road had changed considerably since 1946 and while a number of pre-1947 houses remained, it now contained prominent commercial buildings and multiple unit dwellings which had been constructed after 1946.

Having been assisted by the evidence of heritage architects called by each party, the court found "*that the overall visual character of this part of Old Cleveland Road is not one of traditional character (notwithstanding the presence of some traditional character buildings, particularly toward the western end, of the northern side of the Road)*" (at [32]). Further, the court found "*the reasonable average visitor would leave this section of Old Cleveland Road with the impression that it is a busy arterial road, with a mixed character, both in terms of uses and architectural style, building scale, size and heritage, but in respect of which the commercial and multiple unit dwellings are the more prominent, by virtue of their size, and stark exposure*" (at [33]).

However, despite this considerable departure from the traditional character of the road in 1946, the court was not willing to accept that the relevant part of the road had "no traditional character" and therefore the court found that the proposed demolition did not comply with AO5(d) which required that the road have no traditional character.

Court found that the proposed demolition would not result in the loss of traditional building character and that the house did not contribute positively to the visual character of the road protected by the relevant demolition code

The court noted that the loss of traditional character which is contemplated by AO5(c) of the relevant demolition code is not an absolute loss but is rather a loss of character that is meaningful or significant.

The subject house, which was set back from the road between brick multiple unit dwellings at the eastern end of the relevant part of the road, was isolated from the remaining pre-1947 houses that were clustered towards the western end of the relevant part of the road. These features of the subject house's location and the already significantly degraded traditional building character of the relevant part of the road led to the court finding that the proposed demolition would not result in "*a meaningful or significant loss of traditional building character*" (at [40]) and that the proposed demolition therefore complied with AO5(c) of the relevant demolition code.

Although not necessary, having found that the proposed demolition complied with AO5(c) of the relevant demolition code, the court also considered whether the proposed demolition complied with PO5(c) of the code. This required the court to determine whether the subject house contributed positively to, as opposed to being neutral or detracting from, the visual character of the street protected by the relevant demolition code and the *Brisbane City Plan 2014*.

Being located as it was back from the road and separated from the other remaining pre-1947 houses in the relevant part of the road the court found that "*the contribution of the subject house, to the visual character of the Road which is protected by the code and the planning scheme, is not material*" (at [47]). On this basis, the court found that the proposed demolition complied with PO5(c) of the relevant demolition code.

As the proposed demolition was found to comply with AO5(c) and PO5(c) of the relevant demolition code the appeal in respect of the aspect of the development application for the demolition of the pre-1947 house was allowed.

Proposed self-storage facility refused in the low density residential zone

Shaun Pryor | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fortress Freeholds Pty Ltd v Brisbane City Council & Ors* [2016] QPEC 63 heard before Bowskill QC DCJ

February 2017

In brief

The case of *Fortress Freeholds Pty Ltd v Brisbane City Council & Ors* [2016] QPEC 63 concerned an appeal in the Planning and Environment Court commenced by Fortress Freeholds Pty Ltd against the decision of the Brisbane City Council to refuse a development application for a development permit for a material change of use for a warehouse (self-storage facility) and a reconfiguring of a lot.

The site the subject of the appeal was located on Gympie Road, Carseldine, and was improved by the Carseldine Palms Motel, which had existed since 1996 but was no longer operational. The site was surrounded by predominantly residential lots to the east and west, Carseldine police station to the south and a proposed Energex substation to the north. The council opposed the material change of use but not the reconfiguring a lot aspect of the development application.

The court found that the proposed development was in "*serious and major*" conflict with the planning scheme and that there were no grounds established to justify approval of the development despite the conflict.

Court found that the proposed use was in conflict with the relevant provisions of the Brisbane City Plan 2014

The alleged conflicts with the *Brisbane City Plan 2014* arose from the proposed use of the site for a warehouse in circumstances where the site was included in the suburban living area under the Strategic Framework and the low density residential zone.

Fortress Freeholds conceded that the proposed development was in conflict with a number of provisions of the planning scheme since it would cater for more than a local need but denied conflict with any other provisions.

With regards to the Strategic Framework, the court agreed with the council's submissions and found that whilst the proposed use was not expressly discouraged and some non-residential uses were contemplated in the area, such uses did not include warehousing. On the other hand, the court recognised that the proposed storage and warehousing use was expressly contemplated within industrial areas.

With regards to the low density residential zone code, Fortress Freeholds contended that this code also did not discourage the proposed use and that the proposed development was appropriate on the site having regard to the surrounding locality.

The town planning expert for Fortress Freeholds observed that the existing use of the land for a motel and the surrounding non-residential uses consisting of a police station and a proposed Energex substation, meant that the area did not have a character that is "*predominantly dwelling houses supported by community uses and small-scale services and facilities which cater for local residents*" (at [37]).

The court found, however, that the purpose of the low density residential zone code was clear and that the proposed development could not be said to be "*harmonious*" with the planning scheme in circumstances where the types of non-residential uses contemplated, being community uses and small-scale services and facilities that cater for local residents, were expressly articulated.

Court found that the built form of the proposed development was in conflict with the relevant provisions of the Brisbane City Plan 2014

In respect of the built form, the council contended that the proposed development was in conflict with the provisions of the low density residential zone code and the Bracken Ridge and district neighbourhood plan code.

The applicable codes relevantly required development to be "*of a form and scale that reinforces a distinctive subtropical character of low rise, low density buildings set in green landscaped areas*" and "*of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the … site and is only developed at a greater height, scale and form where there is both a community need and economic need for the development*". The applicable codes also required development for non-residential uses to be "*small-scale*" and to "*cater for local residents*".

In respect of the scale of the built form, the court described the proposed development as "*substantial and significant*" and considered that it would be "*out of place in a low density residential zoned area*". The court also considered that the proposed development was of a greater scale than what could be considered consistent with the amenity and character of the site, community expectations and also the infrastructure assumptions intended for the site and that Fortress Freeholds had not established a need for the proposed development in this location.

Court found no sufficient grounds existed to justify approval despite the conflict

The town planning expert for Fortress Freeholds conceded that the only ground sufficient to overcome the conflict was the potential need for the proposed development, such that if it was found that there was no demonstrated need for the proposed development, there were not sufficient grounds to approve despite the conflict.

The court considered evidence from the need experts for both parties in relation to the self-storage industry. In considering the evidence, the court found the evidence of the need expert for Fortress Freeholds unsatisfactory and unpersuasive and preferred the evidence of the need expert for the council.

The experts identified a self-storage facility customer catchment area defined by reference to a 7km radius of the land (being equivalent to a 20 minute travel time) for the purposes of carrying out a supply and demand analysis.

The analysis identified an estimated demand of 5,225 units based on the 2016 population figure and a demand rate per capita. The analysis also identified 16 competing self-storage facilities within the catchment area providing a total supply of 7,545 storage units. This number was reduced significantly after taking into account discounts for the average occupancy level of 84.1% and the amount of that supply that would be used by people from within the catchment area. This number was then increased when accounting for people within the catchment area using storage facilities outside of the catchment area before arriving at a total existing supply of 5,145 storage units.

The analysis showed that in the "*most likely case*", there would be an estimated shortfall of 101 units which the court found was not evidence of a demonstrable need.

The court also accepted that any need for such a facility could be accommodated on appropriately zoned land within the catchment area.

The court ultimately found that there was not a community or economic need for the facility in the proposed location to justify its approval despite the conflict. It consequently dismissed the appeal in so far as it related to the material change of use aspect of the proposed development.

Despite significant conflict in respect of the height of the building, the court found the proposed development to be of substantial merit

Kathryn O'Hare | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Quintenon Pty Led v Brisbane City Council* [2016] QPEC 64 heard before Rackemann DCJ

February 2017

In brief

The case of *Quintenon Pty Led v Brisbane City Council* [2016] QPEC 64 concerned an appeal by Quintenon Pty Ltd against the council's deemed refusal of a development application for a material change of use for a proposed mixed-use building, including aged care accommodation, assisted living units, medical consulting rooms and a health training facility located at 7 to 17 Wolseley Street, Buranda.

A central issue in the case was the acceptability of the height of the proposed development and whether it was consistent with the intended scale and character of the Buranda Precinct of the Eastern Corridor Neighbourhood Plan.

Relevantly, the council submitted that the proposed development conflicted with the *City Plan 2000* and the *City Plan 2014*, which came into force after the development application was lodged but was deserving of weight. The council also asserted an absence of sufficient grounds to warrant approval notwithstanding the conflict.

Quintenon argued that there was an economic and community need for the proposed development such that there were sufficient grounds to approve the development application. The council argued that the need could still be addressed, to a lesser extent, by a development of acceptable height and that Quintenon had not sufficiently explained the necessity for the number of storeys proposed.

Ultimately, the court was of the view that the proposed development was generally consistent with the relevant local and regional planning provisions, satisfied a strong economic and community need, was of substantial merit and therefore should be approved notwithstanding the conflicts with the planning schemes.

The potential for the proposed development to respond to changing demands by adaptive re-use rather than demolition, promoted desirable sustainability

The height and visual impact of the proposed development gave rise to the most substantial conflicts, in the council's submissions. The proposed development was expressed as 20 storeys but was approximately 82 metres to the top of its roof which the council stated to be "*relatively tall, in absolute terms, for a 20 storey building*". This was a consequence of using a relatively high floor-to-floor vertical dimension of 3.9 metres per floor to ensure that the building could be designed to be flexible in respect of the different uses so that if needs were to change, the potential adaptive re-use of the building could be facilitated.

Of particular focus were the provisions of the Buranda Precinct which relevantly provided that the precinct was to be revitalised, capitalising upon its proximity to the hospital and eastern busway; whilst the intent for the Buranda Core Sub-precinct is that "*a mix of predominantly non-residential uses is supported with a strong focus on medical related services. Development is up to 15 storeys, includes offices and some higher density residential development*".

The court found that the potential for the proposed development to respond to changing demands by adaptive re-use rather than demolition promoted desirable sustainability, in a building which was otherwise well designed and located.

The likely future development of the area must be considered in assessing how the proposed development would sit within the intended outcome for the precinct

Although the central issue was whether the proposed development was consistent with the intended scale and character of the precinct and sub-precinct, the Eastern Corridor Neighbourhood Plan did contemplate the potential for development exceeding the maximum of 15 storeys notwithstanding the statement of intent.

Accordingly, the parties put forward evidence in respect of the likely visual impact of the proposed development with the council submitting that the proposed development would not "fit in" with the surrounding area unless future development was imagined to be exceptionally tall and wide. However, in dismissing this argument, the court found that the likely future development of the area must be considered in assessing how the proposed development would sit within the intended outcome for the precinct.

The court found that the proposed development would not draw attention away from designated landmark sites in the Buranda Precinct

Although the proposed development was in a different physical location, the council submitted that the future development of the designated landmark sites in the Buranda Precinct would find it more difficult to perform their function of providing a prominent visual reference because the height of the proposed development would draw attention away from the designated landmark sites.

In dismissing that submission, the court found that the proposed development would not have the effect alleged by the council, even if the future development of the designated landmark sites was of a lesser height than the proposed development.

The court found that the proposed development as a whole responded to a strong economic and community need

Quintenon relied upon several grounds to justify the approval of the proposed development despite any conflict that were broadly described as relating to need and other matters of merit.

In particular, Quintenon argued that the proposed development satisfied a need for new retirement facilities within the inner city area of Brisbane and difficultly in housing the elderly close to their communities and within easy access to medical-related facilities and more trained aged care workers.

In response, the council submitted that these needs could be addressed, to a lesser extent, by a development of acceptable height and that Quintenon had not explained the necessity for the number of storeys proposed.

However, in finding that the proposed development as a whole responded to a strong economic and community need, the court was satisfied that there was an economic and community need for each component of the proposed development and a benefit to be derived from the co-location of each component.

There were sufficient grounds to approve the proposed development despite the conflict arising from the building's height

Although there was some conflict with the provisions of both the *City Plan 2000* and the *City Plan 2014*, the only significant conflict arose was in respect of the height of the proposed development.

Whilst the height of the proposed development was too high to avoid the finding of some conflict, the court found that it would not be perceived to be dramatically excessive in the context of existing approved and likely future development in the surrounding area as the planned revitalisation and intensification of the Buranda Precinct is realised.

Accordingly, the grounds in favour of approval, including the extent to which the proposed development responded to the strong economic and community need, led the court to conclude that the proposed development should be approved notwithstanding the conflict.

Landowners found to be in contempt of court

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Logan City Council v Jones & Another* [2016] QPEC 60 heard before Rackemann DCJ

February 2017

In brief

The case of *Logan City Council v Jones & Another* [2016] QPEC 60 concerned an originating application by Logan City Council in relation to an alleged contempt of court by landowners. The alleged contempt concerned a contravention of orders made by the Planning and Environment Court on 21 November 2014 in respect of unlawful land uses and buildings found on the landowners' property.

Despite undertaking substantial actions to bring the property into compliance, all parties agreed that the court's orders had been contravened. The court noted that non-compliances cannot be overlooked and should be dealt with so as to deter future reoccurrences.

The court, after acknowledging the landowners' genuine change in attitude and financial difficulties, ordered that they be released into a recognisance, without sureties, for the amount of $1,000 on the condition that for a two-year period they keep the peace, bring the property back into compliance within a fixed period and appear before the court again if required.

Court orders required the landowners to cease unlawful building work and uses on their property and to remove or demolish various buildings

The council previously commenced proceedings seeking declarations and orders that the landowners were unlawfully using their property as a relocatable home park and for the purposes of selling automotive parts and automobiles, and had carried out extensions to a house and a number of other buildings, including a shed and shipping containers.

All parties agreed and consented to orders made on 21 November 2014 requiring all building work to cease until the relevant permits were obtained and the performance of remedial work to remove or demolish certain unlawful structures.

Council commenced an application for contempt in response to continued non-compliance with the court order

It was common ground that the court's original order had been contravened. The council's application for contempt, commenced by way of an originating application, alleged that although certain remedial work had been undertaken, there was substantial non-compliance with the court's orders.

The landowners admitted the facts contained in the council's originating application. This admission led to an order of the court on 5 May 2016, which varied the earlier order of 21 November 2014, to give the landowners a further opportunity to achieve development compliance.

Despite undertaking substantial remedial action, the landowners still failed to fully comply with the revised court order

All parties recognised that the landowners had undertaken remedial actions to demonstrate substantial compliance with the court order of 5 May 2016. Those matters still awaiting compliance related to removing extensions to a house and the removal of three shipping containers.

Whilst the landowners had obtained approval from the council to relocate two of the containers onto concrete foundations, they were unable to finance the works and ultimately had to dispose of all of the containers. The landowners claimed that any subsequent delay in removing the containers stemmed from difficulties in finding a suitable removalist.

In addition, the landowners did not fully comply with a requirement to remove the addition of an unapproved floating floor within the dwelling's carport.

In sentencing the landowners for contempt, the court determined that the landowners had no real excuse for failing to comply with its orders but recognised their financial circumstances and genuine contrition

The landowners explained that they were unable to afford legal advice relating to the court's orders and had therefore acted on the advice of several non-lawyers. Subsequently, it was argued that the landowners had mistakenly formed the view that the court's orders could be challenged or entirely ignored.

The court found that the landowners' explanation offered no good excuse. The court relevantly stated, "*the Court cannot stand by and allow people to thumb their noses at Court orders and the Court needs to deal with non-compliances in a way which not only deters future non-compliance by the people at hand, but which serves to provide a general deterrent to others...*" (at [15]).

The court did, however, hold that it was appropriate to consider the modest means and ongoing financial difficulties faced by the landowners. One of the landowners was an undischarged bankrupt and disability pensioner. The other landowner was a carer. Together they were in default to the mortgage over the subject property and faced imminent eviction.

The court held that imposing a substantial fine was an unattractive sentencing option, particularly as the landowners had no capacity to make such a payment. Furthermore, the genuine contrition of the landowners, their efforts to bring the property into compliance and an offer to undertake community service also convinced the court that there was a low risk of future contraventions.

Ultimately, the court ordered that the landowners be released into a recognisance, without sureties, in the amount of $1,000 on the condition that they appear before the court if required within a period of two years. In the meantime, the landowners were to keep the peace, maintain good behaviour and rectify any outstanding matters of non-compliance within a set period of time.

Does the Draft Queensland Housing Code represent a way forward?

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the purpose and provisions of the Draft Queensland Housing Code

February 2017

In brief

The Queensland State government commenced work on the Draft Queensland Housing Code (**QHC**) in 2014 in consultation with members of the planning, building, property, design and local government sectors. The QHC was formally released for public consultation in September 2016. Individuals wishing to make a submission may do so online until 31 March 2017.

The QHC forms part of the greater Queensland Development Code (**QDC**). Its release represents the State's response to modern development trends and aims to reduce confusion and delays associated with residential development in Queensland. However, its release has garnered mixed responses from local government and the development industry.

The State intends for the QHC to standardise residential development in Queensland to promote efficient land use and development assessment

The purpose of the QHC is to provide a State-wide standardised code for the siting and design of particular residential dwellings. The State intends for the QHC to remove the need for local government planning schemes to incorporate alternative provisions.

The State anticipates that the QHC will streamline the assessment of residential development and facilitate efficient land use, while reducing costs to both consumers and the development industry. By improving the efficiency of development assessment, the State aims to promote innovative designs capable of addressing housing affordability and producing a more diverse built form.

The QHC provides a single standardised code for the siting and design of the majority of residential dwellings across Queensland and operates much like a standard planning scheme code

Parts 1.1-1.3 of the current QDC relevantly provide standardised rules for both the siting and design of Class 1, dual dwellings and associated class 10 buildings across Queensland. The QHC will repeal and replace parts 1.1-1.3 of the QDC upon commencement.

The QHC applies to all infill and greenfield development across Queensland, with the exception of priority development areas. Any applications lodged prior to the QHC's release may still be assessed against the repealed parts 1.1-1.3 and will be governed by the transitional arrangements set out in section 36 and section 37 of the *Building Act 1975*.

The QHC will work in tandem with the Draft Reconfiguring a Lot Code (**QRLC**), which is also intended for incorporation into the QDC and is also currently open for public submissions. The QHC functions similarly to standard planning scheme codes, featuring both performance outcomes and acceptable solutions across each of the following elements:

- height;
- site cover;
- setback encroachments;
- privacy;
- front, side and rear setbacks;
- car parking and driveways;
- private open space;
- fencing;
- additional requirements for built to boundary walls.

If an application for a new dwelling house successfully complies with each of the acceptable solutions, it may be directly approved by a building certifier. If housing plans fail to meet the acceptable solutions of the QHC, the application must be referred to the relevant local government as a concurrence agency in accordance with items 19 and 21 in Schedule 7, Table 1 of the *Sustainable Planning Regulation 2009*.

The State proposes that any inconsistency between the QHC and the relevant local government planning scheme will be addressed and resolved through this concurrence agency arrangement. In effect, local government is burdened with ensuring that the provisions of their respective planning schemes prevail over the QHC.

The State's failure to update parts 1.1-1.3 of the QDC has allowed it to be out paced by modern development standards, giving rise to a complicated and confusing system of alternative standards

The concept of the "traditional family home" continually evolves to reflect factors, including market demand, modern household structures, budgets and land availability. The change in residential development is made evident by observing the now commonplace occurrence of residential subdivisions featuring lots sizes between 400-450m^2. Certain areas are now accommodating lots as small as 150m^2.

Despite such change, parts 1.1-1.3 of the QDC were last updated by the State in March 2010. With this in mind, it can be understood why the State has opted to formally acknowledge that the QDC has been allowed to fall out of step with modern development.

A by-product of the QDC's outdated nature is that it has given rise to an ever-increasing number of alternative siting and design rules across Queensland's 77 local governments. Industry groups lobbying for an update to the QDC highlight there are approximately 500-600 unique Plans of Development within South East Queensland alone. The QHC represents the State's response to such confusion.

While the QHC aims to provide a consistent standard, its application suffers from several practical drawbacks

The QHC is in substance a code designed to standardise development of residential dwellings. Yet the State promotes it as a blueprint for improving dwelling variety and fostering innovative designs across Queensland. In standardising development, the QHC must also overcome the wide array of variables such as local character and environmental constraints presented by a State the size of Queensland.

The design and siting of dwellings is often unique to particular localities. For example, permitting built to boundary walls is commonplace in Brisbane but permitting the same standard in remote localities such as Boulia and Longreach is a different and likely unacceptable proposition. Accordingly, local governments and certain developers have expressed concern that the QHC is at odds with the local character of certain neighbourhoods.

Consultation during the development of the QHC confirmed a divergence of support between the development industry and local government

While members of the development industry pushed for the new QHC to be mandatory, several local governments stood in opposition and expressed a desire to retain locally unique siting and design standards. Subsequently, while the QHC applies across Queensland, it remains a voluntary standard that a local government is free to opt out of or vary.

So long as the QHC remains a voluntary standard, local governments may continue to ignore its requirements and enforce their own standards. This begs the question, is the QHC simply another alternative standard that further complicates an already complex regulatory framework? The uptake of the QHC by local government will ultimately answer this question.

COLIN BIGGERS & PAISLEY LAWYERS

Proposed amendments to Environmental Planning and Assessment Act released

Todd Neal

This article discusses the primary purpose of the reforms to the *Environmental Planning and Assessment Act 1979*

February 2017

In brief

As foreshadowed in our December article *Planning and environment: a recap of 2016 and what to expect in 2017*, proposed amendments to the *Environmental Planning and Assessment Act 1979* were released by the NSW Government in early January 2017. The primary purpose of the reforms is to "promote confidence in our State's planning system", not housing supply. We provide some brief comments on the stated reforms.

Why is reform of the Environmental Planning and Assessment Act important?

The *Environmental Planning and Assessment Act 1979* (**Act**) is the principal piece of environmental planning legislation in New South Wales. From a big picture perspective it does two fundamental things providing the regulatory framework for development:

- authorises plan making for the detail of desired development within NSW;
- provides development assessment processes for development considered by these plans to be potentially appropriate.

In simple terms, the Act and any reforms to it therefore impact on the natural and built environment we enjoy, the economy which provides goods and services, and all the enabling infrastructure.

Reforms aim to promote confidence in NSW planning system, making it simpler and faster

More information about the reforms to the Act can be found on the New South Wales Government's Planning and Environment website, which sets out the following primary source documents:

- Summary of proposals
- Bill guide
- Draft Bill
- Stakeholder feedback

The reforms are significant in terms of both the number of changes being proposed (the draft Bill is 113 pages) and the significance and complexity. The complexity stems from the gaps that have not yet been resolved. In this regard, the reform package being proposed is broader than simply what is contained in the draft Bill. This makes it difficult to fully and properly evaluate and to form a concluded view on some of the changes. It also means you cannot read the Bill in isolation. While the Bill itself is 113 pages, the reforms espoused in the Summary of Proposals are being promulgated not just through the Act but also through a mix of departmental policies, procedures, codes, and proposed changes to the Regulations. Some of these documents are in draft, some are in place already, and others have not yet been released.

The stated primary aim of the reform is about "promoting confidence" in the planning system ("confidence" is a recurring theme in planning reform). The primary aim is **not** promoting housing supply despite the rhetoric, and it is not even one of the four "underlying objectives" in the Summary of Proposals. Accordingly, there appear to be mixed messages being communicated about the aims of the reform as much of the commentary and "noise" about the reforms relate to housing supply rather than "promoting confidence".

One of the Government's underlying aims is to make the system "simpler and faster". This, however, will not always be the case. New types of plans are proposed to be added to the system which create added complexity. The reforms to complying development, transitional Part 3A projects, and modification applications will inevitably add time compared to the processes for them under the Act as it currently stands.

The new Planning Minister, Anthony Roberts, has been handed a significant challenge in getting these reforms through, a task that Brad Hazzard MP was unsuccessful at doing back in 2013.

Summary of the reforms

A detailed commentary on each reform is a massive task. However, we set out in the three columns below a summary of:

- the **stated objective** which will lead to the achievement of the primary aim of improving confidence in the planning system;
- the **stated reform** being proposed either contained within the draft Bill or elsewhere;
- our brief **comments** on the change.

Our table draws on the Government's format summarising the reforms on page 4 of the Summary of Proposals.

OVERARCHING OBJECTIVE: PROMOTE CONFIDENCE IN OUR STATE'S PLANNING SYSTEM		
Underlying objective	**Reform**	**Comment**
Enhance community participation Enhancing community involvement in the key decisions that shape our cities, towns and neighbourhoods	Structural change to the Act – renumbering, removing repealed Parts, and creating new Parts to the Act.	This should aid simplicity, readability, clarity, and is important to ensure an accessible Act. Those who have memorised section numbers will have to relearn them!
	The Act will require Community participation plans (**CP Plans**) to be prepared showing how community participation will occur (unless the council has already prepared an engagement strategy under the *Local Government Act 1993* that meets the Act's requirements).	For developers, the engagement processes will not be standardised across NSW meaning the participation requirements will vary from one local government area to another. Yet another plan will need to be navigated for any development application. For planning authorities, the challenge will be developing workable and meaningful community engagement that avoids "engagement fatigue", and then ensuring implementation of the plan given that the validity of a development consent can hinge on whether proper community participation has been provided.
	New community participation principles (**CP principles**) are to be inserted into the Act.	Planning authorities will need to pay close attention to these principles in preparing their CP Plans. Principles include: the community has a right to be informed about planning matters that affect it, and planning information should be in plain language, easily accessible and in a form that facilitates community participation in planning. The principles won't necessarily yield the same result for each council's CP Plan.
	A statement of reasons for decisions will be required under the Act, and the detail of that statement will need to be proportionate to the scale and impact of the decision.	Understanding why a decision has been made will assist developers to understand their options for a site if refused. According to ICAC, transparency is enhanced by giving reasons for decision-making*. However, this will also potentially broaden the rights to challenge decisions by not just developers, reducing the certainty of decision-making. It will be interesting to see whether this creates further administrative law grounds for review if reasons are, for example, illogical or irrational or impacted by bias. Decision makers will need to learn the art of drafting proper reasons. *NSW Independent Commission Against Corruption (**ICAC**), September 2007, *Corruption Risks in NSW Development Approval Processes*, ICAC Position Paper, Sydney, p. 23.

Underlying objective	Reform	Comment
	New consultation requirements for major development which will flow out of the CP Principles and Departmental practice. No hard requirement is included in the Bill.	This will be introduced through CP Plans and (according to the Summary of Proposals) become a requirement of the Department for environmental impact assessments (**EIAs**). This reflects one of the CP Principles which needs to be considered in preparing CP Plans: "Members of the community who are affected by proposed major development should be consulted by the proponent before an application for planning approval is made."
	Engagement tools to be expanded and updated. No hard requirement is included in the Bill.	The Summary of Proposals advises that a suite of tools is being explored to engage the community, particularly for strategic planning. More meaningful engagement is required. We have moved on from placing a notice on a sign, but at the same time mechanisms are needed which cut through the fog of organisations and business wanting to engage with the community.
	Early consultation with neighbours - again, nothing is contained about this in the Bill, but the amendments will clarify the power to make Regulations to encourage this.	This has been foreshadowed by the previous Planning Minister for the last year. The Summary of Proposals indicates an incentive system of reducing fees where there is early consultation. Small-scale owners/developers will appreciate any fee relief for applications. Larger developers are becoming more sophisticated at community engagement, and this will entrench that trend.
Promote strategic planning and better outcomes Improve upfront strategic planning to guide growth and development	The Act will require new local strategic planning statements (**SPSs**), and review of same every five years.	No council is an "island", and SPSs are proposed to "complete the line of sight from regional and district plans". The draft Bill appears to leave this requirement to be more fully coloured by the Planning Secretary who can prepare requirements for SPSs. Possibly, this is how they will require Government or Greater Sydney Commission sign off, which the Summary of Proposals foreshadows. The intent is for councils to take their cues from higher order strategic plans applying to the area, rather than developing internally-focused SPSs that ignore how that area fits within the broader geography. Planning Proposals will need to give effect to SPSs. While this is important to ensure avoiding myopic or overly parochial planning decisions, it is possible this could be achieved with the current system. In this regard, SPSs add yet another plan to the mix; in the last year we have had introduced Regional Plans, District Plans, and if this is passed, SPSs.
	The Act will require regular (five yearly) local environment plan (**LEP**) checks (as well as SEPPs).	While councils will possess the discretion to work out if the LEP should be updated after doing these reviews, hopefully the review process will at least alert strategic planners to changes that might be required. The changing face of Sydney brought about by population increases and infrastructure renewal makes this a sensible reform; as the recent years have shown, the suitability of a site's zoning can rapidly change. The challenge will be incentivising councils to procure the rezoning of the sites expeditiously, as inertia and cost can often stymy these processes even if there are proper planning grounds for rezoning.

Underlying objective	Reform	Comment
	The Act will be amended to require councils to conform to a standard development control plan (**DCP**) format.	It's been years since the standardised LEP was introduced. This reform (while different to the processes for standard LEPs) should have occurred at the same time. There are a multitude of benefits in doing this: people can understand how DCPs work in one area, without having to relearn things when looking at DCPs in another area; professionals in the industry will have a uniform format across DCPs saving time and cost; and it will allow cleaner uploading onto electronic platforms (ie NSW Planning Portal).
	Optional model DCP provisions (not included in the Bill).	The Summary of Proposals advises this will be developed by a working group comprising Government, councils and industry.
	A new design object in the Act (among other changes to the objects).	The Act's objectives create a culture around the Act in the agencies that administer the Act. One of the key changes to the objects is to include a new object "to promote good design in the built environment". This dovetails with the recent release of the draft *NSW Government's Architecture and Design Policy for New South Wales* which lays the foundation for "design-led planning". The other changes to the objects are also significant. These objects are often used to self-validate decisions or proposals. If the changes are passed, the "orderly and economic use of land" (a common refrain of developers) will be deleted and replaced with "timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing)". The "proper management, development and conservation of natural and artificial resources" will make way for "the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources". The sheer number of objectives makes it a difficult balancing act, and allows the cherry-picking of them.
	Design-led planning strategy.	This is not contained in the Bill, but is to be developed by the Office of the Government Architect. There is little detail on what this will look like other than that the Summary of Proposals states that "it [presumably the strategy] provides a set of principles and guidance to support productivity, environmental management and liveability in NSW".
	The Act will empower the Secretary to accept enforceable undertakings by persons in relation to planning matters, and where breached the court can order: ▪ compliance with that undertaking; ▪ payment to the State of an amount not exceeding the financial benefit indirectly or directly attributable to a breach of the undertaking; ▪ compensation to the person who suffers from the breach;	It will be interesting to see how in practice undertakings are made and whether we will see pressure imposed by consent authorities for such undertakings (in return for the grant of consents) as we have seen for Voluntary Planning Agreements (**VPAs**). Undertakings will provide another "arrow in the quiver" for authorities in the exercise of their regulatory functions, and will provide an attractive option for authorities to seek from applicants. The Summary of Proposals indicates the undertakings regime will enable the efficient application to the court for enforcement of terms and that it will be faster and cheaper than prosecuting the original breach of the consent. Only time will tell how much more efficient the enforcement of undertakings will

Underlying objective	Reform	Comment
	▪ the mitigation of damage to the built or natural environment from the breach; and ▪ damage to be made good.	be – going to court is rarely "quick and cheap". The range of orders available to the court are significant and should disincentivise calculated breaches.
	Improved EIAs.	Not contained within the Bill. Rather this reform is set out in the Department's discussion paper that was open for discussion until 27 November, 2016. It is beyond the scope here to analyse the proposed changes, but the changes being mooted are broad, including consistency across EIA documents and conditions to projects, more certainty on timeframes, strengthened monitoring, audits and compliance reporting. The winds of change are already being felt here for proponents, for example, mines who face more rigorous monitoring, auditing and reporting requirements.
	VPAs: The Act will: ▪ empower the Minister to make determinations or give directions about the method of determining the public benefit provided by a developer under a planning agreement; and ▪ planning agreements may be entered into for complying development proposals.	This is a welcome change and dovetails with the proposed new 2016 VPA Practice Note and Ministerial Direction. As the Summary of Proposals acknowledges, the flexibility around the use of VPAs can mean "there is opportunity for parties to a planning agreement to make unfair or unreasonable demands on what is required under a planning agreement". The change allows the Minister to step in to what is often the central issue in negotiating a VPA: the numerical value of the public benefit. For example, should the method allow FSR to be "purchased" at a rate of "50% of the nominated dollar value per sqm of GFA" as some councils have put forward. Methodology like this has the hallmarks of a tax given the fixed nature of the charge without regard to the circumstances. The language of "purchase" that authorities have historically used also militates against the policy that "planning decisions may not be bought or sold". While the opportunity exists to reign these practices in, the question for many landowners and developers is whether the Minister will exercise these powers! In respect to the second change, we comment about this below.
Increase probity and accountability in decisions Improving transparency, balance and expertise in decision-making to improve confidence and trust in the planning system	Under the Bill, Part 3A arrangements will not be discontinued yet. Strictly speaking the transitional provisions will be moved to the Regulations. The Summary of Proposals indicates that: ▪ Transitional Part 3A projects will become State Significant Infrastructure or State Significant Development, and further modification of Part 3A approvals will be prevented.	The talk about ending Part 3A has been part of the coalition government's discourse since taking office – it was part of the mandate for the O'Farrell government. This is welcome in that it simplifies and harmonises the number of approval pathways for development in NSW. Modifications of these types of projects will become subject to "substantially the same development" test which applies to development applications, which is more restrictive. Part 3A will continue to linger, however, as transitional Part 3A projects will have two months after the commencement of the provisions in which they can lodge section 75W applications, and section 75W applications that have already received Secretary's Environmental Assessment Requirements will continue to be assessed under section 75W if an EIS is lodged within 12 months of commencement of the provisions.

Underlying objective	Reform	Comment
	Under the Bill, the Minister will be able to direct a council to establish a local planning panel to determine development assessments. According to the Summary of Proposals the direction would also require the membership of the panel be approved by the Minister, and set out the circumstances in which the panel is to exercise the determination function.	The Summary of Proposals states that these changes *would be* used by the Minister to address "sustained community concern about the timeliness or quality of a council's planning decisions, or about conflict of interest." While this presents a valid object to get past problems associated with conflicts in councillors making planning decisions if there is a reasonable community concern about the way particular planning decisions are determined in a particular area or delays in decision-making, the power in the draft Bill essentially confers on the Minister the power to orchestrate the membership of the Panels and does not refer to the circumstances where the direction might be used to establish panels. The power could be used broadly, such as where the Minister disagrees with the council's planning decision-making.
	Improved environmental impact assessments.	See analysis provided above.
	The Act will enable broader delegations to council staff. Under the proposed changes, the Minister will be able to direct the circumstances when a development application may be determined by a council delegate. The power may be used to expand the persons delegated to determine development applications.	This falls under the same power as the power to constitute planning panels. According to the Summary of Proposals, councils where development applications have higher rates of delegation, have faster processing times. This power has the potential to impact on the 5% of development and modification applications not determined under delegation (based on the 2014-15 figures set out in the Summary of Proposals).
	Refreshed thresholds for regional development. While not contained in the Bill, the Summary of Proposals flags that thresholds triggering a development going from local to regionally significant development (and therefore determined by regional planning panels) might be increased.	The current thresholds were set in 2011 and are due for updating. The Summary of Proposals indicates that while councils may have an expanded role in assessing and determining development with larger capital investment values than before, some types of development might be "designated by order where the council's development assessment is considered unsatisfactory".
	Name change: the Bill will (if passed) lead to the Planning & Assessment Commission's (**PAC**) name being changed to the Independent Planning Commission (**IPC**). But that is not all, there will also be some significant process changes to the PAC/IPC.	"What's in a name?" A lot according to the Summary of Proposals which states the name change "reflects the independent, expert nature of the Commission and the fact that its role is primarily one of determining State significant proposals". The main change here is not to the name, however, but the *removal of its review function* which is aimed at halving the processing time for State Significant Development (**SSD**). This reform is set against a backdrop where project assessment times for complex State Significant Proposals increased from 598 days in 2008 to 1089 days in 2014.
	Model codes of conduct for planning bodies which will be included in the Regulations but not in the Bill.	Model codes have been in force for the JRPPs (now called Sydney Planning Panels for Sydney panels) for some time. The key will be ensuring that members of the Panels are aware of their obligations in the Codes, and the Chair and others holding members to account.

Underlying objective	Reform	Comment
	Preventing the misuse of modifications: ▪ The Bill, if approved, will amend the Act to prevent planning authorities, including the court, from approving a modification in relation to development in contravention of the initial development consent, except for minor departures to the consent. ▪ The amendments in the Bill will also require consent authorities to consider the reasons for the grant of an original consent when considering proposed modifications.	The current system permits applicants to apply to modify a consent to regularise work already constructed in breach of the development consent. If meritorious and the modification is approved, the future use of the constructed works becomes approved. The changes are designed to end this, except for minor departures from the consent. Development that has been constructed in contravention of a consent will have two options: demolish the departures or apply for a building certificate (which prevent the council from making an order or seeking civil enforcement to require the building to be demolished or altered). The second part of the changes to section 96 will encounter difficulties when people seek to modify consents that were granted before the new requirement for reasons. The provision will require consent authorities going back to the reasons to work out whether changes should be permitted. Under the changes, it will nevertheless be possible for the changes to be consented to even if there were good reasons for, say, a condition, it is just that those reasons will need to have been taken into account (and explained in the eventual reason for the decisions that will be required if the draft Bill is passed).
	Powers to update conditions on monitoring and environmental audit. The new provisions will clarify that the Minister may also vary or revoke monitoring or environmental audit requirements in existing approvals.	Conditions for SSD or SSI projects will be able to be varied or revoked by the Minister. This will apparently enable conditions to be updated to ensure: relevance; that they are contemporary; and remain enforceable. For proponents and contractors involved with projects, it will mean that conditions of approval will in a sense lack finality and may in the future be changed if enforcement of a condition becomes fraught, or if the condition needs (based on the Minister's views) to evolve with the practical realities of the project and its impacts. Uncertainty for projects comes at a price, so these changes may increase prices for carrying out major projects.
Promote simpler, faster processes for all participants Creating a system that is easier to understand, navigate and use, with better information and intuitive online processes	The Bill provides for some efficiencies in obtaining approvals and advice from NSW agencies. The Secretary of the Department of Planning and Environment will be provided "step in" rights to make decisions on behalf of agencies where concurrence is required.	According to the Summary of Proposals, "NSW agencies provide some 8,000 pieces of advice on local development each year. Approximately 10 per cent of these take longer than 40 days. The annual value of development applications with more than one concurrence and/or referral is approximately $6.1 billion." While delays in seeking concurrence for development has become part of development folklore in NSW, the Secretary will still need to conduct an assessment against "State assessment requirements" to be provided for in the Regulations. Further, the changes will only apply to local development where councils are the consent authority, when some of the most significant blockages occur for larger projects that are SSI or SSD. The above means two things: the change is only as good as the Secretary's ability to carry out assessments against the State assessment requirements (while performing their other tasks); and it will not remove delays for larger infrastructure projects.

Underlying objective	Reform	Comment
	Standard DCP format.	Discussed above.
	Optional model DCP provisions.	Discussed above.
	One of the Bill's most significant changes is to the complying development pathway:	Our comments in response to each point are below.
	▪ Where a complying development certificate (**CDC**) does not comply with the relevant standards in the State Policy, it can be declared invalid.	This overcomes the recent Court of Appeal decision (*Trives v Hornsby Shire Council* [2015] NSWCA 158) which held that the characterisation of complying development could only be made by the certifier, and that a court could not look into this matter as a question of "jurisdictional fact" – making it difficult to invalidate.
	▪ The regulations will be able to limit the type of development that can be certified by an accredited certifier.	This will allow the government to play with the levers of housing supply. No doubt if or when supply catches up, the more intense types of complying development will be "turned off".
	▪ A new investigative power is proposed for councils allowing for work to be stopped for 7 days while work is investigated.	The impact of improper or flawed complying development being built and having to deal with it later is fraught. While complying development is meant to be low impact, this helps to ensure that it remains that way when it is being constructed.
	▪ The power for the regulations to allow for a compliance levy to support councils in their role in enforcing complying development standards.	The cost of ensuring compliance for complying development is being pushed back onto developers/landowners. This has the potential to increase development costs, and so care will need to be taken in setting a levy that does not militate against some of the key aims of the reform package.
	▪ Allowing for the deferred commencement in certain circumstances.	The Summary of Proposals indicates there is a need for deferred commencement conditions to allow CDCs where, for example, no lot has yet been created (a CDC cannot be issued in this situation). Such conditions will enable the activation of the consent once the lot is created. While this pragmatism is to be commended, the ability for the certifier to impose deferred commencement conditions appears at large.
	▪ Allowing special infrastructure contributions to be required, and planning agreements to be entered into, for complying developments.	This reflects the user-pay principle of ensuring that those who use infrastructure contribute to the cost of it. Again, this has the potential to increase development costs (particularly when the levy, and VPA costs are added in to the complying development mix), and so care will need to be taken in setting a levy that does not militate against the very aims of the reform package. This is particularly pertinent since complying development was initially intended to be low impact and low cost.

Underlying objective	Reform	Comment
	The Act will create a regime for transferrable conditions so that conditions in a development consent cease to have effect once another approval regime takes effect. This will be subject to the consent authority being satisfied that the matters regulated by the parallel regime conditions will be adequately addressed.	This is a common sense reform that will remove overregulation which can add to confusion and complexity. This is likely to arise where a development consent imposes conditions relating to that development, as well as an Environment Protection Licence, or for mining where a mining lease comes into place. It will mean the relevant regulatory authority responsible for enforcement may change hands during the life of development in respect of aspects of the development and its operation.
	"Fair and consistent" planning agreements.	As discussed above.
	Simplified and consolidated building provisions:	Our comments in response to each point are below.
	▪ Key provisions relating to building regulation and certification into a single part of the Act.	A plain English drafting change which will provide clarity.
	▪ Require a construction certificate (**CC**) to be consistent with the development consent.	The death knell of *Burwood Council v Ralan Burwood Pty Ltd (No. 3)* [2014] NSWCA 404 has sounded; developers who carry out works inconsistently with the approved development will now be at risk of having any CC granted in respect of those works invalid. There will now be two prongs countering such practice: certifiers will be liable for issuing a CC inconsistent with the development consent; and developers will be at risk of having the CC declared invalid, which can cause significant downstream development issues if this occurs (eg bringing the works back into conformity with the consent).
	▪ The court has the ability to declare a CC invalid if it is inconsistent with the consent.	Again, this is responsive to the above Court of Appeal decision.

Impact of Environmental Planning and Assessment Act reform on developers, councils and the Department

The effect of the impacts will be different for different interest groups.

Developers should expect new consultation requirements and generally a higher level of involvement consulting with the public. Development Applications will be aided by showing "good design". Developers will be buoyed by the reaffirmed policy position in relation to VPAs (whether it translates to experience is another matter), but may expect new pressures to enter enforceable undertakings. They will also need to take a cautious approach to works which are unapproved, given the reversing of various case law on CCs and modification applications making it more difficult to regularise. CDCs will also be subject to tighter scrutiny and enforcement, and will be open to a more realistic prospect of being invalidated where they are granted incorrectly. Finally, developers with transitional Part 3A projects will need to plan an exit strategy from this regime which now has a sunset. For some projects, developers can expect conditions to evolve with the life of the project rather than stay stagnate.

Councils will have new plan-making functions: CP Plans, CP Principles, and SPSs. Councils will need to ramp up LEP reviews, bring DCPs into uniformity with the standard DCP, and ensure in exercising their functions under the Act that the new objects are being promoted. They will have an improved smorgasbord of enforcement options (enforceable undertakings), increased scope to intervene over CDCs and CCs. Some councils will need to reign in their VPA practices and policies. Some councils may be directed to set up Planning Panels with a particular composition, and have their own delegations interrupted so that, for example, development applications can be delegated to council officers.

At the State level, the Minister and Secretary of the Department will have expanded functions on a range of matters:

- conditions of approvals;
- step in rights;
- enforceable undertakings;
- intricate involvement with councils such as delegating authority to staff within councils and directing councils to set up Panels;
- intervening in VPAs.

The public consultation period for the Bill has been extended to 31 March, 2017. As this piece shows, there is so much to comment on. Any one of the reforms has impacts which you may want expanded on in a submission and you should consider contacting a lawyer for help with this.

Criminal prosecutions for merged councils: A marriage of convenience

Todd Neal

This article discusses the decision of the NSW Land and Environment Court in the matter of *Environment Protection Authority v Wellington Council* [2017] NSWLEC 5 heard before Moore J

February 2017

In brief – Changes to legal personhood should be considered carefully and proclamations drafted clearly

When one council "marries" another council they are not for the purposes of the criminal law "one flesh". This issue was teased out in the recent judgment of Moore J in *Environment Protection Authority v Wellington Council* [2017] NSWLEC 5.

Environment Protection Authority's prosecution of Wellington Council for water pollution struck out

The effect of the merger of Wellington Council with Dubbo City Council and the constitution of the Western Plains Regional Council meant that the prosecution of Wellington Council for the offence of causing water pollution was struck out despite Wellington Council pleading guilty (before the merger) to the charge laid.

The key events were:

- The EPA commenced criminal proceedings against Wellington Council on 21 April 2015.
- Wellington Council was charged with an offence of "causing water pollution" in breach of section 120 of the *Protection of the Environment Operations Act 1997* arising (allegedly) from three megalitres of untreated or partially untreated raw sewage being discharged from the STP into Bushrangers Creek, entering the Macquarie River.
- On 21 August 2015, the old council entered a plea of "guilty" to the charge laid against it.
- A sentencing hearing had not occurred before the council amalgamations occurred.
- On 12 May 2016, a Proclamation dissolved Wellington Council and Dubbo City Council and constituted a new council; the Western Plains Regional Council (**first Proclamation**).
- The new council sought to have the proceedings against Wellington Council struck out.
- There was a second Proclamation on 9 September 2016 amending the first Proclamation (**second Proclamation**). It transmitted, expressly, criminal liability from dissolved councils to reconstituted councils where that dissolution and reconstitution had been effected by the first Proclamation.

Criminal liability not effectively transferred by first Proclamation and not revived by amended Proclamation, court accepts

Moore J appeared to accept the position of both parties that if the first Proclamation did not have the effect of maintaining the proceedings commenced against the old council as being proceedings continued against the new council, then the second Proclamation could achieve nothing substantive for the purposes of the proceedings before the court.

In respect of the first Proclamation, this was confined to transferring civil liabilities, relevantly, and not criminal ones.

His Honour held that the outcome of the first Proclamation was to abate the proceedings against the old council. His Honour accepted the council's submissions that "as the prosecution had abated, as a consequence of no effective transference by the first Proclamation, it was "gone" and was not revived by the second Proclamation."

Interestingly, this is not the first example of this occurring. Counsel for the council referred in its submissions to a Workcover prosecution against Sydney Electricity which failed in the 90s when that body was dissolved and Energy Australia created (by statute).

In relation to costs, as the "new Council did not become (and never has been) the "accused person" for the purposes of the proceedings that were commenced against the old Council", the Prosecutor's argument for costs also failed.

Proclamations must be clear and unambiguous on transfer of criminal liability

The judgement highlights that Proclamations need to be drafted clearly and unambiguously to transfer criminal liability from one legal person to another legal person. The simple transfer of a former statutory body's staff, assets, rights and liabilities (as most Proclamations are drafted and many government lawyers are familiar with in various empowering Acts) to a new body will not necessarily mean the two bodies become the same legal person. The clear intention to do so is required.

A broader point of application arises from one of the submissions of the council, namely that "it is inconceivable that a legal person, not in existence at the time of an alleged offence, could be criminally responsible for that offence, an offence said to have been committed by the actions or defaults of another person." Changes to legal personhood, such as to a corporation, need to be carefully considered in the context of any criminal prosecution by a government agency, such as the EPA.

Integrity of Townsville's centres hierarchy maintained by Planning and Environment Court

James Nicolson | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *McConaghy Properties Pty Ltd v Townsville City Council & Anor* [2017] QPEC 011 heard before Morzone QC DCJ

March 2017

Summary

Declaration of interest: Colin Biggers & Paisley acted for McConaghy Properties in the case discussed in this article.

In the recent Planning and Environment Court decision of *McConaghy Properties Pty Ltd v Townsville City Council & Anor* [2017] QPEC 011, McConaghy properties, the operator of an established shopping centre in Townsville, successfully appealed a decision of the Townsville City Council to approve a new shopping centre in a nearby out-of-centre location.

The key issues in the appeal centred on the planned centres hierarchy established under the council's current and former planning schemes, the economic need and impact of the proposed development, the loss of sport and recreation zoned land, and the impact of the proposed development on the city's existing and planned transport infrastructure network.

The court allowed the appeal and refused the development, finding significant conflict with the council's current and former planning schemes and insufficient grounds to justify approval despite the conflict.

The proposed development

The proposed development comprised a shopping centre with a gross floor area of 7,042m^2 (including a 4,199m^2 full-line Coles supermarket and an additional 2,432m^2 of retail) and a drive-through fast food outlet.

The site of the proposed development was approximately 1km from McConaghy Properties' existing shopping centre, in a location not serviced by public transport, and owned and operated by Townsville District Rugby Union.

The planning framework

The development application for the proposed development was lodged under the *Townsville City Council City Plan 2005*. Around 12 months prior to the development application being decided by the council, the *Townsville City Plan 2014* came into force, and could therefore be given weight by the council in its assessment of the proposed development.

The site of the proposed development was located within the Green Space Precinct under the 2005 planning scheme and the Sport and Recreation Zone under the 2014 planning scheme. Neither planning scheme supported shopping centre development in the location of the proposed development.

The court's findings on key issues

The court heard evidence from experts in the fields of town planning, economics, sports and recreation, and traffic, as well as non-expert evidence on behalf of McConaghy Properties, Townsville District Rugby Union and Coles.

Centres hierarchy and economic need and impact

The court found that both the 2005 and 2014 planning schemes establish a hierarchy of centres which planned for the development of centres in specific locations and expressly discouraged out-of-centre development. Accordingly, the court held that the proposed development was in significant conflict with both planning schemes.

The development proponent readily conceded the conflict, but argued that approval could be justified on the grounds that there was an economic need for a neighbourhood or local scale convenience-based shopping centre which was not able to be satisfied by the nearby major shopping centre operated by McConaghy Properties.

The court disagreed, finding that the scale of the proposed development was greater than that of a neighbourhood or local centre. While the court accepted that there was a modest economic need for an additional full-line supermarket within the catchment, it was not satisfied that the need could not otherwise be satisfied by development within the centres zone consistent with the 2014 planning scheme.

In reaching this position, the court had regard to its observation in an earlier case that the court is not the planning authority and should not substitute planning strategies, such as the location of centre development, for those which the planning authority has chosen to adopt after careful and proper consideration (see *Brazier v Brisbane City Council* (1972) 26 LGRA 332).

The court noted that the centres hierarchy is a central plank or core policy underpinning the planning scheme, which encourages consolidation and redevelopment of the existing centres network.

The court gave particular weight to the evidence of the economic expert called by McConaghy Properties which showed that the impact of the proposed development on the viability of individual retailers within McConaghy Properties' centre would not be insignificant and overall would prejudice the future development and expansion of the major centre as intended under the 2014 planning scheme.

Loss of sport and recreation zoned land

The court found that the proposed development conflicted with the 2005 and 2014 planning schemes in that it would not protect and maintain the open space and recreational resources of the district.

In this respect, the court acknowledged that the parks and recreation experts agreed that there is a significant shortfall of sport and recreation zoned land in Townsville, and that the proposed development would exacerbate that situation.

Impact on planned and existing transport infrastructure network

The court found that the proposed development was only in minor conflict with the transport planning strategies under the 2005 and 2014 planning schemes.

Nevertheless, the court accepted the evidence of the traffic expert called by McConaghy Properties that transport planning is interrelated to the creation and maintenance of a centres hierarchy. In particular, the court noted that the 2014 planning scheme highlights that centres are to be well connected to the surrounding community, maximising accessibility by walking, cycling and public transport.

The court held that the absence of public transport services along the frontage of the proposed development, among other traffic impacts identified by the experts, were symptomatic of the unplanned centre. In contrast, McConaghy Properties' existing centre provides three onsite public bus stops integrated with associated routes.

Other grounds relied on by development proponent

In addition to an economic need for the proposed development, the development proponent argued additional grounds for justifying approval despite the conflicts with the 2005 and 2014 planning schemes.

In particular, it argued that it would promote a compact urban form by consolidating compatible development within a definable node, would improve the existing road network, provide additional employment opportunities, and facilitate the relocation of Townsville District Rugby Union to new facilities to be constructed on other land owned by the development proponent.

Ultimately, the court found that none of the above grounds particularly favoured approval of the proposed development. In respect of the relocation of Townsville District Rugby Union, the court noted that any new facilities would be subject to a future planning application, assessment and approval, and that the council's decision in respect of such an application should remain unfettered.

Outcome

The court held that the proposed development was in significant conflict with the 2005 and 2014 planning schemes, and that the grounds contended for by the development proponent were not sufficient to justify approval despite the conflict.

In the court's words, the proposed development was simply "*too close, too big and too disruptive to the centres hierarchy*" (at [167]).

Court finds council negligent for incorrectly describing the zoning of land in a Limited Town Planning Certificate

Shaun Pryor | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Geju Pty Ltd v Central Highlands Regional Council (No. 2)* [2016] QSC 279 heard before McMeekin J

March 2017

In brief

The case of *Geju Pty Ltd v Central Highlands Regional Council (No. 2)* [2016] QSC 279 concerned a claim in the Supreme Court of Queensland commenced by Geju Pty Ltd against the Central Highlands Regional Council for damages for negligent misrepresentation of the current zoning of the land.

Geju purchased a block of land in Capella on the belief that it was in the "Town" zone, "Industrial" precinct under the planning scheme. The land was in fact zoned "Rural" with a conditional approval for a material change of use which permitted some forms of industrial development. At the time of purchase, Geju relied upon a Limited Town Planning Certificate issued by the council which incorrectly described the zoning of the land.

Geju claimed damages on the basis that the council negligently misrepresented the present zoning of the land and that it would not have purchased the property if the council had not made the misrepresentation.

The court found that the council owed a duty of care to Geju as a person interested in buying the land and that it breached that duty of care by inaccurately describing the zone and precinct. The court ultimately awarded damages in the amount of $1,127,205.50 which included amounts for the difference in the price paid and the real value of the land, acquisition costs, holding costs, borrowing costs and interest.

Limited planning and development certificate was defective

The planning and development certificate was requested and issued before the commencement of the *Sustainable Planning Act 2009*, and as such the provisions of the *Integrated Planning Act 1997* applied.

The council was obliged under sections 5.7.8 and 5.7.12 of the *Integrated Planning Act 1997* to produce a limited planning and development certificate within five business days of a request by an applicant who had paid the relevant fee.

Prior to the purchase of the land by Geju, the council had issued a limited planning and development certificate to the previous owner of the land, the Mayfair Group, following a request from its solicitors. The planning and development certificate incorrectly stated the zone as "Town" and the precinct as being "Industrial" when in fact the land was zoned "Rural". The planning and development certificate also stated the incorrect lot and plan number but stated the correct address.

Court found that the council owed a duty of care to Geju to take reasonable care in the issuing of a planning and development certificate

The council submitted that it did not owe a duty of care to Geju because it had issued the planning and development certificate to its predecessor in title and did not issue the planning and development certificate directly to Geju. In fact, Geju's representative, Mr Birch, obtained the planning and development certificate from the real estate agent for the Mayfair Group. The council further submitted that there would be no way to define a class of which Geju was a member and as such the duty would be imposing an indeterminate liability.

The court rejected the council's argument and reinforced (at [58]) the principle from *L Shaddock & Associates Pty Ltd v Parramatta City Council (No. 1)* [1981] HCA 59 that "*a public body which in the exercise of its public functions follows the practice of supplying information which is available to it more readily than other persons, whether or not it has a statutory duty to do so, is under a duty to those whom it knows will rely upon it in circumstances in which it is reasonable for those to do so, to exercise reasonable care that the information given is correct*".

Without limiting the classes of people that might be interested in the planning and development certificate, the court suggested that there would be two classes of people that would be particularly interested; those who own the land and those who might be interested in buying it. The court further suggested that those who own the land might be interested in informing those interested in buying it as to the features of the land, including its zoning and potential use.

The court found that Geju, as an interested purchaser, was a member of a class likely to receive the planning and development certificate and that the certificate would be very likely to lead it into entering a transaction to purchase the land.

Court found that it was reasonable for Mr Birch to rely on the planning and development certificate

The council also contended that it was not reasonable for Geju to rely on the planning and development certificate since, on its face, it related to a different property. The council suggested that the planning and development certificate was generally so defective that no reasonable person would rely on it.

The court found that whilst the error was obvious when drawn to one's attention, it was not obvious to a prospective purchaser who was not expecting to receive a planning and development certificate relating to a different piece of land.

The court noted that the incorrect property description was not observed by a series of people who dealt with it, including the council officer who was responsible for issuing the planning and development certificate, the chief executive officer of the council who signed the relevant documents, the real estate agent, the solicitors who acted for both parties in the transaction and the surveyor, and concluded that it was unexceptional that Mr Birch did not notice it.

Court found the council breached its duty of care to take reasonable care in the issuing of the certificate by inaccurately describing the zone and precinct

The court therefore found that the council owed a duty of care to Geju and that the council breached that duty because the planning and development certificate incorrectly stated the zone and precinct.

Court found the council's negligence was a necessary condition of the occurrence of harm

Under the *Civil Liability Act 2003*, it was necessary to show that the council's breach of its duty of care was a necessary condition of the harm. Stated another way, it was necessary for Geju to show that "but for" the error in the planning and development certificate Geju would not have purchased the property and therefore would not have suffered harm. The council submitted that Geju could not satisfy the "but for" test because there was no evidence that it would have acted differently had Geju not seen the planning and development certificate.

The court rejected the council's submission and was satisfied that Geju would not have purchased the land if it had known that the true zoning of the land was "Rural" given the marked difference between the price paid and the value of the land as rural land and its intention to develop the land for industrial purposes.

Court found that Geju was not contributorily negligent

The council also contended that Geju was contributorily negligent for failing to undertake enquiries and investigations as to the zoning, failing to engage a consultant to independently value the property and paying too much for the property.

The court found, however, that Geju did in fact undertake enquiries as to the zoning of the land in that it held the planning and development certificate.

With respect to the price paid for the property, the court found that the price was not necessarily unreasonable in circumstances where "*prevailing market conditions were improving*", an independent purchaser was willing to buy the property four years later for an amount yielding a 75% per annum return on the investment and where Mr Birch, who had experience in land development, was prepared to go substantially into debt for its purchase.

The court also noted that the importance of Geju failing to obtain a valuation and failing to undertake enquiries and investigations as to the zoning would be impossible to assess in the context of attributing a "*just and equitable*" reduction of damages.

The court found that the council had failed to demonstrate that Geju was contributorily negligent.

Court found that Geju's solicitors were a concurrent wrongdoer but did not apportion any liability against them

The council contended that Geju's solicitors were a concurrent wrongdoer and should be proportionately liable for the damage for failing to notice the error.

In support of the council's contentions, the court made findings from admissions in the parties' pleadings that a competent solicitor would have noticed the incorrect lot number and at least made enquiries to the council about the true status of the land.

However, the court found that even if the error was noticed, there was no evidence to show that any search, reasonably open to Geju and its solicitors, would have revealed the true status of the land. Therefore, despite finding that Geju's solicitors were a concurrent wrongdoer, the court ultimately refused to make a finding of apportionment against them.

Court awarded damages for the difference in the price paid and the real value of the land, acquisition costs, holding costs, borrowing costs and interest

The court reinforced that the measure of recoverable damages was the amount of money necessary to restore the plaintiff to the position it was in before the negligent misstatement.

The court ultimately awarded damages in the amount of $1,127,205.50 which included amounts for the difference in the price paid and the real value of the land, acquisition costs, holding costs, borrowing costs and interest.

Owner of land is responsible for infrastructure charges even where they are not the applicant

Shaun Pryor | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Trevorrow v Council of the City of the Gold Coast* [2017] QSC 12 heard before Jackson J

March 2017

In brief

The case of *Trevorrow v Council of the City of the Gold Coast* [2017] QSC 12 is significant as it concerns a land owner's liability to pay unpaid infrastructure charges related to a development approval even where they are not the applicant for the development approval.

The case concerned the interpretation of section 639 of the *Sustainable Planning Act 2009* prior to the amendments on 4 July 2014. However, the authors note that the current section 664 of the *Sustainable Planning Act 2009* is in substantially the same terms and, in our view, would attract the same result.

Trevorrow brought an application in the Supreme Court of Queensland seeking declarations that the registered proprietor of land is not liable to the council for an infrastructure charge under an infrastructure charges notice given with a decision notice for a development approval in circumstances where the registered proprietor was not the applicant for the development approval.

The council issued an infrastructure charges notice to the applicant upon approving its development application for a material change of use on land owned by Trevorrow. Upon non-payment of the infrastructure charge, the council issued a rate notice to Trevorrow which included an amount in respect of the unpaid infrastructure charge.

The court found that if an infrastructure charge were taken to be "rates" under section 639 of the *Sustainable Planning Act 2009*, then section 96 of the *Local Government Act 2009* and section 127 of the *Local Government Regulation 2012* would have applied to make the registered proprietor of land liable for the charge.

The court further found no justification for reading in words in order to limit the operation of section 639(1) of the *Sustainable Planning Act 2009* to circumstances where the owner was the applicant and ultimately dismissed the application.

Court examined the legislative framework for imposing the infrastructure charge and found that a registered proprietor of land is liable for the charge

The relevant infrastructure charges notice was one given under the repealed *Integrated Planning Act 1997* for the purposes of section 833 of the *Sustainable Planning Act 2009*. Therefore, it was taken to be an infrastructure charges notice under the *Sustainable Planning Act 2009*.

Despite the amendments to the *Sustainable Planning Act 2009* on 4 July 2014, section 978(1) of the amended Act provided that the unamended *Sustainable Planning Act 2009* continues to apply to an infrastructure charge under the unamended Act.

Section 639(1) of the unamended *Sustainable Planning Act 2009* relevantly provided that an infrastructure charge levied by a local government is, for the purposes of recovery, taken to be rates.

However, section 639(2) of the unamended *Sustainable Planning Act 2009* relevantly provided that if the local government and an applicant or person who requested compliance assessment enter into a written agreement stating the charge is a debt owing to it by the applicant or person, section 639(1) does not apply.

The court recognised that section 639(1) did not expressly address whether the person liable to pay an infrastructure charge under that section is the "owner" of the land. However, the court identified (at [38]) that the term "*taken to be rates*" "*invites attention as to who is liable to pay rates*".

The court referred to section 96 of the *Local Government Act 2009* which provided that a regulation may provide for any matter connected with rates, including the process for recovering overdue rates and charges.

The court then referred to section 127 of the *Local Government Regulation 2012* which provided that the current owner of the land is liable to pay rates and charges for rateable land, even if the owner did not own the land during the period to which the rates or charges relate.

The court concluded that if an infrastructure charge were taken to be "rates" under section 639, then it follows that section 96 of the *Local Government Act 2009* and section 127 of the *Local Government Regulation 2012* would have applied to make the registered proprietor of freehold land liable for the charge.

Court found no basis for reading words into the Act

Trevorrow submitted that a proprietor is not made responsible for the infrastructure charge by the deeming effect of section 639(1) in the circumstances where the applicant for a development permit was not also the proprietor. Trevorrow submitted that it would be unjust for the owner to be excluded from the power to make an agreement with a local government under section 639(2), but be liable for the charge under section 639(1).

The court found that the effect of such a reading would be to add in the words "*Where the applicant is the owner of the land…*" to section 639(1) (at [53]).

The court ultimately found no basis for reading in these words and further found that the following matters suggested the contrary:

- The *Sustainable Planning Act 2009* distinguished between an applicant and an owner and referred to a case where the applicant is the owner of the land using express words in section 637(1)(d).
- Section 639 was concerned with the recovery of an infrastructure charge by the local government. Where the charge was payable by and paid by an applicant, no recovery from the owner was necessary. Such a charge for a material change of use, was to be paid "before the change happens" or, if that did not apply, on the day stated in the notice.
- The purpose of the section was to make the infrastructure charge recoverable as if it were rates which was usually payable by the owner of land not by an applicant for a development approval.
- The infrastructure charges notice resulted from a development approval which attached to the land and bound the owner and their successors in title.
- No application for a development approval could be made without the owner's consent. Therefore, the owner retained control over whether an infrastructure charge could be levied.
- The owner controlled the use of the land and an infrastructure charge for a material change of use was not payable until the change of use began.

Carrying out assessable development without an effective development permit, and the appropriate exercise of the court's discretionary power to grant declarations and enforcement orders

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Whitsunday Regional Council v Branbid Pty Ltd* [2017] QPEC 003 heard before Bowskill QC DCJ

March 2017

In brief

The case of *Whitsunday Regional Council v Branbid Pty Ltd* [2017] QPEC 003 involved a dispute about the use of a property within the rural zone of the Bowen Shire Planning Scheme for temporary accommodation.

In particular, the Whitsunday Regional Council sought the following declaration and enforcement order against Branbid Pty Ltd, which had ignored previous show cause and enforcement notices:

- A declaration that Branbid Pty Ltd was committing a development offence to the extent that it was providing temporary accommodation without an effective development permit.
- Enforcement order, on an interim and permanent basis, requiring Branbid Pty Ltd to:
  - cease committing the development offence without first obtaining an effective development permit; and
  - return the land to the condition it was in prior to the development offence occurring.

Branbid Pty Ltd argued that the temporary accommodation was a temporary use incidental to and necessarily associated with a continuing pre-existing lawful use.

The court declined to make an order requiring remediation work on the basis that there was no evidence before the court as to any change in the condition on the land.

The court did, however, find that a development offence had been committed and in making that finding considered the following matters:

- What was the proper classification of the use of the land?
- Did the use of the land constitute 'assessable development' that required a development permit?
- Were declarations or enforcement orders appropriate in the exercise of the court's discretion?

What was the proper classification of the use of the land?

The court identified the following relevant principles:

- The Whitsunday Regional Council bore the onus of proof to show that a development offence had been committed.
- Branbid Pty Ltd bore the onus of proof to show that the use being carried out was a temporary use incidental to and necessarily associated with a continuing pre-existing lawful use.

In respect of the first principle, the Whitsunday Regional Council tendered photographs which depicted a number of campervans, tents, and other vehicles, some with trailers, present on the land.

In respect of the second principle, Branbid Pty Ltd tendered no evidence other than its own anecdotal evidence that there was a pre-existing use right for a cattle sale yard in relation to the land, with temporary accommodation being incidental to that use.

The court was not persuaded by the anecdotal evidence of Branbid Pty Ltd and held that, even if there had been such a pre-existing use right established, the temporary accommodation activity described by Branbid Pty Ltd was not incidental to and necessarily associated with the use of the land for a cattle sale yard.

The court was not satisfied, on the balance of probabilities and on the evidence before it, that there was a pre-existing use right to which temporary accommodation was incidental to and necessarily associated with.

Did the use of the land constitute assessable development that required a development permit?

The court held that the use of the land for temporary accommodation constituted a new use being a 'material change of use' of the premises requiring a development permit because temporary accommodation was not exempt development or self-assessable development in the rural zone.

The court therefore found that Branbid Pty Ltd was and had been carrying out assessable development without an effective development permit and was therefore committing a development offence.

Were declarations or enforcement orders appropriate in the exercise of the court's discretion?

In considering whether it was appropriate for the court to exercise its discretionary powers to make declarations and enforcement orders, the court reflected (at [27]) upon the observations of Kirby P, as he then was, in *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, namely:

> *… the need to consider the clear legislative intent of planning law to promote integrated and co-ordinated development, observing that if unlawful exceptions and exemptions became condoned by the court's exercise of discretion not to enforce the law, the equal and orderly enforcement of planning law would be undermined, with a concomitant sense of inequity felt by those who complied with the requirements of the law, or failed to secure similar favourable exercises of discretion.*
>
> *… where the application for enforcement of the planning law is made by a Council, a court may be less likely to deny equitable relief, than it would in litigation between private citizens, because the Council are seen as the proper guardians of public rights; its interest is deemed to be protective and beneficial, not private or pecuniary.*

The court also had regard to the show cause and enforcement notices issued by the Whitsunday Regional Council to Branbid Pty Ltd, as well as Branbid Pty Ltd's subsequent non-compliance.

In the circumstances, the court was satisfied that it was appropriate to make the declaration and enforcement orders sought as they were necessary to empower the Whitsunday Regional Council with the requisite authority to discharge its public duty of managing development, including managing the use of land or premises, within its local government area and in accordance with its planning scheme.

The 10 commandments governing conditions of consent

Todd Neal

This article discusses what developers and consent authorities should consider in relation to the validity of conditions of consent

March 2017

In brief – What developers and consent authorities should consider regarding validity of conditions of consent

Uncertainty about the validity of conditions of consent is common to both developers/landowners and consent authorities. It is not always "black and white", but there are nevertheless a number of clear axioms governing the validity of conditions of consent.

What is abundantly clear is that consent authorities **are** empowered to grant development consents subject to conditions (section 80(1) of the *Environmental Planning and Assessment Act 1979*). The uncertainty relates to how far and wide these conditions can go – numerous cases in the Land and Environment Court (and other courts) have been fought on these lines.

The 10 commandments for developers and consent authorities

The below 10 commandments will help answer questions from developers such as:

- Isn't the consent authority overreaching?
- How can they impose that condition?

It will also help consent authorities answer questions such as:

- Can we validly impose a condition like this?
- Is a condition like this reasonable?

Commandment 1

You must comply with the requirements set out in section 80A of the Act, and the condition must fairly and reasonably relate to one of the statutory powers to impose conditions in section 80A.

Commandment 2

You must comply with three tests in the seminal case of *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731:

- *The condition must be for a planning purpose, and not an ulterior one*. The condition is likely to be for a planning purpose (generally) if:
  - one or more of the statutory requirements in section 80A are met;
  - it is for a purpose authorised by the Act.
- *The condition must fairly and reasonably relate to the development subject of the development application*. The condition is likely to do this if:
  - it falls within the proper limits of the consent authorities functions;
  - it maintains proper standards in local development;
  - it is imposed in good faith and not to achieve extraneous purposes;
  - the development benefits from the condition, including for environmental protection reasons;
  - it relates to a large parcel of land which the land that is the subject of the development application forms part of, even though it does not relate to the land the subject of the application;
  - it fairly and reasonably relates to one of the statutory powers to impose conditions in section 80A;
  - the development itself creates the need for the condition;
  - it is fair and reasonable in the circumstances of the case.

- *The condition must not be so unreasonable that no reasonable planning authority could have imposed the condition* (in the sense set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 ALL ER 680).

Commandment 3

The condition of consent must be reasonably capable of being related to the purpose for which the function of determining a development application is being exercised. That purpose must be ascertained by reference to the statutory provisions.

Commandment 4

If a condition is uncertain or lacks specificity or particularity, it will not necessarily be invalid, **but it** must not go beyond the statutory limit of power being exercised under section 80A of the Act.

Commandment 5

You must answer these three questions when determining the validity of the condition:

- Is the condition manifestly unreasonable (i.e. in the Wednesbury sense)?
- Is it authorised by section 80A of the Act?
- If the condition is – on the face of it – within power, was the condition imposed for an ulterior or improper purpose?

Commandment 6

While you can impose a condition requiring security in relation to potential damage to property of the consent authority or for the completion of a public work, you must not impose a condition requiring an applicant to provide an indemnity or release to the council.

Commandment 7

You must be careful not to over rely on conditions requiring the registration of a restriction as to the user on the title.

Commandment 8

Where there is ambiguity, you must construe development consents against the interests of the consent authority instead of against the interests of the applicant.

Commandment 9

While you may imply words into a development consent using a purposive approach to give effect to the underlying purpose of a development consent or a particular condition, you must not read words into a development consent.

Commandment 10

You must be aware that clause 98 of the *Environmental Planning and Assessment Regulation 2000*, regarding compliance with Building Code of Australia and insurance requirements under the *Home Building Act 1989*, automatically imposes conditions on any development consent involving any building work.

Consent authorities and applicants can be guided by these commandments, but legal advice may be necessary

While a consent authority can grant consent unconditionally, it is rare to see this occurring today, with most development consents attaching several pages of conditions.

The above "commandments" therefore are intended to serve as a guide to both consent authorities and applicants. Legal advice may be required to more precisely align facts with the principles, and the above "commandments" serve as a useful starting point when analysing conditions of consent.

Consent authorities and applicants should be aware that the validity of some types of conditions may change if the 2017 reforms to the Act currently being proposed are assented to, particularly for major projects.

Consider seeking legal advice about the validity of conditions of consent and how they should be construed, particularly where there are conditions that create doubt.

Court allows an appeal to permit the erection of a digital advertising sign on a Brisbane heritage hotel

Chloe McGovern | Russell Buckley | Daniel Tweedale | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Australian Leisure and Hospitality Group Pty Ltd v Brisbane City Council* [2016] QPEC 66 heard before Rackemann DCJ

April 2017

In brief

The case of *Australian Leisure and Hospitality Group Pty Ltd v Brisbane City Council* [2016] QPEC 66 concerned an appeal by the Australian Leisure and Hospitality Group Pty Ltd against the decision of the Brisbane City Council to refuse to grant a licence under the Advertisements Local Law to permit the exhibition of an advertisement on the Kedron Park Hotel, a heritage listed premises at Lutwyche, Brisbane. The proposed advertisement was a single-sided electronic or digital device with a total area of 33.5 square metres and was to be installed on the roof of the Kedron Park Hotel.

The issue in dispute was whether the Brisbane City Council, in exercising its discretion whether to approve the exhibition of an advertisement under the Advertisements Local Law, had due regard for the criteria and conditions prescribed under the Advertisements Subordinate Local Law.

The issue in dispute was whether the advertisement would have an unreasonable impact upon the Kedron Park Hotel itself having regard to its status as a heritage place

The parties did not dispute that the environment within which the premise sat, which was within a residential zone and dominated by major road infrastructure, was consistent with the object of the Advertisements Subordinate Local Law which requires that the advertisement must not unreasonably detract from the desirable characteristics of the natural and built environment in which the advertisement is exhibited.

Rather, the determinative issue in dispute was whether the advertisement would have an unreasonable impact upon the Kedron Park Hotel itself having regard to its status as a heritage place.

In this respect, the court noted that the Kedron Park Hotel comprised three key components:

- the core structure built in 1881 on the corner and with a frontage to each of the streets;
- an extension built in 1920 that wraps around the 1881 core structure and has frontages to each of the streets; and
- a modern extension to the south that has no significant heritage significance.

It was common ground between the parties that the value of the Kedron Park Hotel as a landmark corner hotel was predominantly appreciated by viewing that part of the Kedron Park Hotel which presents itself to the corner – namely, by looking in a generally south-easterly direction at the Kedron Park Hotel.

It was also common ground between the parties that the principal view of the advertisement, were it to proceed, would be to those viewing the building while travelling northbound along Lutwyche Road. From this vantage point the sign would be seen against the backdrop of the rear of the side of the 1920s extension of the building, on top of the roof of the more modern extension.

The ordinary meaning of 'façade'

On this basis, the Brisbane City Council placed significant weight and reliance upon provisions of the Advertisements Subordinate Local Law dealing with façades of heritage places, arguing that the proposed advertisement offended the following provisions:

> *(a) an advertisement, including supporting infrastructure, fixing devices and services, should not detract from the appearance of a building facade;*
>
> *(b) an advertisement should be considered as another design element to be incorporated in the existing elevational treatment of a building, in a manner which respects the style, scale, alignments, patterns and other architectural qualities of the building.*

Australian Leisure and Hospitality Group Pty Ltd challenged this assertion on the basis that the "*ordinary meaning of facade was a face or front, or the principal face, of a building*" and that the wall against which the proposed advertisement would be seen was evidently not at the front of the building, but rather the side or the rear. The Brisbane City Council contended that, because the side and rear were visible from the road, these aspects ought to be considered 'a face' of the building.

The court, in adopting the ordinary meaning of façade as being "*the most important side, the front column, the face of the building*", held that while the side of the building was not irrelevant, the façade of the building in this context was those sides of the building with frontage to each of the streets. Accordingly, the court held that the advertisement would have no effect on the primary views of the Kedron Park Hotel as a landmark corner hotel, given that the sign was to be around the side or rear, well away from those parts of the Kedron Park Hotel which present itself to the corner.

Matters of heritage, and the extent to which development including the erection of advertisements, will impact upon such values is often a matter of subjective assessment upon which reasonable minds may differ

The Brisbane City Council also contended (at [38]) that the proposed advertisement represented "*a new, large, dominant and uncharacteristic visual element, introduced into a visually sensitive place*" which would have an adverse impact on the building and its setting because it would both obscure the view of the building and distract from its visual prominence.

In addressing this contention, the court remarked (at [39]) that "*[m]atters of heritage, and the extent to which development including the erection of advertisements, will impact upon such values is often a matter of subjective assessment upon which reasonable minds may differ…*".

In this regard, the court held that the proposed advertisement would not have any impact upon the appreciation of the intactness of the 1881 component on the building, nor the 1920 extension which addresses the two street frontages.

The court ultimately found that the proposed advertisement represented a relatively minor intrusion at the least sensitive end of the least sensitive component of the Kedron Park Hotel and did not have an undue impact upon the Kedron Park Hotel and its heritage significance.

In finding in favour of the Australian Leisure and Hospitality Group Pty Ltd, the court allowed the appeal and granted a licence to the Australian Leisure and Hospitality Group Pty Ltd under the Advertisements Local Law to permit the exhibition of an advertisement on the Kedron Park Hotel.

Court sets aside a decision of the Building and Development Committee on the basis that its chairperson was not an architect

Russell Buckley | Daniel Tweedale | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brisbane City Council v Atkins* [2017] QPEC 10 heard before Kefford DCJ

April 2017

In brief

The case of *Brisbane City Council v Atkins* [2017] QPEC 10 concerned an appeal by the Brisbane City Council against a decision of the Building and Development Committee to set aside a decision notice refusing a development application for building work on land situated at 27 Elystan Road, New Farm in Brisbane.

The council filed an application in pending proceeding to have the appeal determined by way of a preliminary point. This point challenged the Building and Development Committee's jurisdiction to hear and decide the matter under section 502(2) of the *Sustainable Planning Act 2009*.

The court held that the Building and Development Committee was improperly constituted under section 502(2) of the *Sustainable Planning Act 2009* and therefore ordered that the Brisbane City Council's appeal be allowed.

Council directed a private certifier to refuse a development application for proposed building work for extensions to a dwelling house

The background to this case involved the engagement in May 2016 of a private certifier to assess and decide a building development application for the approval of an extension to an existing dwelling for a metal awning in respect of land located at 27 Elystan Road, New Farm in Brisbane.

The private certifier, acting as the assessment manager for the development application, requested a concurrence agency response from the council, which gave a response to the private certifier requiring that the development application be refused.

The council's concurrence agency response provided for the refusal of the development application in accordance with section 288(2) of the *Sustainable Planning Act 2009* on the grounds that the proposed building work would have an extremely adverse effect on the amenity or likely amenity of the locality, or be in extreme conflict with the character of the locality.

The private certifier subsequently issued a decision notice to the applicant that refused the development application and attached the council's concurrence agency response.

Applicant appealed the council's refusal on the basis that the council's decision contained matters that were not legitimately the subject of an appeal to the Building and Development Committee

The applicant subsequently commenced an appeal to the Building and Development Committee against the council's refusal on the grounds that the council's decision addressed matters that may not legitimately be the subject of an appeal to the Building and Development Committee.

The acting registrar of the Building and Development Committee notified the parties that the Chief Executive had established a committee comprising a chairperson and a member to hear and decide the appeal. The Building and Development Committee finally ordered the building certifier to disregard council's concurrence agency response.

The council subsequently appealed to the Planning and Environment Court and later filed an application in pending proceeding to have the decision of the Building and Development Committee set aside on a preliminary point

The applicant conceded that the Building and Development Committee had no declaratory jurisdiction and consequently the applicant's appeal to the Building and Development Committee was seeking a declaration on matters outside of the jurisdiction of the committee.

The court ultimately determined that the applicant's appeal to the Building and Development Committee was therefore limited to an appeal about the council's referral agency response concerning the amenity and aesthetic impact of a building or structure.

In order to hear an appeal dealing only with a referral agency's response concerning the amenity and aesthetic impact of a building or structure the chairperson of the Building and Development Committee must be an architect

Section 502(2) of the *Sustainable Planning Act 2009* states that, "*if the committee is to hear only an appeal about a referral agency's response concerning the amenity and aesthetic impact of a building or structure, its chairperson must be an architect*".

The *Architects Act 2002* provides for the registration of architects and defines an architect as a person registered as an architect. Section 9 of the *Architects Act 2002* provides for when an applicant is eligible for registration and section 10 provides for when an applicant is qualified for registration.

To successfully register as an architect in Queensland, an applicant must obtain appropriate qualifications and have successfully completed the architectural practice examination or another examination approved by the Queensland Board of Architects.

The board is required to maintain a register of persons who meet the definition of an architect. Section 103 of the *Architects Act 2002* relevantly provides that the register must be kept open for inspection and provided upon request. Section 103(2) of the *Architects Act 2002* provides that the register may also be made available on the board's website.

Brisbane City Council submitted that the decision of the Building and Development Committee should be set aside as a consequence of its improper constitution

The council's affidavit material provided an online copy of the current register of architects, which revealed that the chairperson of the Building and Development Committee was not a registered architect. The applicant did not contest this issue and accepted that the chairperson was not an architect for the purposes of section 502(2) of the *Sustainable Planning Act 2009*.

The court was satisfied that the Building and Development Committee established by the Chief Executive was not properly constituted and therefore did not have the power to hear and determine the appeal in the first instance.

The council indicated that with respect to the merits of the matter determined by the Building and Development Committee it was satisfied that an approval ought to be given. The court therefore found it unnecessary that the matter be remitted to the Building and Development Committee.

The court ordered that the appeal be allowed and the decision of the Building and Development Committee of 15 February 2017 be set aside, and approval be given for the development application subject to conditions.

Court sets aside a decision of the Building and Development Committee on the basis of improper constitution and consideration of irrelevant matters

Russell Buckley | Daniel Tweedale | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brisbane City Council v Reynolds & Anor* [2017] QPEC 12 heard before Kefford DCJ

April 2017

In brief

The case of *Brisbane City Council v Reynolds & Anor* [2017] QPEC 12 concerned an appeal by the Brisbane City Council against the decision of the Building and Development Committee to set aside a decision notice refusing a development application for building work on land situated at 91 Yabba Street, Ascot in Brisbane.

The Building and Development Committee had ordered the decision of the Brisbane City Council to refuse the development be set aside on the grounds that the council's referral agency response was based on incorrect assessment criteria.

The council appealed the committee's decision on the basis that it dealt with matters not within its jurisdiction and contained an analysis of matters which ought not to have been considered. The council also contended that the Building and Development Committee was improperly constituted under section 502(2) of the *Sustainable Planning Act 2009*.

The court held that when properly construed the applicant's appeal to the Building and Development Committee was concerned only with the council's referral jurisdiction for the amenity and aesthetic impact of a building or structure. The court found that in such circumstances the committee's chairperson must be an architect.

After finding that the committee's chairperson was not a registered architect, the court ordered that the committee's decision be set aside and that the appeal be remitted to the registry of the Building and Development Committee for the chief executive to constitute a new Building and Development Committee with appropriate members.

Council in its role as a concurrence agency for the amenity and aesthetic impact of a development application for building work directed the private certifier to refuse the development application

The background to the case involved the engagement in August 2016 of a private certifier to assess and decide a building development application for alterations, additions and demolition to parts of an existing house located at 91 Yabba Street, Ascot in Brisbane which was within the Traditional building character overlay of the *Brisbane City Plan 2014*.

The council was a concurrence agency for the development application as the development triggered the "*amenity and aesthetic impact of a building*" referral trigger contained within schedule 7, table 1, item 17 of the *Sustainable Planning Regulation 2009*.

The private certifier as an assessment manager for the development application, requested a concurrence agency response from the council, which directed the private certifier to refuse the development application. The private certifier issued a decision notice advising the applicant that the development application was refused as a consequence of the council's assessment.

Applicant commenced an appeal in the registry of the Building and Development Committee against the decision to refuse the development application

The applicant accepted the council's jurisdiction as a concurrence agency but opposed the assessment criteria used to refuse the development application. The applicant submitted that the proposed development would not have an extremely adverse effect on the amenity of the locality or be in extreme conflict with the character of the locality.

The acting registrar of the Building and Development Committee subsequently notified the parties that the chief executive had established a Building and Development Committee to hear and decide the appeal comprising a chairperson and a referee.

The Building and Development Committee decided the appeal ordering that the council's decision be set aside and that the private certifier reissue a decision notice for the development application on the basis that council had no concurrence agency requirements.

Council commenced proceedings in respect of the committee's decision on the basis that it was improperly constituted to hear the appeal

The council filed an application in a pending proceeding that sought an order that the appeal be determined by way of a preliminary point. The council's application was commenced on the basis that section 502 of the *Sustainable Planning Act 2009* requires the committee's chairperson to be an architect if it proposes to hear an appeal only about a referral agency's response concerning the amenity and aesthetic impact of a building or structure.

The court found that when properly construed the applicant's appeal to the Building and Development Committee was concerned only with the council's concurrence agency response about the amenity and aesthetic impact of a building or structure

The court found that the committee's decision dealt with matters not within its jurisdiction and issues that should not have been considered. Furthermore, the court found that there was no other reason for the applicant to commence an appeal other than to challenge the council's referral agency response.

Consequently, the court determined that when properly construed the appeal was in fact only concerned with the council's response as a referral agency for the amenity and aesthetic impact of a building or structure.

The court then noted that the *Architects Act 2002* defines an architect to be a person registered as an architect. The board, under the *Architects Act 2002* is required to maintain a register of all persons who are architects. This register must be in electronic form and be open for inspection upon request.

Affidavit material filed by the council included a search of the online register that revealed the chairperson was not included in the register. As a consequence, the court found that the Building and Development Committee was improperly constituted and therefore had no power to hear and determine the appeal in the first instance.

The court ordered that the committee's decision be set aside and remitted back to the Building and Development Committee on the basis that it be properly constituted with new membership

The court noted the decision of *Sunland Group Pty Ltd v Townsville City Council & Anor* [2012] QCA 30 which highlighted the real risk of allegations of apprehended bias if the matter was remitted to the Building and Development Committee as formerly constituted. The court therefore ordered that the appeal be remitted to the chief executive to form a new Building and Development Committee according to law with an architect as its chairperson.

Court considers the relevance and reasonableness of conditions as well as in what circumstances conditions are required

Russell Buckley | Thomas Massey | Daniel Tweedale | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Spry v Brisbane City Council & Anor* [2017] QPEC 16 heard before Kefford DCJ

April 2017

In brief

The case of *Spry v Brisbane City Council & Anor* [2017] QPEC 16 involved an appeal against the decision of the Brisbane City Council to approve a development permit for a material change of use for a multiple-dwelling comprising of three units at 72 Gladstone Road, Highgate Hill in Brisbane.

The grounds of the appeal related to the following matters:

- conditions 35 and 36 in the decision notice lacked finality and certainty and were so unreasonable that no reasonable decision maker would impose them;
- the Brisbane City Council failed to impose a condition that no connection be made to the private foul water or private pipeline traversing the premises.

The former issue was settled by the consent of the parties and did not require a determination by the court. Nonetheless, the court did remark that it considered this ground of appeal to be 'curious' as it seemed to suggest that the inability to comply with one of two possible options rendered the condition incapable of performance.

In respect of the latter issue, the court accepted that the decision notice issued by the Brisbane City Council did not impose a condition in those terms, but went on to remark that the notice of appeal went no further than this and therefore failed to:

- identify the basis for the imposition of the condition;
- identify any conflict with the planning scheme;
- raise any allegation of unacceptable or adverse impacts from the proposed development; or
- raise the need for such a condition by reference to some planning purpose.

As such the council found that there was also no allegation that, in the absence of the condition, the proposed development would in some manner be inadequate.

The applicant nonetheless pursued the issue on the following basis:

- In *Sansom v Beaudesert Shire Council* [2003] QPELR 335, the Planning and Environment Court relevantly stated:

  > *From the point of view of the perfectionist, it may be said to be otiose to put a condition on an approval which says, effectively, "it is a condition that you obey the law" but it is often seen, does no harm and acts as a reminder. And it does serve the useful purpose of making a breach of the law a breach of the development approval from which different or extra consequences may flow*; and

- Section 7.6.7.2 of the Brisbane City Council's Infrastructure Design Planning Scheme Policy relevantly states:

  > *New stormwater connections to existing foul-water lines are not permitted, nor is it acceptable to assume that these lines are redundant.*
  >
  > *Development must not damage these lines and any proposed diversion must connect to the existing stormwater system or a lawful point of discharge.*

However, the court was not convinced either submission was relevant for the following reasons:

- there was no allegation in the grounds of appeal that the provision of a connection to a foul water or private pipeline traversing the premises would amount to a breach of the law;

- while the Infrastructure Design Planning Scheme Policy was relevant to the assessment of the development, it served as a guideline only and as such non-compliance with section 7.6.7.2 did not necessarily amount to a conflict with the planning scheme.

The court was therefore satisfied that there was no identified need to impose the condition.

In this respect, the court referred to *Intrapac Parkridge Pty Ltd v Logan City Council & Anor* [2015] QPELR 49, in which the Planning and Environment Court relevantly stated:

> *There is, of course, no requirement for an assessment manager or, on appeal, the court to impose each and every condition which might pass one of the above tests. There is a relatively broad residual discretion as to what lawful conditions to impose on the approval at hand. That discretion, while broad, must be exercised for a proper planning purpose and not for any ulterior purpose. A planning purpose is one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the relevant authority.*
>
> *In the case of the [Sustainable Planning Act], the assessment manager's decision, including a decision to approve subject to conditions, must be based on the assessment of the application … by reference to the planning scheme.*

In conclusion the court made orders in the terms agreed between the parties in respect of conditions 35 and 36 and did not impose the further condition sought by the applicant in respect of foul water connections.

Current and future infrastructure planning and charging frameworks in Queensland

Ian Wright | James Nicolson

This article is an edited version of an earlier paper titled *Queensland infrastructure planning and charging framework* September 2016 prepared by Ian Wright, Ronald Yuen and Shaun Pryor

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Introduction

Infrastructure planning and charging framework

In June 2011, the *Sustainable Planning Act 2009* was amended by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011* to implement a capped infrastructure planning and charging framework for local governments and distributor-retailers in South-East Queensland (**previous capped framework**).

On 4 July 2014, the *Sustainable Planning Act 2009* (**SPA**) was further amended by the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act 2014*, to provide for the current infrastructure planning and charging framework (**current capped framework**).

Under the current capped framework, provisions relating to local governments were retained in SPA whilst those applicable to distributor-retailers were transitioned to the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (**SEQ Water Act**).

Given that the current capped framework applicable to both local governments and distributor-retailers is materially the same, this paper focuses only on local governments although references to the equivalent distributor-retailer provisions have been provided for ease of reference.

On 25 May 2016, the *Planning Act 2016* (**Planning Act**) was assented to but has yet to commence. The Planning Act is to be supported by a future *Planning Regulation 2017*, the current draft version of which is dated 21 November 2016 (**Draft Planning Regulation**). It adopts the current capped framework for local governments subject to a limited number of changes (**future capped framework**).

Themes of the paper

This paper has three themes:

- First, it provides an overview of the key elements of the current capped framework (section 2).
- Second, it considers the key changes arising from the future capped framework under the Planning Act (section 3).
- Finally, it offers some conclusions about the impact of the current and future capped frameworks (section 4).

Legal and practical implications of the current capped framework

Key elements of the current capped framework

This paper considers the following key elements of the current capped framework:

- Infrastructure scope
- Identification of trunk and non-trunk infrastructure
- Infrastructure planning instrument
- State infrastructure charging instrument
- Local infrastructure charging instrument
- Infrastructure charge
- Development charge
- Conditions for trunk and non-trunk infrastructure
- Conversion applications for non-trunk infrastructure conditions.

However, this paper does not consider the following key elements of the current capped framework:

- Offsets and refunds for trunk infrastructure and development charge
- State infrastructure provider powers
- Infrastructure agreements.

Infrastructure scope

The scope of the current capped framework is based on the definition of development infrastructure and includes water cycle management infrastructure, transport infrastructure, public parks infrastructure and land for specified local community facilities.[1]

Unlike the previous capped framework, development infrastructure no longer includes the local function of State-controlled roads in relation to the transport infrastructure component of development infrastructure.[2]

Identification of trunk and non-trunk infrastructure

The current capped framework empowers a local government to identify development infrastructure as trunk infrastructure in a local government infrastructure plan (called an **LGIP**). Development infrastructure that is not identified as trunk infrastructure in the LGIP (**LGIP unidentified infrastructure**) will generally be non-trunk infrastructure.[3]

However LGIP unidentified infrastructure can also be made trunk infrastructure in the following circumstances:

- *Necessary infrastructure condition* – The LGIP unidentified infrastructure is required by way of a necessary infrastructure condition and services development consistent with the assumptions in the LGIP about the type, scale, location or timing of future development.[4]
- *Conversion application* – The LGIP unidentified infrastructure the subject of a non-trunk infrastructure condition becomes trunk infrastructure by the approval of a conversion application.

Infrastructure planning instrument

The current capped framework requires a local government to include an LGIP in its planning scheme if it intends to levy charges for or impose conditions requiring the provision of trunk infrastructure under Chapter 8 of the SPA.[5] An LGIP under the current capped framework is similar to a priority infrastructure plan (**PIP**) under the previous capped framework.

The current capped framework provides a number of mechanisms for transitioning the various existing infrastructure planning instruments of local governments to the current capped framework. Until 1 July 2016 or a later date decided by the Minister (being no later than 1 July 2018)[6] (the **cut-off date**), the following applies for local governments which have not included an LGIP in their planning scheme:

- *Local government with a PIP* – For a local government that had a PIP under the previous capped framework, the PIP becomes an LGIP.[7]
- *Local government without a PIP* – For a local government that did not prepare a PIP under the previous capped framework, the local government may make a modified charges resolution which identifies trunk infrastructure and states the required standards of service and establishment costs.[8]

The following applies to local governments which have not included an LGIP in their planning scheme before the cut-off date:[9]

- *No infrastructure charges* – The local government cannot levy an infrastructure charge.
- *Limited conditioning power* – The local government can only impose a condition about non-trunk infrastructure.

State infrastructure charging instrument

The current capped framework empowers the Minister to prepare a State planning regulatory provision (called a **SPRP (adopted charges)**).[10]

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1 See section 627 of SPA and Schedule of SEQ Water Act.

2 See Schedule 3 of the *Sustainable Planning Act 2009 (28 May 2014 reprint)* (**28 May SPA**).

3 See section 627 of SPA and Schedule of SEQ Water Act.

4 See section 647 of SPA and section 99BRCR of SEQ Water Act.

5 See section 628A of SPA.

6 See section 997 of SPA.

7 See sections 982 of SPA.

8 See sections 979 and 996 of SPA.

9 See section 628A of SPA.

The *State Planning Regulatory Provision (adopted charges)* dated July 2012 made under the previous capped framework is presently deemed to be the SPRP (adopted charges) under the current capped framework.[11]

On 29 July 2016, the Adopted Infrastructure Charges Schedule 2016 replaced Schedule 1 of the current SPRP (adopted charges) and increased the amount of the maximum adopted charges for development.[12]

Local infrastructure charging instrument

The current capped framework, similar to an adopted infrastructure charges resolution under the previous capped framework, empowers a local government to adopt a resolution (called a **charges resolution**).[13]

A charges resolution is required to provide for the following:

- *Effective date* – The day when an adopted charge under the resolution is to take effect.[14]
- *Charges breakup* – The charges breakup for all adopted charges between the local government and distributor-retailer.[15]
- *Offset and refund calculation methodology* – A methodology for working out the cost of infrastructure the subject of an offset and refund.[16] The methodology must be consistent with the parameters provided for under the SPRP (adopted charges) or the *Statutory guideline 03/14 Local government infrastructure plans* (**LGIP guideline**).[17]
- *Conversion criteria* – Criteria for deciding a conversion application, which must be consistent with the parameters provided for under the LGIP guideline.[18]

A charges resolution, similar to an adopted infrastructure charges resolution, may provide for automatic increases in a levied charge from the date it is levied to the date it is paid.

However, the amount to be paid cannot be more than would result from increasing the charge by the 3 yearly average of the producer price index and cannot exceed the maximum amount that could be levied for the amount at the time the charge is paid.[19]

It is relevant to note that under the previous capped framework the maximum increase was calculated by reference to the consumer price index rather than the producer price index.[20]

Infrastructure charge

The current capped framework empowers a local government to give an applicant an infrastructure charges notice (called an **ICN**)[21] which levies a charge by applying the adopted charge (called a **levied charge**)[22] under a charges resolution in the following circumstances:[23]

- *Development approval* – A development approval has been given.
- *Adopted charge* – An adopted charge applies for providing the trunk infrastructure for the development.
- *Development not under a designation* – The development is not development under a designation proposed by a public sector entity that is a department.

Infrastructure charges notice

Under the current capped framework, an ICN is required to state the following:[24]

- *Amount* – The current amount of the levied charge.
- *Calculation details* – How the amount of the levied charge has been worked out.
- *Land* – The land to which the levied charge relates.

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10 See section 629(1) of SPA; cf. section 648B of 28 May SPA.

11 See section 983(1) of SPA.

12 See sections 629(2) and (3) of SPA; Queensland Government Gazette No. 75, Friday 29 July 2016; Adopted Infrastructure Charges Schedule 2016.

13 See section 630(1) of SPA and section 99BRCF(1) of SEQ Water Act; cf sections 648D(1) and 755KA(1) of 28 May SPA.

14 See section 630(3) of SPA and section 99BRCF(3) of SEQ Water Act.

15 See section 632(4) of SPA.

16 See section 633(1) of SPA and section 99BRCH(1) of SEQ Water Act.

17 See section 633(2) of SPA and section 99BRCH(2) of SEQ Water Act.

18 See section 633A of SPA and section 99BRCHA of SEQ Water Act.

19 See sections 631(3) to (6) of SPA and sections 99BRCG(3) to (6) of SEQ Water Act.

20 See sections 648D(9) and (10) and 755KA(2), (3) and (4) of 28 May SPA.

21 See sections 635(1) and (2) of SPA and sections 99BRCI(1) and (2) of SEQ Water Act.

22 See sections 627 and 635(6) of SPA and Schedule and section 99BRCI(6) of SEQ Water Act.

23 See section 635(1) of SPA and section 99BRCI(1) of SEQ Water Act.

24 See section 637 of SPA and section 99BRCK of SEQ Water Act.

- *Timing* – When the levied charge will be payable.
- *Automatic increase* – Whether the levied charge is subject to automatic increases and how the increases are worked out.
- *Details of an offset or refund* – Whether an offset or refund applies and if so, the information about the offset or refund including the timing of the refund. However, this requirement may be waived by the recipient of the ICN.[25]

  This provides greater certainty to a development proponent about its financial liability for the provision of infrastructure for development without the need for an infrastructure agreement. However, a local government is now required to determine its liability for an offset or refund and its amount at the decision stage of the IDAS process; whereas under the previous capped framework that liability would have been determined by the negotiation of an infrastructure agreement.
- *Establishment cost* – In order to identify the details of an offset or refund it will be necessary to work out the cost of the trunk infrastructure. This will likely require reference to the establishment cost of infrastructure in the schedule of works in the plans for trunk infrastructure in the LGIP. However the process for determining the establishment cost in these circumstances is by no means clear.

  It is relevant to note the following features of the definition of establishment cost under the current capped framework[26] are different from the definition under the previous capped framework[27]:

  - *Existing infrastructure* – The value of works is the "*current replacement cost*" which is reflected in the local government's asset register whilst the value of land is its "*current value acquired for the infrastructure*" which will be interpreted to mean market value.
  - *Future infrastructure* – Costs of "*land acquisition, financing, and design and construction, for the infrastructure*".

  Based on the definition of establishment cost under the current capped framework, the cost of infrastructure stated in an LGIP may not be the establishment cost of infrastructure for the purpose of determining an offset or refund under the current capped framework.
- *Information notice* – The decision, the reasons for the decision and details of appeal rights.[28]

Similar to the previous capped framework, the recipient of an ICN may enter into an agreement with the local government about the payment of the levied charge or providing infrastructure instead of paying the levied charge.[29] However, the power of a local government to give a land contribution notice in lieu of, or in addition to the payment of infrastructure charges under the previous capped framework has been removed from the current capped framework.[30]

Levied charge

The current capped framework for a levied charge features the following:

- *Additional demand* – A levied charge may only be for additional demand placed upon the trunk infrastructure which will be generated by the development.[31] A levied charge must therefore exclude demand on the trunk infrastructure from an existing lawful use or a previous lawful use. It must also exclude demand from other lawful development on the premises that may be lawfully carried out without a further development permit such as the following:[32]

  - *Development permit* – Development which is subject to a development permit but has not been implemented.
  - *Exempt or self-assessable development* – Development which is exempt or self-assessable development.

  This is potentially an issue for local governments particularly from an administrative point of view where a local government is required to exclude the demand generated by an exempt or self-assessable development when levying levied charges.

25 See section 627 of SPA and section 99BRCC of SEQ Water Act.

26 See section 627 of SPA and section 99BRCC of SEQ Water Act.

27 See Schedule 3 of 28 May SPA.

28 See sections 637(2) and 627 of SPA and section 99BRCK(2) and Schedule of SEQ Water Act.

29 See section 639 of SPA and section 99BRCM of SEQ Water Act.

30 See sections 648K(3) and (4) and 755MA(4) and (5) of 28 May SPA.

31 See section 636(1) of SPA and section 99BRCJ(1) of SEQ Water Act.

32 See section 636(2), (3), (3A) and (4) of SPA and section 99BRCJ(2), (3), (3A) and (4) of SEQ Water Act.

It is also relevant to note that under the previous capped framework, an adopted infrastructure charges resolution may provide a discount to an adopted infrastructure charge taking into account the existing usage of trunk infrastructure by the premises on which the development is carried out.[33] However, the previous capped framework did not contain any requirements for local governments to take into account a previous lawful use or other lawful development in working out the charges levied for development.

- *Levied charge attaches to the land* – A levied charge is payable by the applicant[34] and attaches to the land.[35]
- *Levied charge taken to be a rate* – A levied charge is for the purpose of its recovery, taken to be a rate of the local government.[36] A levied charge can therefore be recovered from the owner of the relevant land as well as the applicant.[37]

Infrastructure charge versus development charge

A levied charge under the current capped framework has the following important characteristics:

- *Infrastructure charge is not a development charge* – A levied charge is an infrastructure charge which has the primary goal of recovering the cost of trunk infrastructure to be provided by a local government to service development.[38]

  A levied charge is different to a development charge which is a charge designed to internalise the marginal external costs that are imposed by development and which has the primary goal of influencing the location and nature of development.[39]

- *Average cost approach not marginal cost approach* – The maximum adopted charges in the SPRP (adopted charges) are calculated by reference to an average State-wide cost approach; whereas the adopted charges in a charges resolution upon which a levied charge in an ICN is based are calculated by reference to an average municipality-wide cost approach which is limited to the maximum amount prescribed by the State.[40]

  Importantly levied charges under the current capped framework are based on an average cost approach and are capped. As such, levied charges do not achieve full cost recovery as was the case with infrastructure charges prior to the introduction of the previous capped framework.

Development charge

The current capped framework empowers a local government to impose a condition on a development approval requiring the payment of additional trunk infrastructure costs for development (called an **additional payment condition**) if it meets the following criteria:[41]

- *Infrastructure demand* – The development achieves one of the following:
  - generate infrastructure demand of more than that required to service the type or scale of future development that the LGIP assumes;
  - require new trunk infrastructure earlier than when identified in the LGIP;
  - is for premises completely or partly outside the priority infrastructure area (**PIA**) identified in the LGIP.
- *Additional infrastructure costs* – The development would impose additional trunk infrastructure costs on the local government after taking into account levied charges for the development and the provision of trunk infrastructure by the applicant.

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

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

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33 See section 648D(1)(d) of 28 May SPA.

34 See sections 635(6)(b) of SPA and section 99BRCI(6)(b) of SEQ Water Act.

35 See sections 635(6)(b) and (c) of SPA and sections 99BRCI(6)(b) and (c) of SEQ Water Act; cf. *Montrose Creek Pty Ltd & Manningtree (Qld) Pty Ltd v Brisbane City Council* (2013) QPELR 47.

36 See section 664 of SPA.

37 See *Trerorrow v Council of the City of Gold Coast* (2017) QSC 12.

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

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

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

41 See section 650(1) of SPA and section 99BRCU(1) of SEQ Water Act.

Additional payment condition

An additional payment condition is required to state all of the following:[42]

- *Reasons* – Why it was imposed.
- *Amount* – The amount of the payment to be made under the condition.
- *Trunk infrastructure details* – Details of the trunk infrastructure for which the payment is required.
- *Timing* – When the amount becomes payable.
- *Provision of trunk infrastructure* – That the applicant may, instead of making the payment, elect to provide part or all of the trunk infrastructure.
- *Additional requirements* – If the applicant elects to provide part or all of the trunk infrastructure, the additional payment condition is also required to state the requirements for providing the trunk infrastructure and when it must be provided.[43]

If an additional payment condition is for development completely inside the PIA, it may only require a payment of the following:[44]

- *Earlier than planned in the LGIP* – For trunk infrastructure to be provided earlier than planned in the LGIP, the additional establishment cost that would be incurred by the local government in providing the trunk infrastructure earlier than planned.
- *Different type or scale of development* – For infrastructure associated with a different type or scale of development from that assumed in the LGIP, the establishment cost of any additional trunk infrastructure made necessary by the development.

If an additional payment condition is for development completely or partly outside the PIA, it may only require a payment of the following:[45]

- *Establishment cost of infrastructure* – The establishment cost of infrastructure that is made necessary by the development and, if the relevant local government's planning scheme indicates the premises is part of an area intended for future development for non-rural purposes, necessary to service the rest of the area.
- *Establishment cost of temporary infrastructure* – The establishment cost of any temporary infrastructure required to ensure the safe or efficient operation of infrastructure needed to service the development or made necessary by the development.
- *Decommissioning, removal and rehabilitation costs* – Any decommissioning, removal and rehabilitation costs of the temporary infrastructure.
- *Maintenance and operating costs* – The maintenance and operating costs for up to 5 years of the infrastructure and temporary infrastructure.

Conditions for trunk and non-trunk infrastructure

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

- *Head of power* – The condition must expressly identify one of the following heads of power for the imposition of the condition:[46]
  - *Necessary infrastructure condition* – A condition can be imposed requiring the provision of trunk infrastructure if the trunk infrastructure is necessary to service the subject premises and has not been provided or has been provided but is inadequate.[47] There are two types of necessary infrastructure conditions:
    - *LGIP identified infrastructure* – A condition requiring, at a stated time, LGIP identified infrastructure or different trunk infrastructure delivering the same desired standard of service, if the LGIP identifies adequate trunk infrastructure to service the subject premises.[48]

42 See section 651 of SPA and section 99BRCV of SEQ Water Act.

43 See section 651(1)(f) of SPA and section 99BRCV(1)(f) of SEQ Water Act.

44 See section 652 of SPA and section 99BRCW of SEQ Water Act.

45 See section 653 of SPA and section 99BRCX of SEQ Water Act.

46 See section 335(1)(e)(iii) of SPA and section 99BRAI(2)(e) of SEQ Water Act.

47 See sections 645, 646 and 647 of SPA and sections 99BRCP, 99BRCQ and 99BRCR of SEQ Water Act.

48 See section 646 of SPA and section 99BRCQ of SEQ Water Act.

        - *LGIP unidentified infrastructure* – A condition requiring development infrastructure necessary to service the premises at a stated time, if the LGIP does not identify adequate trunk infrastructure to service the subject premises and the development infrastructure services development consistent with the assumptions stated in the LGIP about the type, scale, location or timing of future development.[49]
    - *Non-trunk infrastructure condition* – A condition can be imposed requiring the provision of non-trunk infrastructure for the following limited purposes:[50]
        - *Internal network* – A network or part of a network internal to the premises.
        - *Connection to external network* – The connection of the premises to an external infrastructure network.
        - *Safety or efficiency of network* – The protection or maintenance of the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.
- *Relevant and reasonable requirement* – The condition must also satisfy the relevant and reasonable requirement of the SPA.[51]

This is significantly different from the previous capped framework where a necessary infrastructure condition could only be imposed if the trunk infrastructure is identified in the PIP or an adopted infrastructure charges resolution of the local government.[52]

Relevant and reasonable test for a trunk infrastructure condition

In the case of a necessary infrastructure condition, the relevant and reasonable requirement is deemed to be met if the following are satisfied:[53]

- *Necessary to service subject premises* – The infrastructure is necessary to service the subject premises.

  According to common law principles, the infrastructure is likely to be necessary to service the subject premises in the following circumstances:

    - The proposed development is serviced by the infrastructure.
    - The proposed development generates additional demand on the infrastructure network.
    - The proposed development has an adverse impact on the safety or efficiency of the infrastructure network.
    - The infrastructure is required as a result of the proposed development.
    - The infrastructure is not required merely for the desirability of having the infrastructure or to meet the local government's desires for the future of the general area in which the subject premises is situated independent of the development of the subject premises.
- *Efficient and cost effective solution* – The infrastructure is the most efficient and cost effective solution for servicing other premises in the general area of the subject premises.

  According to common law principles, the infrastructure is likely to be an efficient and cost effective solution in the following circumstances:

    - The construction of the work is not carried out on a piecemeal basis.
    - Full construction that is necessary to service other premises in the general area of the subject premises is carried out in full, rather than in part as development of other premises progresses.
- *Infrastructure on the subject premises* – The infrastructure, if provided on the subject premises, is not an unreasonable imposition on the development or the use of the subject premises as a consequence of the development.

  According to common law principles, the infrastructure is not an unreasonable imposition if infrastructure is on the subject premises in the following circumstances:

    - The infrastructure involves the following:
        - No or minor redesign of the development.
        - No significant restriction on the development.
        - No significant additional cost burden.
    - The infrastructure is in the interests of rational development or efficient and orderly planning of the general area in which the subject premises is situated.

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49 See section 647 of SPA and section 99BRCR of SEQ Water Act.

50 See section 665 of SPA and section 99BRDJ of SEQ Water Act.

51 See sections 345 of SPA and section 99BRAJ of SEQ Water Act.

52 See section 649 of the 28 May SPA.

53 See section 648 of SPA and section 99BRCS of SEQ Water Act.

- The infrastructure is actually needed to service existing, approved or foreseeable development.
- The infrastructure is subject to an identifiable timeframe for the provision of the infrastructure.

Relevant and reasonable test for a non-trunk infrastructure condition

A non-trunk infrastructure condition is required to satisfy the following requirements:[54]

- *Relevance* – The condition must be relevant to the development or use of the premises as a consequence of the development.

  According to common law principles, the infrastructure is likely to be relevant to the development or use of the premises where the infrastructure is imposed for the following purposes:

  - Maintain proper standards.
  - Another legitimate basis such as where it is imposed in the interests of rational development of the general area in which the premises is situated.

- *Not an unreasonable imposition* – The condition must not be an unreasonable imposition on the development or use of the premises as a consequence of the development.

  According to common law principles, the infrastructure is likely to be a reasonable imposition in the following circumstances:

  - The infrastructure would result in the following:
    - No or minor redesign of the development.
    - No significant restriction on the development.
    - No significant additional cost burden.
  - The infrastructure is in the interests of rational development or efficient and orderly planning of the general area in which the subject premises is situated.
  - The infrastructure is actually needed to service existing, approved or foreseeable development.
  - The infrastructure is subject to an identifiable timeframe for the provision of the infrastructure.

- *Reasonably required* – A non-trunk condition must be reasonably required.

  According to common law principles, a condition is likely to be reasonably required if a nexus exists between the infrastructure and the development or use of the premises such that:

  - the development or use of the premises creates a change to the existing state of the infrastructure network; and
  - the infrastructure requirement is a reasonable response to the change.

Conversion applications for non-trunk infrastructure conditions

Conversion application criteria

The current capped framework empowers an applicant for the development approval to make a conversion application to the local government to convert non-trunk infrastructure imposed in a non-trunk infrastructure condition to trunk infrastructure, if the construction of the non-trunk infrastructure has not commenced.[55]

The effect of an approval of a conversion application is as follows:

- *Non-trunk infrastructure condition* – The non-trunk infrastructure condition no longer has effect.[56]
- *Necessary infrastructure condition* – The local government may amend the development approval by imposing a necessary infrastructure condition for the trunk infrastructure.[57]
- *ICN* – If a necessary infrastructure condition is imposed, the local government must give an ICN or amend an existing ICN to state whether an offset or refund applies and if so, the details of the offset or refund.[58]

The conversion application process raises the following issues:

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

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54 See section 345 of SPA and section 99BRAJ of SEQ Water Act.

55 See sections 658 and 659 of SPA and sections 99BRDD and 99BRDE of SEQ Water Act.

56 See section 662(2) of SPA and section 99BRDH(2) of SEQ Water Act.

57 See section 662(3) of SPA and section 99BRDH(3) of SEQ Water Act.

58 See section 662(4) of SPA and section 99BRDH(4) of SEQ Water Act.

- *Time limitation* – A conversion application may be made at any time before the commencement of the construction of the infrastructure. This gives rise to uncertainty for a local government about when development infrastructure may become trunk infrastructure and consequently its liability to provide an offset or refund which would have a financial implication for the local government. However, this issue has been addressed in the Planning Act, which requires a conversion application to be made within 1 year after the development approval starts to have effect.[59]
- *Conversion* – It enables a development proponent to design development infrastructure servicing the proposed development in such a way that it meets the relevant conversion criteria.

Conversion application assessment criteria

A conversion application is to be assessed against the criteria included in a charges resolution[60] which must be consistent with the parameters provided for under the LGIP guideline (**Adopted Conversion Criteria**).[61]

The Adopted Conversion Criteria must be consistent with the following:[62]

- *Planning rationale* – The context, planning and infrastructure standards for the relevant area. The context, planning and infrastructure standards are those stated in the applicable LGIP and planning scheme. The relevant area is the area of the local authority and not the priority infrastructure area,[63] being the local government area for the relevant local government and the geographic area for the relevant distributor-retailer.
- *Default conversion criteria rationale* – The principles underlying the default conversion criteria.

The LGIP guideline does not identify the underlying principles of the following default conversion criteria leaving their determination to local authorities and development proponents until they are determined by the Planning and Environment Court:[64]

- *Capacity to service other developments* – The infrastructure has capacity to service other development in the area.
- *Consistency with identified trunk infrastructure* – The function and purpose of the infrastructure is consistent with other trunk infrastructure identified in an LGIP, a charges resolution or Netserv Plan for the area.
- *Not consistent with non-trunk infrastructure* – The infrastructure is not consistent with non-trunk infrastructure for which conditions may be imposed in accordance with section 665 of the SPA.
- *Most cost effective option* – The type, size and location of the infrastructure is the most cost effective option for servicing multiple users in the area. The most cost effective option is defined to mean the least cost option based on the life cycle cost of the infrastructure required to service future urban development in the area at the desired standard of service.

Planning Act 2016

The future capped framework under the Planning Act largely replicates the current capped framework subject to a limited number of changes.

Some of the key changes are as follows:

- *State Planning Regulatory Provision (adopted charges)* – The matters provided for in a SPRP (adopted charges) have been incorporated into the Planning Act[65] and the Draft Planning Regulation[66] in recognition of the removal of state planning regulatory provisions.
- *Definitions* – The definition of the PIA has been amended with the term "*non-rural purposes*" replaced with the following:[67]
  - Residential purposes, other than rural residential purposes;
  - Industrial, retail or commercial purposes;
  - Community or government purposes related to a purpose stated above.
- *Terminology* – Key changes in terminology include the following:[68]
  - Additional demand is now referred to as extra demand.

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59 See section 139 of the Planning Act.

60 See section 633A(1) of SPA and section 99BRCHA(1) of SEQ Water Act.

61 See section 633A(2) of SPA and section 99BRCHA(2) of SEQ Water Act.

62 See section 4.2.1 of the LGIP guideline.

63 See section 4.2 of the LGIP guideline.

64 See section 4.2.2 of the LGIP guideline.

65 See Part 6 (Infrastructure) of the Planning Act.

66 See section 47 and Schedule 18 of the Draft Planning Regulation.

67 See Schedule 2 of the Planning Act; cf. section 627 of SPA.

68 See Chapter 4 of the Planning Act; cf. Chapter 8 of SPA.

- Additional payment condition is now referred to as an extra payment condition.
- Additional trunk infrastructure cost is now referred to as an extra trunk infrastructure cost.
- Submissions in the context of seeking a new infrastructure charges notice during the relevant appeal period, are now referred to as representations.
- Obligations in the context of an infrastructure agreement, are now referred to as responsibilities, the reason for which is not readily apparent given that the concepts of "*rights, interests and obligations*" are terms readily recognised by contract law.

- *Maximum adopted charge* – The maximum adopted charge prescribed in a regulation automatically increases each year by the sum of the 3-yearly moving average quarterly percentage increase in the PPI for each financial quarter since the prescribed amount was last prescribed or amended.[69]
- *Necessary infrastructure condition* – Unlike the current capped framework which requires both LGIP identified and LGIP unidentified infrastructure to be necessary to service the subject premises, under the future capped framework LGIP identified infrastructure may be required whether or not the infrastructure is necessary to service the subject premises if the trunk infrastructure is or will be located on the premises.[70]
- *Relevant and reasonable requirement* – Unlike the current capped framework trunk infrastructure required by a necessary trunk condition is not required to be "*necessary to service the subject premises*" in order for the condition to be deemed to be relevant or reasonable.[71]
- *Conversion application* – A conversion application is now required to be made within 1 year after the development approval starts to have effect.[72]

Conclusions

Both the current capped framework and future capped framework provide certainty for development proponents, reduce the cost of the administration of an offset and refund for development proponents and on balance are less costly to administer than the previous capped framework.

However, the current capped framework and future capped framework impose the following significant additional financial costs on local governments:

- *Administrative costs* – The cost of calculating ICNs, recalculation requests, conversion applications and appeals, although these costs can be recovered to some extent by a local government through a review of its cost-recovery fee schedule.
- *Reduced levied charges* – The cost of the reduction of levied charges from higher offset and refund values; has been estimated by the LGAQ as being in the vicinity of $480 million annually.[73]
- *Inefficient settlement patterns* – Capped charges do not provide a price signal as to location with the effect that inefficient settlement patterns are encouraged at unquantified costs of likely social inequity and economic inefficiency.

The short term benefits of the capped framework in terms of increased certainty do not outweigh the medium to long term costs such that there will inevitably be a need for fundamental reform of the capped framework.

69 See section 112 of the Planning Act; cf. sections 629(2), (3) and (5) of SPA.

70 See section 645(1) of SPA; cf section 127 of the Planning Act.

71 See section 648(1) of SPA; cf section 128(4) of the Planning Act.

72 See section 139 of the Planning Act; cf. section 659 of SPA and section 99BRDE of SEQ Water Act.

73 Local Government Association of Queensland Ltd (2013) *Discussion Paper: Infrastructure planning and charging framework review*, Submission, August 2013, page 10.

The court has a discretion to grant an order for costs when an application is brought without a reasonable prospect of success

Sinead Garland | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Swan v Santos GLNG Pty Ltd & Ors (No. 2)* [2017] QPEC 17 heard before Robertson DCJ

May 2017

In brief

The case of *Swan v Santos GLNG Pty Ltd & Ors (No. 2)* [2017] QPEC 17 concerned an application for an order for costs made by Santos GLNG Pty Ltd in respect of a failed application brought by the owner of the land in the Planning and Environment Court alleging Santos had committed offences under the *Environmental Protection Act 1994*.

The owner made an application to the court asserting that Santos had breached the conditions of relevant environment authorities when it constructed a pipeline over the owner's land and, as a result, Santos committed criminal offences under section 430 and/or section 431 of the *Environmental Protection Act 1994*. The owner's application was dismissed on the basis that the owner had failed to discharge the onus placed on him to satisfy the court that Santos breached the conditions under the *Environmental Protection Act 1994*. Following the owner's unsuccessful application, Santos sought an order for costs of and incidental to the proceedings against the owner. In its costs submissions Santos relied on section 457(2)(a),(c), (d), (i) and (l) of the *Environmental Protection Act 1994*.

The court found that the owner never had any reasonable prospect of succeeding in the proceeding and ordered that the owner pay Santos, as well as Papl Downstream Pty Ltd and Total GLNG Australia, their costs of and incidental to the proceedings to be assessed on the standard basis, if not agreed.

Firstly, the court considered the relative success of the parties when making orders for costs

The owner's application asserting that Santos had committed criminal offences under the *Environmental Protection Act 1994* was unsuccessful as the owner failed to discharge the onus to satisfy the court that Santos had breached the conditions of the environment authorities. In short, the owner's application failed and the owner had enjoyed no success in the proceeding.

Secondly, the court considered whether the owner had commenced a proceeding for an improper purpose

There was no direct suggestion by Santos that the owner had commenced proceedings for an improper purpose and therefore this factor did not bear upon the exercise of the court's discretion.

Finally, the court considered whether the owner commenced the proceeding without a reasonable prospect of success

The court found that despite the owner being granted numerous opportunities to bring evidence to support his case, the owner failed to properly particularise his case under section 505(5) of the *Environmental Protection Act 1994*. In addition, the owner failed to properly consider the conditions of the environment authorities before bringing his case. The court found that the owner did not have any reasonable prospect of succeeding in the proceeding.

For these reasons the court exercised its discretion in favour of Santos and rejected the owner's submission that there should be no order as to costs. The owner was ordered to pay Santos, as well as Papl Downstream Pty Ltd and Total GLNG Australia, their costs of and incidental to the proceedings to be assessed on the standard basis, if not agreed.

Court of Appeal upholds a valuation of $4.1 million for a compulsory acquisition of land

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Moreton Bay Regional Council v Caseldan Pty Ltd* [2017] QCA 72 heard before Gotterson and McMurdo JJA and Bond J

May 2017

In brief

The case of *Moreton Bay Regional Council v Caseldan Pty Ltd* [2017] QCA 72 involved an application for leave to appeal a decision of the Land Appeal Court to the Court of Appeal. The council sought to challenge the decision of the Land Appeal Court regarding the value of land located adjacent to South Pine Road in Brendale which was compulsorily acquired by the council.

The council compulsorily acquired the land for "*recreation ground purposes*". At the first instance the Land Court ordered that the council pay $1.8 million in compensation to the owner of the land. A subsequent appeal to the Land Appeal Court increased the compensation to $4.1 million.

The council applied to the Court of Appeal for leave to appeal the decision of the Land Appeal Court. The Court of Appeal ultimately ordered that the council's application be refused and that it pay the owner's costs on the basis that the proposed appeal had no real prospects of success.

Council compulsorily acquired land owned by Caseldan and subsequently appealed the valuation of the land

On 20 July 2012, the council compulsorily acquired 10.1 hectares of land adjacent to South Pine Road, Brendale for "*recreation ground purposes*".

The owner of the land applied to the Land Court for a determination of the compensation to be paid under the *Acquisition of Land Act 1967*. On 9 December 2014, the Land Court determined that the compensation for the land was $1.8 million. The owner later appealed this determination to the Land Appeal Court. On 24 June 2016, the Land Appeal Court determined the compensation for the land to be $4.1 million.

On 4 August 2016, the council filed an application for leave to appeal to the Court of Appeal under section 74 of the *Land Court Act 2000* to challenge the Land Appeal Court's order.

Land adjoined council property and was approved for a range of land uses

The land was configured in a "c" shape and was included within the sport and recreation zone of the *Pine Rivers Plan 2006*. The land was utilised as a 10 hole golf course with an associated restaurant.

At the time of acquisition, a hotel and motel had been approved on the southern portion of the land and an appeal concerning a development application for a supermarket on the northern portion remained unresolved. The land had poor access to the surrounding road network with a strip of council owned land separating the land from the council owned South Pine Sporting Complex.

Land Court adopted a valuation for the land consistent with that of the council's valuer

The Land Court determined that at the date of resumption a hypothetical prudent purchaser would have determined that sport and recreation was the highest and best use of the land.

The Land Court adopted a valuation of $1.8 million provided by a valuer engaged by the council. The member rejected the findings of a valuer engaged by the owner who valued the land at $5,555,000 on the basis that its highest and best use was a mix of residential, commercial, sport and recreational uses in line with the findings of an expert town planner. Evidence of three offers ranging from $4 million to $4.5 million were also excluded.

Land Appeal Court found that the Land Court erred in deciding the value of the land and adopted its own valuation amount

The Land Appeal Court held that the Land Court had erred in a number of respects. In relation to the highest and best use of the land, the Land Appeal Court found that the Land Court had erroneously concluded that a hypothetical and prudent purchaser would determine the prospects of obtaining access for mixed uses to be low. Putting access aside, the Land Appeal Court held that the prospects of obtaining approval for mixed use development was good.

The Land Appeal Court ultimately rejected the findings of both the council's and the land owner's valuers and concluded that the value of the land was $4.1 million, an amount which was not inconsistent with previous unconditional offers to purchase the land.

Council challenged the Land Appeal Court's decision making process on various grounds

The council alleged that the Land Appeal Court had heard the appeal as an appeal de novo despite the decision in *Mahoney v Department of Transport and Main Roads* [2014] QCA 356 which established that appeals to the Land Appeal Court are rehearings rather than true appeals. The Court of Appeal found that this proposition was misconceived and patently incorrect.

Section 74(1) of the *Land Court Act 2000* affords a right of appeal to the Court of Appeal from a decision of the Land Appeal Court only on grounds that there had been an error or mistake of law, absence of jurisdiction to make a decision or exceedance of jurisdiction occurred. The council relied on three primary grounds of appeal, which all alleged an error of law on the part of the Land Appeal Court.

The Court of Appeal dismissed suggestions that the Land Appeal Court's assessment of the land's access amounted to an error of law

The council submitted that the Land Appeal Court had mistakenly applied the decision in *Intrapac Parkridge Pty Ltd v Logan City Council & Anor* [2014] QPEC 48 to mean that there was a "high probability" that the council would be required by the Planning and Environment Court to allow the resumed land to have access over the council land.

The Court of Appeal found that this submission was ill-founded and of dubious merit as the Land Appeal Court made no such assessment with regards to access. Rather, the Land Appeal Court thought that a hypothetical potential purchaser would consider access might be available over the council owned land, however, there was a significant risk in achieving access as proposed.

Further, the Court of Appeal found that the council's complaint in this regard was concerned with an alleged error of fact which is not a valid ground for an appeal to the Court of Appeal.

The council contended that the Land Appeal Court had erroneously given weight to the land's zoning when considering sufficient grounds to overcome conflict with the planning scheme

The council argued that section 326(1) of the *Sustainable Planning Act 2009* contains no provision which allows the Land Appeal Court to give weight to the zoning of the land when determining sufficient grounds to overcome conflict with a relevant planning scheme.

The Court of Appeal accepted the council's interpretation of section 326(1) but rejected the notion that the Land Appeal Court had addressed how these provisions operate or proposed an alternative methodology. The Court of Appeal found that the Land Appeal Court had only expressed a view on a matter of fact, being how a hypothetical purchaser would weigh the current zoning of the land.

Council also challenged the court's decision on the basis that it had erroneously categorised offers made for the land

The council also challenged the decision of the Land Appeal Court on the basis that it had erroneously categorised an offer known as the "Flaskas offer" as unconditional and gave it no weight because it was aged. The Court of Appeal found that the Land Appeal Court had erred in categorising the offer as unconditional, but held that this decision did not vitiate the valuation of the land as the methodology employed did not rely on the details of particular offers.

Court of Appeal refused the council's application on the basis that it had no real prospects of success

The Court of Appeal found that the council had failed to successfully make out any of the grounds of appeal. The court subsequently refused the council's application, upheld the Land Appeal Court's compensation of $4.1 million and ordered that the council pay the owner's costs on the basis that its appeal had no real prospects of success.

Queensland's environmental laws prevail over Commonwealth Corporations Act

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Linc Energy Ltd (in Liq); Longley & Ors v Chief Executive, Department of Environment and Heritage Protection* [2017] QSC 53 heard before Jackson J

May 2017

In brief

The case of *Linc Energy Ltd (in Liq); Longley & Ors v Chief Executive, Department of Environment and Heritage Protection* [2017] QSC 53 concerned an application to the Supreme Court by the liquidators for Linc Energy Ltd (**Linc**) who sought, amongst other things, directions in respect of:

- whether a disclaimer of onerous property under section 568 of the *Corporations Act 2001* (Cth) had the effect of discharging Linc from compliance with an environmental protection order issued by the Department of Environment and Heritage Protection (**DEHP**) under the *Environmental Protection Act 1994*;
- whether the liquidators were personally responsible to cause Linc to comply with the *Environmental Protection Act 1994*.

In ultimately refusing to grant the directions sought by the liquidators, the Supreme Court held that, despite the disclaimer of onerous property under section 568 of the *Corporations Act 2001* (Cth), the obligations created by the *Environmental Protection Act 1994* prevailed and Linc therefore remained liable to comply with the environmental protection order.

The Supreme Court also held that the liquidators fell within the ambit of the definition of an "*executive officer*" for the purpose of section 493 of the *Environmental Protection Act 1994*. The liquidators were therefore obligated to cause Linc to comply with the environmental protection order, with any failure to do so constituting a breach of duty which may result in the liquidators becoming personally responsible and culpable for any consequential offence.

Factual background

Linc was the proprietor and operator of an underground coal gasification facility at Chinchilla in the local government area of Western Downs.

Linc held a mineral development licence granted under the *Mineral Resources Act 1989* and a petroleum facility licence under the *Petroleum and Gas (Production and Safety) Act 2004*, as well as two associated environmental authorities under the *Environmental Protection Act 1994*.

On 15 April 2016, Linc resolved to enter voluntary administration after a series of investigations by the DEHP that led to Linc being committed to stand trial for causing serious environmental harm under the *Environmental Protection Act 1994*.

On 13 May 2016, the DEHP issued Linc with an environmental protection order.

On 23 May 2016, the creditors of Linc passed a special resolution to have Linc voluntarily wound up and appointed the liquidators.

On 30 June 2016, the liquidators gave a notice of disclaimer of onerous property under section 568 of the *Corporations Act 2001* (Cth) to the DEHP, which purported to have the effect of discharging Linc from future compliance with any obligations under the environmental protection order.

The DEHP rejected the purported disclaimer and contended that the liquidators, as "*executive officers*" of Linc, were obliged to ensure compliance with the environmental protection order.

Accordingly, the liquidators for Linc made an application to the Supreme Court for directions under section 511 of the *Corporations Act 2001* (Cth) as to the effect of the disclaimer and their liabilities in respect of the environmental protection order.

The effect of the disclaimer of onerous property in discharging Linc from compliance with the environmental protection order

The dominant issue in dispute was whether the disclaimer of onerous property issued by the liquidators had the effect of discharging Linc from compliance with the environmental protection order. To resolve this issue, the Supreme Court had to reconcile an apparent inconsistency between:

- section 361 of the *Environmental Protection Act 1994*, which creates the offence for contravention of an environmental protection order;
- sections 568 and 568D of the *Corporations Act 2001* (Cth), which confers the right of a liquidator to disclaim onerous property with the effect of terminating the corporation's rights, interests and liabilities in or in respect of the environmental protection order.

The significance of this inconsistency required the Supreme Court to further consider the interaction between section 109 of the *Commonwealth of Australia Constitution Act 1900* and section 5G of the *Corporations Act 2001* (Cth), namely in regard to whether the general proposition enunciated in section 109 of the *Commonwealth of Australia Constitution Act 1900*, being that "*when a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former to the extent of the inconsistency be invalid*", was displaced by section 5G of the *Corporations Act 2001* (Cth).

In this regard, the Supreme Court held that the *Environmental Protection Act 1994* met the conditions set out in section 5G of the *Corporations Act 2001* (Cth) and therefore, by virtue of its operation immediately before the commencement of the *Corporations Act 2001* (Cth) on 15 July 2001 and despite the provisions of the *Corporations (Queensland) Act 1990*, was protected from the application of direct inconsistency under section 109 of the *Commonwealth of Australia Constitution Act 1900*.

In reaching the conclusion that the environmental protection order remained operative despite the disclaimer of onerous property, the Supreme Court conceded that their decision represented a significant departure from the existing, albeit scarce, common law on point. However, the Supreme Court nonetheless felt that such a departure was warranted and justified their decision on the basis of commentary from the High Court of Australia in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, which relevantly stated as follows:

> *[a]lthough the considerations applying are somewhat different from those applying in the case of Commonwealth legislation, uniformity of decision in the interpretation of uniform national legislation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court* ***unless convinced that that interpretation is plainly wrong****.* [emphasis added]

The "executive officers" of a corporation must ensure that the corporation complies with the Environmental Protection Act 1994

A further issue in dispute was whether the liquidators fell within the ambit of the definition of an "*executive officer*" for the purpose of section 493 of the *Environmental Protection Act 1994* and were therefore obligated to cause Linc to comply with environmental protection order, with any failure to do so constituting a breach of duty which may result in the liquidators becoming personally responsible and culpable for any consequential offence.

In ultimately finding that the imposition by statute of an obligation of a corporation to an "*executive officer*" does not, of itself, differentiate between obligations incurred before the commencement of the winding up and post-commencement obligations, the Supreme Court held that the liquidators were "*executive officers*" and were therefore obligated to cause Linc to comply with the environmental protection order.

The court ordered the recovery of some but not all costs in respect of proceedings for enforcement orders

Kathryn O'Hare | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gympie Regional Council v Tregoning* [2017] QPEC 20 heard before Long SC, DCJ

May 2017

In brief

The case of *Gympie Regional Council v Tregoning* [2017] QPEC 20 concerned an application for costs, including investigation costs, by the Gympie Regional Council in relation to an application made by the council for an enforcement order under section 604 of the *Sustainable Planning Act 2009* in respect of an owner's use of land at Imbil.

The case had a difficult and prolonged history. During the life of the proceeding, the issues shifted from the past illegal use of the land to the issue of regularising the present and future use of the land.

Ultimately, the court found a development offence had been committed and made enforcement orders about the development approvals to be sought by the owner regarding plumbing work and building work. The council sought its costs of and incidental to the proceeding.

In support of its application for costs, the council directed the court to the outcome, being the making of the final enforcement order and the process involved, and submitted that there was an absence of reasons to militate against the application of the general or ordinary rule for costs. The council submitted that it should be entitled to recover all of its costs of the proceeding, including investigation costs.

The owner submitted that attempts had been made to resolve the issues with the council and therefore opposed any order for costs. The owner also submitted that he was impecunious, in ill-health and did not have legal representation, being discretionary factors against an award of costs.

In deciding the application for costs, the court ordered the owner to pay some of the council's costs of the application, including investigation costs, as agreed or as assessed on the standard basis. The court did not, however, order the owner to pay the council's costs for an appearance before the court because the owner was not properly served and the court only awarded 50% of the costs incurred by the council thereafter due to the change in the direction of the application.

The court ordered several interim orders allowing more time to achieve the regularisation of the land

The council investigated the land because of a complaint made by a neighbour about negative amenity impacts arising from the use of the land, in particular the noise from a generator, loud music, shouting, barking dogs, intrusion from car headlights and the practice of noticeably toileting in the open and leaving waste products near the boundary of the neighbour's property.

After inspecting the land, the council submitted to the court that the land contained structures associated with the land being used for residential purposes, including a large bus, a large caravan with various structures attached to it, a corrugated iron toilet structure, a large water tank, a mini-bus with structures attached for shelter and a power generator. The court then agreed with the description submitted by the council's town planner that the use resembled an occupation of the land as an encampment at which several people resided on a permanent or semi-permanent basis.

Accordingly, the council made an application for an enforcement order under section 604 of the *Sustainable Planning Act 2009*. Between 30 September 2016 and 9 December 2016, the application came before the court three times. At the first two reviews, the court made interim orders allowing the owner more time to regularise the use of the land and provided the council with inspection rights.

On 9 December 2016, a final order was made. This delay was due, in part, to the shift of the focus of the application and the subsequent submissions of the owner that he was continuing to work towards achieving the regularisation of the ongoing use of the land as well as satisfying the council's concerns in respect of the past use of the land.

The original application was overtaken by the parties' readiness to agree to interim orders which resulted in the court making no decisions in relation to the original issues

In making an order for costs, the court held that it was important to have regard to the nature of the proceedings and the costs incurred by the council over the prolonged period, as well as the "*obvious public interest of securing obedience to planning laws*".

The issues of the proceeding shifted from the past illegal use of the land to the issue of regularising the present and future use of the land primarily because of the owner's right to the lawful use of his land, as well as it being his only place of residence.

In attempting to regularise the use of his land, the owner was eager to agree to the interim orders as well as the final order. Whilst the council raised issues in relation to the lack of compliance or at least delay complying with the interim orders, compliance was better achieved with each interim order as the parties inched closer to regularising the use of the land.

With each iteration of the interim orders which allowed more time for regularising the use of the land, the court was never required to decide the issues of the original application or whether the owner had complied with any of the previous interim orders. This process resulted in the shift in the issues for consideration before the court.

Although the court found that the owner had limited financial means, further costs were incurred by the council due to ongoing delays

At the time of the final order, the only remaining concern was the removal of some remnants of the past use of the land. However, as they were not being used for ongoing residential purposes, it was clear that the council could not maintain insistence on complete removal of these items, the specific subject of the earlier interim orders. Accordingly, the relative success of the parties was considered to be moving in different directions.

The court rejected the council's claim that the owner acted unreasonably, participated in the proceedings without reasonable prospects of success and that he failed to comply with the orders made by the court. However, the court also rejected the claim that delays on the part of the owner may be excused because of his ill-health. The court also held that supporting information submitted by the owner did support a conclusion that he had limited financial means and that this complicated his ability to progress the interim orders.

Regardless of the owner's limited financial means, the court held that the council's reliance on the delay and absence of any meaningful response to its communications prior to the making of the application was justified as it was only by commencing proceedings in the court that an outcome was achieved. Further, in considering *Latoudis v Casey* (1990) 170 CLR 534 in the context of compensatory principles applicable to the issue of costs, the court found further costs were incurred due to ongoing delays in achieving the regularisation of the acknowledged unlawful use of the land.

The court ordered payment of some of the council's costs of the application, including investigation costs

The court held that it was appropriate to allow the council to recover some of its costs of the application, including investigation costs, under section 457(6) of the *Sustainable Planning Act 2009*. The court excluded the costs associated with a court appearance for which the owner was not properly served and further, due to the shift of the focus of the application, ordered the owner to pay only 50% of the council's costs thereafter.

Queensland parliament passes amendments to address the issues arising out of the decisions of a private certifier

Shaun Pryor | Ian Wright

This article discusses the effects of the *Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Bill 2016* which was passed by the Queensland parliament on 10 May 2017

May 2017

In brief

On 10 May 2017, the Queensland parliament passed the *Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Bill 2016*.

Among other things, the Bill sought to address issues arising as a result of a number of decisions of the Planning and Environment Court and the Court of Appeal in relation to the interaction between private certifiers and local governments in the issuing of development approvals (the private certifier decisions).

In brief, the private certifier decisions address the circumstances in which a development approval is also required from the local government where a building development approval is sought from a private certifier.

With the commencement of the *Planning Act 2016* on 3 July, the Bill makes changes to both the *Sustainable Planning Act 2009* and the *Planning Act 2016*, as well as the *Building Act 1975*.

The problem

Under section 83(1)(b) of the *Building Act 1975*, a private certifier must not grant the building development approval applied for until all necessary preliminary approvals under the *Sustainable Planning Act 2009* are effective for other assessable parts of the development.

Since the introduction of this section, local governments, private certifiers and applicants have been operating on the basis that where building work is assessable against a local government's planning scheme, there is a necessary preliminary approval from the local government which is required to be obtained before a development permit authorising the building work to occur can be given by a private certifier.

However, in *Brisbane City Council v Gerhardt* [2016] QCA 76, the Court of Appeal considered the interpretation of this section and in particular what is a "*necessary preliminary approval under the Planning Act*".

In that case, the court considered a development application made to a private certifier for building work for alterations and additions to a dwelling house at Wooloowin. The house was located within the traditional building character overlay of the Brisbane City Council's *Brisbane City Plan 2014* and was code assessable against the Traditional building character (design) overlay code.

The council was also a concurrence agency for the amenity and aesthetic impact of the application and was required to assess the application in that capacity against the Traditional building character (design) overlay code and the dwelling house code under the *Brisbane City Plan 2014*.

In deciding whether a preliminary approval was necessary in this case, the court made reference to section 241 of the *Sustainable Planning Act 2009* which states that a preliminary approval "*approves development, but does not authorise assessable development to take place*" and that "*there is no requirement to get a preliminary approval for development*".

The court found that it was the *Sustainable Planning Act 2009* by which any preliminary approval must be "necessary"; but that the express words in section 241 of the *Sustainable Planning Act 2009* do not require a preliminary approval where one is otherwise not necessary.

The court also found that section 83(1)(b) of the *Building Act 1975* does not itself provide the source of necessity for a preliminary approval.

In the circumstances of that case, the Court of Appeal ultimately concluded that no preliminary approval from the local government was required to be obtained before a development permit for the building work could be given by the private certifier.

Whilst this decision relates to a specific set of circumstances, it caused concern among local governments that the provisions of their planning scheme relating to character housing and other relevant planning issues were potentially undermined.

The solution

In *Gerhardt v Brisbane City Council* [2016] QPEC 48, the Planning and Environment Court considered a development application made to a private certifier for building work for the demolition of two pre-1946 houses at Morningside. The houses were located within the Traditional building character overlay of the Brisbane City Council's *Brisbane City Plan 2014* and was code assessable against the Traditional building character (demolition) overlay code.

Similarly, the issue was whether a preliminary approval from the local government was necessary before a private certifier can give a development permit authorising the building work to take place.

The Planning and Environment Court noted the limitation under the *Building Act 1975* for a private certifier and a council as a concurrence agency to undertake its assessment against, and be satisfied the development application complies with, the building assessment provisions only.

The court observed that the building assessment provisions in the *Brisbane City Plan 2014* included the Traditional building character (design) overlay code but did not include the Traditional building character (demolition) overlay code.

The court therefore found that the assessment of the building work against the Traditional building character (demolition) overlay code could not be done by the private certifier as the assessment manager or the council as a concurrence agency, and must be the subject of a separate development application made to the council as an assessment manager.

It is in these circumstances that the court said a preliminary approval was necessary under the *Sustainable Planning Act 2009* as without one, the development permit given by the private certifier could not properly authorise the assessable development to take place.

The court articulated each party's role in the assessment of building work as follows:

- *Private certifier* – The private certifier is the assessment manager for the matters plainly within the scope and expertise of a private certifier, including where that involves demolition.
- *Local government* – The local government is a concurrence agency for the amenity and aesthetic impact of building work which is required to be assessed against the Traditional building character (design) overlay code. The local government is also the assessment manager for the assessment of the building work required to be assessed against the Traditional building character (demolition) overlay code.

The amendments

The *Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Bill 2016* adopts the approach of the Planning and Environment Court and clarifies that a preliminary approval by a local government under the *Sustainable Planning Act 2009* or a development permit given by an entity other than a private certifier under the *Planning Act 2016* is required in the following circumstances:

- where the building work requires impact assessment; or
- where the building work requires code assessment under the local government's planning scheme against a provision which:
  - does not form part of the building assessment provisions that can be assessed by the private certifier; and
  - cannot be assessed by the local government as a referral agency for the building development application.

In summary, the Bill addresses the following:

- Changes the words "*necessary preliminary approval*" to "*relevant preliminary approval*" in section 83(1)(b) of the *Building Act 1975*.
- Defines "*relevant preliminary approval*" as being a preliminary approval given under the *Sustainable Planning Act 2009* by an entity other than a private certifier.
- Inserts a new section 245A in the *Sustainable Planning Act 2009* and section 73A in the *Planning Act 2016*, restricting a development permit for building work given by a private certifier from authorising the carrying out of the assessable development until a relevant preliminary approval is in effect where the building work requires:
  - impact assessment; or
  - code assessment under a planning scheme or preliminary approval to which section 242 of the *Sustainable Planning Act 2009* applies against a provision which:
    - does not form part of the building assessment provisions that can be assessed by the private certifier; and
    - cannot be assessed by a referral agency for the building development application.

- Restricts a private certifier from granting a building development approval where section 245A of the *Sustainable Planning Act 2009* or section 73A of the *Planning Act 2016* applies, until the relevant preliminary approval or a development permit given by an entity other than a private certifier is in effect for the development.

Powers of entry for environmental investigations and procedural fairness

Todd Neal | Emma Whitney

This article discusses the decision of the NSW Court of Appeal in the matter of *LDF Enterprises Pty Ltd v State of New South Wales* [2017] NSWCA 89

May 2017

In brief – Environmental authorities not required to give notice of entry

Landowners will be interested in the recent decision of the NSW Court of Appeal in *LDF Enterprises Pty Ltd v State of New South Wales* [2017] NSWCA 89 as it provides an important clarification about the powers of entry in the course of environmental investigations and the proper jurisdiction to hear an injunction under environmental legislation.

This decision is of increasing importance given the surge in enforcement activity currently being carried out by the Environment Protection Authority in relation to environmental offences.

Injunction sought by landowner rejected by NSW Supreme Court and Court of Appeal

LDF sought an injunction in the Supreme Court of NSW against the Office of Environment and Heritage (**OEH**) to stop the officers of the OEH from entering the land to inspect a possible offence against the *National Parks and Wildlife Act 1974* (**NPWA**). The primary judge refused the injunction. LDF then appealed to the NSW Court of Appeal, who upheld the decision of the primary judge and refused to grant the injunction.

There were two bases on which the injunction was refused by the Court of Appeal:

- the court does not have the jurisdiction to grant injunctions in relation to potential breaches of environmental legislation as it is a matter which should properly be dealt with by the Land and Environment Court, and
- no procedural fairness is required to be given prior to exercising the power of entry when investigating an alleged environmental offence under environmental legislation.

Land and Environment Court is proper jurisdiction to hear injunctions under environmental legislation

The Court of Appeal held that the Supreme Court did not have the jurisdiction to hear the injunction due to section 71 of the *Land and Environment Court Act 1979*.

Section 71(1) of the Act provides:

> *(1) Subject to section 58, proceedings of the kind referred to in section 20(1)(e) may not be commenced or entertained in the Supreme Court.*

Relevantly, section 20(1)(e) identifies a general class of matters involving environmental legislation, including the NPWA. It was on this basis that the court held (at [13]):

> *The consequence is that in respect of matters involving what may broadly be described as judicial review of the enforcement of rights, obligations or duties, or the exercise of functions, conferred or imposed by a wide range of planning or environmental laws, including the National Parks and Wildlife Act and the Protection of the Environment Operations Act, not only is jurisdiction invested in the Land and Environment Court, but that jurisdiction is exclusive of that of the Supreme Court. Proceedings answering that description may neither be commenced nor maintained in the Supreme Court.*

Procedural fairness when exercising inspection and investigation powers under Protection of the Environment Operations Act

The Court of Appeal also found that the OEH did not need to afford LDF any procedural fairness when exercising its power of inspection and investigation under the *Protection of the Environment Operations Act 1997* (**POEO Act**) (which apply to investigations under the NPWA under section 156B(2)(a) of that Act). (Note that the NPWA picks up on the investigation and inspection powers of the POEO Act).

The court also considered that the requirement for procedural fairness could not be read into the inspection and investigation powers by the court for the following reasons:

- Section 196 of the POEO Act, when read as a whole, distinguishes between the power of entry "at any time" and "at a reasonable time" and it would be difficult to construe the words "at any time" as meaning "at any time, subject first to the landowner having been notified and given an opportunity to be heard".
- Reasonable force is permitted to be used when undertaking an inspection. In other words, this authorises entry where the occupier has not consented or where the owner has not been notified in advance of the entry being effected.
- Wilful obstruction of an authorised person or officer who is undertaking an inspection is an offence. On this point, the court said "*a likely occasion for wilful delay or obstruction is when a landowner has not received notice of entry*".
- Authorised persons or officers may exercise their powers of investigation for the following purposes (section 184):
  - for determining whether there has been compliance with or a contravention of this Act or the regulations or any environment protection licence, notice or requirement issued or made under this Act;
  - for obtaining information or records for purposes connected with the administration of this Act;
  - generally for administering this Act and protecting the environment. These very purposes would be frustrated for environmental investigations if the power could only be exercised after notice had been given.
- Section 197 does not empower entry onto residential premises without the permission of the occupier or a search warrant and the provisions regulating the issue of warrants do not require notice to be given of the possible issuing of a warrant. It would be incongruous for there to be a greater level of notice for non-residential premises.
- Section 189(2) requires an authorised person or officer to provide identification if requested by any person the subject of an investigation. The court stated (at [42]) that the "*terms of that provision tend to sit ill with the right only being exercisable after notice has first been given to the landowner*".

Landowners subject to an investigation under environmental legislation should consider seeking legal advice

The decision emphatically held that relevant environmental authorities have no duty to accord procedural fairness when exercising powers of investigation, including the power of entry onto property. This means that no notice of entry is read into the POEO Act to require notification to be first given by the authority prior to entering the land for the purposes of an investigation.

Caution needs to be exercised by landowners in these types of circumstances due to the potential impact an obstructive approach can have on future penalties under relevant environmental legislation. At the same time, there are limits to the powers of an authority and owners of land enjoy other rights in the context of such investigations. These powers need to be carefully navigated.

You should seek legal advice if you find yourself the subject of an investigation under environmental legislation in relation to any alleged environmental offence.

Proposed change to a development approval by adding roller doors in front of the car parking spaces was accepted as permissible change

Russell Buckley | Daniel Tweedale | Min Ko | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *48 Stuart Pty Ltd v Brisbane City Council* [2016] QPEC 67 heard before Bowskill QC DCJ

June 2017

In brief

The case of *48 Stuart Pty Ltd v Brisbane City Council* [2016] QPEC 67 concerned an application for a permissible change to a development approval that had previously been issued by the Planning and Environment Court.

The development approval was for a multiple dwelling complex which included a driveway down the middle of the complex, with three units on either side of the driveway. Each unit was provided with two open car parking spaces located underneath it, one for the resident and one for the visitor of the unit.

The applicant proposed to add roller doors in front of the car parking spaces and submitted that the proposed change was a permissible change under section 367 of the *Sustainable Planning Act 2009*.

The court approved the application and adjourned the matter for the applicant and the council to prepare a draft order and appropriate notices under section 376 of the *Sustainable Planning Act 2009*.

In approving the application, the court first decided whether the proposed change would be considered a permissible change under section 367 of the *Sustainable Planning Act 2009* by determining the following matters:

- whether the proposed change would result in a substantially different development;
- whether it would not likely cause a person to make a properly made submission objecting to the proposed change.

Once the court found that the proposed change was a permissible change, it considered the following in accordance with section 374 of the *Sustainable Planning Act 2009*:

- the information provided by the applicant;
- the matters the court would have had regard to if the request to make a change to the development approval were a development application;
- the submissions made about the development application the subject of the development approval and about the proposed change;
- the notice the council filed under section 373 of the *Sustainable Planning Act 2009* objecting to the proposed change.

Applicant sought to have conditions of the development approval amended to facilitate the proposed change

The applicant sought to amend the conditions of the development approval to be amended as follows:

> *Condition 10*
>
> *Visitor car parking spaces must:*
>
> *- Be used by bona fide visitors to the premises only:*
>
> *- Be clearly labelled as 'Visitor Parking'; and*
>
> *- Remain unimpeded by landscaping, water tanks, storage (temporary or otherwise)*
>
> *Condition 25(iii)*
>
> *Parking on the site for twelve (12) cars and for the loading and unloading of vehicles within the site. Six (6) of these parking space are to be provided for residents and six (6) ~~unrestricted~~ space for visitors, in the form of one (1) exclusive visitor park per unit. Provide Visitor Park Signage at the site entrance to guide the visitors into the site visitor parking spaces.*

Court found that the proposed change would not result in a substantially different development

In determining whether the proposed change was a permissible change under section 367 of the *Sustainable Planning Act 2009*, the court first considered whether the proposed change would result in a substantially different development.

The court acknowledged that "*substantially different development*" is not a defined term under the *Sustainable Planning Act 2009* and was to be given its "*ordinary common sense meaning*" in accordance with the Explanatory Notes to the *Sustainable Planning Bill 2009*. The court also noted that the Statutory Guideline 06/09 was of assistance in determining whether the proposed change would result in a substantially different development.

The court accepted the evidence provided by the applicant's traffic engineering expert that the proposed change would not change the form and function of the development in that there would be same number of visitor parking spaces designated solely for visitors. The court also noted the number of visitor parking spaces to be provided was in excess of the requirements under the council's Transport, Access, Parking and Servicing Planning Scheme Policy under the *Brisbane City Plan 2000*.

The court also accepted the evidence of the applicant's traffic engineering expert that the installation of the roller doors would not materially impact on the traffic and the parking arrangements for the site in that the invited visitors to the site would be provided with a parking space with or without the installation of the roller door.

In rejecting the council's argument that the visitor car parking spaces would no longer be used by visitors, the court had regard to the following matters:

- the owners of the units confirmed that the visitor car parking spaces would be used by visitors;
- whilst there would no longer be unrestricted access to the visitor car parking spaces, the proposed change would still comply with conditions 10 and 25 of the development approval in that it would allow one visitor parking space for each unit used for bona fide visitors to the premises that would be unimpeded and clearly labelled as "visitor parking";
- the applicant would be required to comply with the development conditions, including ensuring the residents do the same on the basis of the principles stated in *Seabridge Pty Ltd & Anor v Council of the Shire of Beaudesert & Anor* [2000] QPEC 95 and *Harris v Scenic Rim Regional Council* [2014] QPELR 324.

The court did not consider the intensity of the development would be increased as a result of the proposed change in that the traffic impact created by the proposed development would remain the same despite the proposed change.

The court, on balance, found that the proposed change would not result in a substantially different development.

Court found that the proposed change would not cause a person to make a properly made submission objecting to the change

The court only considered the submissions that were relevant to the proposed change. The main concern raised in those submissions was that the installation of roller doors to the visitor car parking spaces would prevent access by visitors, including trades people, which would result in visitors parking outside the site.

In finding that the proposed change "*would not, because of the change, be likely to cause an objective person, fully informed as to the nature and effect of the proposed change, and the reasons why it is being sought, to make a reasonable, and relevant submission, objecting to the change, if the circumstances allowed*", the court noted the following:

- the submissions needed to be considered objectively;
- the council's objection was made on the basis that there would no longer be six visitor car parking spaces which was incorrect;
- accepting the applicant's traffic engineering expert's evidence, the residents' submissions about traffic matters were not related to the proposed installation of roller doors;
- the submissions made for the original development application were based on traffic flow of 12 cars and this did not assist in determining whether the installation of roller doors to the visitor car parking spaces would have caused further submissions;
- the proposed change would not create new impacts and there was no increase in intensity of the known impacts and no changes to the operation of the visitor car parking spaces;
- if the applicant were to make a development application to include the proposed change, it would be code assessable which meant that the residents would not have a right to make a submission objecting to the development application.

Court found that the proposed change would be consistent with the relevant planning scheme provisions under the Brisbane City Plan 2000 and Brisbane City Plan 2014

The court found that the proposed change would satisfy the relevant planning scheme provisions as follows:

- the applicant would provide a plan identifying the proposed change which clearly identified the visitor car parking spaces for each unit which would satisfy A17.3 "(that the location of visitor parking is discernible from the street)";
- the proposed change would still provide six visitor car parking spaces which satisfied the requirement to provide a single shared visitor car parking spaces for the six units under the *Brisbane City Plan 2000* and *Brisbane City Plan 2014*;
- A16 of the *Brisbane City Plan 2000* only required 0.25 spaces per dwelling for visitors;
- the proposed change would still provide "the location of visitor parking (that) is discernible from the street" in accordance with A17.3 of the *Brisbane City Plan 2000*;
- the proposed change would provide parking that was "*safe and convenient for residents, visitors and service providers*" which was consistent with PO22 of the *Brisbane City Plan 2014*.

The court approved the applicant's request to make a change to the development approval to install roller doors to the visitor car parking spaces.

Court found permissible change request made to incorrect entity

William Lacy | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Lipoma Pty Ltd v Minister for State Development & Anor* [2017] QPEC 6 heard before Searles DCJ

June 2017

In brief

The case of *Lipoma Pty Ltd v Minister for State Development & Anor* [2017] QPEC 6 concerned a number of preliminary issues raised by the Ipswich City Council in an appeal in the Planning and Environment Court commenced by Lipoma Pty Ltd against the decision of the Minister of State Development to refuse Lipoma's permissible change request.

The preliminary issues required the court to determine whether the Minister or the council was the correct responsible entity for the permissible change request under section 369 of the *Sustainable Planning Act 2009* (**SPA**).

The court found that the council was the correct responsible entity and that on this basis the permissible change request, which had been made to the Minister, had not been made to the correct responsible entity.

The court found that it was not appropriate to exercise its discretion in the circumstances to excuse the non-compliance with the provisions of the SPA and therefore the appeal was struck out as the decision of the Minister was found to be invalid and was set aside.

Three preliminary issues were raised by the council

The development application which resulted in the development approval that Lipoma was seeking to change was originally made to the council and approved by the council in December 2003.

After being approved by the council, the development application was subject to a ministerial call-in under section 3.6.6 of the now repealed *Integrated Planning Act 1997* and approved by the then Minister for State Development and Innovation in July 2004.

The issues in the proceedings before the court arose out of a permissible change request which sought to change certain conditions of the original approval that was lodged by Lipoma with the Minister for State Development in September 2015. The permissible change request was refused by the Minister in December 2015.

The preliminary issues to be determined by the court which were raised by the council, after it elected to become a party to the appeal, were as follows:

- Issue 1 – The Minister was not the correct responsible entity pursuant to section 369 of the SPA to determine the request to change the development approval to which the appeal relates.
- Issue 2 – The correct responsible entity to determine the request to change the development approval was the council.
- Issue 3 – Lipoma did not have the right to appeal the decision of the Minister to refuse the request to change the development approval.

Court required to determine whether the council or the Minister was the correct responsible entity to determine the permissible change request

The development approval, which was given under the repealed *Integrated Planning Act 1997*, was transitioned to be a development approval under the SPA. Accordingly, the permissible change provisions of the SPA applied to the request to change the development approval, in particular section 369 of the SPA which identifies the responsible entity for the permissible change request.

The relevant matter for the court to determine in respect of issues 1 and 2 was who the responsible entity was for the purpose of section 369 of the SPA. Under section 369(1)(e) of the SPA the responsible entity was "*the assessment manager for the application to which the approval relates*". The Minister maintained that it was the responsible entity and therefore had the power to receive, assess and decide the permissible change request, however, both Lipoma and the council said that the council was the responsible entity.

The Minister submitted that the application to which the approval related was the application made to the council but called-in and ultimately approved by the Minister. The approval which Lipoma sought to change was the approval given by the Minister and therefore the Minister was the correct responsible entity to assess and decide the permissible change request.

Court found that the Minister's role in respect of the development application was for a limited duration and on this basis the council was the correct responsible entity

The court had regard to section 3.6.7 of the repealed *Integrated Planning Act 1997* to determine the effect of the ministerial call-in on the development application. Under section 3.6.7 of the repealed *Integrated Planning Act 1997*, the Minister was only the assessment manager from the time the application was called-in until the Minister issued the decision notice. After this time, the decision of the Minister on the development application was taken to be a decision of the council as the original assessment manager. In short, the approval given by the Minister was deemed to be an approval of the council.

The court found that the plain effect of section 3.6.7 of the repealed *Integrated Planning Act 1997* was to limit the duration of the Minister's role as assessment manager for the development application. On this basis, the court found that the correct responsible entity for the permissible change application was the council and not the Minister.

Lipoma submitted that the court should exercise its discretion to excuse non-compliance with section 369 of the SPA

Having found that the council was the correct responsible entity, the court moved to determine the effects this had on Lipoma's appeal. It was conceded by both Lipoma and the Minister that if the council was the responsible entity the appeal was incompetent.

The council, despite not being the entity to which the permissible change request was made, was given notice of the permissible change request under the provision of the SPA and had advised of its objection to the permissible change request.

Lipoma submitted that the failure to make the permissible change request to the council was a non-compliance with a provision of the SPA that could be excused by the court by exercising its discretion under section 440 of the SPA. Lipoma sought a declaration from the court that would allow the appeal to proceed as if the decision to refuse the permissible change request had been made by the council.

Lipoma submitted that there was no real consequence flowing from the non-compliance with a provision of the SPA that would render it inappropriate to enliven section 440 of the *Sustainable Planning Act 2009*, particularly where the council had been given the opportunity to assess and provide a decision on the request and where remaking the permissible change request to the council would result in the same decision, namely the request being refused.

Court found that the non-compliance was fundamental and that it was not appropriate to exercise its discretion to excuse non-compliance

The court considered that exercising its discretion in the manner submitted by the council would leave the council in a position where it was defending a decision it did not make, a factor which the court considered weighed strongly against exercising its discretion under section 440 of the SPA.

The court found that the non-compliance with section 369(1) of the SPA was neither technical nor minor but rather that it was fundamental. This non-compliance had prevented the council from exercising the full extent of the assessment it would have been required to undertake as the responsible entity. The court therefore found that it was not appropriate to exercise its discretion under section 440 of the SPA to excuse the non-compliance. The appeal was therefore struck out.

Proposed changes to a development application for commercial groundwater extraction were found to be permissible changes

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2017] QPEC 24 heard before Morzone QC DCJ

June 2017

In brief

The case of *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2017] QPEC 24 concerned an application to the Planning and Environment Court made by an applicant to make changes to the development application the subject of the appeal.

The applicant made a development application for a development approval for a commercial ground water extraction use on land at 22-26 Power Parade at Mount Tamborine which involved the following proposal:

(a) the extraction of water from a sub-artesian source assessed by bore;

(b) the storage of extracted water on-site in large water tanks; and

(c) the transportation of water off-site using a single transporter along a defined route.

The council decided to refuse the development application and the applicant appealed against the council's decision. The applicant subsequently made an application to the court to make changes to the development application the subject of the appeal.

The court found that the proposed changes were a minor change for the purposes of section 350 of the *Sustainable Planning Act 2009* (**SPA**) and that the appeal would proceed with the changed development application.

Proposed changes were limited to the transportation of extracted groundwater from the subject land

The applicant proposed the following changes to the development application:

- the water extracted from the subject land would be transported by vehicles owned by third parties rather than by a vehicle owned by an entity related to the applicant;
- the water extracted from the subject land would be delivered not only to one bottling facility as identified in the development application but also to:
  - the community of Mount Tamborine and nearby areas, including to residents and businesses;
  - other bottling facilities away from Mount Tamborine;
  - in the case of an emergency, other bottling facilities for charitable purposes; and
  - in the case of a fire emergency by fire services vehicles, "*the location of fire for fire fighting purposes*".

The court observed that the changes proposed by the applicant were limited to the confines of the original proposals and would not change the operational matters related to the transportation of the extracted groundwater from the subject land.

Proposed changes would not result in a substantially different development within the meaning of section 350(1)(d)(i) of the SPA

In determining whether the changes proposed by the applicant were a minor change under section 350 of the SPA, the court considered whether the proposed changes would constitute a substantially different development under section 350(1)(d)(i) of the SPA.

In considering whether the proposed changes would not result in a substantially different development, the court had regard to the *Statutory Guideline 06/09 Substantially different development when changing applications and approvals*.

The court was satisfied that the changes proposed by the applicant would not result in a substantially different development and were a minor change for the purposes of section 350 of the SPA in that:

- the proposed changes would not remove a component that is integral to the operation of the development in that it would not change the core component of the proposed development;
- the proposed changes would not result in a change to the scale or intensity of the proposed use in that no changes were proposed to the following (at [24]):
  - "*the maximum annual extraction*";
  - "*the hours of operation*";
  - "*vehicle numbers, movements and maximum size*"; or
  - "*the built form or layout of the development in terms of scale, bulk and appearance*";
- no additional parcel of land would be required to accommodate the proposed changes;
- given that the proposed changes were not related to the proposed use, being a "*commercial ground water extraction*" use, the proposed changes would not change the character or ability of the proposed development to operate as intended;
- the proposed changes would not cause any significant traffic or transport planning issue in that:
  - they would not generate more than eight low level traffic movements;
  - the transportation of water in the cases of emergency would occur on limited occasions and for a limited time;
  - the deliveries to residents and businesses would be limited by the nature of supply and demand;
  - the number of truck movements would be ultimately limited by conditions.

Accordingly, the court made the following orders:

- a declaration that the proposed changes to the development application the subject of the appeal were minor changes;
- the appeal would proceed on that basis;
- costs of the application would be determined later.

Short-term demand for proposed hard rock quarry insufficient to justify approval despite serious, significant and other conflicts with the relevant planning schemes

James Nicolson | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Boral Resources (Qld) Pty Ltd v Gold Coast City Council* [2017] QPEC 23 heard before RS Jones DCJ

June 2017

In brief

The Planning and Environment Court's decision in *Boral Resources (Qld) Pty Ltd v Gold Coast City Council* [2017] QPEC 23 concerned an appeal by Boral Australia against the decision of the Gold Coast City Council to refuse a development application for a hard rock quarry located in the Tallebudgera Valley/Reedy Creek area of the Gold Coast hinterland.

The court acknowledged that the appeal was a difficult one to decide, finding that on balance it could not be satisfied that there were sufficient grounds to justify the approval of the quarry despite material conflict with the relevant planning scheme.

Subject land

The land the subject of the development application comprised 216.7 hectares of vacant land extensively covered by mature regrowth vegetation, having previously been cleared in the 1970s for historic uses, including grazing and a nursery.

The subject land was located to the west of an existing quarry owned and operated by Boral Australia which is nearing the end of its operating life. The subject land is surrounded by residential development, including both conventional lot sized residential subdivisions and larger rural residential lots.

A prominent ridgeline extending from the Springbrook Range to Burleigh Heads traverses the subject land and is a significant landform feature in the local context, along with several secondary ridgelines, two watercourses and a number of smaller associated waterways.

Proposed development

The proposed development comprised a hard rock quarry for the extraction of material used for manufacturing products in the building and construction industries. Only 65 hectares (approximately 30%) was to be the subject of actual quarrying activities and associated infrastructure, with the balance of the land to be used for buffering and environmental management purposes.

The quarrying activities would have included blasting, operating heavy machinery, processing material in crushing plants, stockpiling processed material and transportation. Extensive upgrades would have been required to the adjacent road network to accommodate the addition of up to 450 heavy haulage vehicle movements per day.

The expected life of the quarry was at least 40 years but could have extended beyond 60 years depending on demand.

Planning scheme

The planning scheme in force at the time the development application was made was the council's *City Plan 2003*, under which the proposed development was an undesirable and inappropriate outcome for the subject land.

Soon after the development application was made the council's *City Plan 2016* came into force, which the court held to be the planning scheme that should be afforded the most weight for the purpose of assessing relevant conflicts.

Under City Plan 2016, the subject land was included in the Rural Zone but was recognised as a "*non-committed resource*" area under the strategic framework, which relevantly provided at section 3.5.5.1(10) (emphasis added):

> *(10)* ***In the non-committed areas at Reedy Creek*** *… operations only extend into the non-committed areas if it can be demonstrated that:*

(a) *the amenity of nearby residential land is* ***maintained****;*

(b) *critical corridors are accommodated and matters of environmental significance* ***are conserved, protected, enhanced and managed****; and*

(c) ***the green backdrop provided by ridgelines is not reduced*** *when viewed from major roads and surrounding residential land …*

Evidence

The court heard evidence from a total of 34 expert witnesses in areas relating to geology, blasting, air quality, noise, traffic, koalas, quarry management, civil engineering, visual amenity, terrestrial ecology, need (economic and community), water hydrology, aquatic ecology, soils and groundwater and town planning.

Several business people with longstanding commercial relationships with Boral Australia were also called as non-expert witnesses in respect of the economic need for the proposed development.

Conflicts

After hearing from the experts, the court found that the proposed development should not be refused by reference to aquatic ecology, terrestrial ecology, noise (from whatever source), air quality or vibration. The court held that that while some residents located close to the proposed development would have their amenity affected in respect of those matters, the amenity of the nearby residential land as a whole would be maintained to an acceptable level and those ecological issues alone did not warrant refusal.

Nevertheless, the court found that there would be tangible, negative impacts on residential amenity arising from the visibility of the proposed development, blasting, the introduction of heavy traffic and, to a lesser extent, periodic dust issues. The court held that these impacts would be a constant reminder to many of the local residents of the quarry's existence and therefore fell outside the reasonable expectations of residential amenity under both *City Plan 2003* and *City Plan 2016*.

The court found that no conflict arose from the loss of waterways and that any flora of significance (with the exception of koala habitat) within the area to be cleared could be relocated and replanted within the remaining buffer area. However, the impact of clearing 67 hectares of existing koala habitat trees was considered significant and could not be sensibly reconciled with the object of conserving, protecting and enhancing matters of environmental significance under section 3.5.5.1(10) of the strategic framework under *City Plan 2016*.

The court held that on the whole the proposed development was in serious and significant conflict with *City Plan 2003* and material conflict with *City Plan 2016*.

Sufficient grounds

Having found that the proposed development conflicted with the planning schemes, the court considered whether the economic or community need for the proposed development was a sufficient ground to justify its approval despite the conflict.

After hearing from the economic experts and the non-expert witnesses, the court found that there is a need for the proposed development. However, in respect of whether the need was sufficient to overcome the conflicts with the planning schemes, the court observed (at [305]) as follows:

> *The determination of this contest requires an abstract form of a cost benefit analysis, made all the more difficult because on one side of the scales is the economic benefit to the community and on the other, the less tangible benefits associated with maintaining biodiversity and amenity.*

Relevant to the court's determination was the economic benefit to the broader south east Queensland and northern New South Wales communities from having a reliable source of good quality quarried material in that location, and the future supply and demand for that material having regard to the volume of the resource available within existing and approved quarries.

The court found that at the earliest there might be a supply issue and therefore a more pressing need for an additional hard rock quarry from about 2031, but more likely not until about 2040.

On that basis, the court held that the community and economic need for the proposed development was presently not sufficient to justify approval despite the conflict with the relevant planning scheme.

Outcome of the appeal

The court dismissed the appeal and upheld the council's decision to refuse the proposed development. Nevertheless, in doing so the court also observed (at [326]) that there can be no doubt the "*significant resource*" should be protected for future exploitation when appropriate.

Court finds significant conflicts with Planning Scheme and that private economics are not sufficient grounds to approve development despite the conflicts

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Althaus Enterprises Pty Ltd v Ipswich City Council* [2017] QPEC 28 heard before Everson DCJ

June 2017

In brief

The case of *Althaus Enterprises Pty Ltd v Ipswich City Council* [2017] QPEC 28 concerned an appeal by the appellant, Althaus Enterprises Pty Ltd, against the decision of the Ipswich City Council to refuse an application for a development permit for a material change of use to establish townhouses on land at 15 Stanley Street, Goodna in Ipswich.

The issues in dispute were as follows:

- whether the proposed development conflicted with the *Ipswich City Planning Scheme 2006* to the extent that it was inconsistent development in the residential low density zone, inconsistent with the existing and desired character of the area and an overdevelopment of the subject land; and
- whether there were sufficient grounds to approve the proposed development despite the conflict with the *Ipswich City Planning Scheme 2006*.

In ultimately finding in favour of the council and dismissing the appeal, the court held that the proposed development was in significant conflict with the *Ipswich City Planning Scheme 2006* and that there were no grounds in favour of the proposed development which were remotely sufficient to justify approving it despite the conflicts.

Proposed development conflicted with the Ipswich City Planning Scheme 2006 provisions regarding density

The density of the proposed development was 38.8 dwellings per hectare. It was uncontentious that the *Ipswich City Planning Scheme 2006* designated the subject land as being within the residential low density zone and that the proposed development was identified under the residential low density zone code as an "inconsistent use" and an "undesirable development", as it "[involved] *a dwelling density which exceeds the density range for the relevant Sub Area*" (at [11]), being 10 to 15 dwelling per hectare.

The appellant's submission was that the *Ipswich City Planning Scheme 2006* should be read as a whole when considering the question of conflict. In this regard, the appellant argued the following:

- the residential low density zone permits single residential development as a consistent use if situated on a lot of 450m^2, which equates to a density of 22 dwellings per hectare; and
- the density of the proposed development was entirely consistent with providing a mix of housing types, particularly infill residential development within 500m of an existing centre, which was contemplated within the specific outcomes of the Ipswich City Planning Scheme 2006.

In response to this argument, the council submitted that there was no justification for ignoring the plain meaning of the *Ipswich City Planning Scheme 2006* and seeking to qualify it in circumstances where no such qualification existed.

In considering the issue, the court affirmed (at [15]) that the correct approach for the construction of a planning scheme was that enunciated by the High Court in *Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, namely:

> *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'.*
>
> *…*

> *A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.*
>
> *…*
>
> *However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. …*

The court also had regard (at [17]) to the case of *Lockyer Valley Regional Council v Westlink Pty Ltd* (2011) 185 LGER 63 whereby the court held that:

> *[where] the effect of a [particular section] of a planning scheme is that the proposed use is 'not consistent' with the purpose of the zone for which it was proposed … In the absence of any other provision which qualifies the operation of [that particular section] in relation to the proposed use, that [particular section] requires the conclusion that a decision to approve the application is a variance with the Planning Scheme.*

To this end, the court concluded that, while the different treatment of single residential development in the *Ipswich City Planning Scheme 2006* was curious, it did not warrant a departure from the plain meaning of the nominated density range. The proposed development, which involved a density two and a half times that anticipated in the residential low density zone, was in significant conflict with the *Ipswich City Planning Scheme 2006*.

Proposed development conflicted with the Ipswich City Planning Scheme 2006 provisions regarding existing and desired character

The relevant provisions of the *Ipswich City Planning Scheme 2006* required the proposed development to "*reflect the established built character, maintain amenity, and protect and enhance important townscape and landscape elements within local areas, having regard to dwelling density*".

In this regard, the appellant called evidence from both a town planner and an architect, while the council simply relied on evidence from a town planner.

Under cross-examination, the appellant's town planning expert conceded that the proposed development would "*present an appreciable difference in terms of building bulk, scale and density ... and that there would be a difference in character as a consequence*". The court subsequently found that the proposed development significantly conflicted with the existing and desired character for the area.

Proposed development represented an overdevelopment of the subject land

The council submitted that the proposed development conflicted with the specific outcomes of the residential code, which could not be cured by the imposition of conditions. In particular, the council contended that the proposed development conflicted with the provisions of the residential code pertaining to street frontages, entry access, and landscaping requirements.

Noting that the appellant had not tendered any plans or visual representations of the proposed development, the court held that the proposed development was in significant conflict with the residential code and was an overdevelopment of the subject land.

There were not sufficient grounds to approve the proposed development

The appellant submitted that, despite the conflicts with the *Ipswich City Planning Scheme 2006*, there was a need for the proposed development which justified approval. In this regard, the appellant called evidence from a property economist, while the council relied on evidence from a town planner.

There was significant disagreement between the experts as to the capacity of the *Ipswich City Planning Scheme 2006* to supply land to meet demand in Goodna, which was quantified as being 35 semi-detached and attached dwellings per annum.

Under cross-examination, the appellant's property economist conceded (at [35]) that the supply and demand for multiple dwellings was "*tracking comfortably relative to the 15 year period contemplated by the planning scheme*". However, the expert sought to qualify this statement by cautioning that the current market conditions did not make it economically viable to provide multiple dwellings at a density of 10 to 15 per hectare, and therefore the type of development contemplated by the *Ipswich City Planning Scheme 2006* would not occur.

In considering the submissions and evidence before it, the court referred (at [32]) to the concept of "need" by reference to the case of *Isgro v Gold Coast City Council & Anor* [2003] QPELR 414, namely as follows:

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

The court also found that, to the extent the appellant relied on the economics for developing particular parcels of land for multiple dwellings, it appeared to have offended the principle enunciated in *Brown v Moreton Shire Council Mylne* (1972) 26 LGRA 310 that private economics is an irrelevant and immaterial consideration.

Acknowledging its statutory duty not to make a decision that conflicted with the *Ipswich City Planning Scheme 2006* unless there are sufficient grounds to justify the proposed development despite the conflict, the court applied the "three stage test" pronounced in *Weightman v Gold Coast City Council* [2003] 2 Qd R 441, being as follows:

1. examine the nature and extent of the conflict;
2. determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds; and
3. determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict.

The court found in favour of the council and dismissed the appeal. In doing so, the court held that there were no grounds in favour of the proposed development which were remotely sufficient to justify approving it despite the conflicts.

There were sufficient grounds to approve the proposed development at the former ABC site despite conflict with the Brisbane City Plan 2014

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bell v Brisbane City Council & Ors* [2017] QPEC 26 heard before Rackemann DCJ

June 2017

In brief

The case of *Bell v Brisbane City Council & Ors* [2017] QPEC 26 concerned a submitter appeal to the Planning and Environment Court made by the appellant, Kate Peta Bell, against the decision of the Brisbane City Council to approve a development application by the applicant, Sunland Developments No. 8 Pty Ltd, for a material change of use of land situated at 600 Coronation Drive, Toowong, known as the former ABC site.

The proposed development comprises the following:

- 555 units (gross floor area of 49,231.6m^2) with combined community use areas and food and drink outlets;
- 53% of the site area was intended for public open space, including a sculpture park;
- 800 car parks comprising 714 for residents and 86 for visitors with 680 bicycle spaces;
- a public bikeway and pedestrian way connecting to the bicentennial bike way and across the subject land;
- the retention and extension of Middenbury (an 1865 villa residence) and its re-use.

The appellant owns properties comprising six contiguous lots, one of which was a lot adjoining the subject land.

The court found that there were sufficient grounds to approve the proposed development despite its conflict with the provisions of the *Brisbane City Plan 2014*. In doing so, the court considered various matters including:

- the issues contended by the appellant, including centre issues, height, heritage and traffic;
- the level of economic and community need;
- the provision of generous public open space.

Court's ultimate decision would not change even if there was a level of conflict with the Brisbane City Plan 2014 in relation to the issues related to the proposed development being located at Toowong Centre

The appellant submitted that the proposed development was in conflict with the intent of the *Brisbane City Plan 2014* by reason of its limited centre type uses and failure to integrate with the existing Toowong Centre.

While the court accepted that there was a level of conflict with the *Brisbane City Plan 2014*, it confirmed that its ultimate decision would not change in any case.

Court found that the height of the proposed buildings was in conflict with the Brisbane City Plan 2014, however, that this was an exceptional case

The appellant argued that the height of the proposed buildings was in conflict with the *Brisbane City Plan 2014*.

The court accepted that the height of the proposed buildings was in conflict with A01.1 and PO1 of the Toowong-Auchenflower Neighbourhood Plan Code under the *Brisbane City Plan 2014*. However, without deciding whether there was conflict with the relevant overall outcome of the code, the court found (at [81]) that this was "*an exceptional case in which the proposal warrants approval notwithstanding*" given the economic and community need and other sufficient grounds for approval.

Court found that the planning scheme provisions relating to heritage were satisfied

The heritage expert for the appellant opposed the proposed development for reasons including the following:

- likely damage to the significant fabric of Middenbury and its fig trees;
- inadequate and inappropriate setting for Middenbury;
- impaired "*views between Middenbury and the Brisbane River and West End and between Middenbury and Coronation Drive*" (at [135]);
- the form of the proposed development would "*detract from the appearance and expression of Middenbury as an 1860s villa residence*" (ibid).

The court preferred the evidence provided by the heritage experts for the council and applicant and found that the provisions relating to heritage were satisfied.

Court did not find that the traffic issues raised by the appellant would call for refusal of the development application

The appellant disputed a number of traffic issues, including access to the subject land, bikeway and pedestrian path and the layout of carparks.

The court found that the traffic issues could be addressed satisfactorily by the proposed development in that:

- obtaining access from an arterial road, being Coronation Drive, was in conflict with the relevant provision in the *Brisbane City Plan 2014*, however, it would "*not* [be] *accompanied by a significant adverse consequence and the relevant overall outcomes are not prejudiced*" (at [192]);
- the issues relating to the form of the access and Archer Street cycleway access could be resolved by way of development conditions;
- the proposed cycle route satisfied the relevant performance outcome;
- the layout of the resident's carpark was narrower than what was referred to in the relevant policy in the *Brisbane City Plan 2014*, however, it would provide a greater number of carparks than what was required under the *Brisbane City Plan 2014*.

Court found that there was a significant economic and community need for the proposed development, including the residential component

The economist for the appellant argued that there was a great need for the subject land to be used for retail and commercial purposes. The economists for the council and the applicant disagreed.

In finding that there was a significant economic and community need for the proposed development, including its residential component, the court accepted the opinions of the economists for the council and the applicant who considered that:

- the quality of the proposed development would attract residents from the Brisbane inner city and also from interstate;
- the demand for commercial offices in Toowong is limited;
- the need for further retail space is not overwhelming and it can be accommodated by other places in the neighbourhood.

Court found that the proposed provision of public open space was unquestionably generous

The court found that the provision of public open space would provide a great benefit for the following reasons:

- it was much greater than what would be expected;
- access would be provided to open space with high amenity for pedestrians and cyclists;
- a positive contribution would be made to the public realm;
- it would provide an appropriate setting for Middenbury.

The court ultimately found that, on balance, there were sufficient grounds to approve the proposed development despite conflict with the *Brisbane City Plan 2014*.

Competitive regions – South East Queensland

Ian Wright

This article is an edited address to the Committee for Economic Development of Australia conference on *Competitive Regions* held on 28 June 2017

June 2017

Introduction

Colin Biggers and Paisley Lawyers is a longstanding supporter of the Committee for Economic Development of Australia, and its mission of delivering leading thinking, informed discourse and rigorous research on the economic and social issues affecting Australia.

CEDA's reputation for independence, informed debate, policy influence and reach, is the reason why we have with us today the leaders of some of Australia's largest local governments and members of the Council of Mayors of South East Queensland.

It is also the reason why we have attracted a group of some 400 senior professionals, with a keen interest in the future of South East Queensland, its competitiveness and its place in Australia and the world.

Regional playing field

It is clear that some nations such as Australia enjoy greater prosperity than others. It is also clear that the prosperity of regions within Australia varies markedly. We are fortunate to live, work and play in one of Australia's most prosperous regions – South East Queensland.

In a free market economy such as ours, the prosperity of South East Queensland is essentially a composite of the prosperity of the commercial enterprises that we as professionals are engaged in within the region.

Whilst it is true to say that commercial enterprises compete in domestic and international markets and that governments generally do not; it is also true to say that governments compete to offer an attractive and sustainable environment for commercial enterprises and residents to live, work and play.

In an era of global competition characterised by rapid transportation, high speed communication and accessible markets, competitiveness depends not so much on the natural inheritance of general use factors of production of capital, labour and natural resources, which can be readily accessed by commercial enterprises; but by specialised factors of production, which are created not inherited, are not readily replicated by competing commercial enterprises and can be influenced in a proactive way by governments. (Pessoa 2013)

These specialised factors of production are the broad attributes of a region such as South East Queensland which individually and as a system constitute what Michael Porter of the Harvard Business School has termed, the diamond of regional advantage. (Porter 1998)

It is the playing field which each region establishes and operates for its commercial enterprises and residents to live, work and play.

There are four key attributes of the regional playing field in South East Queensland: (Porter 1998)

- First, the region's position in the factors of production such as skilled labour, physical infrastructure and legal frameworks necessary for commercial enterprises to compete in a given industry.
- Second, the nature of the region's demand for an industry's products or services.
- Third, the presence or absence in the region of supplier industries and other related industries that are competitive beyond our region.
- Finally, the conditions in the region governing the strategies, corporate structures and rivalry of commercial enterprises.

Great paradox – globalism versus localism

The key attributes of the regional playing field highlights one of the great paradoxes of the post-industrial age; namely that whilst in theory more open global markets and faster transportation and communication should diminish the role of location in competition; in practice the very opposite is true.

The enduring competitive advantages in a global economy are often heavily local or regional, arising from concentrations of highly specialised skills, knowledge, institutions, rivals, related businesses and sophisticated customers, which drive productivity and innovation.

As the global economy becomes more complex, knowledge based and dynamic, the prosperity of South East Queensland will be determined not so much by the general use factors of production such as exports and natural resources which we have inherited; but rather the specialised factors of production that are created by commercial enterprises and governments working together in partnerships.

Role of government

Governments, national, state and local, have new and important roles to play to establish a playing field within South East Queensland, which provides an attractive and sustainable environment for commercial enterprises and residents to live, work and play.

There are at least four critical ways in which governments can influence the playing field in South East Queensland:

- First, is in the supply of skilled and educated labour – a core focus of Construction Skills Queensland.
- Second, the supply of physical infrastructure – a key focus of the Council of Mayors of South East Queensland.
- Third, the creation of legal and policy frameworks in the form of State and local government Acts and statutory instruments in particular land use and infrastructure planning instruments such as the South East Queensland Regional Plan and local government planning schemes, which should promote rather than detract from productivity and innovation.
- Finally, in a post-industrial age, the refocusing of industry policy from the targeting of desirable industries and intervention through subsidies or restriction, to the promotion of the formation of clusters and the building of public and quasi-public goods such as environmental and social resources, that have significant impact on the many connected commercial enterprises in the region. This is clearly evident in the Draft South East Queensland Regional Plan with its focus on the formation of economic clusters and the protection and enhancement of the environmental and social resources of the region.

Speakers

Today's panellists have been at the forefront of the development of the regional playing field through their roles as the leaders of significant local governments in South East Queensland; members of the South East Queensland Regional Planning Committee, which is preparing the Draft South East Queensland Regional Plan, and members of the Council of Mayors of South East Queensland, which has been a strong advocate for the reform of Federal, State and local government relations, the hypothecation of taxation revenues and their distribution to South East Queensland and the development of the regional economy.

We are therefore fortunate to be joined today by:

- Cr Paul Antonio, Mayor of Toowoomba Regional Council
- Cr Greg Christensen, Mayor of Scenic Rim Regional Council
- The Right Honourable Graham Quirk, Lord Mayor of Brisbane City Council
- Cr Luke Smith, Mayor of Logan City Council
- Cr Allan Sutherland, Mayor of Moreton Bay Regional Council
- Cr Paul Tully, Acting Mayor of Ipswich City Council and the State's longest serving city councillor; and
- Cr Karen Williams, Mayor of Redland City Council.

The discussion today will be moderated by Dr Ben Lyons.

Opportunity

I will leave you today with the words of John F Kennedy delivered in a speech to the Canadian Parliament in Ottawa in 1961, which is perhaps relevant to our forthcoming discussion:

> *Geography has made us neighbours. History has made us friends. Economics has made us partners. And necessity has made us allies. Those whom nature hath so joined together, let no man put asunder. What unites us is far greater than what divides us.*

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The court approves a permissible change application

Kathryn O'Hare | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Highgate Developments Pty Ltd v Sunshine Coast Regional Council* [2017] QPEC 37 heard before Long SC DCJ

July 2017

In brief

The case of *Highgate Developments Pty Ltd v Sunshine Coast Regional Council* [2017] QPEC 37 concerned a permissible change application made by an applicant under section 369(1)(d) of the *Sustainable Planning Act 2009* for a development approval contained in a previous order of the court for the subdivision of land at Tramline Rise and Pope Avenue, Burnside.

There were two matters for the court to determine. The first matter was whether there was effective service of the originating application in compliance with the statutory requirements and the second matter was whether the proposed changes were permissible changes within the meaning of section 367 of the *Sustainable Planning Act 2009*.

As the council raised no issue as to compliance with the statutory requirements regarding the service of the originating application, and there was evidence before the court affirming this matter, the court concluded that the statutory requirements regarding the service of the originating application had been satisfied.

After considering the extent of the proposed changes and the uncontested evidence submitted by the town planner for the applicant in light of the relevant limbs of section 367 of the *Sustainable Planning Act 2009*, the court concluded that the proposed changes would not result in a substantially different development. Further, the court held that the proposed changes dealt favourably with the issues raised in the properly made submissions made in respect of the original development application and that, on the balance of probabilities, there would be no real prospect of causing any properly made submission objecting to the proposal.

After considering evidence and receiving no objection from the council, the court held that the statutory requirements regarding service of the originating application had been satisfied

Evidence as to the service of the originating application was submitted on behalf of the applicant, satisfying the statutory requirements.

In addition to this, the council raised no issue as to compliance with the statutory requirements and the concurrence agency for the development, the Department of Infrastructure, Local Government and Planning, submitted that it did not object to the proposed changes. Accordingly, the court held that the statutory requirements regarding the service of the originating application had been satisfied.

There had been two previous changes made to the first two stages of the original approval by the court with the present application being made in respect of stage three

The proposed changes were to a development approval granted by the court and upon an appeal from the council's refusal of the original development application.

The original approval was to be completed in three stages. The first stage had been completed. The second stage was the subject of a permissible change request granted by the court in 2016 and related to a revised layout and consequential amendments to conditions. The application the subject of this case concerned a permissible change application made under section 369(1)(d) of the *Sustainable Planning Act 2009* and related to stage three of the original development approval.

Although the council consented to the permissible change application, the court was required to find that the proposed changes were permissible changes

The applicant submitted that the following proposed changes responded to the natural topography of the site, changed the layout of the subdivision and realigned an access road:

- increase in lot yield resulting in an overall development increase from 61 to 73 lots;
- compliance with existing minimum lot sizes;
- dedication of land along an existing watercourses to the council as a reserve;
- realignment of 'Road A' through stage three to reduce the amount of earthworks and retaining required for construction and an adjustment of 'Road B' to position it over level ground;
- division of stage three into stages 3A and 3B.

Although the council consented to the permissible change application, the court was nevertheless still required to make a determination about whether the proposed changes were permissible changes within the meaning of section 367(1)(a) and (c) of the *Sustainable Planning Act 2009*.

The court applied the exception under section 371(e) of the *Sustainable Planning Act 2009* and held that it was not practicable for the applicant to obtain consent from 20 individual owners in respect of the permissible change application.

The issue of owner's consent under section 371 of the *Sustainable Planning Act 2009* was raised briefly by the court. The applicant and a related company were the owners of the land subject to stage three and stage two of the development, respectively. However, as it had been completed, stage one had 20 individual owners which led the applicant to seek to apply the exception available under section 371(e) of the *Sustainable Planning Act 2009*, being that consent from all owners can be excused.

The court applied the exception as it was satisfied that due to the number of owners and the fact that the proposed changes did not materially affect the land of those owners, it was not practicable for the applicant to obtain the consent from the 20 individual owners. The court took into consideration whether the proposed changes caused any discernible impact to those lots as well as the potential cost and delay in informing the owners and obtaining their consent.

In considering the applicant's submissions and the uncontested evidence of the town planner, the court accepted that the proposed changes did not result in a substantially different development and would not cause any properly made submission objecting to the proposal

In assessing whether the proposed changes were a permissible change, the court had to consider the cumulative effect of what was proposed on the existing approval and whether that constituted a substantially different development under section 367(1)(a) of the *Sustainable Planning Act 2009*.

The court accepted the uncontested evidence of the town planner for the applicant as well as the contentions set out in the applicant's outline of submissions and held that the proposed changes did not result in a substantially different development as the changes did not introduce new impacts or increase the severity of known impacts.

The court also considered whether, on the balance of probabilities, the proposed change would give rise to a real prospect of causing a person to make a properly made submission objecting to the proposed change.

The court considered the issues raised in previous submissions and was satisfied that the proposed change would not result in the provocation of an adverse submission.

After considering the extent of the proposed changes, the evidence submitted by the town planner and the applicant's submissions, the court approved the permissible change application, concluding that the proposed changes would not result in a substantially different development. Further, the court held that the proposed changes dealt favourably with the issues raised in the properly made submissions made in respect of the original development application and that, on the balance of probabilities, there would be no real prospect of the proposed changes causing any properly made submission objecting to the proposal.

A substantial change to a development application does not necessarily result in a substantially different development

Russell Buckley | Daniel Tweedale | Sinead Garland | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *King of Gifts (Qld) Pty Ltd & Anor v Redland City Council & Anor* [2017] QPEC 15 heard before Everson DCJ

July 2017

In brief

The case of *King of Gifts (Qld) Pty Ltd & Anor v Redland City Council & Anor* [2017] QPEC 15 concerned an appeal against the decision of the council to refuse a development application for a development permit for a material change of use for a combined service station and drive through restaurant at Alexandra Hills, Qld.

The principal issue before the court was whether changes to the proposed development made in the course of the appeal were 'minor changes' under section 350 of the *Sustainable Planning Act 2009* (**SPA**). The court found that a substantial change to the design of a proposed use, that was incidental to the proposed development, does not give rise to a substantially different application. Therefore the proposed change was considered to be a minor change.

In determining its decision to refuse the development application, the council did not take into consideration the plans of the development as no formal application was made under section 351 of SPA

The original development application included a complying onsite sewerage treatment plant with an effluent discharge area of 2,100m^2. The proposed onsite sewerage treatment plant was not a matter being contested in the appeal even though the proposed effluent discharge area did not comply with the irrigation requirements of the Department of Environment and Heritage Protection which was a concurrence agency for the development application.

To applicant to ensure compliance with the concurrence agency's requirements, proposed to replace the above ground effluent disposal area measuring 2,100m^2 on the current plan with an effluent disposal area of 5,060m^2 which utilised subsurface irrigation. The subsurface irrigation area was to remain in the same general area as that proposed in the current plan.

When assessing the proposed changes, the council did not take into consideration the current plans, which were before the council at the time of making its decision, as no formal application was made to council pursuant to section 351 of SPA.

The court noted that had the applicant made an application to the court under section 440 SPA, the court would have declared that the council had to assess the current plans as part of the application. However as the applicant has failed to make the application, the court could not require the council to consider the current plans as part of the application. Therefore, the only issue before the court was whether the proposed changes resulted in a substantially different application.

The court found that when assessing what a substantially different development means, the court is to ensure that the changes are not essential, material or important

In considering this issue, the court relied on the observations found in *Jimboomba Lakes Pty Ltd v Logan City Council & Anor* [2015] QPELR 1044,1049 where it was stated that "*it is not the role of the court to undertake … an analysis of any change sought to be made to a development application … The limitation of section 350 of SPA that the changes not result in a substantially different development means that the proposed changes must not be essential, material or important to the context of the development application*".

The court found that the proposed changes did not result in a substantially different application

The court found that the only significant change in the application was that the onsite effluent disposal area of the proposed development had changed to reflect the irrigation requirements of the concurrence agency.

In assessing this change, the court found that it was merely a design solution to an incidental aspect of the proposed development and did not give rise to a substantially different development.

The court held that in assessing whether a change is a minor change, it is not necessary to look at the change in the context of the development application as a whole

As such, the court found that although the change was a substantial change to the development application, the change did not result in a substantially different application.

The court therefore concluded that the proposed amendments were a minor change under section 350 of SPA.

Reduction in intensity does not result in a substantially different development

Russell Buckley | Daniel Tweedale | Sinead Garland | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council* [2017] QPEC 19 heard before Everson DCJ

July 2017

In brief

The case of *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council* [2017] QPEC 19 concerned an appeal against a decision approving an application for changes to a development approval for premises at 98-196 Guanaba Road, Tambourine Mountain.

The change application proposed a number of design changes to the approved development, but only four changes were contentious:

- reduction in the number of camping sites;
- removal of the vehicular access to the camping sites;
- restriction of the campers to those who were attendees of the mountain bike clinics;
- removal of the proposed caretaker who was to be replaced with a clinic coach who would camp with the attendees.

The Tamborine Mountain Association alleged that if the change application was accepted, the changes would result in a substantially different development to that which was originally proposed and would change the demographics of the area.

The court held that because the change application only resulted in a reduction in intensity of the proposed development, without more, the proposed changes did not result in a substantially different application and therefore the proposed changes are a minor changes under section 350 of the *Sustainable Planning Act 2009* (**SPA**).

The court stated that the relevant test in assessing whether a change is a minor change is to look at whether the change will result in a substantially different development rather than merely resulting in some substantially different development

The court observed that when assessing whether a material change is a minor change under section 350 of SPA, the relevant test to be applied is that which is found in the decision of *King of Gifts (Qld) Pty Ltd & Anor v Redland City Council & Anor* [2017] QPEC 15. In this case it was held that the relevant test pursuant to section 350 of SPA "*is that the change not result in "a substantially different development" not merely that it not result in some substantially different development*".

The court found that the expert opinion regarding the change in demographics was not qualified

The argument raised by the Tamborine Mountain Association that the change would result in a change to the demographics of the area was solely based upon the expert opinion of the Tamborine Mountain Associations' town planner.

The court found that the expert was expressing an opinion outside of the scope of their area of expertise as they did not have the relevant sociology qualifications required to analyse the demographics of the area. Therefore, the evidence that the changes to the proposed development would change the demographics of the area was not accepted.

The court found that the proposed changes did not result in a substantially different development

The court found that the changes which reduced the intensity of the proposed development could not be solely relied on to show that the changes would result in a substantially different application. Without more, the proposed changes did not result in a substantially different development. Therefore the proposed changes are a minor change as defined under section 350 of SPA.

Court declares changes to a development application are a minor change

Shaun Pryor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Telstra Corporation Limited v Brisbane City Council* [2017] QPEC 32 heard before Everson DCJ

July 2017

In brief

The case of *Telstra Corporation Limited v Brisbane City Council* [2017] QPEC 32 concerned an application by an applicant appellant seeking a declaration that proposed changes to a development application were a minor change under section 350 of the *Sustainable Planning Act 2009*.

The proposal involved the demolition of an existing monopole and the replacement of a new monopole approximately 30 metres to the north-east of the existing monopole. The changes to the development application involved moving the location of the new monopole and changing its form.

The court was satisfied that the proposed changes would not result in a substantially different development and declared that the changes to the development application were a minor change under section 350 of the SPA.

Proposed changes to the development application

The appeal to which the application related was an appeal against the council's decision to refuse a development application for a telecommunications facility, comprising a monopole and associated antennas to provide mobile telephone and data coverage.

In the course of the appeal, the applicant sought to change the proposed development as follows:

- locate the new monopole 30 metres to the south-west of the existing monopole rather than 30 metres to the north-east of the existing monopole;
- reduce the overall height of the monopole and antenna structure from 21.3 metres to 19.1 metres above ground level;
- remove the triangular headframe and replace it with slim line panel antennas;
- reduce the width of the antennas from 4 metres to 1.73 metres;
- enhance the capacity of the monopole by adding more radio frequency.

The court noted that despite the changes allegedly benefitting visual impact and increasing capacity, the change in location of the monopole would result in an increase of the overall height of the monopole from 53.88 metres AHD to 55.84 metres AHD due to the higher elevation in the new location.

The court found that the proposed changes would not result in a substantially different development

The court referred to the definition of minor change under section 350 of the *Sustainable Planning Act 2009* and identified that the only relevant consideration was whether the changes would result in a substantially different development.

The court noted the matters set out in *Statutory Guideline 06/09* and determined that nothing in the guideline suggested that the proposed changes would result in a substantially different development.

The court was ultimately satisfied that the proposed changes would not result in a substantially different development and declared that the changes to the development application were a minor change.

Court upholds the decision of the Council to refuse a development permit for the demolition of a pre-1911 federation era house

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Birleymax Pty Ltd v Brisbane City Council* [2017] QPEC 44 heard before Everson DCJ

August 2017

In brief

The case of *Birleymax Pty Ltd v Brisbane City Council* [2017] QPEC 44 involved an applicant appeal against the decision of the council to refuse a development application for the demolition of a house at 87 Birley Street, Spring Hill.

In ultimately finding in favour of the council and dismissing the appeal, the court held that the proposed development was in significant conflict with the *Brisbane City Plan 2014* and that no grounds had been demonstrated in favour of the proposed development which were sufficient to justify demolition of the house notwithstanding the conflict.

Issues in dispute were confined to discrete provisions of the Traditional Building Character (Demolition) Overlay Code

The issues in dispute were whether the proposed development conflicted with overall outcome (2)(b) of the Traditional building character (demolition) overlay code (Demolition Code) which operates to "*protect a federation era or earlier building by limiting demolition or removal to only where a building is structurally unsound*", and performance outcome PO6 which applies if the subject building is pre-1911 and only permits demolition where the significant building "*is not capable of structural repair*" (at [2]).

Court acknowledged that there is a theme running through the Brisbane City Plan 2014 which seeks to preserve traditional building character

In analysing the relevant provisions of the *Brisbane City Plan 2014*, the court observed that there exists in the *Brisbane City Plan 2014* a clear intention to preserve traditional building character. The court found that such intention was evident from the following provisions of the *Brisbane City Plan 2014*:

- Theme 2, element 2.1 of the Strategic framework, which includes specific outcomes and land use strategies requiring the protection of character buildings built in 1946 or earlier and the maintenance of traditional building character which contributes to the character and streetscape of the area.
- Overall outcome 3(a) of the Petrie Terrace and Spring Hill neighbourhood plan, which requires the protection of the character of the built environment by restricting the demolition of character buildings and notes that traditional modest residential dwellings erected on small allotments are a hallmark of Petrie Terrace and Spring Hill.
- The purpose of the Demolition Code, which seeks to implement the strategic plan by protecting residential buildings constructed prior to 1946 and limits the demolition or removal of federation era buildings to scenarios in which they are structurally unsound.

To determine the age and origin of the house, the court considered evidence from the parties' respective heritage architects and that of a historian

To determine the application of the Demolition Code, the court was required to first determine when the building was built. Evidence concerning the age and origin of the house was given by two heritage architects and a historian.

In tracing the history of the house, the court was taken through various historical documents, survey plans, committee minutes, and sewerage and drainage plans, as well as the expert evidence of the parties' heritage architects. The evidence demonstrated that, while the house had undergone various alterations and relocations, it was originally constructed in the federation era being the period between 1890 and 1915.

The court held that the house was a federation era building constructed pre-1911 and that the proposed development was therefore in conflict with both overall outcome (2)(b) and performance outcome PO6 of the Demolition Code.

Court found that there were not sufficient grounds to justify a decision to approve the demolition despite the conflict

The court re-stated the following 'three-stage test' enunciated in *Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 Qd R 302 for determining whether there are "sufficient grounds" to approve the proposed demolition (at [17]):

1. *examine the nature and extent of the conflict;*
2. *determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds; and*
3. *determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict.*

The appellant contended that the nature and extent of the conflict was minor because there was no conflict with the balance of the Demolition Code nor any other relevant provisions of the *Brisbane City Plan 2014*. It also asserted that the house did not exhibit traditional building character or make a positive contribution to the streetscape, and therefore did not warrant preservation.

The council submitted that, given its pre-1911 status, the house was assumed to have the requisite character warranting its preservation and that the only relevant consideration in respect of its demolition was whether the building was structurally unsound.

The court accepted that the *Brisbane City Plan 2014* made it clear that a federation era building was a special class of building which could only be demolished where it was structurally unsound. As the building was structurally sound, the court therefore found that the proposed demolition was significantly in conflict with the relevant provisions of the Demolition Code.

The appellant submitted that there was no public interest in preserving the house for the following reasons:

- the building had been substantially altered and does not contribute positively to the visual character of the street;
- the building does not represent traditional building character;
- demolition will be no loss of traditional building character.

In the absence of a public interest in preserving the building, the appellant submitted that there were sufficient planning grounds to approve the proposed demolition.

The court found that the appellant had misstated the meaning of "grounds" and the purported ground raised was an illusory one. The court stated that in order to qualify as a "ground" the appellant must demonstrate that the actual demolition of the house was in the public interest, which the appellant had not endeavoured to do.

Further, the court held that the fact that the structurally sound house does not currently contribute to the traditional building character of the street is not a matter which justifies the significant conflicts with the relevant provisions of the *Brisbane City Plan 2014*.

The court therefore concluded that the grounds advanced by the appellant were not sufficient to justify approving the proposed demolition notwithstanding the conflicts.

Court finds insufficient grounds to support the demolition of a character house given conflicts with relevant planning scheme

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bilalis v Brisbane City Council* [2017] QPEC 42 heard before Kefford DCJ

August 2017

In brief

The case of *Bilalis v Brisbane City Council* [2017] QPEC 42 concerned an appeal by an applicant to the Planning and Environment Court against the decision of the Brisbane City Council to refuse a development application seeking a preliminary approval for building work to demolish a pre-1947 house at Albion.

In deciding the appeal, the court was required to assess the application anew to firstly determine whether it was in conflict with the provisions of the *Brisbane City Plan 2014* and secondly to identify if there were sufficient grounds to justify approval despite any conflict.

To determine whether the application was in conflict with the *Brisbane City Plan 2014*, the court drew on the provisions of the Traditional building character (demolition) overlay code to define the following issues:

- whether the house was in a street that had no traditional character;
- whether the house was a building which, if demolished, would result in the loss of traditional building character;
- whether the house contributed positively to the visual character of the street; and
- whether the house complied with the purposes of the overlay code.

The court ultimately held that the building work was in conflict with the provisions of the Traditional building character (demolition) overlay code and the appellant had failed to demonstrate any grounds to overcome the conflict.

Appellant appealed against the council's decision to refuse the development application

The appellant lodged with the council a code assessable development application seeking preliminary approval for the demolition of a pre-1947 residential dwelling at 7 Birkbeck Street, Albion. The house was located within the Low-medium density residential (2 or 3 storey mix) zone and the Traditional building character (demolition) overlay of the *Brisbane City Plan 2014*.

The council refused the development application on the basis that the building work conflicted with provisions of the *Brisbane City Plan 2014*. The appellant subsequently appealed the council's decision under section 461 of the now repealed *Sustainable Planning Act 2009*. Under section 311 of the *Planning Act 2016*, the appeal was decided under the *Sustainable Planning Act 2009*.

The appeal proceeded as a hearing anew in accordance with section 495 of the *Sustainable Planning Act 2009* and the court assessed the building work against the relevant codes of the *Brisbane City Plan 2014*.

The court was required to decide the development application in accordance with the decision rules provided under section 324 and section 326 of the *Sustainable Planning Act 2009*, which relevantly required that its decision must not conflict with the *Brisbane City Plan 2014*, unless there were sufficient grounds to justify the decision despite the conflict.

Court held that the house was located on a street with traditional character

Heritage experts for both parties agreed that the design of the house was consistent with the standards of the Traditional building character planning scheme policy of the *Brisbane City Plan 2014*. The court also found that Birkbeck Street accommodates a total of five pre-war 1947 character buildings, including a heritage listed corner store and a further post-1947 character building.

The court's assessment of Birkbeck Street's traditional character was guided by several principles from earlier cases. Such principles highlighted that the street's visual character is to be considered as a whole and that it was not necessary for the street to be in pristine condition or to present a homogenised traditional character.

The appellant's expert compared the current streetscape with its appearance in 1946 to support the contention that the introduction of multi-unit dwellings and commercial buildings had substantially shifted and depleted the prevailing traditional character of the streetscape. The court disagreed with this approach stating that a proper assessment must focus on whether the existing character of the street would be compromised by the proposed demolition.

The court found that Birkbeck Street had traditional character value given the number of character houses evenly distributed along the streetscape and held that a person would tend to perceive the modern buildings at the corner of the street as forming part of Sandgate Road.

Court held that the demolition of the house would result in a meaningful, and unacceptable, loss of traditional building character

The court cited (at [42]) the following observation in *Se Ayr v Brisbane City Council* [2016] QPELR 223: "*reference to demolition not resulting in the loss of traditional building character should not be approached in absolute terms…the relevant loss should be approached on the basis that it is one which is meaningful or significant.*"

The appellant's heritage expert argued that demolition of the house would not result in the loss of traditional building character on the basis that the existing character of Birkbeck Street and the surrounding area had already been eroded by the inclusion of post-1947 development.

The council's heritage expert presented aerial photographs taken in 1946 to demonstrate that the house continued to display the hallmarks of a 1930s traditional timber and tin Queensland house. The council's expert was of the opinion that the demolition of a house of this type would result in the loss of traditional building character from the street.

The court preferred the photographic evidence presented by the council's expert and found that demolition of the house would result in the loss of traditional building character.

Court held that the house positively contributed to the visual character of the street

The court relied again on *Se Ayr v Brisbane City Council* [2016] QPELR 223 and cited the following statement from the court that "*the expression contribute "positively" should be interpreted in the way indicated by Bowskill DJC in Marriot v Brisbane City Council [2015] 910; [2015] QPEC 45; namely, whether the contribution is a positive one in that it adds to the visual character of the street rather than being neutral.*" (At [57].)

The court also relied on the statement of the court in *Lonie v Brisbane City Council* [1998] QPELR 209 to highlight that whether the house contributes positively to the visual character of the street is to be judged from the position of "*the average person walking the street and looking about, with a perception which falls somewhere between that of a Ph.D in Architectural History on the one hand and that of a Philistine on the other.*" (At [60].)

Despite the presence of screening vegetation, the court held that the house positively contributed to the visual character of Birkbeck Street by providing an example of intact traditional character.

Court found that the building work failed to comply with the overall outcomes of the Traditional building character (demolition) overlay code

The court noted that section 5.3.3 of the *Brisbane City Plan 2014*, when properly construed, enables a development application to comply with the Traditional building character (demolition) overlay code by complying with its overall outcomes.

The court considered overlay mapping and reporting exhibited by the parties' experts and determined that the demolition of the house would conflict with overall outcome 2(a) in that the subject house "*gives the areas in the traditional building character overlay their traditional character and traditional building character.*"

The court was persuaded by evidence given by the council's heritage expert and concluded that the house, when combined with the remaining intact traditional timber and tin houses on the street, formed an important part of a streetscape established in 1946 or earlier. On this basis demolition of the house failed to comply with overall outcome 2(d) of the overlay code.

Court dismissed the appeal and found no grounds to justify approval despite the conflict

The court held that the proposed demolition was in conflict with the *Brisbane City Plan 2014*. The appeal was dismissed as the appellant had failed to advance any grounds to justify approval despite the conflict.

Court upholds the decision of the Council to refuse a commercial centre on the basis of conflicts with the centre hierarchy and zoning of the planning scheme

Kathryn O'Hare | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hawkhaven Pty Ltd v Mackay Regional Council & Anor* [2017] QPEC 40 heard before Searles DCJ

August 2017

In brief

The case of *Hawkhaven Pty Ltd v Mackay Regional Council & Anor* [2017] QPEC 40 concerned a Planning and Environment Court appeal against the council's decision to refuse a development application for a development permit for material change of use for a commercial premises, shop, catering shop, healthcare centre and indoor entertainment at Blacks Beach, Mackay.

There were three matters for the court to determine. The first matter was whether the proposed development conflicted with the *Planning Scheme for the City of Mackay 2006*, being the then Current Scheme. The second matter was whether the proposed development conflicted with the *Draft Mackay Region Planning Scheme*, being the Draft Scheme. The third matter was, in the event of a conflict, whether there were sufficient grounds to justify approval notwithstanding the conflict.

Before it could determine these matters, the court was required to establish the weight to be given to the *Draft Mackay Region Planning Scheme* and applied the principle established in *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117. The court found that the *Draft Mackay Region Planning Scheme* should be given considerable weight in the assessment of the proposed development because it identified the most recent planning intent for the local government area and had progressed to the public notification stage.

The court then dealt with and divided the three matters for determination into the three discrete areas of evidence as submitted by the parties namely, town planning, amenity and need.

In its consideration of the town planning evidence, the court addressed the out of centre development and zoning issues and found that the proposed development raised conflict in a town planning sense with both the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme*. Further, the court found that an approval of the proposed development, in its current form, would cut across the clear planning intent of both the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme*.

As there was no evidence submitted by the council or the co-respondent by election in respect of acoustic amenity, the court could only consider the evidence submitted by the appellant. Further, the co-respondent by election submitted that issues pertaining to visual amenity, odour and light amenity in conjunction with community expectations were also relevant to the court's findings. Accordingly, the court found that the appellant had not demonstrated that the proposed development would satisfactorily protect the amenity of the surrounding area as envisaged by the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme*.

In respect of need, the council submitted that the appellant had not demonstrated that there was a need for the proposed development, to which the appellant responded that the court would be satisfied there was an existing, urgent need for additional convenience retailing and services in the Black Beach area. Conversely, the co-respondent by election submitted that any commercial need for such a development would be satisfied by its 2011 approval for a local shopping centre or by other vacant commercial sites in the area.

After considering the evidence submitted by the parties in respect of town planning, amenity and need, the court found that the proposed development seriously conflicted with the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme* and that the nature of the conflict went to the heart of each scheme and were "*planning scheme wide*". In dismissing the appeal, the court held that the grounds submitted by the appellant were insufficient to overcome the established significant conflicts.

Proposed development conflicted with the centres hierarchy and zoning, cutting across the clear planning intent of both planning schemes

The court did not accept the appellant's primary position that the proposed development was located within a local centre under the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme*. Instead, the court found in favour of the council and agreed that the proposed development conflicted with the centres hierarchies envisaged under the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme*. In respect of both schemes, the proposed development was not located in a designated local centre and did not fall within the limited exceptions of permissible out of centre development, being small scale, locational specific uses where there is a demonstrated need for such development.

The council submitted that the proposed development conflicted with the zoning under the *Planning Scheme for the City of Mackay 2006*. The planning intent of the Urban Residential Zone was clear, being land to be developed for residential, rather than commercial purposes. Further, the council submitted that the planning intent for the Medium Density Residential Zone under the *Draft Mackay Region Planning Scheme* continued that of the Urban Residential Zone under the *Planning Scheme for the City of Mackay 2006*, in that the land was to be primarily used for residential purposes.

In dismissing the appellant's evidence to the contrary, the court found that the proposed development conflicted with the centres hierarchy and zoning under both the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme*. The court concluded that, in its current form, the proposed development would cut across the clear planning intent of both planning schemes.

In the absence of probative evidence before the court, the court was not satisfied that the appellant had demonstrated the proposed development would appropriately protect the amenity of the surrounding area

In respect of acoustic amenity, the appellant submitted that the proposed development could "*readily co-exist with surrounding residential development on the basis of suitable noise amenity controls and reasonable and relevant development control conditions*". However, although the appellant was the only party to submit evidence addressing the acoustic amenity, the council submitted that this evidence was insufficient to discharge the onus of establishing that the appeal should be upheld. This was especially so considering the evidence submitted by the appellant was based largely, if not wholly, on previous assessments and investigations undertaken for a previous development application.

The court found that the proposed development would undoubtedly create an impact on the acoustic amenity of the surrounding area, with the evidence submitted by the appellant insufficient to satisfy the court that the proposed development would not cut across the relevant provisions of the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme* which seek to protect amenity.

The co-respondent by election submitted that visual amenity, odour and light amenity were also relevant considerations for the court to determine whether acceptable measures could be implemented to integrate and protect the high level of character and amenity of the residential area in which the site was located. Conversely, the appellant submitted that the odour and light amenity issues could be dealt with by way of conditions.

The court agreed with the co-respondent by election and found that there was no probative evidence before the court dealing with how such matters might in fact be conditioned. Further, the court found that there was insufficient evidence for the court to conclude that amenity had been appropriately considered so as to be satisfied that the proposed development did not cut across the relevant provisions of the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme* seeking to protect amenity.

Court found that additional need for retail facilities could be satisfied by the existing and proposed infrastructure

In respect of need, the council submitted that the absence of demonstrated need for the proposed development was supported by a decline in Mackay's economy since the downturn of mining in 2013. The appellant submitted a more optimistic view that although the decline had "*dampened market confidence*" it had "*not extinguished it*". The court found that the state of the economy was important to the context in which to assess whether there was a demonstrated need for the proposed development.

The council and the co-respondent by election submitted that the appellant had not demonstrated that there was a need for the proposed development and that an approval of the proposed development would prejudice the implementation of the co-respondent by election's current approval. The appellant submitted that this was an irrelevant consideration, however the court found that it was relevant, when determining if a proposed development should be approved, to consider whether an existing approval would be prejudiced by a subsequent proposal.

The court also considered the vacancy rate of nearby centres as further demonstrating the lack of economic need with the council submitting that any need that did exist could be easily met by vacant tenancies at those nearby centres.

The court was unconvinced by the appellant's submission that "*things will turn around*" and found that, combined with the co-respondent by election's current approval, there was no economic need demonstrated for the proposed development. The court found that additional need for retail facilities could be satisfied by the existing and proposed infrastructure.

In dismissing the appeal, the court held that there were insufficient grounds to overcome the established significant conflicts with the planning schemes

The court repeated its earlier findings with respect to town planning and amenity and stated that the proposed development materially conflicted with both the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme*, cutting across the clear planning intent for the site. To approve the proposed development would be inconsistent with the planning strategy envisaged by the council for the local government area in both planning schemes.

The court found that the proposed development seriously conflicted with the *Planning Scheme for the City of Mackay 2006* and the *Draft Mackay Region Planning Scheme* with the nature of the conflict going to the heart of each scheme and the extent of the conflict being "*planning scheme wide*".

The court went on to determine whether there were sufficient grounds to approve the proposed development despite the conflict. The appellant submitted that there was a need for the proposed development, that the site was appropriate for the proposed development and that the proposed development was appropriately located and would promote transport network efficiency.

In dismissing the appeal, the court considered the grounds submitted by the appellant to be insufficient to overcome the real and material conflict so as to justify the approval of the proposed development. In considering the first two grounds, the court had already determined there was no economic need for the proposed development and the court accepted the council's submission that the second ground was not a proper ground within the meaning of schedule 3 of the *Sustainable Planning Act 2009*. In respect of the final ground, the court accepted the council's submission that such a ground was not adequately addressed during the hearing as the appellant had not submitted probative evidence about the existing deficiencies in the transport network which could be improved by the proposed development.

Court found that the costs to repair a pre-1947 property were reasonable in circumstances where they amounted to 15% of the "as is" value of the property

Sinead Garland | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Althaus & Anor v Brisbane City Council* [2017] QPEC 41 heard before Kefford DCJ

August 2017

In brief

The case of *Althaus & Anor v Brisbane City Council* [2017] QPEC 41 concerned an applicant appeal against a decision made by the Brisbane City Council to refuse a development application for a preliminary approval to carry out building work for the demolition of a pre-1947 residential building located at the corner of Kingsley Terrace and Wolsey Parade, Wynnum.

The council refused the development application on the basis that the proposed demolition conflicted with the Traditional building character (demolition) overlay code (Demolition Code) and the Wynnum-Manly neighbourhood plan code (Wynnum-Manly Plan Code) of the *Brisbane City Plan 2014*, in particular in the following respects:

- the building was reasonably capable of being made structurally sound (overall outcome 2(g), performance outcome PO5(b) and acceptable outcome AO5(b) of the Demolition Code);
- the building was in a street that had traditional character (acceptable outcome AO5(d) of the Demolition Code);
- the proposed demolition would result in a material loss of traditional building character (acceptable outcome AO5(c) of the Demolition Code);
- the building contributes positively to the visual character of Kingsley Terrace and Wolsey Parade (performance outcome PO5(c) of the Demolition Code);
- the proposed demolition did not comply with overall outcomes 2(a) and 2(d) of the Demolition Code; and
- the proposed demolition conflicted with the purpose of the Wynnum-Manly Plan Code.

The court concluded that the development application was in conflict with the Demolition Code and the Wynnum-Manly Plan Code and dismissed the applicant's appeal.

Court found that the subject building is reasonably capable of being made structurally sound

The engineering experts agreed that the building is capable of being made structurally sound. The issue before the court was whether the works needed to be undertaken to make the building structurally sound were reasonable.

The engineers agreed upon 12 necessary items of repair costing, in round terms, $160,000. The engineers disagreed about seven items of repair, as well as the appropriate contingency amount, being as follows (at [48]):

> *(a) replacement of all of the pine flooring (as distinct from 50 per cent only);*
>
> *(b) demolition and reconstruction of Flats 4 and 5;*
>
> *(c) replacement of the north and east window sills to tower;*
>
> *(d) repainting of upper external walls of the building;*
>
> *(e) upgrading (replacement) of plumbing and electrical services);*
>
> *(f) replacement of borer damaged cornice, architraves and internal doors;*
>
> *(g) asbestos removal during the course of carrying out structural restoration works;*

In respect of each of the disagreed items, the court found that the appellant was not required to achieve structural soundness or the cost was not material in the overall assessment of reasonableness. In respect of the contingency amount, the court concluded that $20,000 was an appropriate amount. Therefore, the court concluded that the total cost to achieve structural soundness was $180,000.

The appellant urged the court to find that the cost to achieve structural soundness was unreasonable based on findings in other cases. However, the court rejected that approach and stated that what is reasonable in each case turns on the facts and circumstances of the individual case.

Having regard to the facts and circumstances of the case, the court expressed the view that even if a figure of $200,000 was required to make the repairs, "*that figure represents only less than 15% of the "as is" value of the property*" (at [106]). As such, having regard to the costs to bring the building to a state of structural soundness together with the fact that the work was feasible and achievable, the court found that the appellant failed to demonstrate compliance with acceptable outcome AO5(b) and performance outcome PO5(b) of the Demolition Code.

Court found that although Kingsley Terrace and Wolsey Parade were of a mixed character, it could not be said that the streets had no traditional character

To determine the character of the street, the court had regard to the visual character of the street as a whole rather than the character of the building in isolation.

The appellant's heritage architecture expert contended that Kingsley Terrace and Wolsey Parade did not have a traditional building character, as the once scattered distribution of pre-1947 houses has been eroded over the years with a number of pre-1947 houses being replaced with contemporary residences which do not represent traditional building form.

Although the court accepted the observation of the appellant's heritage architecture expert, the court found that even though the streetscape has changed over time there is "*no point at which a person walking along the street will not have a traditional character house in view*" (at [122]).

Consequently, the court found that the appellant failed to demonstrate compliance with acceptable outcome AO5(d) of the Demolition Code.

Court found that if the subject building was demolished the loss would be meaningful or significant

The court stated that the relevant test to be applied to determine whether the demolition of a building will result in a loss of traditional building character is that stated in *Se Ayr Projects Pty Ltd v Brisbane City Council* [2016] QPEC 3. The test, as stated in that case, is that "*the reference to demolition not resulting in the loss of traditional building character should not be approached in absolute terms. …The relevant loss should be approached on the basis that it is one which is meaningful or significant*".

The court found that it is equally important to consider the overall intent of the Strategic Framework which, in this case, reinforces "*that character housing is important to the community and should be preserved*" (at [125]).

The council's heritage architecture expert opined that if the building was demolished, the demolition would result in the loss of traditional building character as the building is a "*very fine example of a traditional 'timber and tin' high set bungalow*" and is "*a very important component of the traditional character of Wolsey Parade and Kingsley Terrace*" (at [129]).

In contrast, the appellant's heritage architecture expert opined that the demolition would not result in the loss of traditional character as the traditional streetscape character "*has already been progressively eroded by the inclusion of post-1946 residences*" (at [130]).

The court rejected the opinion of the appellant's heritage architecture expert on the basis that the expert had failed to take into consideration the full extent of the agreed streetscape when making the expert's assessment. Again, the court stated that "[t]*here is virtually no point at which the hypothetical person walking along either of the streets would not have a building that exhibits traditional building character within view*" (at [131]).

The court also placed weight on the opinions of local residents who regarded the building as being a "*local landmark*" and an "*architecturally and historically significant residence in the district*" (at [132]). As such, the court found that had the building been demolished, the loss of the traditional building would be meaningful. The court therefore concluded that the appellant failed to satisfy acceptable outcome AO5(c) of the Demolition Code.

Court found that the traditional character of the building contributes positively to the visual character of Kingsley Terrace and Wolsey Parade

In assessing the importance of a house upon the visual character of a street, the court noted that one should have regard to the perception of an "*average person walking along the street and looking about*" (at [135]).

The court concluded that the subject streetscape is mixed in character and that there is "*no point at which a hypothetical person walking along either of the streets would not have a building that exhibits traditional building character within view*" (at [138]). The court went on to reject the opinion of the appellant's heritage architecture expert, being that the building has a negative impact on the visual character of the street given its scale and setting on a large lot, and was satisfied that the building contributes positively to the visual character of the street.

The court found that the importance of the building's contribution to the streetscape was reinforced by the local residents' opinion that the building is a "*local landmark*". The court therefore found that the appellant failed to demonstrate compliance with acceptable outcome PO5(c) of the Demolition Code.

Consequently, the court also found that the proposed demolition did not comply with overall outcomes 2(a) and 2(d) of the Demolition Code given the impact of the loss of the subject building and the contribution the subject building makes to the streetscape.

Court found that the demolition of the subject building, having traditional building character, was in conflict with the Wynnum-Manly Plan Code

In light of the court's finding with respect to the conflicts with the Demolition Code, the court found that the proposed demolition did not comply with the relevant overall outcomes in the Wynnum-Manly Plan Code.

In reaching this conclusion, the court received submissions from the appellant about an interpretation issue which, given its findings, the court was not required to determine. The court did, however, describe the appellant's' submissions as being of "*considerable force*" and they are worth noting (at [156]).

Relevantly, the appellant submitted that overall outcome 3(b) of the Wynnum-Manly Plan Code contains a general statement about "*broad and amorphous values or considerations*", being the retention of the locality's "*strong sense of place including the area's relationship to Moreton Bay, its buildings, seaside landscapes, (and) sense of community identity*". However, nothing in the overall outcome or anywhere else in the Wynnum-Manly Plan Code deals directly, indirectly or inferentially with the demolition of a residential dwelling.

The appellant urged that if a proposed demolition meets the requirements of the Demolition Code, reliance cannot be placed upon the general statement contained in overall outcome 3(b) to nevertheless refuse the development application on the basis of being contrary to the Wynnum-Manly Plan Code. Although the court did not finally determine the issue, it is worth noting the way in which the court is likely to determine the issue if required.

Court allows the reconfiguring of rural land to further fragment good quality agricultural land

Nina Crew | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wason v Gympie Regional Council* [2017] QPEC 34 heard before Everson DCJ

August 2017

In brief

The case of *Wason v Gympie Regional Council* [2017] QPEC 34 concerned an appeal by an applicant against a decision of the Gympie Regional Council to refuse a development application for a development permit to reconfigure one lot into two lots for land at 58 Cullinane Road, Mothar Mountain.

The court ultimately allowed the appeal on the basis that the reconfiguring of the land did not result in the alienation or fragmentation of the good quality agricultural land or a loss of land for primary production.

Council refused the application for a development permit to reconfigure the land as the reconfiguring did not preserve the land as productive agricultural land

The applicant sought to reconfigure the land into two lots comprising a northern portion, being 10.8 hectares, and a southern portion, being 37.66 hectares, both of which contain a dwelling house, outbuildings, stockyards and a number of dams. The northern portion and southern portion of the land are separated by Cullinane Road.

The council refused the development application on the basis that the proposed reconfiguration conflicted with provisions of the *Gympie Regional Council Planning Scheme 2013* (Planning Scheme), in particular the provisions of the Strategic Framework, Rural Zone Code and Reconfiguring a Lot Code.

Court held that the reconfiguring of the land did not result in a loss of good quality agricultural land

The council contended that the proposed reconfiguring of a lot did not preserve the good quality agricultural land in the area.

The court heard evidence in relation to the viability of the good quality agricultural land after the proposed reconfiguration of the land from Mr Thompson, for the applicant, and Dr Matthew, for the council. Both experts agreed that 33.09 hectares of the land was good quality agricultural land if irrigation was available.

The court accepted the evidence from Dr Matthew that there was sufficient water available from the sources on the land to irrigate both the northern portion and the southern portion of the land and retain the Class A and Class B good quality agricultural land.

Further, whilst the experts agreed that the land was already of insufficient size to be commercially viable for grazing, Mr Thompson expressed the view that regardless of whether the land was reconfigured, the land was of insufficient size to be a viable commercial cropping enterprise. On the other hand, Dr Matthew was of the view that even after the proposed reconfiguration, both the northern portion and the southern portion of the land could be used for a small-scale commercial cropping enterprise such as growing tomatoes.

The court, having regard to the expert evidence, held that the proposed reconfiguration would not result in any loss of good quality agricultural land on the basis that the proposed reconfiguration did not affect the capacity to irrigate the good quality agricultural land on both portions of the land, or further reduce the already limited capacity to grow commercially viable crops on the land.

Court held that the land in the region was already fragmented and did not compromise the use of the land for primary production

The court considered whether the proposed reconfiguration would result in a loss of good quality agricultural land through the alienation or fragmentation of the land.

Whilst the town planner for the council conceded that the land was already one of a number of fragmented sites in the area, it was submitted that the proposed reconfiguration would result in "unnecessary fragmentation of the land" and the possible change of ownership in the land would result in a reduction of production capacity and affect the ability of the land to be used for a productive rural purpose.

The court ultimately held that the proposed reconfiguration did not alienate the good quality agricultural land as there was sufficient irrigation available on the land and commercial cropping was viable on either portion of the land. Further, the court held that the land was already fragmented by the presence of Cullinane Road bisecting the northern portion and the southern portion of the land. The proposed reconfiguration did not of itself result in further fragmentation of the good quality agricultural land.

Court held that the proposed reconfiguration was consistent in size and dimension with other lots in the vicinity of the land

The council submitted that the *Gympie Regional Council Planning Scheme 2013* relevantly prescribes a requirement for new lots in a rural zone to be a minimum of 100 hectares in size which represents the intended development pattern for the area (see Table 9.4 (Minimum lot dimensions) of the Planning Scheme).

The court rejected this submission on the basis that there is no provision in the planning scheme which mandates the minimum lot size of 100 hectares in a rural zone. The court took into account that the proposed reconfiguration created an additional rural lot on land which is consistent in size and dimension with the surrounding lots.

The court found that a requirement to impose a minimum lot size of 100 hectares represented a planning control that was inconsistent with the pattern of development in the vicinity of the land.

Conflicts with the planning scheme were only minor in nature and there were sufficient grounds to justify the approval of the reconfiguring of the land

The court found that the conflicts with the Planning Scheme were minor in nature for the following reasons:

- the land in the locality of the proposed reconfiguration was already fragmented with similar sized lots;
- the land was already fragmented by Cullinane Road;
- the land was insufficient in size to support a commercially viable grazing enterprise;
- the proposed reconfiguration did not affect the capacity for the land to support a small cropping enterprise.

In any event, the court held that the conflicts could be justified on the grounds that the proposed reconfiguration would provide an opportunity to improve the safety for motorists on Cullinane Road as a result of the separation of the rural uses occurring on either side of the road.

Noosa Shire Council's long-term strategic vision for the Shire Business Centre preserved by the Planning and Environment Court

Daniel Tweedale | James Nicolson | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *QIC Noosa Civic Pty Ltd v Noosa Shire Council & Ors* [2016] QPEC 69 heard before Jones DCJ

August 2017

In brief

The case of *QIC Noosa Civic Pty Ltd v Noosa Shire Council & Ors* [2016] QPEC 69 concerned an appeal against a decision of the Noosa Shire Council to refuse a development application to substantially expand the existing Noosa Civic Shopping Centre within the Shire Business Centre Zone.

The key issues raised in the appeal related to town planning, economic and community need, visual amenity and traffic, with a particular focus on the council's strategic planning for the Shire Business Centre Zone; a major centre in the council's centres hierarchy.

The court dismissed the appeal and refused the proposed development, noting that it was in serious conflict with the intended and planned uses for precincts within the Shire Business Centre and, while the merits of the proposal were finely balanced, there were insufficient grounds to justify approval despite the conflict.

Proposed development

The proposed development involved a substantial expansion of the existing Noosa Civic Shopping Centre, including a total retail floor area of 22,230m^2 and a roofed area 35,059m^2.

In addition to the existing discount department store, major supermarket and numerous specialty shops, the proposed expansion would provide a second discount department store, a second major supermarket, a subordinate supermarket, more than 50 additional specialty shops, as well as other mixed uses including commercial uses, sophisticated entertaining and dining, childcare, education, wellbeing and temporary markets.

Planning framework

The proposed development was contained predominantly within the Shire Business Centre Zone and partly within the Open Space Conservation Zone under the relevant planning scheme.

The planning scheme contemplated the Shire Business Centre as a mixed-use centre with non retail diversification and employment growth as part of a long-term strategy to reduce Noosa's economic dependence on the tourism industry and comprises a number of district precincts which remain largely undeveloped.

Relevantly, the proposed development was to occupy the entirety of the E1 – Employment (Technology Based R&D Business Offices and Civic) precinct and encroach materially into the E7 – Employment (Business and Offices) precinct.

The Shire Business Centre is designated in the *SEQ Regional Plan 2009–2031* as a "*new economy*" science and technology opportunity area for government and private sector investment in major research infrastructure and land secured for future creative industry, science and knowledge-based hubs.

Strategic planning for the Shire Business Centre

The town planning experts agreed the proposed development was in stark conflict with the site specific planning intentions for the Shire Business Centre which had been in place for many years and regularly reviewed.

The economic experts agreed that there was low demand for the non-retail uses contemplated for the Shire Business Centre and there was otherwise a surplus of land available elsewhere within the council's area to meet any future demand that may arise. The Shire Business Centre was otherwise a logical location for the proposed development.

The council acknowledged that demand for non-retail commercial uses was currently low, but argued that demand could increase dramatically and suddenly in the future given the pace of technological change. In the event that demand did grow, the Shire Business Centre was ideally located. The planning scheme expressly recognised that "*protecting the long term viability of the Shire Business Centre may mean setting aside short term needs to ensure the medium-long term implementation of the centre*".

The court considered the current lack of demand for non-retail uses and the surplus of land elsewhere to be significant factors in favour of the proposed development, noting that the council's planning for such uses had been materially if not grossly optimistic.

Nevertheless, the court recognised that the planning scheme provided a legitimate and clear statement of planning intent by the council to encourage non-retail commercial enterprise to reduce the area's dependency on tourism. The court held that in such circumstances it should adopt a self-limiting approach and not substitute alternative planning strategies to those adopted by the council.

Economic and community need

The economic experts agreed there was an economic and community need for an additional discount department store, at least one major supermarket, more specialty shops and other uses. However, the experts disagreed on the need for a shopping centre of the scale proposed.

The court accepted the evidence of the council's economic expert that the proposed development would have a material negative economic impact on the existing nearby Noosa Junction shopping centre by as much as 15 percent, leading to a high levels of vacancy in the short to medium term which could take up to seven to ten years to recover.

The court was not satisfied that the benefits to the community from the proposed development would offset the negative consequences that would likely flow from the impact on the Noosa Junction shopping centre or that there was a genuine need for a shopping centre of the scale proposed.

Visual amenity

The proposed development was significant in size, being approximately 300m in length and up to 160m wide. Nevertheless, the built form was to be articulated and well screened by landscaping such that a person situated in or driving by the existing shopping centre would be unlikely to be able to observe the proposed development in any material way.

The court found that the proposed development was not of a form or scale desired or anticipated in the Shire Business Centre and far from enhancing the adjacent open space it would effectively turn its back on it.

The court held that while the visual amenity impact of the proposed development was inconsistent with the planning scheme, it did not warrant refusal in its own right.

Traffic impacts

The scale of the proposed development would bring forward the need for planned future road upgrades, including traffic signals, and had the potential to divert from the major road corridors.

The court found that it was more likely than not that traffic signals would be required in the future in any event and that any delays at those intersections would be relatively modest and not likely to result in an unacceptable traffic impact. Further, while the diverted traffic generation would likely be greater than if the Shire Business Centre had been developed as intended, it could be addressed in a meaningful way by further works if not entirely eradicated.

The court held that while the proposed development would cause some limited adverse traffic impacts, those impacts did not warrant refusal in their own right.

Outcome

The court dismissed the appeal and upheld the council's decision to refuse the proposed expansion of the Noosa Civic Shopping Centre, observing (at [142]) that "*to permit the proposed development to go ahead would effectively defeat a clear and long standing statement of planning intent.*"

Court upholds the decision of the council to refuse a development for a warehouse in a low-density residential zone

Russell Buckley | Daniel Tweedale | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Delta Contractors (Aust) Pty Ltd v Brisbane City Council* [2017] QPEC 13 heard before Everson DCJ

August 2017

In brief

The case of *Delta Contractors (Aust) Pty Ltd v Brisbane City Council* [2017] QPEC 13 concerned an applicant appeal against the decision of the council to refuse an application for a development permit for a material change of use for a warehouse with an ancillary office and preliminary approval for building work on land at 101 Medway Street, Rocklea in Brisbane.

The development application sought to retrospectively approve the unlawful use of the land, for which the applicant had been issued with a show cause notice by the council on 24 January 2014.

The disputed issues in the appeal were the following:

- whether the proposed development was in conflict with the council's planning scheme and in particular the strategic framework and the low density residential zone code;
- whether the proposed development would result in any unacceptable amenity impacts;
- whether there were sufficient grounds to justify approval of the proposed development despite any conflict with the council's planning scheme.

The court found in favour of the council and dismissed the appeal, finding that the proposed development roused significant land-use conflicts, amenity impacts and constituted a major conflict with the council's planning scheme.

Land-use designation

The applicant contended that the land "*appears to be within, but at the edge of a Major Industry Area*" under the strategic framework mapping of the *Brisbane City Plan 2014*, which provided that the relevant land-use strategy of the Major Industry Area was to ensure that "*development for industrial uses is prioritised in the Major Industry Areas … which are zoned to maximise the industrial land use potential of these areas.*"

The council argued that other mapping clearly depicted the land within the low-density residential zone.

The court found (at [11]) that the "*[land] was unquestionably within the low density residential zone*" and there was therefore "*absolutely no support for the proposed development in the low density residential zone code*", which "*provide[s] for predominantly dwelling houses supported by community uses and small-scale services and facilities which cater for local residents.*"

The court, having regard to the *Brisbane City Plan 2014* as a whole and recent developments on, and contiguous to, the land concluded that the proposed development "*significantly conflicts with the obvious residential intent for the land*" (Ibid).

Amenity impacts

The court having determined that the land was included within the low-density residential zone, considered whether the proposed development would result in any unacceptable amenity impacts should it be approved.

The applicant asserted that the following conditions could be imposed upon the proposed development to limit amenity impacts on adjoining residential land:

- acoustic barriers along the western and northern boundaries measuring 3.5 and 4.8 metres in height, respectively;
- limiting the number of heavy vehicle movements to two per week;
- severe restrictions on the hours of operation of the proposed development and the manner in which it may be carried out; and
- buffering and other attenuation works.

The court, in considering the efficacy of these conditions in sufficiently mitigating the potential impacts of the proposed development, referenced the following cases:

- *Elan Capital Corporation Pty Ltd and Anor v Brisbane City Council* [1990] QPLR 209, in which the Planning and Environment Court relevantly stated:

  "*It should not be necessary to repeat it but this Court is not the Planning Authority for the City of Brisbane. It is not this Court's function to substitute planning strategies (which on evidence given in a particular appeal might seem more appealing) for those which a Planning Authority in a careful and proper [manner] has chosen to adopt.*"

- *Broad v Brisbane City Council & Anor* [1986] 2 Qd R 317, in which the Supreme Court relevantly stated:

  "*There is no doubt that the concept of amenity is wide and flexible. In my view, it may in a particular case embrace not only the effect of a place on the senses, but also the resident's subjective perception of his locality.*"

The court affirmed (at [15]) that what these authorities indicated was that it was not the place of the court to move the boundaries of zones which delineated separate uses unless "*there are very good reasons for doing so and, further, that in determining what amenity consequences may follow, it is necessary not to construe potential amenity impacts too narrowly*".

In applying this reasoning to the present case, the court held (at [12]) that "*there [was] no basis for asserting that it is appropriate to move the residential/industry interface to within the residential precinct with the result being that the industrial activities the subject of the proposed development would occur immediately adjacent to residential uses*". The court also held that the boundary of the industrial zone was clear and well defined and that the encroachment of the proposed development into the distinct residential precinct would bring about unacceptable amenity impacts.

Moreover, the court found (at [16]) that the conditions were "*patently unenforceable in circumstances where an approval runs with the land and is binding on successors in title*" and that "*restricting a use of this type in this manner [was] unrealistic.*"

Sufficient grounds to justify approval despite the conflict

The court then considered whether or not there were sufficient grounds to justify approving the proposed development despite the identified conflicts and applied the established 'three-stage test' established in *Lockyer Valley Regional Council v Westlink Pty Ltd (as trustee for Westlink Industrial Trust)* [2013] 2 Qd R 302:

1. *examine the nature and extent of the conflict;*
2. *determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds; and*
3. *determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict.*

The court found that the nature and extent of the conflict between the proposed development and the relevant planning provisions of the council's planning scheme were major. The court was therefore satisfied that that there were insufficient grounds to justify approving the proposed development notwithstanding the conflict and dismissed the appeal.

Local governments can change the form of infrastructure after approving a conversion application

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Avenues Highfields Pty Ltd v Toowoomba Regional Council* [2017] QPEC 48 heard before Kefford DCJ

August 2017

In brief

The case of *The Avenues Highfields Pty Ltd v Toowoomba Regional Council* [2017] QPEC 48 concerned the following two proceedings and corresponding issues:

- *Originating Application* – where a decision is made to convert non-trunk infrastructure to trunk infrastructure, does section 662(3) of the *Sustainable Planning Act 2009* (**SPA**) give the council the discretion to impose a necessary infrastructure condition that changes the form of the development infrastructure?
- *Appeal* – do the circumstances warrant approving the conversion of the non-trunk infrastructure to trunk infrastructure?

The court ultimately found as follows:

- in respect of section 662(3) of the SPA, there is no requirement that the council impose a necessary infrastructure condition on the same, or substantially the same, terms as the original condition requiring non-trunk infrastructure; and
- in respect of the subject non-trunk infrastructure, it was not appropriate to convert it to trunk infrastructure because it failed to meet the relevant criteria for trunk infrastructure.

The council refused to convert roadworks infrastructure

The appellant intended to develop land located on the corner of the New England Highway and Cronin Road, Toowoomba into a master-planned residential community known as "The Avenues Highfields". Certain conditions of the development approval required the appellant to undertake external roadworks to upgrade Cronin Street, Barracks Road and Kuhls Road. The appellant applied to the council to convert non-trunk stormwater drainage and roadworks infrastructure required by the conditions to trunk infrastructure. The council approved the conversion of the stormwater infrastructure but refused to convert the roadworks infrastructure.

The parties disputed the proper construction of section 662(3) of the SPA

Section 662(3) of the SPA requires that "[w]*ithin 20 business days of making the decision [to convert non-trunk infrastructure to trunk infrastructure] the local government may amend the development approval by imposing a necessary infrastructure condition for trunk infrastructure.*"

The appellant submitted that the following were all reasons in support of its argument:

- "May" should be read as "must" and the council did not have the discretion to not impose a necessary infrastructure condition.
- Section 662(2) of the SPA operates such that a condition requiring the provision of non-trunk infrastructure no longer has effect, and as a consequence the developer is no longer obliged to provide reasonable and relevant infrastructure.
- The primary intention of a necessary infrastructure condition is to convert non-trunk infrastructure to trunk infrastructure, otherwise the development approval is shorn of a reasonable and relevant condition, leaving it potentially of no effect.
- It could not have been the legislative intention that an applicant, having successfully applied to convert non-trunk infrastructure to trunk infrastructure, is then faced with the risk of a different and potentially more onerous infrastructure requirement.

- If it was intended that the council be given fresh discretion to impose infrastructure conditions on the development it would flow that it would be accompanied by fresh appeal rights. However, the SPA contains no such appeal rights.
- Section 661 of the SPA presupposes that the outcome of approving a conversion application is that an offset or refund for trunk infrastructure will be available. There would be no utility in this if the council had the discretion to not impose a fresh condition requiring trunk infrastructure.

On the other hand, the council submitted that section 662(3) of the SPA gave it the opportunity to exercise a discretion to impose a necessary infrastructure condition requiring changed infrastructure.

The court found that section 662(3) of the SPA did confer discretion on the council to change the form of the development infrastructure

In short, the court found that section 662(3) of the SPA did confer discretion on the council to impose a necessary infrastructure condition that changed the form of the infrastructure.

Whilst the court opined that the appellant's arguments were compelling, it relevantly held as follows:

- The court rejected the appellant's argument that "may" in section 662(3) of the SPA is to be read as "must", citing relevant case law and legislation about the applicable principles of statutory construction.
- Interpreted literally, section 662(3) of the SPA permits the council to impose a necessary infrastructure condition or to not impose a necessary infrastructure condition. This is reinforced by section 662(4) of the SPA which starts with the word "if".
- Section 649 of the SPA applies in the event a necessary infrastructure condition is imposed and requires an offset or refund. Section 649 operates to neutralise adverse consequences for an applicant by compensating it for the difference between the establishment cost of the infrastructure and the amount for which it is responsible. The council therefore bears the financial burden of more onerous infrastructure, which reinforces the interpretation that the council may elect to condition the infrastructure works or undertake the infrastructure works itself.
- Had the legislature intended to limit the council's power such that the condition to be imposed after a successful conversion application was to be on identical terms as the original condition, it would have been a simple matter to legislate.
- Whilst there are no express appeal rights with respect to a necessary infrastructure condition imposed under section 662(3) of the SPA, there are protections afforded to an applicant in the SPA which includes the requirement that a conversion application be made before construction commences. This ensures that there are no wasted costs associated with any change required to the ultimate form of the infrastructure.

The court determined that the requirement to "have regard to" the conversion criteria does not require the council to adhere to the criteria

Section 660 of the SPA requires that the council, in determining the appellant's conversion application, "*have regard to*" the criteria in the council's charges resolution. Relevantly, section 7(a) of the council's Charges Resolution No.2 provided as follows:

> *(ii) construction of the infrastructure has not yet started;*
>
> *(iii) the infrastructure is inconsistent with the requirements for non-trunk infrastructure stated in section 665 of the SPA;*
>
> *(vii) the type, size and function of the infrastructure is:*
>
> *(A) consistent with the trunk infrastructure identified in the council's LGIP; or*
>
> *(B) consistent with the examples of trunk infrastructure stated for a network in Table 4.*

The court determined that the words "*have regard to*" required the council to only give "proper, genuine and realistic consideration" to the criteria in section 7. The council was not required to adhere to the criteria and had a broad discretion, such that it was not bound to decide the application in compliance with section 7 of the Charges Resolution No.2.

The court found the appellant's non-compliance with section 7(a)(ii) of the Charges Resolution No.2 was significant

Construction of Cronin Road had started.

The court found that section 658(b) of the SPA supported section 7(a)(ii) of the Charges Resolution No.2 by manifesting a clear intention that the commencement of construction of the non-trunk infrastructure was inconsistent with a conversion application. The court found no good reason to overlook the accepted fact that the appellant had commenced construction.

The court found that the appellant had failed to justify non-compliance with section 7(a)(iii) of the Charges Resolution No.2

The court found that the infrastructure was consistent with the requirements for non-trunk infrastructure as it would protect and maintain the safety and efficiency of the infrastructure network, being a criterion for a non-trunk infrastructure condition in section 665(2)(c) of the SPA.

The court held that the appellant had failed to establish firstly why the relevant conditions were erroneous and secondly that the roadworks already undertaken were more than required to protect and maintain the efficiency of the infrastructure network. Further, the court did not accept the appellant's argument that the non-compliance with section 7(a)(iii) of the Charges Resolution No.2 is to be given little weight on the basis that protecting or maintaining the efficiency of the infrastructure network applies to all roads and, as such, section 665(2)(c) of the SPA does not help to distinguish between trunk and non-trunk infrastructure.

The court found that the appellant's conversion application failed to comply with section 7(a)(vii) of the Charges Resolution No.2

The infrastructure was not identified in the council's LGIP and the court held that it was not consistent with the examples of trunk infrastructure in Table 4 in the Charges Resolution No.2.

The relevant example in Table 4 of the Charges Resolution No.2 was for land or works for major distributor roads having a minimum capacity of 5,000 vehicles per day and servicing a minimum of 500 residential lots. The court was satisfied that both roads would not carry traffic volumes to support classification as distributor roads. Whilst there was a theoretical capacity for both roads to carry 5,000 vehicles per day, it was not the likely reality. Lastly, the court was not satisfied that the roads would service 500 residential lots.

The court dismissed the appeal following the appellant's failure to satisfy the relevant criteria

The court held that the appellant's failure to satisfy the criteria in section 7(a)(ii), (iii) and (vii) of the Charges Resolution No.2 was not fatal as section 660 of the SPA does not mandate refusal.

Despite this, the court dismissed the appeal on the basis that the appellant had commenced works and that it was inappropriate to convert infrastructure which fails to meet the criteria for trunk infrastructure and thereby potentially entitles the applicant to an offset and refund.

The UK High Court gives an example of what would be a relevant matter for an impact assessable development application in Queensland

Nadia Czachor | Ian Wright

This article discusses the decision of the High Court of Justice of England and Wales in the matter of *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2017] EWHC 2057 (Admin) heard before John Howell QC

August 2017

In brief

The case of *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2017] EWHC 2057 (Admin) concerned an appeal to the High Court of Justice in the United Kingdom against the decision of the Secretary of State of Communities and Local Government to grant conditional planning permission for a residential development in the village of Newick.

Planning permission was refused by the local planning authority in the first instance. The applicant for the planning permission appealed the refusal to the Secretary of State and it decided to grant conditional planning permission for the Newick development.

The claimants in the appeal argued that the decision to grant the planning permission should be quashed because the Secretary of State should have made his decision consistent with his earlier decision in a comparable appeal, even though the parties did not supply the earlier decision. Relevantly, in the earlier decision concerning a development in a nearby village of Ringmer, the Secretary of State found that a planning instrument was not out-of-date. In the decision concerning the Newick development, the Secretary of State found that the same planning instrument was out-of-date. The decisions of the Secretary of State were contained in letters dated less than three months apart.

The case is interesting, despite being outside of the Australian jurisdiction, because it states that whether a matter is "*obviously material*" is not a relevant test for determining whether a decision-maker has acted as a reasonable decision-maker in the circumstances. The court preferred a simpler test, being to ask whether the matter is one that no reasonable decision-maker would have failed to take into account.

The Secretary of State refused to give planning permission for the Newick development for reasons incongruent with his decision in the Ringmer development only three months earlier

The planning framework was relevantly as follows:

- *Lewes District Local Plan* (LDLP) – a local planning instrument for the villages of, relevantly, Newick and Ringmer, adopted in 2003 and for the plan period to 2011. The LDLP contained Policy CT1 which required that development be contained within certain planning boundaries identified on a map.
- *Lewes District Local Plan – Part 1 – Joint Core Strategy* (JCS) – a local planning instrument also for the villages of, relevantly, Newick and Ringmer, adopted in May 2016 and for the plan period 2010 to 2030. The JCS contained Spatial Policies which, relevantly, required a minimum number of additional dwellings during the plan period in identified strategic sites and contained a site allocation process for more sites where required. Minimum additional dwelling requirements for Newick were to be met in identified strategic sites.
- *Newick Neighbourhood Plan* (NPP) – a local planning instrument with more nuanced planning outcomes for the village of Newick adopted in July 2015 and covering the period from 2015 to 2030. The NPP allocated sites to meet the minimum amount of new housing.

The decision-making process for the Secretary of State was relevantly as follows:

- *Inquisitorial hearing* – a public local inquiry chaired by an inspector at which interested parties make submissions about whether planning permission should be approved or refused.
- *Investigator's report* – a report prepared by the inspector chairing the public local inquiry containing recommendations about whether planning permission should be approved or refused.
- Secretary of State's decision letter – a letter given by the Secretary of State, after considering the investigator's report, either approving or refusing planning permission.

Some of the policies in the JCS expressly superseded policies in the LDLP. Policy CT1 was not superseded. As a legal consequence, the JCS could not have been lawfully adopted by the council unless the policies in the JCS were consistent with, relevantly, Policy CT1.

The Secretary of State refused to give planning permission for the Newick development on the grounds that Policy CT1 could not be relied upon as it was out-of-date because it restricted new housing to sites within the identified planning boundaries, which was inconsistent with the strategic aspirations in the JCS to develop within the identified strategic sites and other permissible sites. As a legal consequence, the "tilted balance" provisions of the National Planning Policy Framework could be relied upon which presume in favour of development where relevant policies are out-of-date and any adverse impacts of approval "*significantly and demonstrably*" outweigh the benefits.

In contrast, the investigator's report for the earlier Ringmer development stated that he "*found the JCS as a whole sound*" and that "*Policy CT1 should be regarded as up-to-date*" (at [25]). Consistent with the investigator's report, the Secretary of State issued his decision letter on 19 September 2016 and in it stated that "*Policy CT1 should be regarded as up-to-date*" (at [27]). The "tilted balance" was therefore not invoked.

The Secretary of State issued his decision letter approving the Newick development on 23 November 2016 and apparently ignorant of the earlier decision about the Ringmer development (at [30]).

The court held that no reasonable decision-maker in the circumstances could have ignored the Ringmer decision when deciding whether to give planning permission for the Newick development

There was no requirement expressed in an enactment or by necessary implication that the Secretary of State take the Ringmer decision into account when determining whether to give planning permission for the Newick development.

The applicant for the planning permission argued that the Secretary of State's decision was lawful, and could not be displaced on the basis that he failed to take into account the Ringmer decision because that decision was not placed before him by the parties.

The claimants in the appeal argued that the Ringmer decision was "*obviously material*" to the Newick decision and, as such, should have been taken into account. The claimants in the appeal argued that the Secretary of State's failure to have regard to the Ringmer decision offended the "*obviously material*" test derived from the case law and was therefore unlawful.

The court reaffirmed that the relevant test for invalidity was whether a reasonable decision-maker in the circumstances would have failed to take the relevant matter into account (at [149]). The court held that the Ringmer decision was a relevant matter for the Newick decision and, therefore, that the Secretary of State's decision about the Newick development was invalid having failed to take into account his earlier determination about the currency of Policy CT1.

The court dismissed the "obviously material" test as being appropriate when determining whether a decision-maker has acted as a reasonable decision-maker in the circumstances

The court held that the "*obviously material*" test was not a desirable test because it could tempt the court to decide based on what in its view was "*obviously material*". To cast the test as being whether something is "*obviously material*" would require the court to firstly determine how significant or obviously material the matter was and secondly the likely availability of the matter, and that a more complicated test formulation was likely to mislead or produce an incorrect result.

The court preferred a simpler test, that being to "*ask only whether the matter is one that no reasonable decision-maker would have failed to take into account in the circumstances*" (at [151]).

Applying that test to the case, the court held that the Secretary of State, acting as a reasonable decision-maker in the circumstances, should have taken reasonable steps to ensure that his decision about the currency of Policy CT1 was consistent with his other decisions about its currency.

The court therefore held that the Secretary of State's determination that Policy CT1 was out-of-date was invalid and that the “tilted balance” therefore should not have been applied. The Secretary of State's decision was therefore quashed and, absent sufficient grounds to grant planning permission, planning permission was refused.

In the Queensland context, it is our view that if the Planning and Environment Court was required to adjudicate a similar dispute under the *Planning Act 2016*, the earlier determination about the currency of Policy CT1 may be considered an "*other relevant matter*" to which an assessment manager could have regard when assessing impact assessable development under section 45(5)(b) of the *Planning Act 2016*.

Development application for a synagogue refused due to inadequate security assessment of a terrorist threat

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Land and Environment Court of New South Wales in the matter of *Friends of Refugees of Eastern Europe v Waverley Council* [2017] NSWLEC 1404 heard before Brown C

August 2017

In brief

The case of *Friends of Refugees of Eastern Europe v Waverley Council* [2017] NSWLEC 1404 concerned an appeal commenced in the Land and Environment Court of New South Wales against the Waverley Council's decision to refuse a development application for the demolition of synthetic tennis courts and ancillary buildings, and the construction of multiple dwellings, an underground car park and a Jewish synagogue.

The key issues before the court were whether the site was unsuitable to accommodate the proposed synagogue because of potential risks to future users and the general public, and whether the proposed development appropriately responded to the context and character of the existing residential streetscape.

To determine the matter the court had regard to written submissions from both parties, including evidence from experts in the fields of town planning, urban design and security.

The court found that the proposed development was not obligated to adopt the characteristics of the existing residential streetscape but dismissed the appeal and upheld the council's decision to refuse the development application on the basis that the applicant failed to sufficiently consider potential terrorist threats against the proposed synagogue, adjoining properties and the public.

The council refused the applicant's development application

The applicant lodged a development application with the council seeking approval for the demolition of tennis courts and ancillary buildings, and the construction of a proposed synagogue, underground car park and two, three-storey multiple dwellings containing 32 units.

The site, located at 105 Wellington Street, Bondi, was included within the R3 - medium density residential zone of the *Waverley Local Environmental Plan 2012*. The proposed synagogue, being a "place of public worship", and the proposed multiple dwellings were both permissible land uses within this zone.

The council refused the development application for the following reasons:

- the proposal did not respond to the context, character and streetscape of the area or provide for an appropriate residential identity;
- unacceptable amenity impacts, including loss of solar access, noise and privacy; and
- potential risk to users and other members of the general public.

The court held that it was not necessary or appropriate to require the proposed synagogue to adopt the characteristics of the existing residential streetscape

The proposed development positioned multiple dwellings at the rear of the site and behind the proposed synagogue, which dominated the site's frontage to Wellington Street.

A town planning expert for the council stated that the proposed development's land use, frontage, lot depth and built form would create an anomaly as Wellington Street was otherwise characterised by a consistent rhythm of lot sizes, setbacks and one and two-storey detached and semi-detached residential buildings with interspersed houses.

The council's expert was also of the opinion that as the proposed synagogue was to be located within an existing residential neighbourhood and was intended to serve the local community, it should present an open frontage with a readily identifiable and level access.

Town planning and urban design experts for the applicant stated that the proposed development was not obligated to prioritise residential land uses over the proposed synagogue as places of worship have long been an essential element of residential neighbourhoods.

The applicant's experts found no consistent setback along Wellington Street and highlighted that amendments to the proposed development, including the removal of high perimeter walls, allowed for a balanced streetscape with clearly defined and landscaped pedestrian and vehicle access points.

The court found that it was neither necessary nor appropriate for a non-residential land use that is otherwise permissible within the zone to have to adopt the characteristics of the existing residential streetscape. The court was satisfied that the proposed synagogue would not unacceptably impact on the streetscape and character of the local area.

The council submitted that evidence relied upon by the applicant confirmed the proposed synagogue posed a potential unacceptable threat to future users and the local community

The applicant commissioned a Preliminary Threat and Risk Analysis (PTRA) to support the construction of protective walls on the front and side boundaries to protect the proposed synagogue.

The protective walls were ultimately replaced with lower, open, palisade fencing.

However, the council relied on the contents of the PTRA to contend that the proposed synagogue posed a potential safety and security risk to future users, nearby residents and pedestrians in Wellington Street and should therefore be refused.

The council submitted that the PTRA identified that Australia faced an ongoing threat of "at home" terrorism as a consequence of its military operations against ISIS and that anti-semitic undertones pervaded much of ISIS' literature. The council also argued that the PTRA identified the risk of a number of possible scenarios, including car bombings, parcel bombs, suicide bombers, small arms attacks and riots.

However, and most importantly, the council argued that whilst the PTRA identified a number of potential threats, it failed to assess the impact on nearby residents, motorists and pedestrians in Wellington Street as a consequence of the identified potential threats. In support of its contention, the council relied upon the concerns of local residents who had "*expressed great concern for their own safety and that of their family and property*" (at [37]).

The applicant argued that the evidence did not raise any specific safety and security concerns as a result of the proposed synagogue

In response, the applicant contended that the PTRA did nothing more than relevantly state that Jewish communities worldwide are "*no stranger to the threat of violence*" and, as such, "*security measures* [are taken] *into account when planning, constructing and renovating buildings*" (at [40]). In particular, the applicant argued that the council misread and misapplied the evidence before the court in that it mistakenly argued that the evidence identified the proposed synagogue as a threat, and that there was consequential risk and likely harm.

The court held that there was a potential unacceptable risk of harm

The court was persuaded that there was no evidence to suggest that the proposed synagogue was a specific target for attacks. Rather, it held that the PTRA identified a potential unacceptable risk of harm to Jewish communities around the world and in Australia which, in turn, was enough to confirm the need to address security for the proposed synagogue.

The court held that using Crime Prevention Through Environmental Design (CPTED) strategies was not a reasonable response and greater consideration of the risk and risk response was required

The court had regard to guidelines produced by the New South Wales Department of Infrastructure, Planning and Natural Resources under section 79C of the *Environmental Planning and Assessment Act 1979*. Section 79C relevantly provides that consent authorities may refuse or modify a development application where the risk of crime cannot be minimised. Relevantly, the guidelines require that development be subjected to a formal crime risk assessment in conjunction with police before consideration be given to CPTED strategies.

The court found that, whilst the applicant's security expert had considered the threat of terrorist attacks on the Jewish people at an international and national level, insufficient consideration had been given to site specific threats or to the protection of the local community. The court also noted that whilst "crime" encompasses many activities, CPTED may be an inappropriate response to terrorism. The court went so far as to say that a more sophisticated risk assessment process may be required where a potential terrorist threat is identified.

Outcome of the appeal

Whilst the court was satisfied that design amendments had resolved concerns about the proposed synagogue's physical impacts, it found that a more sophisticated assessment was required to address potential threats to safety and security.

The court ordered that the appeal be dismissed and that the development application be refused.

Planning and Environment Court finds no reasonable requirement for imposing conditions on a development approval

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wust v Moreton Bay Regional Council* [2017] QPEC 27 heard before Bowskill QC DCJ

September 2017

In brief

The case of *Wust v Moreton Bay Regional Council* [2017] QPEC 27 concerned an appeal to the Planning and Environment Court against the council's deemed refusal of a development application for a material change of use for a multiple dwelling on land located at 165 - 169 Caboolture River Road, Morayfield.

Whilst the council agreed that the appeal should be allowed and a development permit be granted, the parties remained in dispute over two conditions requiring the reorientation of the dwellings and the provision of a pedestrian connection at the rear of the development.

Town planning experts for both parties disagreed as to whether the application was in conflict with the relevant planning schemes. Ultimately, the court found that the disputed conditions were not required and that the application would not conflict with the planning scheme in the absence of the conditions.

The applicant sought approval for multiple dwellings in a transitioning area of Morayfield

The applicant owned two lots with frontage to both Caboolture River Road and Cox Drive. A development approval was sought for a staged material change of use for 20 single-storey multiple dwellings in the form of detached housing.

The parties' experts agreed that the locality surrounding the proposed development was transitioning from 4,000m^2 lots to an increasingly urbanised character and that the council had previously approved an identical development within one block of the proposed development.

The applicant disputed the justification for imposing particular conditions

The parties agreed that a development permit should be granted but disagreed in relation to the imposition of the following conditions:

- Condition 2(a)(i) to (iv), which required that dwellings one and ten be reoriented to face Cox Drive.
- Condition 2(v), which required the construction of a pedestrian connection between the southern end of the development and Caboolture River Road.

The council submitted that the conditions were required to prevent conflict with both the *Caboolture Shire Planning Scheme 2005* and the *Moreton Bay Regional Council Planning Scheme 2016*.

The applicant argued that the development application was not in conflict with either planning scheme and that the conditions imposed by the council failed to meet the requirements of reasonableness and relevance under section 345(1) of the *Sustainable Planning Act 2009* (**SPA**).

The court set out the framework for assessing the development application before reviewing the parties submissions

The appeal was an applicant appeal under section 461(1) of the SPA. Section 495(1) of the SPA requires that such an appeal is heard anew by the court. Section 495(2) of the SPA required the court to assess the application based on the laws and policies applying at the time of the application, but allowed consideration of new laws and policies.

The 2005 planning scheme was in effect at the time the development application was first lodged with the council. The council argued that the 2016 planning scheme should be given significant weight. The court held that while it may be considered it would not affect the decision in a meaningful way.

The 2005 planning scheme included the land within the Residential A zone, under which the proposed development was impact assessable. As the application was subject to impact assessment, section 326(1)(b) of the SPA required that the court's decision not conflict with the planning scheme, unless there are sufficient grounds to justify a decision to approve despite the conflict.

The court defined the term "conflict" to be variance with or disagreement with and the term "grounds" to be a matter of public interest, excluding the personal circumstances of the applicant.

The court rejected submissions that dwellings 1 and 10 should be reoriented to reflect traditional Queensland design elements

Specific outcome 4 of the Residential A zone code under the 2005 planning scheme required the scale, form and bulk of a dwelling to incorporate "traditional Queensland design elements". The council's expert considered the phrase to have the same meaning as "traditional building character elements" as used in the overlay codes designed to protect pre-1947 housing.

The council's expert highlighted that a core principal of this design standard was that dwellings were oriented to face the street. The applicant argued that the layout of the houses already ensured casual surveillance of Cox Drive from kitchen windows and rear patios.

The court rejected the interpretation adopted by the council's expert, finding that it would have been straightforward for the drafters of the 2005 planning scheme to make this link clear if that was their intention. The court relied on an overall outcome of the zone code to broadly interpret traditional Queensland design elements to require dwellings to be responsive to Queensland's climate. The court found the proposal achieved this standard.

The court determined that the reorientation of the dwellings would not improve the balance of public and private open space

The council's expert argued that the proposed development failed to comply with specific outcome 13 of the Residential A zone code under the 2005 planning scheme on the basis that it did not optimise reciprocal amenity or functionality and interaction between the private and public domains.

The court preferred the opposing evidence of the applicant's expert, finding that the arrangement of the dwellings around a singular driveway allowed for convenient access while providing for an appropriate balance of private and public open spaces that promoted opportunities for casual surveillance.

The court found that the proposal provided for an acceptable standard of design and access

The council argued that the application failed to comply with specific outcomes 3 and 5 of the Medium density residential zone code of the 2005 planning scheme, which required development to provide for a "high standard of design" and entries that are clearly visible to visitors from the street and driveway.

The court found that simply turning the dwellings around would not produce a higher standard of design. The court also observed that the reorientation of the dwellings would require significant consequential changes to the proposed development such as the relocation of parking spaces. After observing photographs of the nearby identical development, the council's arguments concerning the visibility of the entrances were described as pedantic.

The court also disagreed with submissions stating the proposal failed to comply with specific outcomes requiring the incorporation of Crime Prevention Through Environmental Design principles. The court found that the open central driveway and orientation of the dwellings provided significant opportunity for casual surveillance while respecting the need for residential privacy.

The court found that the construction of a pedestrian pathway would produce negative impacts

The council's conditions required the construction of a 1.5 metre wide pedestrian pathway between dwellings 5 and 6 to connect the development to Caboolture River Road. The council's expert argued that the pathway was needed to ensure the proposed development was permeable and conducive to active transport.

The applicant's planning expert argued that there was no reasonable basis or benefit to justify the construction of the pathway. The applicant's expert advanced the argument that the pathway would reduce the available open space and significantly reduce the safety and amenity of residents by encouraging unrelated visitors to pass through the site.

The court agreed with the applicant's expert finding that the pathway had limited potential benefit and considerable detrimental effects on the amenity of future residents, including reducing the private open space adjacent to each dwelling to no more than 75 centimetres in width. It was also observed that the pathway ultimately failed to provide the most efficient route to Caboolture River Road.

The court found that the application was not in conflict with the planning schemes and allowed the appeal

The court held that the development application would not be in conflict with either the 2005 planning scheme or 2016 planning scheme in the absence of the disputed conditions. Accordingly the court found that there was no reasonable or relevant basis for the conditions and ordered that the appeal be allowed.

Planning and Environment Court considers the reasonableness and relevance of conditions imposed upon a quarry

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors* [2017] QPEC 35 heard before Robertson DCJ

September 2017

In brief

The case of *Parklands Blue Metal Pty Ltd v Sunshine Coast Regional Council & Ors* [2017] QPEC 35 concerned an appeal by the applicant for a development approval against conditions imposed by the council, in respect of a development permit for a material change of use for an extractive industry (quarry) at Yandina.

The issues in dispute related to the relevance and reasonableness of conditions for the following:

- the timing of a haul route upgrade;
- the standard to be adopted for the construction of the haul route;
- the financial responsibility for the upgrade and the ongoing maintenance of the part of the haul route that was owned by the respondent;
- aviation safety.

The court found in favour of the council in respect of all conditions, save in respect of aviation safety.

Timing of the haul route upgrade

The applicant had previously agreed that the haul route should be upgraded to the appropriate standard before the use commenced and this was common ground between the parties. The issue in dispute, however, related to what constituted commencement of the use in the context of the development permit for a material change of use for an extractive industry.

The council's argument relied on the definition for a "material change of use" and "use" under the *Integrated Planning Act 1997*, being the relevant assessment framework at the time, whereas the applicant relied on the definition of "extractive industry".

In considering the issue, the court had regard to the decision of the Queensland Court of Appeal in *McDonald v Douglas Shire Council* [2003] QCA 203 where it was held that in determining whether a use has commenced, one must "*look at the approval, identify the particular use envisaged by that approval, and ask has that particular use commenced. Recourse to the general definition of use … is therefore* [in the Court's view] *unhelpful*".

The court found that this construction of "commencement" favoured the applicant, namely that the use commenced when an "extractive industry", as defined in the council's planning scheme, commenced.

Nonetheless, in the exercise of its discretion as to what conditions should be imposed, the court had regard to traffic safety and amenity impacts and, on that basis, held that conditions which required the haul route to be fully and adequately upgraded in the "preparation phase" were reasonably required as a consequence of the development.

Standard of the haul route upgrade

It was common ground between the parties that certain sections of the haul route were flood prone. A report prepared by the parties' flood experts offered three options to overcome the flooding issues.

The first option, which was preferred by the respondent, involved the construction of a concrete floodway. The second option involved the construction of a raised road pavement on a fill embankment. Neither parties preferred this option as it was generally accepted that it was not economically viable.

The third option, which was preferred by the applicant, involved among other things, the construction of surface and sub-surface drains.

The council argued that the third option was wholly unsatisfactory on the basis that it increased the risk of damage to the haul route immediately after flooding events and therefore, while the least expensive in terms of capital costs, required higher maintenance costs. In response, the applicant proposed to restrict heavy vehicle movement on the haul route for a period of time proceeding a flood event.

The court was satisfied that the third option was a reasonable response to the flooding issues associated with the haul route, subject to the further qualification as to restrictions of usage immediately after flood events.

Cost of the haul route upgrade

The council's planning scheme revealed their intention to allocate $1.95 million for upgrading and sealing of the haul route within 10 years. To that end, the applicant contended that its forward planning expenditure should in some way be offset against its primary responsibility to pay for the upgrade.

The court, in finding that the evidence was not conclusive that the $1.95 million would be spent, held that the major user and beneficiary of the haul route would be the applicant and, in that regard, it was not unreasonable for it to bear the whole cost of constructing the haul route.

Likewise, in respect of maintenance, the court held that because the majority of the maintenance and repairs to the haul route would be occasioned by vehicle traffic generated by the development, the conditions requiring the applicant to pay for all maintenance costs were reasonable, relevant and not an unreasonable imposition on the applicant.

Aviation safety

The issue of aviation safety concerned blasting protocols and their impact on airport operations. To address the issue the council imposed a condition that the applicant undertake an aeronautical study to properly inform the terms of the blast protocol. The applicant contended that no aeronautical study was necessary as the risks were too remote.

The court agreed with the applicant that on the basis of the aeronautical experts' evidence the risk was remote and that the condition should be removed.

Land Court dismisses an appeal on the basis of inadequate evidence and a valuation based on a false assumption

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Heatham Pty Ltd as Trustee v Valuer-General* [2017] QLC 26 heard before WA Isdale

September 2017

In brief

The Land Court's decision in *Heatham Pty Ltd as Trustee v Valuer-General* [2017] QLC 26 concerned an appeal against the Valuer-General's value of the appellant's land at 429 Fairfield Road, Yeronga. The landowner argued that the value was not supported by comparable sales and was excessive. The landowner further contended that the best use of the land was for residential purposes as a four storey residential development with underground car parking, contrary to the Valuer-General's valuation.

The court found that both the landowner's valuer and the Valuer-General erred in their valuation method. In particular, the court found significant errors in the approach used by the landowner's valuer whose evidence was based on a false assumption that the highest and best use of the land was as a residential development.

The court found that the assumption of the landowner's valuer was contrary to the relevant planning scheme, being the *Brisbane City Plan 2014*, as the planning scheme allowed a code assessable mixed use development in a district centre.

The court ultimately held that the landowner failed to discharge its onus of proof with respect to any of its grounds of appeal. The court ordered that the appeal be dismissed and that the valuation appealed against be confirmed.

Highest and best use of the land

The Valuer-General valued the land at $3,800,000 whereas the landowner argued that the valuation should be $3,000,000. The Valuer-General contended that the highest and best use of the land was as a code assessable mixed use development in a district centre. The landowner's valuer contended that the highest and best use of the land was as residential land.

The Valuer-General claimed that the landowner had failed to discharge its onus of proof under section 169(3) of the *Land Valuation Act 2010* on the basis that the landowner's valuer had not followed the method claimed to have been applied, and had provided insufficient evidence to support the claim that a residential development was the highest and best use of the land.

Landowner's valuation report

The court held that the landowner's valuer had inconsistently valued the comparable sales. The court found that out of the four sales contained in the report, only one applied the direct comparison approach. The comparable sales relied upon by the landowner were as follows:

- **Landowner's Sale One** – Sale one was identified by the court as the best comparable sale. It was located at 295 Fairfield Road, Yeronga. It was sold on 14 August 2014 for $4,500,000. The Valuer-General valued the land at $3,800,000 on 1 October 2014. The landowner's valuer valued the site at $5,000,000. This price was established by taking into account the costs associated with decontamination, flood mitigation, and infrastructure credits. The landowner's valuer relied upon a figure of $373 per square metre by dividing the sale price by the total useable area.
- **Landowner's Sale Two** – Sale two was land situated at 586 Sherwood Road, Sherwood. It was sold for $510,000 in November 2013 and was zoned for a medium density residential use. The court noted that the landowner's valuer did not take into account the age of the sale, being 11 months before the valuation date. The sale price equated to a rate per square metre of $630. The landowner's valuer however applied $654 per square metre as the purchaser of the land had improved the land by developing a four storey, 12 unit development. The court found fault in this approach as it did not relate to the sale of the land, and therefore the price of $654 per square metre should not have been considered. The price was not reflective of the initial sale of the land and was analysed on the applied value.

- **Landowner's Sale Three** – The court found again that the landowner's valuer did not apply the alleged valuation method of direct comparison. It was established by the court that the land should have been valued at a figure of $315 per square metre. The landowner's valuer valued the land on its sale price and did not take into account improvements made and the loss of land. Furthermore, no allowance was made for the fact that parts of the analysed land were categorised under the *Brisbane City Plan 2014* as having high ecological significance.
- **Landowner's Sale Four** – The landowner's valuer valued the land on the basis of its applied value. The error in this approach was that the sale price which the landowner's valuer utilised was not for the entire property, rather a 7/8 interest in the land. This approach was rejected by the court as it was deemed unreasonable.

Valuer-General's valuation report

The Valuer-General provided five comparable sales. These sales were subject to criticism by the landowner's valuer and also the court.

- **Valuer-General's Sale One** – The first comparable sale was located at 60 Shottery Street, Yeronga. The land was sold on 24 March 2015. This land was the Valuer-General's primary sale as it was close to the subject land and had the same zoning. The landowner's valuer however had concerns about the valuation date. The valuation of the subject land was 1 October 2014. The landowner's valuer asserted that the sale date of this land was significantly after the valuation date of 1 October 2014 and therefore could not be used as a comparable sale.
- **Valuer-General's Sale Two** – Sale two consisted of three houses located at 15, 17 and 221 Yeronga Road, Yeronga. These properties were bought on 12 July 2013 and demolished to obtain an area of 1,169m². This area was zoned medium low density. The landowner's valuer argued that this land was an unsuitable comparison due its earlier sale date, and because it was considerably smaller and possessed a different zoning. The court also noted that the valuation did not allow for demolition costs or infrastructure charges credit.
- **Valuer-General's Sale Three** – The land used for this comparison also did not take into account associated demolition costs or infrastructure charges credits. The land was located at 902-906 Logan Road, Holland Park West. It was smaller than the subject land, being 2,430m², and possessed uninterrupted city views.
- **Valuer-General's Sale Four** – Sale four, located at 90 Waldheim Street, Annerley, was sold for $4,200,000 on 13 May 2015. The landowner's valuer had concerns about the settlement date, sale price including GST, and that, again, there was no allowance made for demolition costs or infrastructure charges credits associated with the land.
- **Valuer-General's Sale Five** – Sale five sold for $3,100,000 on 28 November 2011. It was included in the emerging community zone and was located at 587 Barrack Road, Cannon Hill. The landowner's valuer argued that the lot required a retaining structure and therefore required an adjustment to the price to account for that. The landowner's valuer highlighted that the Valuer-General failed to do this.

The court found that there were significant weaknesses to the Valuer-General's evidence. The Valuer-General's sales matrix lacked information such as infrastructure charges credits and demolition costs. The court also noted that the Valuer-General's report was inadequate and not sufficient. The adequacy of the Valuer-General's report was not however a question for the court to decide and thus had no impact on the outcome of the appeal.

Appeal dismissed

The principle error in the landowner's case was that the highest and best use of the land was as a four storey residential development. The court referred to *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1987-86) LGRA 410 as having analogous circumstances being that a value was tainted by error in applying an incorrect principle to establish the highest and best use of the land. The court noted in that case that "*the first task of the valuer is to determine what [the land] use is and then to value the land on [that] basis*". In the subject appeal, the court found that the landowners' valuer had not correctly executed these tasks.

The court noted that under the *Brisbane City Plan 2014* the zoning for the subject land allowed for mixed uses comprising retail, commercial, residential, offices, administrative and health services, community, and small scale entertainment and recreational facilities capable of servicing a district. The subject land was a retail space which included a shopping centre and child care facility with underground car parking. Contrary to the planning scheme, the landowner's valuer argued that there was limited demand in the area for a mixed use development. During cross examination the landowner's valuer did not offer any evidence to support that claim. The court could therefore not find that the highest and best use of the subject land was residential development. The court did however find that there is a demand for mixed use development due to the relevant planning scheme. The court ultimately found that the landowner had failed to discharge its onus of proof on any of its grounds of appeal. The appeal was dismissed and the valuation appealed against was confirmed.

Land Court dismisses appeal concerning valuation of land

Nina Crew | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Beydoun v Valuer-General* [2017] QLC 36 heard before FY Kingham

September 2017

In brief

The case of *Beydoun v Valuer-General* [2017] QLC 36 concerned an appeal to the Land Court by the appellant against the Valuer-General's rejection of the appellant's objection to the assessment of the appellant's site located at 227 McLeod Street, Cairns.

The court ultimately found that the appellant had not discharged the onus of proof that there was an error in the Valuer-General's original assessment and accordingly the appeal was dismissed.

The court stated that the appeal was a re-hearing limited to the grounds of the appeal where the onus of proof on the balance of probabilities was borne by the appellant

The appellant's site value was assessed by the Valuer-General to be $305,000 as at 1 October 2015. The appellant objected to the Valuer-General's assessment, instead contending that the site value was no more than $230,000, being the assessment by the Valuer-General as at 1 October 2014. The Valuer-General rejected the objection.

The appellant subsequently appealed the Valuer-General's rejection and relied upon the following grounds of appeal:

- the increase in the Valuer-General's assessment was not justified because real estate values in Cairns had fallen;
- the Valuer-General's assessment did not adequately account for the disadvantages of the site;
- the Valuer-General's assessment was excessive compared to the Valuer-General's assessment of the adjacent property at 229 McLeod Street, Cairns.

The court stated that the appeal was a re-hearing which was limited to the grounds of appeal and that the appellant held the onus of proof on a balance of probabilities.

The court found that the appellant's argument in respect of a falling real estate market did not challenge the Valuer-General's assessment of the site

The appellant argued that the Valuer-General's assessment of the site was not justified on the basis that the report by Herron Todd White called CairnsWatch, stated that the "*Cairns median house price trend is continuing to slowly ease… to be 4.3.% lower than it was in October 2015*".

The court determined that the appellant's reliance on the extract of the report did not challenge the Valuer-General's assessment for the following reasons:

- the statement made in the report formed part of a trend analysis of the Cairns region as a whole;
- the report provided for a median property price which did not necessarily equate to movements in individual sales;
- the report related to trends for properties rather than land prices;
- the report related to a period which was after the date of the Valuer-General's assessment of the site.

The court found that the Valuer-General's assessment did adequately account for the disadvantages of the site

The appellant argued that the Valuer-General's assessment was excessive because it did not adequately account for the site's narrow 12 metre frontage which constrained development and the issues with drainage on the site after heavy rain. The appellant contended that the combination of these disadvantages meant that the value of the site was worth 25% less per square metre than the adjoining property at 229 McLeod Street.

Firstly, the Valuer-General accepted that the narrow frontage was a disadvantage of the site and stated that the site value would have been assessed at a much higher rate if the site had the typical 20 metre frontage. The Valuer-General submitted that it ultimately relied on the analysis of the sale of 28 Grove Street, Cairns which had a comparably narrow frontage of 11 metres to assess the value of the site.

Secondly, the Valuer-General did not accept that the drainage issue represented a significant issue in assessing the value of the site and stated that each of the comparable sales involved land which would have required minor site works prior to development. The court accepted the Valuer-General's submission that if the site was vacant the drainage issue could be resolved by some minor earthworks. As such, the court was not persuaded by the appellant that the Valuer-General's assessment failed to adequately assess the disadvantages of the site.

The court found that the assessment of 229 McLeod Street was not a comparable sale and therefore the Valuer-General's assessment was not excessive

The Valuer-General valued the site to be $301.38 per square metre which the appellant argued was excessive given that the Valuer-General had assessed the adjacent site at 229 McLeod Street to be $278.95 per square metre for a 3,549m^2 block of land.

The court accepted the Valuer-General's submission that it was an accepted valuation principle that the rate per square metre was lower for larger properties.

The appellant also referred to the percentage increase in the last two assessments of the site to support the argument that the Valuer-General's assessment was excessive. However, the court held that the percentage increase in the assessment of the site did not demonstrate that the assessment was excessive "*if it is supported by bona fide sales of comparable parcels of land*".

The court found that the sales data relied upon by the Valuer-General provided an appropriate basis for assessing the value of the site. Further the court determined that the appellant did not establish that the Valuer-General incorrectly analysed the comparable sales for the site and the appeal was dismissed.

Land Court dismisses application for costs after determining conduct did not bear the hallmarks of frivolity or vexatiousness

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *The Trust Company Limited v Valuer-General* [2017] QLC 29 heard before WL Cochrane

September 2017

In brief

The case of *The Trust Company Limited v Valuer-General* [2017] QLC 29 involved an application for costs in the Queensland Land Court. The issue before the court was whether an order for costs on the standard basis should be made in favour of the Valuer-General, following the Trust Company Limited filing a notice of discontinuance that was not consented to.

The appellant withdrew from an appeal against a decision of the Valuer-General following a joint meeting of experts. The Valuer-General sought costs on the basis that the appellant had engaged in vexatious or frivolous conduct that necessitated its participation in needless interlocutory proceedings which incurred unwarranted costs.

The court found that it was entirely reasonable for the appellant to withdraw from the proceedings following a re-evaluation of prospects after the experts' meeting. The appellant had not behaved in a frivolous or vexatious manner by promptly providing notice of its intention to withdraw from the proceeding.

The Valuer-General engaged expert witnesses and participated in interlocutory proceedings in response to the appellant's actions

The parties attended a preliminary conference before the Judicial Registrar within two months of the appellant filing a notice of appeal. The matter was listed for a directions hearing at which interlocutory orders were made. The parties exchanged lists of documents and the appellant served its grounds of appeal within a month of the directions hearing.

Soon after the Valuer-General filed and served its statement of facts, matters and contentions. The matter was listed for review on 10 June 2016 and expert witnesses were named. A consent order was made requiring, among other things, a meeting of the experts. The appellant wrote to the Valuer-General four days after the meeting to seek its consent to withdraw from the proceedings.

The Valuer-General claimed costs on the basis that it was forced to incur harm by responding to the appellant's frivolous or vexatious conduct

The Valuer-General made submissions that the appellant's participation in interlocutory steps prior to seeking to withdraw the appeal caused harm and amounted to frivolous or vexations conduct. The Valuer-General's submissions specifically argued that the appellant's conduct forced the following to occur:

- proceedings that could have been avoided if the appellant withdrew at the conclusion of the court supervised preliminary conference;
- the unreasonable, unnecessary and unjustified preparation of a response in the proceedings;
- an inappropriate and inefficient use of the court's resources.

The court found that frivolous proceedings and vexatious proceedings are not the same thing. The court stated that a proceeding is frivolous if it is brought without any real prospect of success, whereas a proceeding is vexatious if it is brought with a purpose of embarrassing or prejudicing the other party.

Whilst the court has an unfettered discretion to award costs its decision must be supported by an explanation and have been made for compensatory rather than punitive purposes

The relevant basis for the court's power to award costs is under section 34 of the *Land Court Act 2000*. Rule 18 of the *Land Court Rules 2000* relevantly provides that if an appellant withdraws from proceedings, the court may order the appellant to pay the costs of the party to whom the discontinuance or withdrawal relates if the party has not consented to the discontinuance and the costs of the other party are caused by the discontinuance or withdrawal.

The court noted that whilst section 34 of the *Land Court Act 2000* provides the court with unfettered discretion to award costs it is a decision that must be exercised judicially and be supported by explanation and substantiation.

The court held that the power to award costs is not punitive. It is a compensatory power that seeks to award costs to the successful party to cover the expenses it has incurred as a consequence of the legal proceedings. The court held that the engagement of an expert and that expert's attendance at a meeting of the parties amounted to a serious commitment.

The Valuer-General drew the court's attention to decisions in which costs were awarded for various failings on the behalf of particular parties

The Valuer-General made submissions citing that the Land Appeal Court has generally emphasised the desirability of easy access to the Land Court to air grievances. The Valuer-General cited a number of cases in which the court held that such access should be available without fear or costs being awarded except in special circumstances.

The Valuer-General's submission also drew the court's attention to two cases in which costs were awarded. In *Chief Executive, Department of Natural Resources and Mines v Sabina Three Gorges Corporation Ltd* [2001] QLC 26 the court awarded costs after finding that the appellant's withdrawal was driven in part by a failure of strategy which treated the proceedings as a test case.

In *Permanent Trustee Australia Ltd as Trustee and Anor v Department of Natural Resources and Mines* [2002] QLC 93 the court awarded costs after a notice of discontinuance was filed 10 days prior to a set hearing date, without explanation and after several prior adjournments and interlocutory proceedings.

The court held that the cases cited by the Valuer-General were of little utility to the current proceedings.

The court found that the appellant acted promptly and reasonably after re-evaluating its position following the joint experts' meeting

The court found that the appellant acted promptly by filing the notice of discontinuance within four business days of the experts' meeting. The court held that it was reasonable to conclude that the appellant had given proper consideration to its prospects following the joint expert meetings.

In light of these findings the court held that there was no material before it that would satisfactorily support a determination that the appeal against the Valuer-General's valuation was frivolous, or doomed to fail before it was commenced. Accordingly, the court ordered that the application for costs be refused.

Valuation expert values the wrong thing yet the court still finds value in the evidence

Sinead Garland | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Suncorp Metway Insurance Pty Ltd v Valuer-General (No. 2)* [2017] QLC 46 heard before WA Isdale

September 2017

In brief

The case of *Suncorp Metway Insurance Pty Ltd v Valuer-General (No. 2)* [2017] QLC 46 concerned an appeal against the Valuer-General's valuation of the site on which, in general terms, the Sofitel Hotel is located in the Brisbane CBD.

The Valuer-General's valuation was originally $39,500,000 but was subsequently reduced during the course of the appeal to $34,500,000.

The appellant contended that the site had no value or a nominal value of $1 because of its unappealing location and the restrictions on construction. Alternatively, if a certain development was possible, the appellant contended that a site valuation of $13,180,000 was appropriate.

The court found that the Valuer-General's valuation expert had valued the wrong thing and the evidence was therefore based on significant errors of fact. However, the court still found some utility in the evidence.

The court ultimately found that the appellant's valuation expert's evidence was the better evidence, despite the court cautioning the expert for being argumentative. The court allowed the appeal and reduced the valuation to $13,180,000.

Valuer-General's valuation expert valued the wrong thing

The court had to first determine what was to be valued.

The appellant contended that the appeal concerned Lot 2, being a volumetric lot with a footprint having an area of 7,432 square metres. The lot sits within the volumetric lot which is over Central Station in the Brisbane CBD.

In the course of the appeal, the Valuer-General wrote to the appellant and reduced the amount of the valuation but, in doing so, referred to the property in question as being land the subject of certain leases, being leases to the appellant from Queensland Rail. Further, the Valuer-General later sought to amend its statement of facts, matters and contentions so that the land being valued included the leases to Queensland Rail.

The court was not satisfied that such an amendment was possible and held that the thing being valued was Lot 2, being the volumetric lot having a footprint of 7,432 square metres and not including the leases to Queensland Rail. As such, the Valuer-General's valuation expert had valued the wrong thing.

Although the court found that the Valuer-General's valuation expert had valued the wrong thing, the court still found some utility in the evidence. The court stated that the evidence was still useful in considering whether the appellant's valuation expert had applied the correct rate for determining the value of the site.

Appellant's valuation expert was criticised by the court but the evidence was still useful

The Valuer-General submitted that the appellant's valuation expert did not meet the standards expected of an impartial and independent expert as the expert was argumentative and offensive.

Although the court agreed with the Valuer-General's criticism of the appellant's valuation expert's behaviour, the court found that it would be unfair to penalise the appellant for the lack of professionalism shown by its valuation expert. The court stated that it would be a last resort, suitable for the most extreme cases, to disregard the evidence of the appellant's valuation expert.

Consequently, the court found that the appellant's valuation expert's evidence was still useful and should be considered on its merits.

The unique attributes of the site made valuation difficult

The court acknowledged that there "*is simply something different to the land the subject of the appeal*" (see paragraph 52).

The differentiating characteristics of the land included its location above Central Station in the Brisbane CBD and the associated construction restrictions, as well as the restrictions because of its geographical location.

The court found that building over a major operational railway would be inherently difficult. The difficulties identified by the court included the requirement to negotiate with Queensland Rail about the type of development and the construction elements and process, as well as the requirement to manage disruptions to a major operational railway.

Court analysed the valuation evidence of both parties' experts

Despite the Valuer-General's valuation expert valuing the wrong thing and the appellant's valuation expert being criticised, the court did not automatically dismiss the evidence of either expert and considered each comparable sale in turn.

The comparable sales were as follows:

- **111 Mary Street** – The valuation experts relied upon different sales of 111 Mary Street.

  Relying upon the 2010 sale for $38,000,000, the appellant's valuation expert adopted the rate of $5,253 per square metre. This rate allowed for the excavation of the site to a value of $10,000,000. However the actual cost of the excavation was $24,500,000. This adjustment was criticised by the court because of the amount of the adjustment and the tenuous basis for the valuation. The court did not accept that the sale was a reliable guide.

  Relying upon the 2014 sale of the volumetric lot for $29,000,000, the Valuer-General's valuation expert adopted the rate of $637 per square metre of GFA. However, the Valuer-General's valuation expert contended a higher rate was more appropriate because of the improvements in excavation works that had occurred since the sale and the superior location of the site. As such, the Valuer-General's valuation expert valued the site at $1,000 per square metre. The court rejected the Valuer-General's valuation expert's evidence on the basis that it lacked reliability and was unconvincing.

  Consequently, the court rejected the analysis of both valuation experts for 111 Mary Street.

- **304 George Street** – The appellant's valuation expert adopted the same rate used by the Land Court in *Brisbane Square Pty Ltd v Valuer-General* [2016] QLC 69 being $7,793 per square metre. The Valuer-General's valuation expert agreed with the basis upon which the rate was determined but disagreed with the appellant's valuation expert's inclusion of the excavation costs in the valuation.

  The court found that it was appropriate for the appellant's valuation expert to take into account the excavation costs because they were used in the redevelopment. The court accepted the appellant's valuation expert's analysis of the rate per square metre but observed that the sale at 304 George Street was superior to that of the site and its potential should be considered in the valuation of the site.

- **65 Mary Street** – Only the Valuer-General's valuation expert relied on this sale. It sold in February 2014 for $7,300,000 which amounted to $756 per square metre of GFA. The Valuer-General's valuation expert adopted the same rate per square metre for the site.

  The court found that the Valuer-General's valuation expert's evidence was unconvincing as the site was located in an inferior location when compared to 65 Mary Street. As a result, the court rejected the Valuer-General's valuation expert's evidence relating to this sale.

- **127 Charlotte Street** – This property sold in May 2010 for $9,090,908 which amounted to a rate of $986 per square metre of GFA. Only the Valuer-General's valuation expert relied on this sale.

  He contended that the site commanded a higher value per square metre because the site is in a superior location. The court found that, if anything, the property at 127 Charlotte Street is in a superior location. As a result, the court rejected the Valuer-General's valuation expert's evidence relating to this sale.

- **30 Albert Street** – This property sold in December 2013 for $18,750,000. The Valuer-General's valuation expert determined the rate to be $9,936 per square metre. The Valuer-General's valuation expert again contended that the site was in a superior location when compared to this property. The court found that the Valuer-General's valuation expert's evidence was unconvincing and rejected the evidence relating to this property.

- **105/111 Margaret Street** – This property sold in July 2011. The sale of 111 Margaret Street, Brisbane was in 2012 and was purchased by the adjoining owner. The Valuer-General's valuation expert relied on both sales as the one transaction. The court found that the sale "is a confection of two sales" which cannot be treated safely as one. As a result the court rejected the Valuer-General's valuation expert's evidence regarding this property.

- **168 Wharf Street** – The Valuer-General's valuation expert relied upon this sale and determined the rate to be $977 per square metre. The Valuer-General's valuation expert considered this sale to be primary evidence of the appropriate value of the site because it supports the development of a four star hotel and is located 200 metres from the site. The court agreed.

The court preferred the appellant's evidence and determined that the evidence submitted by its valuation expert was the better evidence. Consequently, the court allowed the appeal and reduced the site valuation to $13,180,000.

COLIN BIGGERS & PAISLEY LAWYERS

Waste industry in the spotlight: How are waste operators in NSW regulated?

Todd Neal | Katherine Edwards

This article discusses the powers and obligations available to regulatory authorities and the implications for the waste industry

September 2017

In brief – Ensure compliance with approvals or risk enforcement action

Waste operators and waste transport businesses in New South Wales should be aware of the regulatory environment surrounding their activities and the penalties that might arise from unlawful activities. We take a look at who the regulators are, their powers and responsibilities, and the implications for the waste industry.

Regulation of waste industry attracts significant public interest

The NSW waste industry has recently been thrown into the spotlight by a Four Corners investigation that aired on 7 August 2017, *Trashed: The dirty truth about your rubbish*. It exposed a number of serious issues within the $12.5 billion per annum waste industry and has resulted in calls for a national strategy to be developed to deal with the current state of the waste industry.

Three issues that are now at the forefront of the government's and the community's mind include:

- transport of waste generated in NSW to Queensland;
- illegal dumping that is prevalent throughout communities;
- illegal stockpiling of waste.

The regulatory environment dealing with these matters is complex and includes statutes, regulations and various policies. While navigating the system can be time consuming and costly, so too can the rectification of breaches. To that end, given the increased enforcement budget of the NSW Environment Protection Authority (**EPA**) and the significant public interest in this issue, waste operators and waste transport businesses will need to be aware of the regulatory environment and the penalties that might arise from unlawful activities.

Who are the regulatory authorities?

- **Local councils:** The powers of local councils in respect of waste are primarily found in the *Local Government Act 1993* (NSW) (**LG Act**) and the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Councils are generally responsible for assessing development applications for the use of land for waste management or resource recovery facilities. In addition, councils also have illegal dumping units and environmental units to monitor land uses in the local area and to issue notices where necessary.
- **EPA:** With respect to the waste industry, the EPA is responsible for assessing and determining Environment Protection Licence (**EPL**) applications. EPLs are required where a Scheduled Activity that is set out in Schedule 1 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) is carried on at a premises. It is the EPA's job to regulate these premises to protect the environment. The EPA's powers are generally set out in the POEO Act, as well as the *Protection of the Environment Operations (Waste) Regulation 2014* (NSW) and the *Protection of the Environment Operations (General) Regulation 2009* (NSW).
- **Department of Planning and Environment:** The Department of Planning and Environment is responsible for approving larger, State significant development applications. However, their powers are still found in the EP&A Act. While the Department of Planning and Environment is involved with larger scale and more intense operations, there is still a significant amount of hands-on investigation work that is undertaken by this Department relating to the enforcement of conditions of consent.

What powers do regulatory authorities have?

Regulatory authorities conduct investigations to determine whether companies or individuals have committed an offence. Well known offences in the waste industry include the unlawful depositing of waste and the use of a premises without an EPL.

In conducting an investigation, regulatory authorities have the following powers:

- **Entry and search:** There are equivalent powers under Part 7.4 of the POEO Act to section 119D and section 119F of the EP&A Act for authorised officers to enter premises for the purposes of investigations. A similar provision also exists under section 192 of the LGA.

  Where an authorised officer lawfully enters a premises, that officer has the power to, for example, take samples, take photographs or videos, require records to be produced for inspection and copy records. The powers are broad, but not without limit.

- **Require information and records:** More commonly used investigative powers are those that require persons to furnish any information and or records to the regulatory authority. Similar provisions can be found in Part 7.3 of the POEO Act and section 119J of the EP&A Act.

  Formal requests for information or records are often drafted with significant breadth in an attempt to capture any and all relevant information that may assist a regulatory authority in their investigation. Careful consideration needs to be given as to whether documents held are within or outside of the scope of the formal request and whether they are lawfully able to be sought.

- **Formal interview:** Regulatory authorities have the investigative power to require a person to answer questions. Similar provisions are contained in Part 7.5 of the POEO Act and section 119K of the EP&A Act. A regulatory authority may have a specific person or persons whom they wish to question, or alternatively, require a corporation to nominate a person authorised to answer questions on behalf of the corporation. A person who is to be interviewed by a regulatory authority should be well prepared and advised on what their rights are.

- **Enforcement action for offences:** The legislative framework creates offences for persons who:

  - neglect or fail to comply with a requirement of the relevant piece of legislation without a lawful excuse;
  - furnish information or do things in purported compliance with a requirement of the relevant piece of legislation knowing that it is false or misleading in a material respect;
  - willfully delay or obstruct an authorised officer in the exercise of their powers.

  Prosecutions arise from a regulatory authority carrying out an investigation into whether an offence is likely to have been committed. The level of evidence required by the regulatory authority is dependent on the forum they intend to prosecute the matter in, i.e. the Local Court or the NSW Land and Environment Court. The burden of proof in criminal proceedings is "beyond reasonable doubt" which is higher than the standard required to be met in civil proceedings which is "on the balance of probabilities".

Successful prosecutions can prove costly as seen in EPA v Foxman Environmental Development Services, Botany Building Recyclers and Foxman

Some of the issues involved in the criminal prosecution of a waste matter were exposed in *Environment Protection Authority v Foxman Environmental Development Services; Environment Protection Authority v Botany Building Recyclers Pty Ltd; Environment Protection Authority v Foxman* [2015] NSWLEC 105.

The EPA successfully prosecuted six offences against the defendants in relation to the transportation and placement of waste on land.

The evidence that was relied on by the prosecutor was collected over a number of years, and included:

- samples taken from the site;
- records of interviews undertaken with relevant persons;
- responses to statutory notices.

In this case, the defendants were ordered to pay $390,000, plus investigation costs of $4,646 and the prosecutors' unknown legal costs, which are on average above $70,000 based on recent Judicial Commission statistics we have seen. The defendants were also ordered to pay for a notice to be placed in the Sydney Morning Herald and Inside Waste to inform the public of the outcome of the matter. In addition, the court ordered Mr Phillip Foxman and Foxman Environmental Development Services Pty Ltd to remove or procure the removal of the illegally filled material.

Cases such as this demonstrate that those involved with the management of waste cannot afford to ignore the risks, and that processes and systems need to be in place to ensure compliance with the regulatory framework.

Implications for waste operators in New South Wales

Penalties can range from an amount up to $15,000 for a penalty notice to hundreds of thousands of dollars in fines imposed by the court, as well as the prosecutors' legal fees if successfully prosecuted.

Given the more inquisitorial nature of the powers available to regulators, it is important to ensure that the regulatory authority is acting within its powers. This requires a careful examination of the empowering legislation together with an analysis of the request or actions already undertaken by regulatory officers.

In this time of scrutiny for the NSW waste industry, and in particular given the renewed focus on enforcement amongst the EPA and Department of Planning and Environment, waste industry operators need to be aware of the powers and obligations available to regulatory authorities. It is trite to say but they need to ensure the correct approvals are in place and that their operations comply with these approvals or they run the risk of enforcement action being undertaken against them.

No Council resolution required to incorporate other information into rating categories

Nadia Czachor | Ian Wright

This article discusses the decision of the Supreme Court of Queensland in the matter of *Ugarin Pty Ltd v Lockyer Valley Regional Council* [2017] QSC 122 heard before Mullins J

October 2017

In brief

The case of *Ugarin Pty Ltd v Lockyer Valley Regional Council* [2017] QSC 122 concerned an application for judicial review of two decisions made by the council relating to rating categories for the calculation of differential general rates.

The relevant decisions were as follows:

- The council's decision to adopt different categories of rateable land and different rates for each category.
- The council's decision to apply differential general rates category 8 as the category applying to the applicant's land, being the Plainland Shopping Centre.

In particular, the council had adopted different rating categories by reference to "land use codes", being codes conceived by the Department of Natural Resources and Mines (**DNRM**) and used for the State-wide database of Queensland Valuation and Sales Information (**QVAS**).

Council adopts the 2015/2016 budget

At the council's 2015/2016 budget meeting held on 28 July 2015 (Budget Meeting), the council adopted the Corporate and Community Services Report dated 23 July 2015. Included in the report was a resolution that the council adopt different categories of rateable land. A description of each category of rateable land was contained in table 1.

In table 1, the categories of rateable land were described by reference to certain land use codes and the descriptions included certain land use codes and excluded others. Relevantly, table 1 described categories 4, 6 and 8 on the following terms [our emphasis]:

- Category 4, being Commercial > $2 Million – "*Land used for commercial purposes, other than primary production, with a rateable value greater than $2 million, other than land included in category 5 to 10, 17 to 20, 37 to 39 or 43 to 45. Includes land with the following land use codes: 10 to 46 and as otherwise identified by the Chief Executive Officer.*"
- Category 6, being Supermarkets > $1 Million – "*Land used for a Supermarket, with a rateable value greater than $1 million. Includes land with the following land use codes: 10-15, 17-27 and as otherwise identified by the Chief Executive Officer but does not include any land with land use code 16.*"
- Category 8, being Shopping Centres > 7,000 square metres – "*Land used or capable of being used for a Shopping Centre that has a property land area greater than 7000 sq metres, or more than 120 onsite carparking spaces. Includes all land of the relevant size with land use code 16 and as otherwise identified by the Chief Executive Officer.*"

The relevant definition of "land use codes" was "*those land use codes approved by the Lockyer Valley Regional Council effective from 1 July 2015*".

Council applies category 8 to the Plainland Shopping Centre

The council applied category 8 in levying the general rates payable by the applicant in respect of the Plainland Shopping Centre. The council conceded that there was no document setting out all of the land use codes before it adopted the different categories of rateable land at the Budget Meeting. The council also conceded that the decision to apply category 8 was not made at a council meeting.

First ground for review – it was unlawful for the council to refer to the land use codes in the category descriptions and the land use codes were required to be approved by council resolution

After receiving the rate notice for the Plainland Shopping Centre, the applicant requested a list of all the land use codes and their corresponding uses. The council provided the land use codes published by the DNRM and explained that "*[f]or the purposes of assisting to identify the ratings category to which particular parcels of rateable land belong, where relevant, council has approved the Land Use codes provided by the Department of Natural Resources and Mines (DNRM) and recorded in the Department's property files in the Integrated Valuation and Sales system*".

The council's manager of finance and customer services gave evidence further explaining the use of land use codes. The officer explained that the council's rating system is linked to the QVAS, which is maintained by the DNRM. Included in the QVAS information are land use codes and every property in Queensland is allocated a code. The officer explained that the land use code is the initial identifier of land use used by the council for determining the applicable rating category but this can be changed where the actual use is different to the assigned land use code.

The court found that the *Local Government Regulation 2012* was unambiguous on its terms, in that it required the council to pass a resolution identifying the different categories of rateable land. The court was satisfied this requirement was discharged at the Budget Meeting.

Further, the court held that the council could identify the different categories in any way it considered appropriate. The applicant had argued that the mere fact that the council incorporates the QVAS land use codes into its land records did not amount to "approval" as required by the definition of "land use code" and that the definition should be interpreted as requiring an approval by a council resolution. The court was satisfied that, whilst the definition of "land use code" contemplated a separate approval process by the council, there was no requirement for approval by a council resolution. The court commented that the council could have been more precise about the source of the land use codes or that each relevant land use code was already recorded in the council's land records, however it was satisfied that no separate council resolution was required approving the use of the QVAS land use codes.

In addition, the court also considered it relevant that an owner or potential purchaser could search the council's land records to determine the applicable land use code and as such there was no potential disadvantage to be suffered.

The court therefore held that the category descriptions were lawful and the first ground of review failed.

Second ground for review – category 8 should not have been applied to the Plainland Shopping Centre

The court had no difficulty in classifying the Plainland Shopping Centre as belonging in category 8.

The court therefore dismissed the application for judicial review and ordered that the applicant pay the council's costs.

Federal Court dismisses challenge to the Environment Minister's decision to approve Carmichael Coal Mine

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Federal Court of Australia in the matter of *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* [2017] FCAFC 134 heard before Dowsett, McKerracher and Robertson JJ

October 2017

In brief

The case of *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* [2017] FCAFC 134 concerned an appeal to the Federal Court of Australia challenging the lower court's decision to dismiss an application for judicial review of the Minister for the Environment's decision to approve the Carmichael Coal Mine in Central Queensland.

The appellant appealed on the basis that the lower court had incorrectly interpreted that the Minister, in the Minister's statement of reasons, was satisfied that appropriate consideration had been given to various statutory tests under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) in particular that an assessment of the physical impacts of climate change on the Great Barrier Reef had been completed and was acceptable.

The court dismissed the appeal on the basis that neither the lower court nor the Minister had fallen into legal error.

The Minister approved the Carmichael Coal Mine

The Minister's initial 2014 decision to approve the Carmichael Coal Mine was set aside by consent after the proponent and environmental groups provided the Minister with new information relating to the mine's environmental impacts. The Minister approved the mine again in 2015 based on the following reasons:

- the proposal would not have an unacceptable impact on World Heritage values or be inconsistent with Australia's obligations under the World Heritage Convention or plans for World Heritage managed property;
- the proposal would not have an unacceptable impact on the National Heritage values of the reef or any plan prepared for the management of a National Heritage place;
- scope one and two emissions, being those generated by the mine or the energy required to carry out the proposal, would be dealt with under existing and future arrangements;
- scope three emissions, being those generated by overseas markets burning coal from the mine, were subject to numerous variables and would be mitigated by international multilateral environmental agreements and various control frameworks.

The appellant applied to the court for judicial review of the Minister's decision

The appellant's application for judicial review relied on three grounds and sought orders to quash the Minister's decision and an injunction to restrain the Minister from taking any further steps to give effect to the decision.

Ground one alleged that the Minister made an error of law by failing to adhere to the statutory command under section 137 of the EBPC Act to not act inconsistently with Australia's obligations under the World Heritage Convention.

Ground two alleged that the Minister made an error of law in the following respects:

- Characterising emissions from rail and shipping transport and combustion of the coal product overseas as an indirect consequence of the proposed coal mine, without applying the test under section 527E of the EBPC Act to determine if these factors represented a relevant impact.
- Failing to comply with the requirement in section 136(2)(e) of the EBPC Act by giving inappropriate consideration to information about the likely or potential impacts of overseas emissions on protected matters.

Ground three alleged that the Minister made an error of law by finding that it was "*difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance*" without first considering or applying the precautionary principle required under section 136(2)(a) and section 391 of the EPBC Act.

The court rejected the appellant's application

The lower court concluded that the appellant's core proposition for judicial review was that the Minister had failed to properly consider new information regarding whether greenhouse gas emissions caused by the combustion of the mine's coal overseas were a relevant "event or circumstance" within the definition of "*impact*" under section 527E of the EPBC Act.

The lower court referred to the explanatory notes to the EPBC Act to identify that the purpose of section 527E was to clarify the extent to which indirect impacts must be considered and dealt with under the EPBC Act. The lower court also referred to the decision in *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 to conclude that an event or circumstance can only amount to an "*impact*" where it is either a direct consequence of the development or an indirect consequence substantially caused by the proponent.

The lower court rejected the appellant's application for judicial review after finding that the Minister's statement of reasons demonstrated that the Minister had adopted the wording of section 527E including the phrase "*substantial cause*" to find that overseas emissions would have no relevant impact on the reef. The Minister found that the range of variables associated with overseas emissions was such that calculating their net contribution to global temperatures amounted to speculation.

The appellant appealed the decision of the lower court

The grounds of appeal alleged that the lower court:

- erred in interpreting the Minister's statement of reasons to include a determination as to whether or not the physical effects of climate change on the reef were an "*impact*" within the meaning of section 527E of the EPBC Act; or
- alternatively, if on a proper interpretation of the statement of reasons the Minister did address whether or not the physical impacts of climate change on the reef were an "*impact*", that the lower court erred by failing to find that the Minister misdirected himself as to the correct question under sections 82(1), 136(2)(e) and 527E.

The appellant contended that whilst the Minister was unable to quantify the "actual" quantity of greenhouse gas emissions generated by the transport and combustion of coal the Minister was able to calculate the "possible" quantity. The appellant argued that, as a consequence, it was not open to the Minister to make the determination that he did being that the effect of climate change, caused by greenhouse gas emissions, on the reef was not an impact.

The court found that the appellant's claim was without merit

The court determined that section 130 of the EPBC Act required the Minister to allow or refuse a proposed action on the basis that it will have, or is likely to have, an impact on a protected matter.

The court found that whilst the Minister's statement of reasons was short it was clearly based on extensive evidence and subject to the Queensland Bilateral Agreement. The court also recognised that the Minister was satisfied the national and international arrangements and frameworks were in place to address the scope one, two and three emissions.

The court ultimately found that the lower court had correctly construed the Minister's decision for approving the mine. The court saw no justification to support the appellant's claim that the Minister did not take into account the possible impacts of overseas emissions on the level of greenhouse gases and the consequences thereof on the reef.

The court found that the appellant's reliance on sections 82, 136(2)(e) and 527E of the EPBC Act had lead it into error. The court affirmed that while the Minister was required to consider overseas emissions this did not necessarily require the Minister to conduct this assessment within the boundaries of sections 82 or 527E of the EPBC Act.

Adani's coal export terminal at Abbot Point to progress after unsuccessful challenge to the environmental authority

Luke Grayson | Nadia Czachor | Ian Wright

This article discusses the decision of the Supreme Court of Queensland in the matter of *Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection & Anor* [2017] QSC 121 heard before Daubney J

October 2017

In brief

The Whitsunday Residents Group challenged the lawfulness of the decision by the Environment Department to give an environmental authority to Adani for prescribed environmental activities for a proposed coal terminal at the Port of Abbot Point. The application for judicial review was based on a number of matters, most relevantly that the decision was an improper exercise of power as a result of a perceived failure of the Environment Department to consider the applicable statutory requirements in an assessment report, particularly where this report was dated after the date of the decision to approve the environmental authority. The Supreme Court relevantly determined that there was no legal error in the Environment Department's decision and that the Environment Department's decision to grant Adani's environmental authority should be upheld.

Judicial review of a decision to give an environmental authority for Adani's port expansion

The case of *Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection & Anor* [2017] QSC 121 relates to the proposal by Adani Australia Coal Terminal Pty Ltd to expand the Abbot Point coal terminal as part of the construction of the broader transport infrastructure network for the operation of the proposed Carmichael Mine.

The Whitsunday Residents Against Dumping Ltd applied to the Supreme Court of Queensland for judicial review of a decision by the Department of Environment and Heritage Protection to approve an application under the *Environmental Protection Act 1994* for an environmental authority for prescribed environmentally relevant activities for the proposed expansion of the Abbot Point coal export terminal.

Environment Department required to undertake an environmental objectives assessment of Adani's application

The *Environmental Protection Act 1994* relevantly required the Environment Department to undertake an environmental objectives assessment in deciding Adani's application for an environmental authority.

The *Environmental Protection Regulation 2008* relevantly states the following matters for the environmental objectives assessment:

- The Environment Department must decide the extent to which the application achieves each relevant environmental objective.
- In deciding each environmental objective the Environment Department must decide:
  - whether the application achieves item one of the stated performance outcome for the environmental objective; and
  - if not, whether the application achieves item two of the stated performance outcome.
- The application achieves an environmental objective if the Environment Department is satisfied the application:
  - achieves item one or item two of the stated performance outcome for the environmental objective; or
  - includes alternative measures to achieve the environmental objective.

Whitsunday Residents Group questioned the sufficiency of the assessment report upon which the Environment Department's decision was based

The Environment Department prepared an assessment report which the decision-maker stated that she had relied upon in deciding to approve Adani's application. The sufficiency of the assessment report to satisfy the Environment Department's environmental objectives assessment formed the basis of the Whitsunday Residents Group's legal challenge.

The issues raised with the assessment report primarily related to the following:

- *Date of assessment report* – The assessment report was signed by the decision-maker on 10 December 2015, being three days after the Environment Department approved Adani's application.
- *Legislative test not properly applied* – That, in the Whitsunday Residents Group's view, the assessment report made "no discernible attempt" to carry out the environmental objectives assessment given the report did not identify where the assessors (at [54]):
  - decided the extent to which Adani's application achieved each relevant environmental objective;
  - assessed whether the relevant environmental objective was achieved by meeting item one or two of the stated performance outcome; and
  - assessed whether an alternative measure is proposed.
- *Incorrectly stated reason for refusal* – The assessment report stated that the decision-maker "*should only consider refusing an application if one or more of the following apply…*" (at [71]). One of the listed reasons was not commensurate with the legislation.

Grounds for judicial review all related to the assessment report

The Whitsunday Residents Group relevantly argued that the defects in the assessment report resulted in the following:

- *Improper exercise of power* – That the Environment Department improperly exercised its power by:
  - failing to take a relevant consideration into account, on the basis that the assessment report was dated after the decision and was therefore not taken into account;
  - not seriously engaging with the statutory requirements, on the basis that the assessment report, to the extent it was taken into account, did not expressly refer to the elements of the legislative test; and
  - taking into account an irrelevant consideration, on the basis that the assessment report, to the extent it was taken into account, stated an incorrect reason for refusal.
- *Non-observance of procedure* – That the Environment Department had failed to follow a necessary statutory procedure by:
  - not considering the assessment report before making its decision on Adani's application, on the basis that the decision was made before the date of the assessment report; and
  - failing to make any serious attempt to follow the requirements for the environmental objectives assessment, on the basis of the issues that the Whitsunday Residents Group raised with the assessment report.
- *Want of jurisdiction* – That the Environment Department had no authority to decide Adani's application, on the basis of the issues raised with the environmental objectives assessment in the assessment report.
- *Error of law* – That the Environment Department had committed an error of law in making its decision, on the basis of a "significant failing" in the environmental objectives assessment in the assessment report (at [76]).

Environmental objectives assessment held to be valid despite issues raised with the assessment report

The Supreme Court of Queensland decided to dismiss the Whitsunday Residents Group's application for judicial review and dealt with the three issues raised with the assessment report by determining as follows:

- *Date of assessment* – Whilst the assessment report was dated after the decision was made, the decision-maker had received a draft of the report and had regular consultations with the person preparing the report about the relevant issues for consideration in the report. Further whilst the content of the assessment report was approved on the date of the decision, the discrepancy with the dates was explained because the report itself was signed as part of a "notice of decision" which was required to be sent within five days of the decision.

- *Legislative test not properly applied* – The assessment report was a mere internal administrative record and not a statement of reasons and should therefore not be strictly construed. When the report was read as a whole, it was clear that the assessor had applied the legislative test and determined that Adani's application achieved item two or both item one and two of the performance outcome for each applicable environmental objective.
- *Incorrectly stated reason for refusal* – The incorrect reason for refusal did not impact on the assessment report's considerations in the body of the report and it could not be inferred that the statement actually influenced the decision-maker.

The Supreme Court therefore determined that none of the Whitsunday Residents Group's grounds for judicial review were made out and the Environment Department's decision to grant Adani's environmental authority was lawful.

Supreme Court finds that the usual rules as to costs applies despite the public interest character of the proceeding

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Supreme Court of Queensland in the matter of *Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection & Anor (No. 2)* [2017] QSC 159 heard before Daubney J

October 2017

In brief

The case of *Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection & Anor (No. 2)* [2017] QSC 159, heard by the Supreme Court, concerned an application made by Adani Australia Coal Terminal Pty Ltd for payment of its legal costs following an unsuccessful application by a community based organisation, seeking judicial review of the decision made by the Department of Environment and Heritage Protection to grant an environmental authority for the expansion of Adani's Abbot Point coal terminal.

The court found in favour of Adani and, in doing so, considered the following:

- whether the proceeding was "public interest litigation" which justified departure from the usual order as to costs;
- whether the case determined principles of general application or was a test case; and
- the status of the applicant for judicial review as a community based organisation and its capacity to pay the costs order.

Court found that it was not enough to seek to characterise the proceeding as "public interest litigation" in order to avoid the operation of the usual order as to costs

The applicant submitted that the case's subject matter concerned the protection of the Great Barrier Reef against potential impacts arising from the proposed coal terminal. As a consequence, the case was a matter of widespread public interest and importance.

The applicant also pointed to its status as a community based organisation, with no commercial interest, and that it had a genuine interest in the proper administration of the environmental rules and regulations.

The court rejected the applicant's arguments and restated the following relevant principle in *Sharples v Council of the Queensland Law Society Incorporated* [2000] QSC 392:

> *[t]here is always a public interest in seeing that statutory obligations of a statutory body are fulfilled and that personal rights of any party affected by the performance of that statutory obligation are observed. By the nature of what is a decision to which the Act applies, every review application will involve an element of public interest … there will usually be some broader public interest involved in the particular application to justify a special costs order than the usual public interest which must be present in every application from the mere fact that the Act applies to the decision under review* (At [8]).

While the court conceded that the case involved an element of public interest to the extent it concerned the due administration of the *Environmental Protection Act 1994*, that of itself was not sufficient to warrant the court's departure from the general rule as to costs, being that costs follow the event.

Court found that the case was neither a test case nor a case which determined principles of general application

The applicant argued that the case involved "*detailed and complex decisional rules*" as to environmental protection. The court dismissed this argument and held that it was clear from the primary judgment that the case did nothing more than turn on the plain reading of the environmental objective assessment.

Status of the applicant was irrelevant and there was nothing to suggest it was unaware of the likelihood of a costs order or unable to satisfy a costs order

The court held that the community based status of the applicant did not automatically confer immunity on it from an adverse costs order. Further, there was no evidence to suggest that the applicant did not appreciate the likelihood of an adverse cost order being made against it. Finally, the court found that there was nothing to suggest that the applicant would be unable to satisfy the costs order.

The court was ultimately satisfied that there was no reason to depart from the usual order as to costs or that it reduce the quantum of costs.

Planning and Environment Court refuses to join Queensland Rail as a party to an appeal concerning a condition requiring works on land leased by Queensland Rail

Thomas Massey | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mirvac Pacific Pty Ltd v Gold Coast City Council* [2017] QPEC 39 heard before Rackemann DCJ

October 2017

In brief

The case of *Mirvac Pacific Pty Ltd v Gold Coast City Council* [2017] QPEC 39 involved an application by the Gold Coast City Council to the Planning and Environment Court to join Queensland Rail Pty Ltd as party to an appeal, under rule 69(1)(b) of the *Uniform Civil Procedure Rules 1999* (**UCPR**).

The applicant had commenced an appeal against the council's deemed refusal of a request to change a development permit for reconfiguring of a lot to facilitate the residential subdivision of land located at Gainsborough Drive, Pimpama.

The land was located to the east of a railway line corridor. The council contended that it was in the interests of orderly planning to provide convenient vehicular, cyclist and pedestrian access across the corridor. A bridge in the area, subject to some improvements, could facilitate such access. Condition 5A of the development approval required the bridge to be upgraded, if not replaced, and roadworks to be conducted to and from the bridge.

The bridge was built on Crown land leased by Queensland Rail. The applicant made a request to change the development approval such that condition 5A be deleted. The request was not decided within the prescribed time and the applicant appealed against a deemed refusal of the application. Council sought to join Queensland Rail as a respondent to the appeal. Queensland Rail opposed the application on the basis that it was not desirable, just and convenient for it to be joined to the appeal.

The applicant sought to have condition 5A deleted because it could not be complied with due to circumstances beyond the applicant's control, in particular that Queensland Rail's approval was required to do the works as railway manager under section 255 of the *Transport Infrastructure Act 1994* (**TIA**). The applicant referred to an email from Queensland Rail as evidence of Queensland Rail requirement that the council accept ownership and responsibility for the future maintenance of the bridge, however the council would not agree to accepting ownership and responsibility for the bridge.

The onus was on the council to demonstrate that under rule 69(1)(b) of the UCPR, Queensland Rail's presence before the court:

- was necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceedings; or
- was desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.

The court found that it was difficult to establish impossibility of compliance where Queensland Rail's approval had not formally been sought

The court noted the difficulty in establishing the practical impossibility of compliance where the applicant had not gone through the formal process of seeking Queensland Rail's approval for access to the railway corridor. The court observed that this process would involve an application under section 255 of the TIA, and would be required to be assessed on the merits at the time. The court found that the email from Queensland Rail that the applicant sought to rely on was, at best, a preliminary view of how the approval process would be determined but could not lawfully fetter the discretion to be exercised in making the decision. Further, any decision could be subject to an internal review and an external appeal. As such, the court could not be satisfied that there was an impossibility of compliance where that process had not yet occurred.

The court determined if the appellant wished to argue that compliance should be judged as being not reasonably possible, it would need to establish the evidentiary basis for that finding which would involve a factual inquiry into Queensland Rail's position. Even so, the court found that it did not follow that Queensland Rail's joinder as a party was necessary or desirable, just and convenient within the meaning of rule 69 of the UCPR.

The court found that it was outside the court's jurisdiction to order Queensland Rail to undertake action in respect of the bridge, or to resolve any dispute between the parties as to the performance of the works under the development application.

The court noted that it was not within the court's jurisdiction to order Queensland Rail to give approval under the TIA or to order Queensland Rail to give an approval rendering Queensland Rail responsible for the ongoing ownership and maintenance of the upgraded bridge.

The council argued that if Queensland Rail were made a party to the proceedings, then the court could order Queensland Rail to participate in a mediation with the view to resolving the dispute as to future ownership and responsibility for maintenance of the bridge. Although the parties could be ordered to participate in alternative dispute resolution process with a view to possible resolution, the court noted that it was outside the court's jurisdiction to force the parties to resolve any dispute as to the ownership of and the responsibility for the maintenance of the bridge.

The court further determined that the presence of Queensland Rail as a party to the proceedings was not necessary, desirable, just or convenient for the court to decide the importance of the access link for the orderly development of the locality or to adjudicate upon the transport issues otherwise.

The court found that there was no reasonable basis upon which to exercise the discretion under rule 69(1)(b) of the UCPR to join Queensland Rail as a party to the proceedings and dismissed the application. The court then heard the parties as to costs.

Planning and Environment Court awards costs against the council following an unsuccessful joinder application

Thomas Massey | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mirvac Pacific Pty Ltd v Gold Coast City Council (No. 2)* [2017] QPEC 57 heard before Rackemann DCJ

October 2017

In brief

The case of *Mirvac Pacific Pty Ltd v Gold Coast City Council (No. 2)* [2017] QPEC 57 involved an application for costs by Queensland Rail against the Gold Coast City Council under section 457 of the *Sustainable Planning Act 2009* (**SPA**) and followed a prior decision of the Planning and Environment Court in which the court refused an application by the council to join Queensland Rail to the appeal.

The appeal by Mirvac Pacific Pty Ltd was against the council's deemed refusal of a request to change a condition of a development approval which would require upgrading works on land leased by Queensland Rail. The council sought to join Queensland Rail to the appeal but was unsuccessful.

The parties agreed that the applicable costs regime for the application was that prior to 19 May 2017 when the *Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Act 2017* commenced. At this time the application of section 457 of the SPA directed the court to consider the following non-exhaustive list of factors in exercising its discretion to award costs:

> *(a) the relative success of the parties in the proceeding;*
>
> *...*
>
> *(c) whether a party commenced or participated in the proceeding for an improper purpose;*
>
> *(d) whether a party commenced or participated in the proceeding without reasonable prospects of success; and*
>
> *...*
>
> *(g) whether the proceeding involved an issue that affects or may affect a matter of public interest*" (at [2]).

The court noted that relevant to its considerations was that Queensland Rail had been wholly successful in resisting the joinder application and that the application for joinder persisted in the face of timely notice of grounds of opposition.

The court found that the joinder application was brought for an improper purpose

The court accepted Queensland Rail contention that the joinder application was brought for the purpose of seeking to "bring QR to the table" to negotiate issues of ownership and maintenance of the bridge.

In rejecting the council's submission that the application was to assist the court to properly determine the issues the subject of the appeal, the court noted the council's acceptance of the fact that the court did not have jurisdiction to impose an order rendering Queensland Rail responsible for the ongoing ownership and maintenance of the bridge.

The court found that there was no public interest in bringing the joinder application

The court noted the unsuccessful joinder application as a dominant factor in determining whether there was public interest in the council's joinder application. Mirvac had resisted the application on the basis that there was an impossibility of compliance given the necessity of Queensland Rail's cooperation for the works to be performed. This basis raised the question of Queensland Rail's attitude towards the carrying out of the works. The court determined that an application to join Queensland Rail to the proceedings, as opposed to ascertaining its position in relation to the works, did not advance the public interest.

The court also found that a joinder application should not be used as a vehicle to entangle Queensland Rail in proceedings about decisions concerning the ownership and management responsibilities for the bridge, as the court did not have jurisdiction to deal with these issues.

Costs ordered in circumstances where an appeal was neither frivolous nor vexatious, however the appellant's conduct caused the Valuer-General unreasonable trouble and expense

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Alceon Captarans JV Pty Ltd v Valuer-General* [2017] QLC 30 heard before WL Cochrane

October 2017

In brief

The case of *Alceon Captarans JV Pty Ltd v Valuer-General* [2017] QLC 30 concerned an application for an order for costs made by the respondent, Valuer-General, after the appellant, Alceon Captarans JV Pty Ltd, decided to withdraw its appeal against the respondent's determination that the value of the subject land was $6,500,000.

The court found that the appellant should pay the Valuer-General's costs of the appeal incurred after the first directions order was made on 17 March 2016 having regard to the appellant's conduct subsequent to that order.

The court considered the appellant's conduct in the appeal particularly in relation to the issue of disclosure

On 17 March 206, orders were made in respect of the conduct of the appeal, which included the following order in respect of disclosure:

> *(a) Disclosure and inspection of documents in the parties possession or control directly relevant to the issues in the proceedings; …*

The appellant's agent, on behalf of the appellant, provided disclosure on 14 April 2016, 11 May 2016, 16 May 2016 and 10 June 2016. However, the respondent contended that the appellant's disclosure was not adequate and the matter was brought back to the court for further review and directions on 13 June 2016.

The court relevantly ordered on 13 June 2016 that:

- the appellant provide further disclosure by 24 June 2016; and
- the parties' experts provide a joint report and statements of evidence by 20 July 2016.

Subsequently, the appellant appointed a solicitor to act on its behalf and the solicitor filed a notice of appointment of solicitors on 27 June 2016.

The respondent made an application for further disclosure on 21 July 2016 and a request for costs to be reserved, which was set for hearing on 1 August 2016.

On 22 July 2016, the solicitor for the appellant provided further disclosure.

A without prejudice meeting between the appellant and the respondent was held on 29 July 2016 and the appellant subsequently filed a notice of discontinuance on 1 August 2016. The notice of discontinuance was foreshadowed by the appellant in a letter from the appellant's solicitor to the respondent sent on 29 July 2016.

At the time the letter of 29 July 2016 was sent to the respondent, the parties' experts were required to deliver a joint expert report. Also, the parties were required to deliver statements of evidence and exchange with each other in accordance with the order made on 13 June 2016. The court presumed that some of the work in relation to those steps would have been commenced at the time the letter of 24 July 2016 was sent.

The court did not consider the appellant's conduct in the appeal to be either vexatious or frivolous

The appellant submitted that an inference could not be drawn that the appeal was commenced without merit. In its submission, the appellant asserted that:

- the prospects of success of the proceeding evolved in the course of the proceeding as the appellant received the particularisation of the respondent's case and the respondent's disclosure material after the commencement of the appeal and before the discontinuance of the appeal;

- the appellant's decision to discontinue the proceeding was influenced not only by the prospects of success but also by the changing circumstances of the appellant;
- a letter of 29 July 2016, which indicated that the appellant's instruction to withdraw the proceeding "*emerged as a result of advice that we have recently given it in relation to the appeal and its prospects in the appeal*", was not an acknowledgement by the appellant that the appeal was commenced without merit.

The court considered whether the appellant's conduct in the appeal was frivolous or vexatious and therefore whether the court would be able to exercise its discretion to award costs against the appellant in accordance with section 34 of the *Land Court Act 2000*.

In determining whether the appellant's conduct in the appeal was frivolous or vexatious, the court considered the case of *Mudie v Gainriver Pty Ltd (No. 2)* [2003] 2 Qd R 271 at [36] in which it was found that "*unquestionably, something much more than lack of success needs to be shown before a party's proceedings are frivolous or vexatious*".

The court also considered the case of *Re Cameron* [1996] 2 Qd R 218 in which Fitzgerald P observed that:

> *… such factors as the legitimacy or otherwise of the motives of the person against whom the order is sought, the existence or lack of reasonable grounds for the claims sought to be made, repetition of similar allegations or arguments to those which have already been rejected, compliance with or disregard of the court's practices, procedures and rulings, persistent attempts to use the court's practices, procedures and rulings, persistent attempts to use the court's processes to circumvent its decisions or other abuse of process, the wastage of public resources, and funds, and the harassment of those who are the subject of the litigation which lacks reasonable basis* (at page 3).

Having considered those cases, the court found that the appellant's conduct in the appeal was neither frivolous nor vexatious.

The respondent submitted that the absence of legal advice in the appellant's list of disclosure indicated that legal advice was not obtained by the appellant prior to commencing the appeal and that "*the Court should conclude that the appeal was commenced without any, or any proper, consideration of whether there was any demonstrable error in the respondent's valuation, or whether the appellant would be able to prove the allegations contained in its notice of appeal*" (at [45]).

The court did not consider it necessary for the appellant to obtain legal advice in writing prior to commencing the appeal, although it would have been prudent to do so.

The court found that the appellant caused the respondent to incur unreasonable costs in attempting to comply with the orders while dealing with inadequate disclosure by the appellant

In determining whether the court would make a costs order against the appellant in accordance with section 171 of the *Land Valuation Act 2010*, the court considered whether there was some failing by the appellant in the conduct of the appeal.

The court found that up to the time when the first order was made on 17 March 2016, the appellant's conduct was nothing unusual for a party protecting its statutory right granted under the *Land Valuation Act 2010*. However, the appellant's failure to provide adequate disclosure in accordance with the subsequent orders and to withdraw the appeal late in the process caused the respondent "*unreasonable trouble and expense in attempting to comply with the orders of the Court*".

Accordingly, the court ordered that the appellant pay the costs of the appeal incurred by the respondent after 17 March 2016.

Land Court of Queensland refuses to strike out one claim for compensation but prevents another after finding an estoppel

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Kube & Anor v Sunshine Coast Regional Council* [2017] QLC 48 heard before WA Isdale

October 2017

In brief

The case of *Kube & Anor v Sunshine Coast Regional Council* [2017] QLC 48 concerned an application by the council in the Land Court of Queensland to strike out the applicants' claims for compensation under the *Acquisition of Land Act 1967* (**ALA**) for developments, identified as the "first works" and "second works", which were undertaken prior to a compulsory acquisition of the applicants' land at 76 Wharf Road, Bli Bli.

The court ultimately refused to strike out the claim for the first works after concluding that there was no evidence to confirm that allowing the proceeding to continue was vexatious or prejudicial to a fair hearing. However, the applicants' claim relating to the second works was stuck out after it was determined that an estoppel prevented submissions being heard that effectively sought to revisit previous enforcement orders made by the Planning and Environment Court.

The Planning and Environment Court made enforcement orders against the applicants after determining that a development offence had occurred

The council provided written notice of its intention to perform stormwater drainage maintenance on the applicants' land at 76 Wharf Street, Bli Bli. The applicants notified the council verbally that it would undertake the works personally.

The applicants proceeded to carry out earthworks on the land, identified as the first works, which included a 455 metre long drainage channel that had no relation to the council's requirements. The council compulsorily acquired the affected land for of an easement before bringing proceedings against the applicants in the Planning and Environment Court.

The Planning and Environment Court determined that the applicants had committed a development offence by failing to carry out the first works in accordance with a relevant development permit. The Planning and Environment Court subsequently made enforcement orders which required the applicants to carry out works, identified as the second works.

The applicants sought compensation for the completed works

The applicants later filed an originating application in the Land Court which sought compensation for the council's compulsory acquisition of the land under the ALA.

Section 20(1)(b) of ALA allowed the court to have regard to the applicants' "*costs attributable to disturbance*". Section 20(5)(g) of the ALA defines costs attributable to disturbance to include "*other economic losses and costs reasonably incurred by the claimant that are a direct and natural consequence of the taking of the land*".

The council brought an application seeking to strike out the applicant's compensation claims

The council brought an application in the Land Court which sought to strike out the applicants' compensation claims on the following grounds:

- the claims disclosed no reasonable basis for compensation under the ALA; and
- the claim relating to the second works sought to revisit enforcement orders made by the Planning and Environment Court and therefore amounted to an abuse of process.

The council argued that there was nothing before the court to support the applicants' claim while the applicants relied on precedents established in earlier decisions

The council submitted that it had not requested the applicants to carry out the first works or any part of them and that the first works were carried out prior to the acquisition of the land and without formal notice to the council.

Relying on these facts, the council contended that there was nothing before the court to demonstrate that the applicants had suffered losses or costs reasonably incurred and as a direct and natural consequence of the first works.

The applicants submitted that all facts upon which their claims were based, including that the first works were undertaken in the knowledge that the council's acquisition was imminent, were capable of proof. The applicants argued that for the council to succeed in striking out the claims it must establish that they were obviously untenable within the meaning of section 20 of the ALA.

The applicants directed the court to the decision of the High Court in *General Steel Industries Inc v Commission for Railways* (NSW) (1964) 112 CLR 125, in which the court held that the jurisdiction to strike out the items of a claim should be used sparingly, and only where the prospects of success were untenable.

Reference was also made to the decision of the Court of Appeal in *Brisbane City Council v Mio Art Pty Ltd & Anor* [2011] QCA 234, where the court held that reference to the date of the acquisition is not explicitly required when assessing compensation claims.

The applicants also submitted that in *Ostroco Pty Ltd v Chief Executive, Department of Transport and Main Roads* (2013) 34 QLCR 314 the Land Court had supported an argument that section 20(5) of the ALA, particularly paragraphs (f) and (g) allowed for the award of compensation for a loss suffered prior to the acquisition of land.

The court found no reasonable basis to strike out the applicants' claim for compensation for the first works

The court referred to the decision in *George D Angus Pty Ltd v Health Administration Corporation* [2013] NSWLEC 212, in which the NSW Land and Environment Court found the words "direct" and "natural" in comparable legislation are designed to limit compensation by reference to the nature or degree of the required causal relationship.

After considering an agreed statement of facts provided by the parties, the court determined that the key issue was whether the first works were attributable to disturbance within the meaning of the ALA and whether the applicants' claim was so futile that it should be struck out.

The court refused to strike out the applicants' claim over the first works after concluding that there was no evidence to support the argument that allowing the application to continue would be vexatious or have a tendency to delay or prejudice a fair hearing.

The council argued that the applicant's claim over the second works was an abuse of process

The council argued that the second works were ordered by the Planning and Environment Court and that the applicants' claim for compensation was an abuse of process as it effectively sought to litigate a matter which had already been determined. The council submitted that if the claim was permitted it would create an inconsistency with the Planning and Environment Court's decision.

Whilst the applicants accepted that a party will be estopped from bringing an action which conflicts with an earlier judgment, they submitted that such a scenario was not present as the claim sought compensation only for those works which the Planning and Environment Court had ordered, but which exceeded the extent of work that needed to be done.

The court found that an estoppel arose against the applicants' claim for the second works

The purpose of the Planning and Environment Court's enforcement order was found to require the applicants to, as far as practicable, restore the land to its state prior to the development offence being committed. Upon review, the Land Court found that a reading of the orders led to the inescapable conclusion that the specified works were necessary to fulfil the stated purpose.

The Land Court held that the applicants were therefore estopped from arguing that the Planning and Environment Court orders exceeded the extent of the works which were required to return the land to its state prior to the development offence. In finding that the applicants were prevented from arguing this claim the Land Court found that it was unnecessary to consider whether related submissions were an abuse of process.

The court nevertheless addressed this issue and found that if the claims were allowed for the second works they would effectively revisit the Planning and Environment Court's decision and amount to an abuse of process.

Court of Appeal dismisses claims of procedural unfairness and upholds validity of Environmental Protection Order

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Bond v Chief Executive, Department of Environment and Heritage Protection* [2017] QCA 180 heard before Morrison and Philippides JJA and Mullins J

November 2017

In brief

The case of *Bond v Chief Executive, Department of Environment and Heritage Protection* [2017] QCA 180 concerned an application for leave to appeal against an earlier decision of the Planning and Environment Court in respect of an Environment Protection Order (**EPO**) which had been issued against the appellant.

The court acknowledged that the case involved important questions of general application as to the proper interpretation of the *Environmental Protection Act 1994* (**EPA**). For this reason, the court granted leave however ultimately dismissed the appeal.

The EPO and prior decision of the Planning and Environment Court

The appellant was the Chief Executive Officer and Managing Director of Linc Energy Limited.

Linc Energy Limited operated an underground coal gasification plant at Chinchilla, which had caused environmental harm and contamination to land within its vicinity.

The respondent issued an EPO to the appellant in order to ensure that the obligations of Linc Energy Limited to rehabilitate and restore the land were performed.

The appellant sought an internal review of the respondent's decision to issue an EPO, the result of which was that the respondent confirmed its decision to issue the EPO.

The appellant appealed to the Planning and Environment Court against the respondent's decision to issue the EPO and sought the determination of a preliminary point, namely that the EPO was unlawful on the basis that it did not comply with the relevant provisions of the EPA and that the appellant was denied procedural fairness.

The primary judge dismissed the appeal and held that the EPO was valid.

The grounds of appeal

The respondent sought leave to appeal against the decision of the Planning and Environment Court on the basis that the primary judge had made errors of law in failing to conclude that the EPO was invalid.

The pertinent issue in the appeal was the proper construction of section 521 of the EPA, which states that a dissatisfied person may apply for review of a decision to issue an EPO if an application is made to the respondent within 10 business days after receipt of the EPO or a longer period that the respondent has, in special circumstances, permitted.

Relevantly, the appellant argued that (at [5]):

- The respondent was required to determine whether there were special circumstances prior to the issue of the EPO to enable a longer period than 10 business days within which to apply for a review of the decision to issue the EPO. If so determined, the respondent was required to state a longer period than 10 business days in the EPO. At all material times, the respondent was of the view that special circumstances were involved but the EPO did not state a longer period than 10 business days.
- Alternatively, the respondent failed to make the determination about whether there were special circumstances involved prior to the issue of the EPO, which accordingly failed to state a longer period than 10 business days for making an application for a review.
- Further, or alternatively, if (as the respondent contended) it was possible to apply after receipt of the EPO for a longer period than 10 business days within which to apply for a review of the decision to issue the EPO, the EPO did not say so.

Proper construction of section 521 of the EPA

The court affirmed that the correct approach to the construction of statutory provisions was as set out by the High Court of Australia in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Relevantly, the court observed the following (at [8]):

> *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'.*
>
> *A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.*
>
> *… the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.*

In applying these principles to the interpretation of section 521 of the EPA, the court held as follows (at [31] and [45]):

- In respect of the appellant's first and second contentions, the proper construction of section 521 of the EPA is that the decision as to whether special circumstances exist, and therefore warrant a longer period, is not confined to being made before an EPO issues.
- In respect of the appellant's third contention, it was true that there was no provision in the EPA giving a right to review a decision to refuse a longer period, or give a period longer than 10 business days but still shorter than requested. However, such a decision represented a discretionary decision of an administrative character and would therefore be amenable to judicial review under the *Judicial Review Act 1991*, which may give rise to a stay being granted to preserve the efficacy of the review proceedings.

Ultimately the court held that the grounds attacking the validity of the EPO must fail and upheld the validity of the EPO.

Lapsed development approval revived where applicant misunderstood effect of related approvals

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *1770 Nominees Pty Ltd v Gladstone Regional Council* [2017] QPEC 59 heard before Long SC DCJ

November 2017

In brief

The case of *1770 Nominees Pty Ltd v Gladstone Regional Council* [2017] QPEC 59 concerned an application to the Planning and Environment Court seeking declarations and orders to extend the currency period of a development approval for a material change of use and to excuse non-compliance with section 341(1) of the *Sustainable Planning Act 2009* (**SPA**).

The applicant applied to the council for operational works permits based on a mistaken understanding that this action would effectively extend the currency period of an earlier development approval for a material change of use.

The court identified that by the time the applicant applied for the operational works permits they were unrelated to the material change of use development approval and therefore failed to extend its currency prior to its lapse.

The court ultimately found that several factors favoured the applicant being granted relief under section 440 of the SPA and ordered that the currency period of the material change of use development approval be extended.

The applicant lodged a development application for a material change of use

The applicant's family owned and operated a marina for some 30 years on land leased at 535 Captain Cook Drive, Seventeen Seventy.

In September 2007 the applicant lodged a development application with the council for a code assessable material change of use for eight additional marina berths under the now superseded Miriam Vale Shire Planning Scheme.

The council approved the development application on 19 December 2008, subject to conditions. A negotiated decision notice was subsequently given by the council on 22 December 2009 following further representations. The approval was given for the standard currency period of four years, pursuant to section 3.5.21 of the repealed *Integrated Planning Act 1997*.

The approved material change of use lapsed as a consequence of the applicant's misunderstanding

The applicant applied to the council on 26 February 2014 for operational works permits. The applicant believed that the operational works permits would effectively commence the earlier material change of use development approval as they fell within the meaning of "related approvals" under sections 341(7) of the SPA.

The court identified that the operational works permits were not applied for within two years of the start of the relevant period for the material change of use approval. Having reached this finding, the court determined that the operational works permits were not within the meaning of related approvals and therefore had no effect on the currency period of the material change of use development approval.

Uncontested evidence confirmed that the applicant had misunderstood the effect of the operational works permits and had therefore subsequently neglected to apply to extend the currency period of the material change of use development approval. Accordingly, the material change of use development approval lapsed on 22 April 2015.

The applicant filed an originating application

The applicant filed an application with the court on 5 May 2017 which sought the following declarations and orders:

- excusal of non-compliance with section 341(1) of the SPA in accordance with section 440 of the SPA; and
- the granting of an extension to the material change of use development approval, upon the court hearing a new request made under section 383 of the SPA.

The court recognised that discretionary factors favoured granting relief to the applicant

The court found that the following discretionary factors favoured orders being given to provide the applicant with relief:

- a vessel loading facility at the applicant's marina satisfied an increasing demand for marina berths within the surrounding locality;
- delays in carrying out the approved material change of use were primarily due to changing economic circumstances;
- the applicant would be forced to incur significant financial burden if a new development application was required;
- the council consented to the relief sought by the applicant; and
- the application to extend the material change of use development approval was necessary following the applicant's misunderstanding of the effect of the operational works permits.

The hearing was adjourned as the applicant failed to provide the court with necessary materials

The court identified that the applicant had neglected to include evidence of landowner's consent as required by section 383(3)(d) of the SPA.

The applicant was unable to rely upon section 383(4) of the SPA as there was no evidence to suggest that the landowner's had unreasonably withheld consent or that the number of landowners' meant that obtaining consent was impracticable. The court accordingly adjourned the application at the applicant's request.

The Planning Act 2016 had commenced when the Application next came before the court

The application came before the court again on 25 August 2017 at which point the applicant provided evidence of owner's consent. At this date the SPA had been repealed and replaced by the *Planning Act 2016*.

The court identified that pursuant to section 311 of the *Planning Act 2016*, the application continued to be decided subject to the provisions of the SPA. The court ordered that the applicant's non-compliance with section 341 be excused and that the relevant period for the material change of use development approval be extended to 1 December 2016.

Planning and Environment Court re-enlivens a lapsed development approval where the relevant council was not opposed the re-enlivening

Thomas Massey | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Austin & Anor v Sunshine Coast Regional Council* [2017] QPEC 50 heard before Long SC DCJ

November 2017

In brief

The case of *Austin & Anor v Sunshine Coast Regional Council* [2017] QPEC 50 involved an application to the Planning and Environment Court under section 440 of the *Sustainable Planning Act 2009* (**SPA**) to re-enliven a lapsed development approval.

The applicants were seeking to develop land to provide for their impending retirement. The applicants obtained a development approval to reconfigure land and for a material change of use of land from rural to park residential. The development application took effect on 3 April 2007. The applicants lodged eight further applications to the council. Two were in relation to changes to the approval, three were in relation to operational works permits and three were requests to extend the relevant period of the development approval.

The development approval lapsed on 3 April 2017 because the applicants failed to make a further extension application to the council while the development approval was current. As such, the applicants were unable to make an application to the council for a further extension and had to seek the court's discretion to excuse non-compliance with the requirements of the SPA.

Court found that the SPA governed the application despite having been repealed

The court had to determine whether the SPA continued to apply in the relevant circumstances, specifically the discretionary power in section 440 of the SPA which vests in the court the power to excuse non-compliance with a provision of the SPA. This issue arose as the application was filed but had not been determined prior to the commencement of the *Planning Act 2016* (**PA**) and the consequential repeal of the SPA. The court accepted that section 311 of the PA operates to preserve the SPA's application, and relief under section 440 of the SPA was available.

Court identified a number of factors relevant to its decision to extend the relevant period

There were a number of matters the court took into account in determining that it was appropriate for it to exercise its discretion.

The court firstly noted the council's lack of opposition to the application and preparedness to consent to the orders sought was relevant, citing *Devy & Anor v Logan City Council* [2010] QPEC 96 as the relevant authority.

The court also noted that the applicants' failure to make the application for the extension to the council before the expiration of the statutory deadline was a product of oversight only. It was also relevant that the application to the court had been made in a timely fashion.

Further, the court thought it was relevant that the applicants were continuing to take steps to complete the development by carrying out operational works and selling the proposed lots.

Lastly, the court noted that no concurrence agencies needed to be consulted.

The court therefore determined that it was appropriate to exercise its discretion under section 440 of the SPA and re-enlivened the lapsed development approval.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court considers the full extent of a development approval in declaring that the demolition of part of a pre-1946 dwelling, which in isolation would have been exempt development, was not in fact exempt development

Thomas Massey | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mypropertyprofession Pty Ltd v Brisbane City Council* [2017] QPEC 43 heard before Everson DCJ

November 2017

In brief

The case of *Mypropertyprofession Pty Ltd v Brisbane City Council* [2017] QPEC 43 involved an application to the Planning and Environment Court about a preliminary point of law, being whether the demolition of part of a pre-1946 house at Hamilton was exempt development.

The applicant was given a preliminary approval to carry out building work for partial demolition and relocation of a house and multiple dwellings (three units) in late 2015. The council issued an enforcement notice requiring the immediate cessation of all building work on the premises except for those works required to stabilise the house, which was appealed. In the course of the appeal, the parties asked the court to make a declaration about the applicable level of assessment for the "*demolition of that part of the existing dwelling that is behind the highest and rearmost part of the roof*" (see [3]).

The issue arose as a consequence of the interpretation of two applicable provisions in the levels of assessment tables. The court applied the applicable principles of statutory interpretation, as noted in *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* (2014) 201 LGERA 82, and gave effect to both of the relevant provisions by reading the planning scheme as a whole. In doing so, the court declared that the demolition of the part of the subject house behind the highest and rearmost part of the roof was not exempt development.

The parties sought a declaration about the interpretation of two applicable levels of assessment

The *Brisbane City Plan 2014* relevantly provides in section 5.3.2(3) that "*[b]uilding work and operational work are accepted development, unless the tables of assessment state otherwise or unless otherwise prescribed in the Act or the Regulation.*"

It was relevant to the determination of the level of assessment that the land was within the Traditional building character overlay and that the subject house was constructed in 1946 or earlier. The relevant levels of assessment table stated as follows:

- "*the components of a building constructed in 1946 or earlier forward of a point which is the highest and rearmost part of the roof*" was code assessable; and
- "*building working involving a dual occupancy, dwelling house, multiple dwellings or rooming accommodation, where not in the Local heritage place sub-category or the State heritage place sub-category of the Heritage overlay*" was also code assessable.

The appellant submitted that given the operation of the former provision and section 5.3.2(3), the demolition of the part of the house behind the highest and rearmost part of the roof was exempt development.

The council submitted that the development approval constituted building work involving a multiple dwelling and, given the operation of the *Brisbane City Plan 2014* as a whole, the demolition behind the highest and rearmost part of the roof was code assessable.

The court considered the extent of the building work and read the planning scheme as a whole to determine the applicable level of assessment

The court noted that the approved plans showed "*significant building works*" and pointed, in particular, to the following:

- the partial demolition of the house;
- the repositioning of the house and the construction of an additional story underneath it;
- the interconnection between the relocated house and the new building resulting in a multiple dwelling use covering three distinct but joined buildings.

The court was satisfied that if the development approval was just for demolition work, only the demolition of parts of the house forward of the highest and rearmost part of the roof would be code assessable. However, the court found that the development approval went further than just seeking demolition.

In this respect, the court applied the applicable principles of statutory interpretation as stated in *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* (2014) 201 LGERA 82 and read the *City Plan 2014* as a whole in order to give effect to its provisions. The court determined that the development approval involved demolition as well as "*significant building work to renovate and reposition the pre-1946 dwelling and incorporate it into a multiple dwelling use*". As such, the court determined that the building work was code assessable and it followed that the demolition of part of the house behind the highest and rearmost part of the roof was not exempt development.

Adaptive reuse of heritage building Athol Place a powerful ground in support of proposed commercial development

James Nicolson | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Body Corporate for Mayfair Residences Community Titles Scheme 31233 v Brisbane City Council & Anor* [2017] QPEC 22 heard before Kefford DCJ

November 2017

In brief

In the decision of *Body Corporate for Mayfair Residences Community Titles Scheme 31233 v Brisbane City Council & Anor* [2017] QPEC 22 the Planning and Environment Court upheld a decision of the Brisbane City Council to approve a development application for the adaptive reuse of a heritage building known as Athol Place and the adjacent development of a new eight storey commercial office building at 307 Wickham Terrace, Spring Hill.

The appeal was commenced by a submitter which was the body corporate for the Mayfair Residences, a 12 storey residential building located opposite the site. The key issues in the appeal centred on the bulk and scale of the proposed development, consistency of the commercial use with the planning intent for the precinct, the impact of the proposed development on the heritage significance of Athol Place and planning and community need.

In upholding the council's approval, the court held that the proposed development is one of substantial merit which allows for the co-location of medical services within a short walk to the Brisbane Private Hospital and provides for the revitalisation and adaptive reuse of Athol Place.

Proposed development of Athol Place

The proposed development comprised of two components. The first component involved the adaptive reuse of a heritage listed two storey Georgian-style terrace house known as Athol Place which was constructed in the 1860s along the street frontage to Wickham Terrace.

The existing use of Athol Place is for medical consulting rooms and residential flats. The adaptive reuse proposed the demolition of a dilapidated 1929 rear addition to expose the original stone exterior, removal of some internal walls, and use of the interior for a combination of consulting rooms, a food and drink outlet, and an interpretation centre showcasing the history of the building and its occupants.

The second component involved a new eight storey commercial building behind Athol Place to be used for offices and health care services (principally medical consulting rooms) as well as a rooftop food and drink outlet.

Brisbane City Plan 2014

The proposed development was assessed against the *Brisbane City Plan 2014*, under which the site was located in the High density residential (up to 15 storeys) zone and the High-rise residential precinct (special area 22) of the Petrie Terrace and Spring Hill Neighbourhood Plan. The site was also subject to the Heritage overlay.

While the proposed development was impact assessable and was therefore to be assessed against the whole of the *Brisbane City Plan 2014*, the issues focussed principally on the code provisions for the relevant zone, neighbourhood plan and the heritage overlay.

Bulk and scale (plot ratio, site cover, boundary setbacks and building separation)

The submitter argued that the proposed development was an overdevelopment of the site based on the fact that it failed to achieve the minimum setbacks and separation distances from all boundaries. The submitter also argued that adjacent buildings had a plot ratio and site cover that was some three to six times the maximum amount prescribed by the relevant acceptable outcomes.

The court held that while the proposed development substantially exceeded many of the quantitative standards in the acceptable outcomes, it did not conflict with the relevant performance outcomes (with the exception of the rear boundary setback) when the likely visual presentation of the proposed building is viewed in perspective and in context.

In reaching this conclusion, the court found that the proposed development would be consistent with the existing modulated skyline and that its bulk, form and scale would be in keeping with the locality.

Planning intent

The overall outcomes of the High-rise residential precinct (special area 22) within the Petrie Terrace and Spring Hill Neighbourhood Plan Code provide for the reasonable intensification and expansion of an existing well-established use.

The court found that the site is presently under-developed, the uses proposed by the development are specifically acknowledged to be consistent uses, the effects on neighbours are not unreasonable as character and amenity will be protected and enhanced (particularly by the reuse of Athol Place), and that the planning negatives typically associated with non-residential uses that the code seeks to guard against, are absent.

The court held that the proposed development was a reasonable intensification and expansion of the existing use and did not conflict with the planning intent for the area as expressed in the overall outcomes for the neighbourhood plan Code.

Heritage impact

The submitter argued that the proposed development conflicted with the Heritage Overlay Code for two reasons.

First, that extinguishing the original residential use of Athol Place for the first time in more than 150 years and demolition of the 1929 rear addition would have an unacceptable impact on the cultural heritage significance of the place.

In this respect, the court held that the matters of heritage significance for a heritage place are limited to those stated in the Queensland Heritage Register, which in this instance made no mention of the 1929 rear addition. While the occupation of Athol Place as a residence is mentioned, the court found from the context that its cultural heritage significance is tied to its "appearance" as a residence rather than its "use".

Second, that the size and scale of the proposed commercial building component would appear as a visually imposing contemporary backdrop immediately behind Athol Place that would impact on the heritage character and significance of the building.

In respect of this point, the court again emphasised that the proposed development must be viewed in the context of the locality, which in this instance contains an eclectic mix of buildings including many tall buildings. The court held that the proposed eight storey commercial building is not dissimilar to surrounding mid-rise buildings, some of which can already be seen as part of the backdrop of Athol Place.

The court ultimately held that the proposed development will improve the interpretation and appreciation of the heritage significance of Athol Place by restoring, maintaining and providing access to the building for future generations.

Planning and community need

The applicant developer argued that there was a planning and community need for health care services in the location of the site and that, when a proposed development involves the provision of essential services, the bar to establish community or planning need ought not be set too high.

The court agreed, noting that the co-location of health care services within a flat, short walk to Brisbane Private Hospital will provide a significant benefit to the community and has synergistic benefits for both patients and medical professionals.

Outcome of the appeal

The court concluded that while the proposed development was in conflict with some performance outcomes of the codes in *Brisbane City Plan 2014* there were sufficient planning grounds to justify approval despite the conflict.

In dismissing the appeal, the court noted that the proposed development is one of substantial merit located on a particularly suitable site and that the revitalisation and adaptive reuse of Athol Place is a powerful ground in support.

Proposed onsite relocation of heritage structure refused due to removal of front garden

Luke Grayson | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Alloa Properties Pty Ltd v Brisbane City Council & Ors* [2017] QPEC 51 heard before RS Jones DCJ

November 2017

In brief

The Planning and Environment Court dismissed an appeal by Alloa Properties Pty Ltd against the refusal by the Brisbane City Council of a development application which sought approval for a proposal to relocate the existing heritage building some 20 metres closer to the road frontage, on the basis that the front garden formed a part of the heritage significance of the site and its proposed destruction conflicted with the *Brisbane City Plan 2014*.

Appeal against the council's refusal of a development application for material change of use and preliminary approval for building work

The case of *Alloa Properties Pty Ltd v Brisbane City Council & Ors* [2017] QPEC 51 relates to a proposal by Alloa Properties to construct three townhouses on a site at New Farm. The proposal also provided for the extant heritage building to be relocated approximately 20 metres closer to the road frontage to make room for the three townhouses to be constructed to the rear of the heritage building.

Alloa Properties Pty Ltd applied to the council under the repealed *Sustainable Planning Act 2009* for a development permit for a material change of use and preliminary approval for building work to implement the development proposal. This application was refused by the council and Alloa Properties appealed to the Planning and Environment Court against the council's decision.

Town planning experts agreed that there were not sufficient grounds to justify approval

The town planning experts for all parties agreed that to the extent there was conflict with the provisions of the *Brisbane City Plan 2014*, sufficient grounds did not exist to justify approval despite the conflict.

The court therefore determined that the sole issue in dispute was whether the proposed development involved conflict with the *Brisbane City Plan 2014*, in particular the Heritage overlay code.

Issue in dispute was whether or not the garden formed a part of the heritage place

The alleged conflict with the *Brisbane City Plan 2014* related to the proposed relocation of the heritage building from its current position set back from the road by some 25 metres, to a position set back by some 5-6 metres. The area on which the building was to be resituated on is currently covered by a garden, which the council considered to form part of the heritage place.

The heritage citation which had been prepared for the site identified the following reasons for heritage significance:

- That the site is important in demonstrating the evolution and pattern of the city's or local area's history.
- That the site is important in demonstrating the principal characteristics of a particular class or classes of cultural places.
- That the site is important because of its aesthetic significance, including the "attractive garden setting".
- That the site has a special association with the life or work of a particular person, group or organisation of importance in the city's or local area's history, including by being the home of Edward Granville Theodore when he was the Premier of Queensland.

The court found that the front garden formed part of the significance of the site

The aspects of heritage significance potentially relevant to the front garden were aesthetic significance and special association with the life of a particular person.

In determining whether the garden was important because of its aesthetic significance, evidence given by the landscape and gardening experts on whether the garden setting could be described as "attractive" was thoroughly considered by the court. The court concluded that whilst the garden is probably awkward and lacking in harmony and style it would be accurate to describe it as an "attractive garden setting".

In determining whether the garden was important because of its special association with the life of Edward Granville Theodore, the evidence provided by the expert historians established that the front garden was of particular significance to Theodore, but that part of the garden had been sold and developed and in the remaining garden area few plants still exist from the time of Theodore's ownership. The court found that the front garden has a special association with the life of Theodore and it was likely the site for social and philanthropic events and was therefore of heritage significance.

Removal of garden area involves conflict with planning scheme

The court found that the relocation of the heritage building onto the site of the front garden involved conflict with the *Brisbane City Plan 2014*, in particular the Heritage overlay code and the Low-medium density residential zone code.

The conflicts with the Heritage overlay code related to the impact of the proposal on the conservation of the heritage place and the damage to its cultural heritage significance as a result of the destruction of the front garden.

The conflicts with the Low-density residential zone code related to bulk and scale issues which were exacerbated by bringing the existing heritage building some 20 metres closer to the road frontage.

The court therefore dismissed the appeal by Alloa Properties and upheld the decision of the council to refuse the development application.

Development approval for building work thwarted by failure to obtain consent from parties benefitting from easements on the land

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *ISPT Pty Ltd v Brisbane City Council & Anor* [2017] QPEC 52 heard before Kefford DCJ

November 2017

In brief

The case of *ISPT Pty Ltd v Brisbane City Council & Anor* [2017] QPEC 52 concerned a submitter appeal in the Planning and Environment Court commenced by ISPT Pty Ltd against a preliminary approval for the partial demolition of the Embassy Hotel in Brisbane's City Centre.

The court found in favour of the appellant but held that, had it not been for the strict operation of section 65 of the *Building Act 1975*, the appeal would have otherwise been dismissed. The following issues were considered by the court:

- whether the development proposal conflicted with the Heritage overlay code;
- whether there was a conflict with the relevant performance outcomes of the *Brisbane City Plan 2014*; and
- whether the court had the power to grant the preliminary approval for building work without the consent of third parties who had the benefit of registered easements over the land.

The court found that it was not sufficient to establish conflict with the assessment criteria in the Heritage overlay code, in which the notion of reasonableness is inherent

Citing *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* [2014] QCA 147 the court held that the same principles of statutory construction apply to the interpretation of a planning scheme. Accordingly, it was necessary to read the *Brisbane City Plan 2014* within its context, and "*in a way which is practical … as intending to achieve balance between outcomes*" (see at [43]).

On that basis, the court held that the disputed provisions of the Heritage overlay code were not characterised in absolute terms and contemplated a balance between conservation of heritage places and the promotion of development of Brisbane's City Centre. The Burra Charter referenced by those provisions was also found to reflect that goal.

The appellant submitted that the decision to approve partial demolition of the hotel was in conflict with the Heritage overlay code insofar as it would result in an unacceptable impact on the cultural heritage significance of the hotel's internal fabric that closely relates to the 'inter-War period', namely the Art Deco ceiling, the original timber flooring and rendered masonry walls.

To resolve whether partial demolition of the hotel would conflict with the Heritage overlay code, the court said that the only necessary consideration was the impact of the proposed demolition on the cultural heritage significance of the building, by reference to the statement of significance set out in the heritage citation for the hotel.

The court found that the statement of significance, being that the hotel was "*a four-storey corner hotel erected during the CBD building boom of the 1920s*" (see at [91]), indicated that the significant features of the building were external, and would not be affected by the proposed development.

Since the proposed demolition would not result in an unacceptable impact to the heritage significance of the hotel, the court concluded that there was no conflict with the Heritage overlay code.

The court found that the identified conflicts with the Brisbane City Plan were at the lower end of the scale and readily overcome by sufficient grounds

The conflicts with the relevant performance outcomes in the *Brisbane City Plan 2014* were afforded little weight on the grounds that, among other things, some of the relevant performance outcomes have no analogue in the current planning scheme, the proposed development supported the object of the relevant provisions being to enhance cultural heritage significance and the proposed development would facilitate the purpose of a number of the overall outcomes in the relevant neighborhood plan code which the court considered a matter of public interest.

The requirement in section 65 of the Building Act 1975 could not be overcome by the court

The land was burdened by a number of registered easements. Therefore, the assessment manager could not approve a development application under section 65 of the *Building Act 1975* without the consent of the parties taking the benefit of the easements.

It was submitted that the provisions of the now repealed *Sustainable Planning Act 2009* in respect of approvals expressly differentiated between the court and the assessment manager, and so demonstrated a legislative intention that the court would not be bound by the constraint under section 65 of the *Building Act 1975*.

The court rejected the argument that section 65 of the *Building Act 1975* intentionally excludes the court on the basis that, under section 495 of the now repealed *Sustainable Planning Act 2009*, the appeal is by way of a hearing anew and the court must therefore decide the appeal as though it is bound by the legislative regime that bound the assessment manager, when the application was made.

The court found that section 65 of the *Building Act 1975* evinces a clear and unambiguous prohibition against building work approval "*unless each registered holder of the easement … has consented*" (see at [155]). Consent had been sought from the easement holders however none had provided consent. The court was therefore bound by section 65 of the *Building Act 1975* not to approve the development application for building work.

Finally, the court found that its excusatory power for non-compliance or non-fulfillment was not wide enough to overcome the effect of section 65 of the *Building Act 1975*. The mandatory language of section 65 of the *Building Act 1975* prevented the court from engaging its powers to waive the requirement.

Notably, the court signposted the possibility that, despite the mandatory language of section 65 of the *Building Act 1975*, some circumstances may justify non-fulfillment of the statutory prohibition, for example, where consent was provided after the grant of the development approval.

The clear and significant need for a shopping complex, coupled with the unlikely prospect of that need being met other than in the increasingly congested Maroochydore Centre, justified approval of the development despite being in conflict with the Maroochy Plan 2000

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Harvest Investment Co (No. 2) Pty Ltd v Sunshine Coast Regional Council & Ors* [2017] QPEC 61 heard before Everson DCJ

November 2017

In brief

The case of *Harvest Investment Co (No. 2) Pty Ltd v Sunshine Coast Regional Council & Ors* [2017] QPEC 61 concerned an appeal by the applicant for a development permit for a material change of use for a shopping complex against the decision of the council to refuse the application on the basis that the proposed development at 141 Jones Road, Buderim was in serious conflict with the former *Maroochy Plan 2000*.

In ultimately finding in favour of the appellant, the court considered the following:

- whether the proposed development conflicted with the *Maroochy Plan 2000*;
- whether the proposed development resulted in unacceptable character and visual amenity impacts;
- the clear economic and community need for the proposed development; and
- whether there were sufficient grounds to justify approval of the proposed development.

The court found significant conflict with the Maroochy Plan 2000

The planned hierarchy of centres in the *Maroochy Plan 2000* demonstrated a clear intention that a shopping complex use only occur within district centres or higher order centres, however there was no relevant centre designation for the site of the proposed development.

The appellant submitted that the proposed development should be treated as the creation of a district centre to satisfy a demand and, as such, did not conflict with the *Maroochy Plan 2000*. However, this was not accepted as the site was not relevantly designated and the court was not satisfied that approval would be akin to approving the creation of a district centre.

Given that the proposed shopping complex was not a contemplated use within the relevant precinct, the proposed development was in significant conflict with the *Maroochy Plan 2000*.

The court found that unacceptable character and visual amenity impacts were minor, at best

The parties' experts agreed that the proposed development was "*unlikely to generate adverse impacts on nearby residential visual amenity*" and the scope of visual impact was limited because of the separation and screening of nearby residents from the site (at [36]).

The council argued that the proposed development fell short of complying with the provisions of the *Maroochy Plan 2000* that required that developments "*demonstrate street level design cohesion*" and that it would fail to "*present a generally continuous shopfront appearance*". The court rejected these arguments on the basis that the circumstances and topography of the site did not support the council's claims. Further, the court was persuaded by an existing development approval on the site that persisted despite similar constraints.

The court preferred the appellant's expert's evidence, finding that there was sufficient scope to satisfactorily landscape the proposed development and accordingly any conflict with the *Maroochy Plan 2000* was inconsequential.

The court found that there was a clear economic and community need for the proposed development to service the current and future residents of the area

The appellant submitted that the unsatisfied demand created a planning need for the proposed development and overcame any conflict with the Maroochy Plan. In considering the concept of a "planning need" the court cited the explanation given in *Isgro v Gold Coast City Council & Anor* [2003] QPELR 414 where the court relevantly explained as follows:

> *[n]eed in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community... Of course, a need cannot be a contrived one. It has been said that the basic assumption is that there is a latent unsatisfied demand which is either not being met at all or is not being adequately met* (see [21]).

The court considered the extent of the need and held that the evidence of the experts for both parties about the estimated population and growth forecast demonstrated a clear demand for the proposed development.

The council's expert argued that the small nearby primary trade area would be significantly impacted by the proposed development. The court held that this position was exaggerated and referred to the test in *Kentucky Fried Chicken Pty Ltd v Gantidis & Anor* (1979) 140 CLR 675 which relevantly states as follows:

> *[h]owever the mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration* (see [17]).

The court was of the view that the small nearby primary trade area would persist and ultimately compete with the proposed development.

The court preferred the appellant's expert's evidence, being that there was a need for a full-line supermarket to serve the area and that the population level could clearly sustain the proposed development. The court found that the shopping complex would satisfy the modern consumer's need for a "*full range of goods available in convenient locations*" (at [33]).

The court found that the planning grounds in favour of the proposed development were, on balance, sufficient to justify its approval

Despite the conflict with the *Maroochy Plan 2000*, the court was persuaded to approve the proposed development because the council had previously departed from the planning intent of the *Maroochy Plan 2000* because the contemplated "Town Centre Core" in the relevant precinct was in fact absent. Further, the council had approved a number of developments, including a nearby development, that presented similar conflicts with the planning scheme. Lastly, the court was satisfied that there was a significant need for the proposed development.

Planning and Environment Court finds insufficient grounds to support the approval of an out of centre development involving a shopping centre

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Lipoma Pty Ltd & Ors v Redland City Council & Nerinda Pty Ltd* [2017] QPEC 53 heard before Morzone QC DCJ

November 2017

In brief

In the Planning and Environment Court decision of *Lipoma Pty Ltd & Ors v Redland City Council & Nerinda Pty Ltd* [2017] QPEC 53 the appellants, who own and operate three nearby shopping centres, successfully appealed the decision of the Redland City Council (**council**) to approve a new mixed use development in a nearby out-of-centre location.

The key issues in the appeal centred around the retail and commercial aspects of the development and related to the following:

- the nature and extent of the conflict with the *Redlands Planning Scheme 2006*, the draft *Redland City Plan 2015* and the *South East Queensland Regional Plan 2009-2031*; and
- whether there were sufficient grounds to justify the approval despite the conflicts having regard to the need for the development, commercial, traffic and amenity impacts of the development and whether the *Redlands Planning Scheme 2006* had been overtaken by events.

The court allowed the appeal and refused the development, noting that the development conflicted with the *Redlands Planning Scheme 2006* and did not demonstrate sufficient grounds to justify approval despite the conflict.

Development application

The development application sought the following:

- a development permit for a reconfiguration of a lot (one lot into two lots subdivision);
- a preliminary approval under section 242 of the *Sustainable Planning Act 2009* (**SPA**) for a mixed-use development incorporating both:
  - residential uses, including a mixture of 35 two-storey attached and semi-detached townhouses and duplexes on small lots as well as detached houses on a larger lot; and
  - centres uses, including a full-line supermarket, retail warehouse, speciality shops, tavern, medical centre and service station.

Planning framework

The development application was made under the SPA in August 2014 when the *Redlands Shire Planning Scheme 2006* was in force. The draft *Redland Shire City Plan 2015* was publicly exhibited by the time the council approved the application in November 2015.

The land the subject of the development application was 6.25 hectares in size and located at the junction of two major roads, namely Boundary Road and Panorama Drive in Thornlands.

Under the *Redlands Planning Scheme 2006* the land was as follows:

- partly in the Medium Density Residential Zone – Sub Area MDR5;
- partly in the Urban Residential Zone – Sub Area UR1;
- partly in the Open Space Zone and the Community Purposes Zone – Sub Area CP7;
- designated under the Kinross Road Structure Plan as:
  - partly Medium Density Residential Housing;
  - partly Urban Residential Housing; and
  - partly Greenspace Network.

The draft *Redland City Planning Scheme 2015*, which was publicly exhibited in September and November 2015, effectively replicated the zoning of the *Redlands Planning Scheme 2006* for the subject land with the land zoned a mixture of medium density residential, low-medium density residential and open space.

Issues in the appeal

The appellants took no issue with the reconfiguration of the lot or the residential aspect of the development. The issues in the appeal centred around the retail and commercial component of the development, with particular focus on the full-line supermarket and associated retail and tavern uses.

The court refined the issues in the appeal to the following:

- the nature and extent of the conflict with the *Redlands Planning Scheme 2006*, the draft *Redlands City Plan 2015* and the *South East Queensland Regional Plan 2009-2031*;
- whether there were sufficient grounds to justify the approval despite the conflicts having regard to:
  - the need for the development;
  - commercial, traffic and amenity impacts of the development; and
  - whether the *Redlands Planning Scheme 2006* had been overtaken by events.

Nature and extent of the conflict with the Redland Planning Scheme 2006 and the draft Redland City Plan 2015

The court's consideration of the nature and extent of the conflict predominantly involved a comparison of the distinguishing characteristics between a major, district, neighbourhood and local centre and an analysis of whether the development constituted out-of-centre development.

In this respect, the court noted that despite the applicant's characterisation of the development as a "neighbourhood centre", it represented the second largest full-line supermarket in the Redland City local government area. The applicant accepted that the development did represent an out-of-centre development, but argued that it did not affect the primacy of the centres network.

The court found that the development was out-of-centre development and that the conflict with the *Redland Planning Scheme 2006* was plain and significant because it was not contemplated in its location, scale, or function. The court noted the following about the development:

- it would result in an additional centre inconsistent with the Scheme's planned centre network;
- it would potentially jeopardise the ability of higher order centres to function at the level intended by the centres hierarchy;
- it was inconsistent with the intention for the land to be utilised for medium density residential housing, urban residential housing and green space network; and
- it would impact the ability of the planned local centre in the Kinross Road Structure Plan area to properly function.

In relation to the draft *Redlands City Plan 2015*, the court noted that it replicated the existing zoning pattern and attracted the same issues as the *Redlands Planning Scheme 2006*, with the only material difference being that the term "neighbourhood centres" changed to "local centres" to conform with the Queensland Planning Provisions. The court therefore concluded that the maintenance of full-line supermarkets in the centres hierarchy and centre zoning by the draft *Redlands City Plan 2015*, after it had undergone a whole planning scheme review, defeated the argument advanced by the applicant and the council that there was a "planning deficiency" to meet population growth in the Kinross Road Structure Plan area, and the broader Thornlands area.

Nature and extent of the conflict with the South East Queensland Regional Plan 2009-2031

In its consideration of the *South East Queensland Regional Plan 2009-2031*, the court noted that "*[the South East Queensland Regional Plan 2009-2031] is in the nature of a higher order strategic planning document expressed in broad terms and ought be considered with that in mind*" and that "*conflict with the [the South East Queensland Regional Plan 2009-2031] does not mandate refusal in the absence of sufficient grounds*".

Sufficient grounds

The court moved to considered whether there were sufficient grounds to approve the development despite the "plain and significant" conflicts.

The applicant pursued the following two key points:

- The *Redlands Planning Scheme 2006* had been overtaken by events and no longer was consistent with the needs of the community. The applicant relied on evidence from its town planning expert whom identified a number of discrepancies and conflicts within the *Redlands Planning Scheme 2006*.

  The council also acknowledge these shortcomings, in response to which the court observed as follows:

  > *It is very rare that a Council is so critical and damning about its own current scheme. But this submission and the body of expert opinion must be properly considered in light of the legislative force and intent of the [Redlands Planning Scheme 2006], which is reinforced by the evolvement of the* [Redland City Plan 2015].
  >
  > *Notwithstanding sound expert opinion or Council's submitted aspiration, the Court is bound to have regard to the relevant scheme and ought not usurp the role of the local authority.*

- The development fell within a "geographic hole" of centres for which the development responded to:
  - a community need, in the sense that it promotes convenience and affordability within the local area;
  - an economic need, in the sense that it would be economically viable as it serviced a catchment area with a population in excess of 10,000 people and would not have a significant impact upon other centres;
  - a planning need, in the sense that it responds to significant growth in dwellings and population in the southern Thornlands area, which is predicted to continue in the future in such areas as Kinross Road and Woodlands Drive.

Conclusion

While the court acknowledged that there were strong arguments and opinion about the deficiencies in the *Redlands Planning Scheme 2006*, it was reticent that the draft *Redland City Plan 2015* effectively replicated the zoning pattern, maintenance of full-line supermarkets in the centres hierarchy and centre zoning.

To this end, having considered the grounds in favour of the application as a whole, the court was not satisfied that there were, on balance, sufficient grounds to justify approving the application despite the conflicts.

The court allowed the appeal and refused the development.

Building and Development Committee decision incorrectly focussed on procedural requirements instead of reasonable and relevant plumbing requirements

Shaun Pryor | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Council of the City of Gold Coast v Sedgman Consulting Pty Ltd* [2017] QPEC 18 heard before Kefford DCJ

December 2017

In brief

The case of *Council of the City of Gold Coast v Sedgman Consulting Pty Ltd* [2017] QPEC 18 concerned an appeal by the Gold Coast City Council against a decision of the Building and Development Committee to set aside a decision of the council to issue a compliance permit for plumbing and drainage work subject to conditions.

The applicant for the compliance permit appealed the council's decision to the Building and Development Committee on the grounds firstly that the council had failed to issue an information notice as required; and secondly against condition 1 of the compliance permit.

The Building and Development Committee set aside the decision of the council to issue a compliance permit on the basis that the information notice had not been given.

The Planning and Environment Court found that by focussing on the procedural requirements the Building and Development Committee did not decide all of the matters the subject of the appeal and fell into error of law for exceedance of jurisdiction.

The court noted that the council's decision letter could not be regarded as an information notice

Under the *Plumbing and Drainage Act 2002*, the council was required to give an information notice about the decision where it refuses to give a compliance permit or gives a compliance permit on conditions.

The *Plumbing and Drainage Act 2002* relevantly defines an information notice as a notice stating the following:

- the decision;
- the reasons for the decision;
- that the person to whom the notice is given may appeal against the decision within 20 business days;
- how the person may appeal against the decision.

The court found that the council's letter dated 7 April 2016 notifying the applicant of its decision to give a compliance permit on conditions could not properly be regarded as an information notice for the purposes of the *Plumbing and Drainage Act 2002* as it did not contain the reasons for the decision, did not give notice of the right of appeal to the Building and Development Committee within 20 business days and did not advise how to appeal.

However, as there was no application to declare the information notice invalid, the court noted the relevance of this finding was only in relation to the appropriate orders to be made in remitting the matter back to the Building and Development Committee.

Building and Development Committee failed to determine the reasonable and relevant plumbing requirements

Despite the council's failure to give an information notice, the court found that the Building and Development Committee incorrectly concerned itself with the question of whether the compliance permit was valid rather than the reasonable and relevant plumbing requirements.

The court found that in doing so the Committee "*did not decide all of the matters that were the subject of the appeal*" and made an error or mistake of law.

The court was satisfied that the matter was within the jurisdiction of the Building and Development Committee and that the appropriate order was to remit the matter to the committee for a decision to be made according to the law.

The court noted the difficulty for the applicant in making an informed decision to initiate the appeal and about the grounds of appeal in circumstances where the reasons from the council had not been given. Consequently, the court ordered that the council give the applicant a written statement of reasons for its decision to give a compliance permit on conditions.

Increases in built form are relevant to whether there is a material change of use even where the nature of the use is unchanged

Shaun Pryor | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gerhardt v Brisbane City Council* [2017] QPEC 49 heard before Kefford DCJ

December 2017

In brief

The case of *Gerhardt v Brisbane City Council* [2017] QPEC 49 concerned an originating application to the Planning and Environment Court made by a private certifier seeking declarations that the proposed use of the subject land for residential purposes did not constitute a material change of use and that no development application for either a development permit for a material change of use or a preliminary approval for building work was required to be made to and approved by the council.

Despite the historical use of the land also being for residential purposes, the court observed that the development of the proposed house represented an increase in built form and introduced new impacts.

Accordingly, the court found that the proposed house constituted a material change of use and would be code assessable under the council's planning scheme.

The court also found that the building work was code assessable against the council's planning scheme, but that the type of further approval required to be obtained would be a product of timing. Accordingly, the court was not satisfied that it would be appropriate to make a declaration about whether a preliminary approval would be required.

Background

A development application for a development permit for building work (residential dwelling) was made to the applicant, being a private certifier. The council was a concurrence agency for the development application for design and siting as well as for amenity and aesthetics.

In its concurrence agency response, the council directed a refusal of the development application based on the amenity and aesthetic impact of the development and advised the applicant that the proposed development constituted a material change of use.

Court found that changes in built form are relevant to whether there has been a material change of use

The court examined the definition of material change of use in both the *Planning Act 2016* and the Sustainable *Planning Act 2009* and noted that the relevant limb of the definition was "*whether there had been a material increase in the intensity or scale of the use of the premises*" (at [24]).

In making this determination, the court acknowledged that the appropriate comparison to be made was between the historical use of the land for residential purposes and the proposed development which was also for residential purposes.

The applicant contended that there could be no material change of use if the proposed use was the same as the historical use, both being a residential use. It further contended that changes to the built form were an irrelevant consideration.

The court found however, by reference to existing authority, that the built form associated with the use was a relevant consideration to whether there is a material increase in the intensity or scale of the use.

There was a material increase in the intensity or scale of the use of the premises

The court examined the differences between the demolished house and the proposed house. It found that the proposed house would have an extra storey, at least one additional bedroom, greater floor area, a contemporary design rather than timber, a large number of additional rooms and facilities including a study, pool, deck, and a cellar, and a number of larger facilities including the kitchen, dining and living areas.

The court found that the proposed house would result in an increase in the residential built form on the land.

The court also found that the increase in size of the proposed house would be material as it would be substantially larger in terms of bulk, height and scale and would introduce new impacts which are not "*trivial or technical*" (at [43]).

Such impacts included the potential to increase an unacceptable flood risk because of non-compliance with the required minimum non-habitable floor level, conflict with the Waterway corridors overlay code, and visual and character impacts because of non-compliance with the Traditional building character (design) overlay code.

For these reasons, the court ultimately found that the construction of the proposed house constituted a material change of use.

Court declined to make an order about whether a development application for a preliminary approval was required to be made to the council

The applicant also sought declarations that no application for a preliminary approval was required to be made and approved by the council for the proposed house.

The court determined that the building work was code assessable against the council's planning scheme but held that the type of further approval required to be obtained is a matter dependant on when such approval is sought. The court also found that the question of who is the appropriate assessment manager was not fairly raised in the originating application.

In any event, the court found that there would be no utility to the declaration sought given that the development application was required to be refused given the council's concurrence agency response.

Accordingly, the court was not satisfied that it would be appropriate to make a declaration that a preliminary approval would be required.

Costs

Despite the applicant seeking costs on an indemnity basis, the court found that the proceedings brought by the applicant were vexatious for the purposes of section 60(1)(b) of the *Planning and Environment Court Act 2016*.

The court highlighted the applicant's poor articulation of the preliminary approval point, particularly in circumstances where the applicant had conceded that the development application had to be refused.

In respect of the material change of use point, the court refused to accept the applicant's submission that the point raised a matter of public interest in circumstances where the applicant led no evidence and there was clear existing authority on the matter which was contrary to the applicant's arguments.

The court ordered that the applicant pay the council's costs on a standard basis.

Land Court dismisses an appeal challenging the council's rating categorisations

Thomas Massey | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Marchesi v Noosa Council* [2017] QLC 19 heard before WL Cochrane

December 2017

In brief

The case of *Marchesi v Noosa Council* [2017] QLC 19 involved an appeal to the Land Court by a landowner against the inclusion by the council of lots within rating categories.

In particular the landowner argued as follows:

- Lot 5101 be changed from Residential (not Principal Place of Residence) to Low-rise Units (not Principal Place of Residence);
- Lot 7204 be changed from High-rise Units (not Principal Place of Residence) to Commercial and Industrial;
- Lot 7503 be changed from High-rise Units (not Principal Place of Residence) to Residential (not Principal Place of Residence);
- Lot 9415 be changed from High-rise Units (not Principal Place of Residence) to Residential/Other.

The court dismissed the appeal on the basis that its task was limited to determining whether the rating categorisations were appropriate by reference to the specific definitions contained in the council's Revenue Statement.

The landowner's main issue relating to Lot 5101 was that the landowner should be repaid for overpayments made since the purchase settlement, due to the incorrect categorisation. The council had re-categorised Lot 5101 from High-rise Units (not Principal Place of Residence) to Residential not Principal Place of Residence prior to the proceedings being commenced in the court. Given that the re-categorisation had already been achieved, the court could take the matter no further as its jurisdiction was limited to determining whether the rating categorisations were appropriate.

When does a building constitute a High-rise Unit

The landowner contended that Lots 9415, 7503 and 7204, which were categorised as High-rise Units (not Principal Place of Residence), should be re-categorised as Low Rise, Commercial Industrial or Residential (not Principal Place of Residence) and other.

The court initially noted that the landowner had failed to establish on the other evidence why the alternatives were more appropriate than the category assigned by the council. The court stated that the landowner was required to demonstrate on the evidence why the category imposed by the council was inappropriate, rather than simply arguing that the council's categorisation was wrong and offering a variety of alternatives.

The court considered the definition of "*High-rise Unit*" under the Revenue Statement which relevantly stated "*all strata units within a complex as defined under the Body Corporate and Community Management Act 1997 where the complex contains a building greater than 4 storeys above the ground*".

The council tendered a report which demonstrated that Lot 9415 was located in a four storey building and that Lots 7204 and 7503 were located in a five storey building. The court applied a literal interpretation of the council's Revenue Statement and held that the units within the complex should be categorised as High-rise Units by reference to the definition of High-rise Units contained in the Revenue Statement.

The definition of Complex

The landowner argued that the word "*complex*" within the definition of High-rise "*should be used in the sense of it being a building rather than a number of buildings within the Community Titles Scheme…*" [at 112].

The court applied a literal interpretation approach, and relied upon the Macquarie Dictionary definition of "*complex*" being [at 117]:

> 1. *composed of interconnected parts, compound. 2. Characterised by an involved combination of parts.*

The court then referred to the English decision of *Dixon (Inspector of Taxes) v Fitches Garage Ltd* [1975] 3 ALL ER 455, which was a case that involved a determination of whether a canopy erected over the forecourt of a petroleum station was plant for the purpose of trade. In particular, the court referred to the discussion of Brightman J who relevantly stated [at 118]:

> *A 'complex' is, I think, modern jargon for something which is capable as being regarded as an integer or unit though composed of independent or semi- independent parts. My understanding of the reasoning of the General Commissioners is that they took the view that the canopy was a part of a unit of which the petrol pumps were the principal components, and that as the petrol pumps were clearly plant (with which I agree) therefor the canopy, has an integrated component, was also plant.*

In applying the literal interpretation approach and in reliance on the decision in Dixon, the court concluded that the use of the term "*complex*" in the definition of "*High-Rise Unit (not Principal Place of Residence)*" lead to the conclusion that the categorisation did not contemplate individual buildings and was intended to mean a number of buildings.

While the court accepted that there were categorisations that contemplated individual buildings, "*High-rise Units (not Principal Place of Residence)*" was not one of them. As such, the court was satisfied that the categorisation was appropriate.

Land Court dismisses appeal where evidence did not involve true comparable sales

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *The Trust Company Limited v Valuer-General* [2017] QLC 25 heard before WA Isdale

December 2017

In brief

The case of *The Trust Company Limited v Valuer-General* [2017] QLC 25 concerned an appeal by a landowner against the Valuer-General's valuation of the landowner's land at 1233 Wynnum Road, Cannon Hill.

The landowner contended that the valuation was excessive. The court was required to consider the following:

- whether the Valuer-General's valuation of $1,600,000 was excessive when compared to the sales of comparable properties;
- whether the Valuer-General's valuation methodology was faulty as the value did not reflect the characteristics of the land and the constraints on its use;
- whether the valuation by the landowner's valuer of $1,000,000 was more accurate.

The court preferred the Valuer-General's valuation and dismissed the appeal.

Valuation principles

The court confirmed that the appropriate method for determining the value of land is to use comparable sales on the open market around the date of the valuation and to assume the land is held in Fee Simple, and sold by agreement between fully informed and willing parties.

Particulars of the land

The land was 60m^2 in area and contained 10 double-sided fuel bowsers with 20 fuelling bays. The land was in the Emerging Community Zone within the River Gateway Neighbourhood Plan under the *Brisbane City Plan 2014*. A small portion of the land was subject to flooding and overland flow.

Valuation method

The method used by both valuers to value the land was the direct comparison method using a rate per square metre based on comparable sales. To that end, both valuers determined that the highest and best use of the land was as a service station, being its present use.

The court preferred the evidence of the Valuer-General's valuer, rather than the landowner's valuer which was based on unqualified opinion

Whilst the valuers agreed that the highest and best use of the land was a service station, the landowner's valuer argued that the valuation should be based on the optimum use of the land as a service station being an eight bay fuelling station. The court found that the contention that the land would be better suited for an eight bay fuelling station was not based on any evidence and was the valuer's opinion only and, as such, should not be adopted by the court. The Valuer-General's valuer determined the land value by using comparable sales of land for commercial purposes in the area. The court preferred the evidence of the Valuer-General's valuer, being based on comparable sales of commercial land, rather than that of the landowner's valuer which relied upon unqualified opinion about the use of the land.

The comparable sales relied upon by the landowner's valuer had limited utility

The court found that the comparable sales relied upon by the landowner's valuer were of limited utility. One sale did not take into account any expert assessment of the improvement to the land as a service station. A second sale was based on the land being lightly improved and the court held that it could not rely on this sale as the value of the business was enmeshed in the total sale price. The third sale was considered to be sound. However, the court ultimately found in favour of the Valuer-General as the comparable sales relied upon by the landowner were not true comparable sales and could not be relied upon.

Land Court dismisses appeal against Valuer-General's decision and reinforces the legal test of land value

Dee Ardham | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Banks v Valuer-General* [2017] QLC 52 heard before WA Isdale

December 2017

In brief

The case of *Banks v Valuer-General* [2017] QLC 52 concerned an appeal to the Land Court against the Valuer-General's valuation of land located at Savages Road, Brookfield.

The appellant argued that the Valuer-General's valuation was not evidenced by comparable sales and that the subject land was incorrectly compared to non-farming land. The appellant valued the land using a different valuation method to the Valuer-General and reached a different valuation figure.

The court found that the appellant's valuation method could not result in a reliable conclusion. Ultimately, the court held that the Valuer-General's valuation figure was supported by the material available. The court confirmed that the valuation method used to determine this was consistent with the *Land Valuation Act 2010* (**LVA**) and an approach consistently favoured by the courts.

The Valuer-General challenged the evidence of the appellant and the appellant's expert

The Valuer-General challenged the appellant's ability as an expert witness given the appellant's financial interest in the case. The aim of this challenge was not to render the appellant's evidence inadmissible but rather to emphasise that the evidence needed to be closely scrutinised.

The court reiterated that the matter in dispute was relevant to land valuation, an area that the appellant did not claim expertise. Therefore, the court held that it was unnecessary to resolve this challenge. Similarly, the court did not resolve a challenge to the ability of the appellant's expert witness, qualified in agriculture and experienced in resource management, as the expert witnesses also did not profess to be a valuation expert.

The appellant disputed the Valuer-General's view on the highest and best use of the land

The Valuer-General valued the land at $330,000 as at 1 October 2015 whereas the appellant contended that the land should be valued at $66,000. The appellant argued that there were no comparable sales and that the Valuer-General incorrectly compared the subject land to non-farming land, resulting in a valuation figure that was too high.

The appellant described the land as frost-free with productive soil. The land mainly consists of custard apples but also has a mango orchard and hoop pines for timber. Accordingly, the appellant contended that the highest and best use of the land was farming.

The appellant used relativity to value the land by selecting the closest custard apple farm, located in Upper Brookfield, and dividing the value of it into its area. This provided a figure of $8,234 per hectare which was then multiplied by the area of the subject land to produce the appellant's valuation figure of $66,000. The appellant did not use evidence of comparable sales around the valuation date as it was the appellant's view that only custard apple farms sold for farming were applicable and there were no such sales to compare.

The Valuer-General's valuation expert witness supported the Valuer-General's valuation method

The Valuer-General's valuation expert was a registered valuer with over 30 years' of experience in Queensland. The Valuer-General's valuation expert acknowledged that relativity can be a consideration in the valuation process but not one which can replace comparable sales as the primary method to determine land value.

The Valuer-General's valuation expert's report confirmed the Valuer-General's valuation figure of $330,000. The Valuer-General's valuation expert arrived at this by direct comparison to bona fide sales of land. The report considered various factors including land type, topography, vegetation, access, power, telecommunications and

flooding susceptibility. Furthermore, it was the Valuer-General's valuation expert's view, unlike the appellant, that there is one merged market as opposed to separate markets for farming and non-farming land in the area.

The Valuer-General's valuation expert relied on four comparable sales which were in a merged market and considered similarities between the sales and the subject land to confirm the Valuer-General's valuation figure of $330,000. In accordance with section 46 of the LVA, sales enhanced by a higher use were not relied upon.

The Valuer-General's valuation expert accepted that not all of the comparable sales qualified as farms under the LVA. However, it was argued that this would make little difference and that they were all useful. The Valuer-General's valuation expert conceded that using sales of farms is preferred if available but reiterated that sales are fundamental to valuation and that the most comparable sales must be used.

The expert witnesses considered the comparable sales relied upon by the Valuer-General's valuation expert

The appellant's expert witness and the Valuer-General's valuation expert considered each of the comparable sales. The combined views of the experts were as follows:

- **Sale One** – This sale was located at 42 Pacey Road, Upper Brookfield. This property was valued at $495,000 as at 1 October 2015. The appellant's witness found that the land had not been farmed for a while and consisted of at least 50 percent remnant forest. However, the Valuer-General's valuation expert noted that this land had superior access as well as a power and telephone connection despite being notably smaller than the subject land.
- **Sale Two** – This sale was located at 607E Upper Brookfield Road, Upper Brookfield. This property was valued at $460,000 as at 1 October 2015. The appellant's witness found that the land was unlikely to be suitable as a farm as it was over half remnant forest. However, the Valuer-General's valuation expert found that it was superior to the subject land overall due to its superior access and availability of services.
- **Sale Three** – This sale was located at 195 Priors Pocket Road, Moggill. This property was valued at $400,000 as at 1 October 2015. The appellant's witness found that the land had been farmed in the past and contained a lot of woodland. However, the Valuer-General's valuation expert considered the land to be superior as it had superior access with bitumen to the frontage as well as a power and telephone connection.
- **Sale Four** – This sale was located at 80 Oxford Street, North Booval. This property was valued at $260,000 as at 1 October 2015. The appellant's witness found that the land did not have a comparable use to the subject land. The Valuer-General's valuation expert found that it was superior in access and had services available. However, the Valuer-General's valuation expert noted it was inferior to the subject land overall due to its location and susceptibility to flooding.

The appellant argued that the views presented by his witness strengthened his argument that the sales relied upon by the Valuer-General were not comparable sales. The Valuer-General argued that the Valuer-General's valuation expert's findings supported the valuation method and figure adopted by the Valuer-General.

The court reinforced the legal test for land valuation

The court considered both valuation methods presented by the parties and noted that it is bound by the decisions of the Land Appeal Court. In the case of *NR and PG Tow v Valuer-General* (1978) 5 QLCR 378, the Land Appeal Court held that the best test of land value is the sales of comparable properties, preferably unimproved, in the open market around the date of the valuation. This test has been continuously approved by the courts.

The court, supported by its previous decisions, held that value deduced from relativity cannot be solely relied upon. The court stated that it is not sufficient to simply infer a value based on relative comparisons with nearby land. It must first be demonstrated that the land being relied upon was correctly valued and that the subject land was incorrectly valued.

The court accepted the Valuer-General's valuation expert's valuation method and dismissed the appeal

The court found that the valuation figure of $330,000 was justified by the available evidence. The court held that the Valuer-General's valuation expert correctly applied the best test of value, sufficiently addressed the grounds of appeal and did not make a factual error. The court accepted the Valuer-General's valuation expert's opinion that there is a merged market as neither the appellant nor the appellant's witness were qualified valuers to present a contrary expert opinion.

The court was not satisfied that the appellant's valuation figure of $66,000 was correct. The court was unable to rely solely upon the appellant's valuation method of relativity as this would contradict the historical approach of the Land Court.

For these reasons, the court dismissed the appeal and confirmed the Valuer-General's valuation figure of $330,000.

Injunctive relief in the NSW Land and Environment Court

Todd Neal | Brianna Smith

This article discusses the issue of breaching development consent or anticipating grant of modification

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In brief – Recent decisions show risks of breaching development consent or anticipating grant of modification

A common issue planning and environment lawyers advise on is where development proceeds faster than the relevant certifications and approvals are obtained. Sometimes developers and builders get ahead of themselves unintentionally. At other times calculated risks are taken to carry out development in anticipation of the grant of consent or in breach of it. Both scenarios carry some inherent risks.

We take a look at two recent Land and Environment Court decisions, both involving Strathfield Municipal Council, where injunctions have been awarded to stop such works from proceeding:

- *Strathfield Municipal Council v Michael Raad Architect Pty Ltd (No. 2)* [2017] NSWLEC 119.
- *Strathfield Municipal Council v C & C Investments Trading Pty Ltd* [2017] NSWLEC 155.

Prohibitionist starting point: development consents and applications for consent authority modifications

The starting point for any analysis on this issue is section 76A(1) of the *Environmental Planning and Assessment Act 1979* (NSW). This section provides that where the relevant environmental planning instrument stipulates that specified development cannot be performed without a development consent, a development consent must be obtained and development must be performed in accordance with that consent.

Section 96 allows an application to be made to the consent authority to modify a development consent. Following a consideration of prescribed matters in the statute, the consent authority may subsequently choose to consent to or refuse the application. It may also do nothing, in which case a deemed refusal may crystallise.

Carrying out development in anticipation of a modification being consented to, or in breach of a consent, carries inherent risk. Where the relevant authority identifies development occurring prior to the grant, it may seek an order from the court to injunct the works from proceeding. In addition, there is the risk that the consent authority may ultimately refuse the application, requiring the developer to bear the cost of correcting any development not in accordance with the original development consent.

Court awards injunction to stop works proceeding despite evidence of likely consent to modification application

In the matter of *Strathfield Municipal Council v Michael Raad Architect Pty Ltd (No. 2)*, the respondents' development progressed faster than the consent for the modification was obtained. The in-force consent provided for the construction of a multi-level basement for a block of residential units. The respondents lodged a section 96 consent modification application to construct only a single-level basement. Prior to the determination of the application, the respondents commenced works to construct the single-level basement.

On application by Strathfield Council, an injunction to stop works proceeding was awarded despite evidence before the court indicating that it was likely the modification application would be granted consent. In his reasons, Robson J observed (at [47]) that the respondents had taken a "*calculated risk in undertaking this further work*". He found that the court should not "*countenance what appears to be flouting of the planning regime simply because the respondents are prepared to take what is said to be a commercial risk*" (Ibid).

Strathfield Municipal Council successfully applies for injunction of works not in accordance with development consent

In *Strathfield Municipal Council v C & C Investments Trading Pty Ltd*, the first and second respondents (the developer and builder respectively) undertook development in contravention of a condition of consent. The contraventions included the construction of blade walls, a hard stand courtyard, balconies and enclosed outdoor areas. Following the council issuing a "Cease Work Order", the respondents lodged a section 96 modification application to "regularise the non-compliances". This application was refused by the council (see at [18]).

The council applied to injunct the performance of any works at the premises that were not in accordance with the development consent. The council contended in support of the injunction that in order to ensure that approval for the development was obtained, the first and second respondents removed elements of their development proposal that were objectionable to the council. Once the approval was obtained, they intentionally reincorporated the unapproved and objectionable elements breaching the conditions of consent. The council claimed that such behaviour "*undermin[ed] the development approval regime*" (at [27]). The court found that the balance of convenience favoured the grant of an order to stop works proceeding.

Injunction risk considerations for developers and builders

Both of these cases show that there are risks of works being injuncted where development is carried out in contravention of in-force approvals or where it is carried out without approval.

We are seeing an increase in the enforcement activity of regulatory authorities at this time. Those involved with development should bear in mind the suite of options available to authorities which can impose a significant cost burden not just in litigation costs but also the project costs while activity stalls.

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