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.

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

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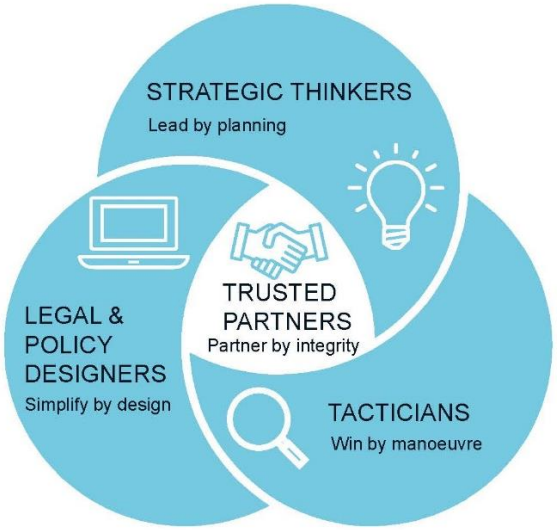

Lead, Simplify and Win with Integrity

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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The bushfire crisis and its implications for NSW planning and environment laws

Annie Dong | Anthony Landro | Mollie Matthews | Katherine Edwards | Todd Neal

This article examines what we might expect under the current planning and environmental legal framework and as law makers continue the large reform agenda that was to occur this year. In short, the bushfires will lead to further change

January 2020

In brief

The recent bushfire crisis is likely to serve as an existential moment for law and policy makers across a range of legal areas. Not surprisingly, the New South Wales and Commonwealth planning and environment laws have again been placed into the spotlight as the affected regions recover and rebuild.

Calls for action

On 10 January 2020, the President of the Australian Academy of Science Professor John Shine issued the following media release regarding the unprecedented bushfires across the Christmas and New Year period:

> *The Academy is resolute that the response to the bushfires must extend beyond the immediate and essential need to rebuild and recover.* ***Everything, including urban planning; building standards; habitat restoration; biodiversity and species preservation; and land, water and wildlife management will need careful and measured consideration****.* [Emphasis added]

Prime Minister Scott Morrison has also commented that as a result of the impact more broadly of climate change and drought on the length of the fire season, there is:

> *a need to address issues around hazard reduction for national parks, dealing with land clearing laws, zoning laws and planning laws around people's properties and where they can be built.*

Proposed reforms to Commonwealth and NSW legislation

Significant processes for reform in these areas of law are currently underway:

- 2020 marks the 20th anniversary of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (the chief piece of Commonwealth environmental legislation), which also marks its statutory review.
- In New South Wales, the Minister for Planning and Public Spaces, the Honourable Rob Stokes also announced last year that there would be further significant reforms in 2020 to the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) (NSW's chief piece of planning and environmental legislation).
- The NSW Productivity Commission is also "Kickstarting the productivity conversation" with a view to developing a productivity reform agenda, which will have implications for the NSW planning system.
- Finally, Prime Minister Scott Morrison recently announced that there would be a proposal put to Cabinet to establish a Royal Commission into Australia's bushfires.

It appears safe to say that it is inevitable that the NSW bushfire crisis will provide further "grist for the mill" within these reform processes, and more change is likely.

Balancing long-term bushfire planning and protection, and enabling the prompt rebuilding of what has been destroyed will make for a challenging process.

This article considers those matters the President of the Australian Academy of Science referred to as requiring careful and measured attention.

Urban planning

Urban planning is primarily regulated by the States and Territories. In NSW, the zoning system provides (to use John Whitehouse's metaphor in his textbook *Development and Planning Law in New South Wales*) a "coarse sieve" that broadly delineates the types of land uses permitted within certain zones. These zones delineate areas considered by statutory planners to be inappropriate for residential development, as well as areas deemed appropriate. The zones also include areas for environmental protection where works are tightly restricted.

The second, finer sieve (generally Part 4 of the EP&A Act) regulates what land uses and development can occur within the zones against planning instruments like Local Environment Plans and Development Control Plans. In addition, certain types of development can be "exempt" (not requiring assessment), or "complying development" (a fast-tracked approval process which allows a private certifier to sign off on certain development without assessment by council). The levers within this system are likely to be used in addressing the re-evaluated bushfire risk in light of the bushfire disaster.

There will no doubt be pressures to increase the land designated as bushfire prone land, and for development on such land to be more closely scrutinised with the imposition of higher standards. Already this year we have seen clients dealing with more stringent requirements being imposed by NSW Rural Fire Service (**RFS**) to address bushfire risk.

Despite land zoning, there is a common misconception that the NSW planning system does not provide an entitlement for development. The grant of a development consent in fact provides a dispensation to the general prohibition of development on land within the State. It is also possible for land to be "downzoned" without compensation for the landowner. While that is the legal position, there are many other factors at play which militate against these processes being relied on in a callous way by the authorities, particularly following a bushfire disaster. There will be an obvious tension between allowing landowners whose homes have been destroyed to rebuild simply and cheaply, and regulating whether the land should be developed given its bushfire prone status, and if so, the imposition of more stringent (and therefore costly) development standards.

We are likely to see a tension between the desire to rebuild destroyed buildings quickly through the complying development process and long-term bushfire planning. Complying development that satisfies specific standards in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**Codes SEPP**) enables immediate reconstruction as applications are determined by council or private certifier, without the need for a full development application. However, that process relies on the issue of Bushfire Attack Level (**BAL**) certificates where land is bushfire prone. If the BAL is too high, development applications will need to be lodged with a more detailed (and costly) Bushfire Risk Assessment Report.

One policy response to this dilemma of housing in at-risk areas is a voluntary buyback program, which occurred in Victoria following the 2009 Black Saturday fires. Given that in NSW it has been reported (as at 7 January 2020) that more than 2,000 homes, 200 facilities and 4,000 outbuildings have been destroyed, such a program may be one of the policy responses proposed.

As part of the urban planning patchwork of regulation, NSW also has a policy of Asset Protection Zones (**APZ**). An APZ is a fuel-reduced area surrounding a built asset such as a residential or commercial building. This can help suppress the impact of a bushfire, and allows emergency services and homeowners access to defend their property. There is also the controversial 10/50 Vegetation Clearing Scheme, allowing people in designated Vegetation Clearing Entitlement Areas to clear trees on their property within 10 metres of their home and underlying vegetation within 50 metres of their home, without seeking approval. It is likely that there will be renewed regulatory interest in these provisions, as the review and reform agenda proceeds this year.

Building standards

According to consulting firm SGS Economics, the current bushfires are causing up to $50 million a day in economic disruption. The catastrophic scale of these fires, and their costs, provides a market signal towards new innovation in building standards for fire resistance. Just as Christchurch has had to adapt its building standards to its earthquakes, Australia will need to further adapt to its bushfire risk. Measures such as bunkers, rooftop sprinkler systems, fire resistant housing material and frames and smart housing design will all no doubt be given renewed interest. As prefab materials gain popularity, these will need to be tailored to Australian conditions.

NSW has already undergone reform on combustible cladding used in residential flat buildings in relation to more urban forms of fire risk, including the use of building product rectification orders. Extending this regulatory response to substandard buildings in bush fire zones may form another response by authorities, although the imposition of costs on already stretched land owners would weigh against this.

As mentioned above, land that is bushfire prone already needs to address building standards. First, the "Planning for Bush Fire Protection" (**PBP**) prepared by the NSW RFS is applicable to all development applications proposed for land that is classified as bushfire prone land. The PBP sets out what applicants must demonstrate to the NSW RFS or the consent authority. The current legislated version that is adopted is PBP 2006. An updated version is expected to be legislatively adopted in March 2020. However, it is possible (if not likely) this will be pushed back while the implications from these most recent fires are considered.

The *Building Code of Australia* also plays a role for new development. It is a prescribed condition of a development consent for development that involves any building work for that work to be carried out in accordance with the requirements of the *Building Code of Australia*: see clause 98 of the *Environmental Planning and Assessment Regulation 2000* (NSW). The *Building Code of Australia* is contained within the *National Construction Code*, which contains requirements for building in bushfire prone areas that are identified by individual States and Territories. It is possible further changes to the *National Construction Code* will be considered after the implications of these fires are studied.

Habitat restoration

Habitat restoration is generally carried out by State and volunteer agencies, as well as other non-government environmental organisations. Already funding has been announced for organisations involved with restoration.

Given the large-scale habitat destruction in NSW, which can be seen by the "Fires Near Me" mapping of the NSW RFS, part of the policy response might be to provide further incentives to the private sector contributing to this process. Increasingly over the last decade, restoration has occurred in connection with new development as developers improve habitats surrounding and connected with their new development. This can be applied for in development applications and required through the grant of development consents (through conditions) and through Voluntary Planning Agreements entered into with consent authorities (such as councils).

Developers are also sometimes incentivised into habitat restoration to mitigate impacts on habitat so that they can protect themselves from risks of the development being considered to have a significant impact on threatened species or their habitat.

The process of obtaining development consent for some types of habitat restoration works may need to be simplified to increase speed and reduce its cost. However, given the delicate nature of bushfire impacted ecosystems, this will need to be carefully considered since rushed and ill-considered works could be counterproductive given the precarious ecology of some of the landscapes impacted by the fires.

Biodiversity and species preservation

According to Chris Dickman, Professor of Ecology at the University of Sydney, an estimated 1 billion animals have died across NSW. The heightened urgency in protecting species of both national and State significance may lead to the imposition of stricter criteria when considering the environmental impacts of developments around Australia.

At the Commonwealth level, the preservation of threatened species and ecological communities is regulated under the EPBC Act, such that if an action may impact a threatened species, approval from the Commonwealth Minister may be needed to be obtained. In determining whether a species is eligible for listing as threatened under the EPBC Act, rigorous scientific assessments are undertaken by the Threatened Species Scientific Committee. The decline of Australia's biodiversity following these bushfires may see the status of some of Australia's threatened species escalate from "vulnerable" to "endangered" to "critically endangered". Already the Commonwealth Minister has made comments as to the fires' effect on koalas. Koalas are admittedly an iconic species and in the spotlight, but there is likely to be many other less well known, but also critical to ecological functioning, populations of species wiped out by the fires.

At the NSW level, biodiversity and species preservation is primarily controlled by the interaction between the EP&A Act and the *Biodiversity Conservation Act 2016* (NSW) (**BCA Act**), which has only recently been introduced following the repeal of the *Threatened Species Conservation Act 1995* (NSW). The new framework operating under the BCA Act, the Biodiversity Offsets Scheme, requires any new application for development consent or modification under Part 4 of the EP&A Act to be subject to its biodiversity assessment requirements. Development proposed to be carried out in a declared area of outstanding biodiversity value or likely to affect threatened species will require a Biodiversity Development Assessment Report to be submitted with the development application.

In light of the significant loss of biodiversity, there are going to be changes in the ecology surrounding new development which will need to be grappled with by proponents and consent authorities.

Land, water and wildlife management

As mentioned in Professor John Shine's media release:

> *To have the best chance of succeeding, we must draw on all the available evidence and knowledge, including working with Aboriginal and Torres Strait Islander peoples and undertaking further research where it will have the most benefit.*

We may therefore see moves within the regulatory system to enable more involvement of indigenous fire practices. Regulators will need to carefully consider the safety of those involved and nearby communities if more flexibility is given to such practices given the attendant safety risks and problems that have occurred in the past with back burns.

In relation to water, with 100% of NSW in drought, water management – already under intense scrutiny following the Murray-Darling Basin issues involving water theft, and water allocations to large-scale industry – will attract further attention given the extreme dryness of vegetation comprises one element that has contributed to these fires. An emerging difficulty for governments will be the balancing act of satisfying the necessities of livelihoods and allocating sufficient water to maintain healthy environmental flows.

Other land management issues regulated on land through our zoning system and environmental laws such as grazing, vegetation clearance, and the control of deer and horses in alpine regions, are also likely to be queried as to whether the right balance exists between the competing pressures.

Climate change

All sides of politics have acknowledged that anthropogenic sources of climate change have contributed in some way to the extent and severity of these bushfires.

The legal mechanisms that might be used to address this are many and varied involving mitigation (reducing greenhouse gas emissions) and adaption (preparing for change), and occur at State and Commonwealth levels. Precisely how our State and Commonwealth governments will respond is unknown, but the regulatory response will invoke the balancing of environmental, economic, social and political factors.

The year ahead for planning and environment law

This background indicates 2020 will be a year marked by legal "VUCA" – volatility, uncertainty, complexity and ambiguity – when it comes to planning and environment law. In that regard:

- It is likely there will be more sudden forms of changes to this regulatory environment, particularly given reform was already on the cards.
- There will be uncertainty as responses will depend on the fall-out from the experts' reviews, but the amount of regulation in this area already also contributes further uncertainty for those navigating this area of law.
- Complexity arises from the application of laws by the authorities and the courts, as well as the open textured nature of these laws.
- Finally, there is ambiguity with multiple viable options available in responding to the challenges.

Deficient systems and practices relating to cultural heritage lead to the prosecution of a local government

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205 heard before Preston CJ

February 2020

In brief

The case of *Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205 concerned a sentencing hearing in the Land and Environment Court of New South Wales (**L&E Court**) for an offence committed by the Clarence Valley Council (**Council**) against section 86(1) of the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**).

The L&E Court convicted the Council of the offence of harming an object the Council knew was an Aboriginal object for the purposes of the NPW Act, and held that the objective seriousness of the offence was within the moderate to high range for the reasons that:

- the harm caused by the offence was substantial (see section 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**)); and
- the Council was recklessly indifferent as to whether it caused harm to the Aboriginal object (see *Plath v Vaccount Pty Ltd t/as Tableland* [2011] NSWLEC 202).

The L&E Court ordered the following:

- that in accordance with section 205(1)(a) of the NPW Act, the Council publicise its offending and the consequences and the orders of the L&E Court in respect thereof in various State and local newspapers, a national Indigenous newspaper, and on the Council's website and Facebook;
- that in accordance with section 205(1)(b) of the NPW Act, the Council notify specified bodies of its offending and the consequences and the orders of the L&E Court in respect thereof, and publish the same in Council's annual report;
- that in accordance with section 205(1)(d) of the NPW Act, the Council pay $300,000 to the Grafton Ngerrie Local Aboriginal Land Council to be used to fund a study in relation to the keeping of, and research into, local Aboriginal heritage items, and a series of one-day healing festivals;
- that in accordance with section 205(1)(f) of the NPW Act, the Council establish cultural skills development workshops for its staff that deal in matters which may affect cultural heritage;
- that the Council, in any future reference to the payment of the monetary amount ordered, include the words prescribed by the L&E Court (see [130]), to acknowledge that the funding arose out of the Council's harming of a culturally modified tree in breach of the NPW Act.

Facts and circumstances

The culturally modified tree the subject of harm by the Council (Scar Tree) was located in the Council's local government area until its removal by the Council in May 2016.

The Scar Tree was registered on the Aboriginal Site Register in 1995 as a culturally modified tree, and was identified as an Aboriginal object for the purposes of the NPW Act in 2005.

In 2013, the Council was issued with a penalty notice by the Office of Environment and Heritage (**OEH**) for the Council's harming of an Aboriginal object by lopping the crown of the Scar Tree. In 2015 the Council marked the Scar Tree in its annual stump grinding list which resulted in the Scar Tree's removal in May 2016.

One day after the Council's removal of the Scar Tree, it self-reported to the OEH that it had harmed an Aboriginal object by removing the Scar Tree. The Council pleaded guilty to the prosecution then brought by the Chief Executive of the OEH for the offence against section 86(1) of the NPW Act.

Determining the appropriate sentence

The L&E Court, in determining the appropriate sentence for the offence, ultimately had regard to the past and continued conduct of the Council relevant to the Council's harming of the Scar Tree in light of the purposes for which a sentence may be imposed.

Sentencing purpose

The L&E Court observed the purposes for which the L&E Court can impose a sentence found in section 3A of the CSP Act, and held that the purposes of retribution, prevention, reparation, and restoration were relevant in determining the appropriate sentence for the Council.

Objective seriousness

The objective seriousness of the offence, in light of the nature of section 86 and its place within the statutory scheme was a relevant consideration of the L&E Court.

After looking at the statutory scheme and the degree by which the Council's conduct offended the object of the NPW Act, the L&E Court concluded that the Council:

- had undermined the express object in section 2A(1)(b) of the NPW Act, namely, the conservation of places, objects, and features of Aboriginal people;
- had hindered section 2A(1)(c) of the NPW Act by removing the Scar Tree as its removal precludes the opportunity to foster appreciation, understanding, and enjoyment of its cultural heritage; and
- had acted inconsistent with the principles of ecologically sustainable development in section 2A(2) of the NPW Act by causing inter-generational inequity.

The L&E Court considered that the "fifty fold" increase in 2010 of the penalty for offences harming or desecrating Aboriginal objects or places, reflected the seriousness with which the legislature, and therefore the community, view the protection and conservation of Aboriginal cultural heritage and offences which harm Aboriginal cultural heritage.

When determining the objective seriousness of the Council's removal of the Scar Tree, the L&E Court looked at the matters in section 194 relevant to imposing a penalty for an offence against the NPW Act. The sentencing matters the L&E Court had specific regard to, were the following:

- section 194(1)(a) in relation to the extent of the harm caused or likely to be caused by the removal of the Scar Tree;
- section 194(1)(d) in relation to the extent to which the Council could have reasonably foreseen the harm caused or likely to be caused by the removal of the Scar Tree;
- section 194(1)(c) in relation to the Council's failure to take practical measures to prevent, control, abate, or mitigate the harm caused by the removal of the Scar Tree.

The Council, despite making undertakings to do so after receiving a penalty notice in 2013, did not take steps to improve its systems relating to Aboriginal cultural heritage.

The L&E Court concluded that the Scar Tree was of high significance to the Aboriginal people that had an association with it and that the Council was in a position to have reasonably foreseen the harm caused or likely to be caused by removing the Scar Tree. The Court's premise for this was that the Council had previously received the penalty notice for lopping the Scar Tree and had knowledge of the emotional harm that lopping had caused for Aboriginal people. It was therefore reasonably foreseeable that if further harm was caused to the Scar Tree that further emotional harm would ensue.

Circumstances of the Council

The L&E Court took into account, within the limits of the objective seriousness of the offence, the following mitigating factors:

- the Council's lack of prior convictions (see section 21A(3)(e) of the CSP Act);
- the Council's guilty plea (see sections 21A(3)(k) and 22(1) of the CSP Act);
- the Council's demonstrated remorse (see section 21A(3)(i) of the CSP Act);
- the Council's cooperation with the OEH during the investigation and the preparation of the agreed statement of facts, and the Council's conduct during the sentence hearing (see section 21(3)(m) of the CSP Act);
- the Council's unlikeliness to reoffend (see section 21A(3)(g) of the CSP Act).

Conclusion

In light of the objective seriousness of the offence, the circumstances specific to the Council, and the purposes of sentencing, the L&E Court held that a combination of different sanctions, as outlined in its orders, were the appropriate penalty for the Council's harming of an Aboriginal object.

NSW authority bound by contract to give developers a seat at the negotiating table

Alexa Brown | Ian Wright

This article discusses the decision of the New South Wales Supreme Court in the matter of *Crown Sydney Property v Barangaroo Delivery Authority; Lendlease (Millers Point) v Barangaroo Delivery Authority* [2018] NSW 1931 heard before McDougall J

February 2020

In brief

The joint matters of *Crown Sydney Property v Barangaroo Delivery Authority; Lendlease (Millers Point) v Barangaroo Delivery Authority* [2018] NSW 1931 concerned applications for declaratory relief to the Supreme Court of New South Wales in respect of the construction of similar clauses within two agreements concerning the development of Barangaroo, which is an area on the eastern shore of Darling Harbour. The agency responsible for the development of the area was the Barangaroo Delivery Authority (**Authority**). The two developers were Crown Sydney Property (**Crown**) and two related entities of Lendlease (Millers Point) (**Lendlease**).

Relevant context

Crown and Lendlease were proposing to develop an integrated hotel resort and luxurious residential apartments in a precinct of Barangaroo immediately adjacent to the Central Barangaroo precinct (**Proposed Development**). Crucially, the Proposed Development would (to varying degrees) have views of the Sydney Harbour Bridge and the Sydney Opera House over the low rise development in the Central Barangaroo precinct.

The Concept Plan for Central Barangaroo maintained height limits on the development within Central Barangaroo. However, the State Government proposed constructing a metro station in Barangaroo which would allow for more intensive and thus higher development in the area.

Both Crown and Lendlease independently entered into agreements with the Authority in respect of the Proposed Development (**Agreements**). Both Agreements contained similar clauses that dealt with the views from the Proposed Development of the Sydney Harbour Bridge and the Sydney Opera House (**Sight Line Clauses**). The Court summarised the relevant elements of the Sight Line Clauses to be as follows (at [7], emphasis added):

> *(1) recognise that optimisation of the development of Central Barangaroo is of critical importance to the Authority;*
>
> *(2) recognise that retention of the sight lines is of critical importance to Crown and Lendlease respectively; and*
>
> *(3) provide that if any application is made for development on Central Barangaroo different to that provided for in the Concept Plan, the Authority must discuss and negotiate in good faith with Crown and Lendlease to seek to agree changes that would retain the sight lines while at the same time optimising development opportunities.*

The Authority released a request for development bids to develop Central Barangaroo which resulted in a preferred bid by a third party which for convenience is referred to as Grocon (**Grocon**). This preferred bid was progressed through to an application to the NSW planning authority to modify the Concept Plan to account for higher development in the Central Barangaroo precinct, which would relevantly partially block Crown and Lendlease's views.

Crown and Lendlease were only given the opportunity to discuss and negotiate in good faith with the Authority about the changes to the Concept Plan after extensive discussion and analysis had occurred between the Authority and Grocon regarding its proposed development and Grocon was prepared to submit an application to the NSW planning authority.

Having completed the extensive discussion and analysis with Grocon, the Authority started the discussions and negotiations with Crown and Lendlease from the position that the relevant views would not be retained.

Construction of the contract

Both parties relied on the rules for the construction of contracts set out in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 which were summarised by the Court as follows (at [81]):

> [The Court is required to] *give to the words of the parties' bargain the meaning that a reasonable business person, cognisant of the relevant matters of background and context, would give them. And it requires the Court, so far as possible, to give all parts of the contract work to do, to read them so far as possible harmoniously, and to avoid so far as possible commercial absurdity.*

The Court found that the following were relevant matters of background and context known to the parties:

- how the Authority would conduct the process of entertaining and dealing with bids for the development of Central Barangaroo;
- it was possible that a metro station would be located at Barangaroo;
- that the presence of a metro station would support and justify more intensive development within and around Barangaroo;
- that the only land available for development in the Barangaroo precinct was in Central Barangaroo.

The Court held that, in light of the relevant matters of background, the purpose of the Sight Line Clauses was to give Crown and Lendlease "a seat at the table", which would enable them to negotiate with the Authority about the form of development in Central Barangaroo if it were proposed to differ from that provided for in the Concept Plan.

Meaning of the word "application"

In issue was whether the reference to "application" within the Sight Line Clauses was a reference to a specific type of application, such as a development application, or to an application as defined in ordinary language, which would include bids. The term "application" is otherwise a defined term in the Agreements and a reference to the defined term appears capitalised.

The Court held that the absence of the capitalised defined term indicated that the ordinary meaning of the word "application" was intended. Further, that the factual background supported an interpretation that was not narrowly confined, in particular that the Authority had no power to approve development applications.

The Sight Line Clauses therefore allowed Crown and Lendlease an opportunity to have good faith discussions and negotiations about the future development of Barangaroo from the moment an "application", "request" or "bid" to develop Barangaroo was given to the Authority.

The Court held that Grocon's application to be a preferred bidder satisfied the ordinary language in the definition of "application", and that negotiations should have commenced once the application was received.

Position of the Authority in respect of the sight lines

The Court held that the language of the Sight Line Clauses distinguishes between the absolute and unqualified retention of sight lines and the many ways in which development in Central Barangaroo may be optimised.

The Court considered that the retention of the sight lines was a fixed or objective quality, while the optimisation of development opportunities is of a subjective and judgemental quality. The Court therefore held that the Sight Line Clauses required that when negotiating, the parties should at least start with the proposition that the relevant views were to be retained.

Whilst the Court was only called upon for declaratory relief, as the Authority never contemplated, even as a starting point, the retention of the sight lines for the purpose of the negotiations and discussions in good faith, the Authority had not complied with the Sight Line Clauses of the Agreements.

Conclusion

Crown and Lendlease were both seeking declaratory relief in respect of the construction of the Sight Line Clauses within the Agreements.

It was the Court's view that, on the proper construction of the Sight Line Clauses, the Authority should have engaged in discussions and negotiations in good faith with Crown and Lendlease once Grocon became a preferred bidder and those negotiations should have started from the position of the retention of the relevant views.

The Court made orders that the Authority had breached the relevant parts of the Sight Line Clauses and ordered the Authority pay Crown and Lendlease's costs.

Traditional building saved from demolition: Planning and Environment Court has refused an appeal to approve the demolition of a house built in 1946 or earlier

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Irvine v Brisbane City Council* [2019] QPEC 50 heard before Everson DCJ

February 2020

In brief

The case of *Irvine v Brisbane City Council* [2019] QPEC 50 concerned an appeal commenced by a landowner (**Landowner**) against the decision of the Brisbane City Council (**Council**) to refuse a development application for a development permit for building work for the demotion of a dwelling house at Hawthorne in the Traditional Building Character Overlay (**TBC Overlay**) of the *Brisbane City Plan* (**City Plan**).

The Planning and Environment Court (**Court**) found that the proposed development failed to comply with the relevant assessment benchmarks of the City Plan and held that it was not appropriate to approve the development application.

Issues

The Court considered the following issues:

- whether the subject house exhibits a traditional building character and contributes to the traditional streetscape;
- whether the Court ought to engage its discretionary power under section 60(2)(b) of the *Planning Act 2016* (**Planning Act**) to approve the proposed development.

Legislative regime

The Court noted that the proposed development was code assessable under the City Plan, and therefore considered the following provisions of the Planning Act:

- Section 45(3) – "*code assessment must be carried out only against the assessment benchmarks in a categorising instrument for the development and having regard to any matters prescribed by regulation.*"
- Section 59(3) – "*the assessment manager's decision must be based on the assessment of the development carried out by the assessment manager.*"
- Section 60(2) – "*to the extent that the application involves development that requires code assessment, the assessment manager, after carrying out the assessment – (a) must decide to approve the application to the extent that the development complies with all of the assessment benchmarks for the development; and (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks …*".

The Court then went on to consider the relevant assessment benchmarks under the City Plan.

The Court noted that the issue at the heart of the dispute was whether the proposed development complied with Overall Outcomes 2a and 2b and Performance Outcomes 5 and 7 of the Traditional Building Character (Demolition) Overlay Code (**Demolition Code**). Relevantly, Overall Outcomes 2a and 2b of the Demolition Code states as follows:

> *2(a) Development protects residential buildings constructed in 1946 or earlier that individually or collectively contribute to giving the areas in the Traditional Building Character Overlay their traditional character and traditional building character.*
>
> *2(b) Development protects a residential building or a part of a building constructed in 1946 or earlier where it forms a part of a character streetscape comprising residential dwellings constructed in 1946 or earlier nearby in the street within the TBC Overlay.*

Performance Outcomes 5 and 7 of the Demolition Code state as follows:

> *5 Development involves a building which:*
>
> *(a) does not represent traditional building character; or*
>
> *(b) is not capable of structural repair; or*
>
> *(c) does not contribute to the traditional building character of that part of the street within the Traditional building character overlay.*
>
> *7 Development involves a building which:*
>
> *(a) does not represent traditional building character; or*
>
> *(b) is not capable of structural repair; or*
>
> *(c) is not a building constructed in 1946 or earlier.*

The Court went on to consider section 8.2.21.2 (Purpose) of the Demolition Code, which states that "*the purpose of the Demolition Code is to implement the policy intent of the Strategic Framework and promote development that protects residential buildings constructed in 1946 or earlier that individually or collectively contribute to giving the areas in the Traditional building character overlay their traditional character and traditional building character*". The Court stated that the Strategic Framework of the City Plan makes it clear that houses built in 1946 or earlier that make a contribution to the character of Brisbane are to be preserved.

Court found that the subject premises is of a traditional character and contributes to the traditional streetscape character of the surrounding locality within the TBC Overlay

The Court accepted the Landowner's and the Council's respective expert evidence that the subject premises exhibited a traditional building character and is structurally sound.

The Court additionally accepted the Council's expert's evidence that the subject premises was constructed in either 1939 or early 1940, and makes a significant contribution to the immediate locality due to its prominent location on the corner of the street. Furthermore, the Court observed that all premises in the immediate vicinity, save for one premises, are of a traditional building character and are constructed in 1946 or earlier.

The Court therefore concluded that the proposed development conflicts with the applicable assessment benchmarks of the City Plan as the dwelling exhibits traditional building character and contributes to the traditional building character and traditional character of the streetscape.

Court found that it would be inappropriate to approve the proposed development

The Landowner submitted that the discretion of the Court under section 60(2)(b) of the Planning Act ought to be engaged to approve the proposed development in circumstances where the proposed development failed to comply with the relevant assessment benchmarks. The Court observed that it would be inappropriate to approve the proposed development using the Court's discretion under section 60(2)(b) of the Planning Act, when the evidence clearly established that the subject premises is of a traditional building character and contributes to the immediate locality within the TBC Overlay.

The Court therefore dismissed the appeal.

Planning and Environment Court refuses an application for costs as the Council failed to establish that the Applicant Appellant did not contravene section 457(2)(a) of the Sustainable Planning Act 2009

Cara Hooper | 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* [2019] QPEC 44 heard before Morzone QC DCJ

February 2020

In brief

The case of *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2019] QPEC 44 concerned an application for costs by the Scenic Rim Regional Council (**Council**) to the Planning and Environment Court (**Court**) after the Court refused the appeal commenced by the Applicant Appellant in relation to the Council's refusal of its development application.

The Applicant Appellant had made a number of development applications since 2011 in order to use the subject premises for commercial groundwater extraction. The latest appeal to the Court concerned a minor change application to the development application in order to extract groundwater for commercial purposes. The Court ultimately refused the appeal as it was held that the development application would conflict significantly with the Council's planning scheme (**Appeal**).

The Council sought to recover its costs under section 457(2)(a) and (e) of the *Sustainable Planning Act 2009* (**SPA**) due to the Appellant's unsuccessful appeal and that the development application conflicted with the Council's planning scheme.

In order to determine whether the Appellant ought to bear the Council's costs, the Court considered the following matters under section 457(2) of the SPA:

- what was the relative success of the parties;
- was there a commercial interest in pursuing the Appeal;
- did the Appellant commence or participate in the Appeal for an improper purpose;
- did the Appellant commence or participate in the Appeal without reasonable prospects of success;
- did the Appeal concern a decision which conflicted with a relevant instrument under section 326 of the SPA;
- did the change have an adverse effect on the proceeding to which section 495 of the SPA applied;
- did the Appeal involve an issue that affected or may affect a matter of public interest, in addition to any personal right or interest of a party in the proceeding;
- did the parties act unreasonably leading up to the proceeding;
- did the parties act unreasonably in the conduct of the proceeding;
- did any of the parties incur costs due to the introduction of new material;
- did any of the parties incur costs due to a party not complying or not fully complying with a provision of the SPA;
- did any of the parties incur costs due to a party defaulting in respect of the Court's procedural requirements; and
- whether a party should have taken a more active part in the proceeding and did not do so.

The Court ultimately held that each party was to bear their own costs.

What was the relative success of the parties?

The Court noted that the Applicant Appellant had accepted that the proposed development conflicted with the Council's planning scheme and that, the main focus for the Appellant in the Appeal was the identification and sufficiency of grounds for the approval of the proposed development despite its conflict with the Council's planning scheme.

The Appellant in the Appeal relied upon grounds such as the economic need, planning need and community need for the development. The Court held that in this instance, the Appellant had failed to persuade the Court that there was the requisite tension between the application of the planning scheme and the public interest, and that the Appellant's grounds did not warrant an approval despite the significant conflict with the planning scheme.

Was there a commercial interest in pursuing the Appeal?

The Court noted that the development application the subject of the Appeal, was an attempt by the Appellant to secure an approval for commercial groundwater extraction.

The Court therefore held that the Appellant had a legitimate commercial interest in commencing the Appeal against the Council's refusal, and that the Council properly defended its position, and the co-respondents properly joined in the Appeal.

Did the Appellant commence or participate in the Appeal for an improper purpose?

The Court held that the Appellant did not commence the Appeal for an improper purpose as the Appellant had purchased the land for commercial groundwater extraction, spent money on infrastructure and capital for the particular use and sought to resurrect the commercial operation which was once carried out on the premises.

Did the Appellant commence or participate in the Appeal without reasonable prospects of success?

The Court held that the Appellant did not commence the Appeal without reasonable prospects of success as the scope of the dispute was tested and refined in the earlier proceeding. Further, the change application sought to meet any deficiencies in its original development application.

Did the appeal concern a decision which conflicted with a relevant instrument under section 326 of the SPA?

The Court held that the Council's decision to refuse the development application did not conflict with a relevant instrument defined under section 326(2) of the SPA. Further, the Court held that none of the matters stated in section 326(1) of the SPA were satisfied.

Did the change have an adverse effect on the proceeding to which section 495 of the SPA applied?

Although the proceeding was an appeal to which section 495(2) of the SPA applied, the Court held that the change to the development application was made in appropriate circumstances and the change was allowed, and had no adverse effect on the proceeding.

Did the Appeal involve an issue that affected, or may affect a matter of public interest, in addition to any personal right or interest of a party in the proceeding?

The Court held that the Appeal involved an issue which affected or may affect a matter of public interest, in addition to affecting the personal rights and interests of the Applicant Appellant. This was because the issues in the Appeal clearly involved a matter of public interest, being the effect of the development on the water supply in a small community.

Did the parties act reasonably before and during the Appeal?

The Court held that the Appellant did not act unreasonably during the development assessment process before the commencement of the Appeal and that all parties had conducted themselves reasonably during the Appeal.

Did the parties incur any undue costs?

The Court held that the Appellant did not introduce new material during the proceeding which would have caused the Council to incur undue costs. Further, the Court held that that there was no evidence of non-compliance with the SPA or any evidence of default in the Court's procedural requirements which would have caused the Council to incur any undue costs.

Whether a party should have taken a more active part in the proceeding and did not do so?

Lastly, the Court held that the Appellant took an active role in the proceeding.

Conclusion

The Court held that although the Appellant was unsuccessful in the Appeal, it did not contravene any of the circumstances listed under section 457 of the SPA, which the Court has discretion to consider when making an order upon costs.

The Court therefore held that each party to the Appeal ought to bear their own costs of the proceeding.

Wednesbury Unreasonableness – a historical showcase of the principle

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the England and Wales Court of Appeal in the matter of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 heard before Lord Greene, MR, Somervell LJ and Singleton J

February 2020

In brief

The historical case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 concerned an appeal by Associated Provincial Picture Houses Ltd (**Associated**) to the Court of Appeal (of England and Wales) against an application for a declaration that a condition imposed by the Wednesbury Corporation (**Wednesbury**) had been imposed unreasonably or in circumstances where the imposition was ultra vires.

Background

Section 1(1) of the *Sunday Entertainments Act 1932* (UK) allowed a licencing authority to grant a licence for the giving of performances on a Sunday "*subject to such conditions as the licencing authority think fit to impose*".

Wednesbury was the relevant licencing authority under the *Cinematograph Act 1909* (UK) and could grant a licence under section 1(1) of the *Sunday Entertainments Act 1932* (UK). Associated owned a cinema and sought a licence for Sunday performances.

Wednesbury granted a licence to Associated for the giving of performances on Sunday, subject to the following condition:

> *No children under the age of fifteen years shall be admitted to any entertainment, whether accompanied with an adult or not.*

The principles upon which a discretion must be exercised

The Court noted the broad discretion given by the language of the section in respect of Wednesbury's ability to impose any condition they thought fit, and the lack of any appeal rights in respect of the decision.

The Court concluded that a discretion such as the discretion of the licencing authority could not be questioned in a court of law unless the discretion was outside the four corners of the principles within which discretion must be exercised.

The Court set out the principles which the Court could consider as demonstrating that the discretion was outside the four corners of its discretion as follows:

- express or implied matters within a statute that an authority must have regard to;
- matters which, having regard to the subject matter and general interpretation of the Act, must not be taken into account;
- other elements such as bad faith, dishonesty, disregard of public policy and unreasonableness.

Court decided that the condition was not reasonable

Associated argued that the condition was unreasonable and therefore ultra vires. Associated argued that Wednesbury was unreasonable because it was not competent by disallowing children. The Court disagreed, as the Court considered that the condition related to the well-being and physical and mental health of children, which was a matter that an authority such as Wednesbury could properly consider.

The Court noted that it was not for the Court to decide the correctness of the one view or another, such as whether children should or should not be admitted, but to investigate if the relevant authority acted within the four corners of its jurisdiction in considering the matter. Where an authority had considered a matter within its jurisdiction, but nevertheless reached a result that was so absurd that no reasonable authority could have imposed it, the Court noted that it was also entitled to intervene.

As Wednesbury had considered a matter germane to the opening of cinemas on Sunday, being the health and wellbeing of children, and the result was not so absurd to be such that no reasonable authority could have imposed it, the Court determined that the condition was not unreasonable or ultra vires.

Conclusion

The appeal was dismissed by majority and costs awarded to Associated.

The principles found in this case have been considered and generally adopted by the High Court of Australia, and forms the basis of the Wednesbury Unreasonableness test, which determines whether a decision was so unreasonable that no reasonable authority could ever have come to it.

Emergency health crisis calls for emergency planning powers – State Government of Queensland has amended the Planning Act 2016 and the Economic Development Act 2012 through the Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020

Alexa Brown | Ian Wright

This article discusses the recent amendments to applicable Queensland legislation in relation to the COVID-19 emergency

March 2020

In brief

This article concerns the recent amendments to the *Planning Act 2016* (**PA**), *Local Government Act 2009* (**LGA**) and the *Economic Development Act 2012* (**EDA**) by the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (**Amendment Act**), which was assented to on 19 March 2020.

Declaration COVID-19 emergency is an applicable event

The Amendment Act inserts a new part, Part 4B (Applicable events), into Chapter 7 (Miscellaneous) of the PA. Part 4B contains new provisions in respect of an "applicable event", which is defined in section 275D (Definitions of this part) of the PA to be an event declared under section 275E (Declarations of applicable events) of the PA to be an applicable event for the purpose of Part 4B.

The Minister for the Department of State Development, Manufacturing, Infrastructure and Planning (**Minister**) has declared that the COVID-19 emergency is an applicable event for the purpose of section 275E of the PA. The declaration is available at https://www.statedevelopment.qld.gov.au/resources/policy/declaration-of-an-applicable-event-notice.pdf. The declaration applies to all of Queensland and is in effect until 20 June 2020, but, under section 275F (Extensions of applicable event periods) of the PA may be extended in certain circumstances.

The following divisions have also been inserted under Part 4B of the PA, and apply in relation to an applicable event notice for an applicable event, or to premises located in part of the State to which an applicable event notice for an applicable event applies:

- Division 3 (Temporary use licences).
- Division 4 (Declaring uses and classes of uses).
- Division 5 (Extending and suspending periods under the Act).

Temporary use licences

Division 3 of Part 4B of the PA allows a person to apply to the Chief Executive of the PA (**Chief Executive**) for a temporary use licence for a relevant change, which includes the following under section 275H (Applications for temporary use licences):

> *(a) if a development approval for a material change of use is in effect for the premises— changes a condition of the development approval;*
>
> *(b) if the premises is designated premises— provides that a use of the premises is not required to comply with a requirement about the use stated in the designation for the premises;*
>
> *(c) otherwise—changes the existing lawful use of the premises, including, for example, by—*
>
> *(i) increasing the intensity or scale of the existing lawful use; or*
>
> *(ii) adding a new use; or*
>
> *(iii) replacing the existing lawful use with a new use.*

The Chief Executive can only grant a temporary use licence where, having regard to the nature of the event, there are reasonable grounds for the relevant change during the applicable event period for the applicable event notice (see section 275I of the PA). A temporary use licence is only in effect until the applicable event period ends (see section 275K of the PA).

Whilst a temporary use licence is in effect, the offence and infrastructure agreement provisions of the PA are varied in effect. For example:

- a person does not, during the period the temporary use licence is in effect, commit a relevant offence under the PA in relation to the relevant change (see sections 275L(3) and (4) of the PA); and
- an infrastructure agreement does not apply instead of a part of the relevant change to the development approval (see section 275L(5) of the PA).

Declaring uses and classes of uses

Division 4 of Part 4B of the PA allows the Minister to, by notice published on the relevant department's website, make a declaration in respect of a use, or a class of uses, for the applicable event. The declaration may be made in respect of all or part of the area to which the applicable event notice applies, and will have effect from the date of publication to the end of the applicable event period for the applicable event notice.

The declaration has the following effect on provisions, requirements and conditions which limit the hours of operation of the use, or a use of the class, or restricting the movement of goods in relation to the use, or a use of the class under section 275P(2) (Effect of declaration under s 275O) of the PA:

> *(2) For the period the declaration is in effect, the provision, requirement or condition does not apply in relation to the carrying out of the use, or a use of the class, on premises in the area to which the declaration applies.*

Currently, this provision is being used in respect of provisions, requirements and conditions that limit the operational hours for certain shop uses, allowing them to operate and resupply 24 hours a day, 7 days a week (refer to the declaration of the Minister dated 20 March 2020, which is accessible at https://www.dsdmip.qld.gov.au/resources/declarations/declaration-of-use-covid-19-notice-mar-2020.pdf).

Extending and suspending periods under the Planning Act

Division 5 of Part 4B of the PA allows the Minister to, by notice published on the relevant department's website, make a declaration in respect of the extension of a period under the PA for the doing of a thing, or the suspension of a period under the PA for the doing of the thing (see sections 275R and 275S of the PA). An example of a period under the PA for the doing of a thing includes the following:

- the period mentioned in section 25(1)(a) of the PA for reviewing a planning scheme;
- the period for notifying an application stated in the development assessment rules under section 68 of the PA.

As at the date of this article, no extension or suspension periods have been given yet (refer to the relevant department's website at https://www.dsdmip.qld.gov.au/planning/planning-legislation-amendment.html).

Amendment of the Economic Development Act

The Amendment Act also amends the EDA in similar terms to those of the PA, by inserting a new Part 3B (Applicable events) into Chapter 5 (General) of the EDA, which includes the following new divisions in Part 3B:

- Division 2 (Temporary use licences).
- Division 3 (Effect of particular declarations under Planning Act 2016) – referring to the declarations in relation to a use or class of uses made under section 275O of the PA.
- Division 4 (Extending and suspending periods under Act).

Amendment to other Acts in respect of the quadrennial election for 2020

It is worth noting that the Amendment Act also make amendments to the *Electoral Act 1992* (**Electoral Act**), *Local Government Electoral Act 2011* (**LG Electoral Act**), *Local Government Act 2009* and *City of Brisbane Act 2010* in respect of the upcoming quadrennial election for 2020, being the local government elections to be held on 28 March 2020. Some of the most interesting amendments include the following:

- Powers to postpone the polling day in respect of a by-election (see section 392D of the Electoral Act).
- Powers to allow electronically assisted voting for electors of a particular class (see section 392G of the Electoral Act and 200F of the LG Electoral Act).
- Powers to suspend or terminate the election in relation to the notice of election published on 22 February 2020 in circumstances where it will minimise serious risks to the health and safety of persons caused by the public health emergency involving COVID-19 (see sections 200B and 200C of the LG Electoral Act).
- A regulation making power which may include certain types of provisions, or retrospective provisions, in the relevant regulation in respect of the quadrennial election for 2020 (see section 260AB of the Electoral Act and 200L of the LG Electoral Act).

Déjà vu? – Court of Appeal considers substantially the same application for leave to appeal as it did in 2007

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Bunnings Group Limited v Sunshine Coast Regional Council & Ors* [2019] QCA 252 heard before Gotterson and McMurdo JJA and Boddice J

March 2020

In brief

The case of *Bunnings Group Limited v Sunshine Coast Regional Council & Ors* [2019] QCA 252 concerned two applications for leave, brought under section 63 of the *Planning and Environment Court Act 2016* (**P&E Court Act**), to appeal to the Court of Appeal of the Supreme Court of Queensland (**Court of Appeal**) against the decision of the Planning and Environment Court (**P&E Court**) to dismiss the appeal by Bunnings Group Limited (**Bunnings**) against the decision of the Sunshine Coast Regional Council to refuse to issue a development permit for a material change of use of premises to establish a Bunnings Warehouse at Coolum.

The proceedings in the P&E Court commenced before the commencement of the *Planning Act 2016*, and therefore the now repealed *Sustainable Planning Act 2009* (**SPA**) applied.

The P&E Court held that each development proposed by Bunnings was in conflict with the now superseded *Maroochy Plan 2000* (**Planning Scheme**), and that there were, under section 326(1)(b) of the SPA, insufficient grounds to justify an approval of either development proposal, notwithstanding the conflicts with the Planning Scheme.

In its application, Bunnings argued that leave ought to be granted because of the following errors of law by the primary Judge in *Bunnings Group Ltd v Sunshine Coast Regional Council & Ors* [2018] QPEC 42 (**P&E Court Decision**):

- the primary Judge erred in misconstruing parts of the Planning Scheme;
- the primary Judge erred by misstating some matters of principle;
- that the reasons for judgment were insufficient and in some ways, inconsistent.

2007 litigation

The Court of Appeal observed that the P&E Court had previously considered whether the subject site ought to be approved for a development permit for a material change of use to a Bunnings Warehouse in the case of *Coolum Properties Pty Ltd v Maroochy Shire Council & Ors* [2007] QPEC 13 (**Coolum Properties**).

In *Coolum Properties*, the P&E Court considered the same provisions of the Planning Scheme as in the P&E Court Decision and determined that a Bunnings Warehouse of 5,815 square metres was in conflict with the Planning Scheme, and that there were insufficient grounds to overcome the conflict and allow an approval notwithstanding the conflict.

The Court of Appeal noted that the decision in *Coolum Properties* was sought to be appealed by an application for leave, which application the Court of Appeal also refused in the case of *Coolum Properties Pty Ltd v Maroochy Shire Council & Ors* [2007] QCA 351 (**2007 CoA Case**).

Facts and circumstances of the development sought

The development permit applied for by Bunnings sought approval of a material change of use of the subject site to a Bunnings Warehouse with a gross floor area (**GFA**) of 8,600 square metres, and in the alternative a Bunnings Warehouse with a GFA of 5,850 square metres.

The subject site was designated urban in the Strategic Plan and located within the Master Planned Community (Precinct 7) (**Precinct 7**) in Planning Area 11 (Coolum Beach) (**Planning Area 11**). Planning Area 11 was described as being intended to be (at [15]):

> *an attractive coastal village, with a growing number of boutique eateries, shops and tourist facilities ... a compact village centre and … provide only a limited range of goods and services to meet the immediate needs of residents and visitors to the locality.*

P& E Court's finding of conflict with the Planning Scheme

In the P&E Court, Bunnings argued that the appeal ought to be allowed and the development permit granted on the following grounds:

- the proposed developments were of a type appropriate for the Precinct and of a lesser scale than the proposed development in *Coolum Properties*;
- another approval in the area, namely an approval for a supermarket, meant that the provisions of the Planning Scheme had been overtaken by subsequent events;
- there was a need for the proposed development;
- the development would result in beneficial traffic outcomes as a result of the upgrade of the surrounding roads and would benefit the community without an unacceptable impact.

The Court of Appeal noted the P&E Court's reasons for dismissal of the appeal as follows:

- the Planning Scheme intended that the Coolum area remain a small scale centre and the subject site was not located within a Planning Area, namely the area north of Beach Road, south of Margaret Street and east of Sunshine Street and at the western end of Yandinda-Coolum Road, which permitted commercial and business activities, or industrial activities;
- the proposed changes of use were not preferred and accepted uses under the Planning Scheme because a Bunnings Warehouse was held not to be a retail sale of goods primarily of a bulky nature and therefore did not fall within the definition of a showroom, which was a preferred and accepted use under the Planning Scheme;
- even if the proposed developments were within the definition of a showroom, a Bunnings Warehouse would not only compete with goods and services in the area as permitted in the Planning Scheme, but would lead to the closure of a Mitre 10 store within the Precinct;
- although there was a likely demand for the development, there was not a strong level of planning need as two Bunnings Warehouses existed within 15–20 minutes of the subject site;
- the beneficial outcome of the upgrade of surrounding roads did not justify the extreme conflicts with the Planning Scheme and there were unacceptable impacts, including that the proposed development was in conflict with the retail hierarchy of the Planning Scheme, as was also found in *Coolum Properties*.

Court of Appeal's refusal to grant leave

For the leave of the Court of Appeal to be granted, section 63 of the P&E Court Act requires the Court of Appeal to be satisfied that the P&E Court's decision was infected by an error or mistake of law or jurisdictional error.

The Court of Appeal dismissed the applications for leave to appeal for the following reasons:

- there was no error in the primary Judge's interpretation and application of the Planning Scheme;
- the primary Judge's reasoning and consideration of the evidence was revealed in the judgment and there was no inconsistency in the reasoning of the primary judge;
- the primary Judge did not err in the application of matters of principle in that the Judge was entitled to take into account, and could hardly have ignored, the previous decisions of the P&E Court and the Court of Appeal in *Coolum Properties* and the *2007 CoA Case*;
- whether the primary Judge ought to have considered that Planning Area 11 had been overtaken by events was a question of fact.

Conclusion

The Court of Appeal concluded that there was no error of law in respect of the primary Judge's decision that the proposed scale, intensity and function of the proposed development, inconsistency with the intended retail hierarchy of the Planning Scheme, likely impact on existing centres and traders, and the absence of master planning for the site warranted a dismissal of the planning appeal and refused the applications for leave to appeal against the decision of the P&E Court with costs.

Land Court finds no compensation payable for access to mining leases

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Corella Valley Corporation Pty Ltd v Campbell* [2019] QLC 44 heard before PG Stilgoe OAM

March 2020

In brief

The case of *Corella Valley Corporation Pty Ltd v Campbell* [2019] QLC 44 concerned the compensation payable to a landowner in relation to an application by Corella Valley Corporation Pty Ltd (**Applicant**) to renew its access to two mining leases. In concluding that no compensation was payable, the Land Court of Queensland relevantly held as follows:

- compensation will not be awarded for the mere presence of an access track;
- other access agreements do not assist the Court to determine the compensation payable to a landowner without information about the circumstances in which such agreements were negotiated;
- the liability to pay compensation to a landowner should be shared amongst the parties who use the access track; and
- the Court does not have power to compensate a landowner for costs incurred by the landowner in negotiating an access agreement.

Background

The Applicant held two mining leases in Cloncurry, which were accessed using a track on a nearby lot owned by Mr Campbell (**Landowner**). The mining leases had been held by the Applicant since the early 1970s, and the access track was constructed between 1974 and 1976. The access track was 6.4km long and 20m wide, being a total of 12.8ha.

The Applicant applied to renew its access to the mining leases for a period of two years commencing on 1 May 2018, but could not agree on the compensation payable to the Landowner for the renewed access.

The Landowner submitted that the access track diminished the Landowner's use of the land because the dust generated by traffic made the vegetation nearby unpalatable to his cattle. The difficulty for the Court was how and whether this loss could be quantified.

Mere presence of an access track did not entitle the Landowner to compensation

In considering the compensation payable, the Court had to consider the matters set out in section 281(3) of the *Mineral Resources Act 1989* (Qld) (**MRA**), which linked any compensation payable to loss or expense arising from the Applicant's use of the land (at [4]).

The Landowner calculated that the compensation payable was $250 per kilometre, but provided no evidence for this calculation. The Landowner also pointed to a decision where the Warden ordered that compensation be paid for the renewal of a 20 year lease because of the deprivation of possession of the surface of the land (see section 281(3)(a)(i) of the MRA).

The Court noted that the access track was not fenced and that the renewal was for a period of two years. In such circumstances, the Court held there was no basis for adopting the Warden's method of calculation.

In relation to the Landowner's submission that traffic made the nearby vegetation unpalatable, the Court held that without supporting evidence, it could not accept the Landowner's submission. In doing so, the Court found as follows (at [12]):

- the track had been used for many years, and any initial effect on cattle would have dissipated;
- the Applicant submitted that it would only be using the track a couple of times per month; and
- a video of the access track showed no evidence of dust deposits on the surrounding vegetation which was described as "*reasonably vigorous*".

The Court held that it would not award the Landowner compensation for the mere presence of the access track, and determined that the amount payable was nil.

Evidence of another compensation agreement is not helpful when determining the compensation payable

Both parties pointed to other agreements to form the basis for their assessment of compensation.

The Court considered whether such agreements satisfied the test in *Spencer v Commonwealth* [1907] HCA 82, where the High Court of Australia held that when assessing the value of land, "*the basis of valuation should be the price that a willing purchaser would at the date in question have had to pay to a vendor not unwilling, but not anxious, to sell.*"

The Court concluded that in the absence of information about the circumstances in which the other agreements were negotiated, it was unable to conclude that such agreements represented a bargain that satisfied the test in *Spencer*.

If an access track is used by multiple parties, compensation should be shared among the parties

The Applicant submitted that any compensation payable should be shared with another mining company who used the access track. The Court agreed with this submission and concluded that the Applicant's contribution to any loss should be no more than 50%. This was a moot point given that compensation was assessed at nil.

Conclusion

The Court ordered that the compensation payable to the Landowner for access by the Applicant to the nearby mining leases was nil. The Court also concluded that it did not have power to compensate the Landowner for costs incurred in negotiating the access agreement.

Planning and Environment Court refuses submitter appeals against the development of centre activities on rural residential land and states again the need to read a planning scheme as a whole

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Navara Back Right Wheel Pty Ltd v Logan City Council and Ors; Wilhelm v Logan City Council and Ors* [2019] QPEC 67 heard before Williamson QC DCJ

March 2020

In brief

The case of *Navara Back Right Wheel Pty Ltd v Logan City Council and Ors; Wilhelm v Logan City Council and Ors* [2019] QPEC 67 concerned submitter appeals to the Planning and Environment Court against a development approval given by the Logan City Council (**Council**) to Citimark Properties Pty Ltd (**Developer**). The approval authorised the development of a service station, shop, and food and drink outlet on land in Cornubia.

The submitter appellants (**Submitters**) argued that the development did not comply with the *Logan Planning Scheme 2015* (**Planning Scheme**) because it comprised "centre activities", which should not be located on land zoned as rural residential. The Submitters argued that the centre activities would have unacceptable impacts on traffic and the character and amenity of the area. The Submitters also argued that the relocation of an existing bus stop in accord with the conditions imposed by the concurrence agency would be unsafe and detrimentally impact on the privacy of one of the Submitters.

The Court dismissed the appeals but set the development approval aside and ordered that it be replaced with a new decision incorporating updated conditions. In particular, the Court found as follows:

- when the Planning Scheme was read as a whole, it was clear that it did not limit the location of "centre activities" to areas designated as "centres" within the Planning Scheme;
- if the Court was wrong to conclude that centre activities were not limited to designated centres, the proposed development substantially complied with the requirements contained in the Planning Scheme for centre activities; and
- the proposed development would meet an identified need for affordable fuel in the area, provide an opportunity to increase competition and choice in the fuel market, and improve elements of the local road network.

Proposed development

The proposed development was for a service station, shop, and food and drink outlet, which would operate 7 days a week, 24 hours a day.

The land is located on the corner of a four lane arterial road, which carries approximately 22,000 vehicles per day, and a smaller two lane road. The amenity of the land and area generally is significantly impacted by noise from road traffic. Although the land is zoned as rural residential, the evidence was that the land had a "more urbanised character" (at [23] and [26]).

Planning Scheme does not limit the location of centre activities to areas designated as "centres" within the Planning Scheme

The Submitters asserted that the proposed development materially departed from the provisions relating to "centre activities" in the Planning Scheme. It was argued that because the Planning Scheme was to be treated as an expression of the public interest, it should not be readily departed from.

The Submitters relied on section 3.5.8.1(1)(a) of the Strategic Framework, which stated that centre activities had to be: (i) located in a centre; (ii) consistent with the intent of the centre; and (iii) at a scale compatible with the role and function of the centre in the centre hierarchy.

The Submitters argued that the development did not fall within the exception to subsection (1)(a) contained in section 3.5.8.1(1)(b). Subsection (1)(b) relevantly provided that subsection (1)(a) did not apply if: there was a community and economic need for the use; the use did not have unacceptable adverse effects on an existing or planned centre; the use could not be located in a principal, major, district, local or neighbourhood centre; and, the use has a specific locational need requiring its location outside of a centre and is located in accordance with that need.

The Court said that although centre hierarchy planning was an important forward planning tool in a planning scheme, it was necessary to read the planning scheme as a whole before drawing conclusions as to the limits of a planning strategy (at [45]).

The Court concluded that when the Planning Scheme was read as a whole, it was clear that the proposed development did not have to be located in a designated centre. The Court relevantly stated as follows:

- The centre strategy had to be read with other parts of the Planning Scheme, which allow uses that are centre activities to be located in out-of-centre locations without having to comply with section 3.5.8.1(1) (at [74]). The particular uses in this case were anticipated within and outside of the centre hierarchy (at [85]).
- Section 3.5.8.1 applied to new and expanded centres. The word "centre" was understood to mean a centre identified in section 3.5.1(1) of the Planning Scheme and by reference to the other indicators of a centre contained in section 3.5.1(2) of the Planning Scheme, as well as the broader context of the Planning Scheme.
- The proposed development was too small to fall within the identified hierarchy of centres set out in section 3.5.1(1), and therefore was not captured by section 3.5.8.1(1) (at [130]).

If the Court's finding was wrong, the Developer established that the proposed development substantially complied with section 3.5.8.1(1)(b)

The Court said that if it was incorrect in concluding that the proposed development was not captured by section 3.5.8.1(1), the development in any event substantially complied with the exception in section 3.5.8.1(1)(b). That conclusion was based on the following:

- The service station would satisfy a community and economic need. Although the evidence did not demonstrate an economic need for the shop and food and drink outlet, or for 24/7 trading, the evidence established there would be no unacceptable impact on amenity or character, and that 24/7 trading had identifiable benefits to the public.
- The proposed development would have no material adverse effect on existing and proposed centres in or adjacent to the trade area. Although the Court found that land to the west of the Loganholme local centre could theoretically accommodate a service station, this development scenario was unrealistic and impractical (at [153], [158]).
- The zone code anticipated non-residential uses and the development could be conditioned to ensure it did not offend the amenity and character of the zone code, and to protect the privacy of the first submitter. This was particularly so given the surrounding area was more urban in character.

The Court also referred to *Broad v Brisbane City Council* [1986] 2 Qd R 317, in which the Court stated that the Court could "*have regard to the views of residents of the area*" when determining the likely effects on amenity, but that such views had to "*find justification in specific, concrete likely effects*" of the development. Although Council in this case received submissions from the public which raised concerns about the impact of the development on the feel and amenity of the area, such views could find no direct support in the expert evidence.

Proposed development would not adversely impact traffic conditions and met an identified need for affordable fuel

In relation to whether the proposed development would adversely impact traffic conditions, one of the Submitter's experts asserted that the service station would complicate the intersection. In particular, the expert emphasised that the service station traffic would compete with local traffic, who would be focussed on the intersection as opposed to traffic from the service station.

The Court found that the safety of the intersection would not be compromised and had regard to evidence which demonstrated that red light queues during peak hours reduced traffic speed, and the manoeuvres required to navigate the intersection were safe and simple. The Court agreed with evidence that the works would, in fact, improve the safety and efficiency of the road network.

Finally, in relation to "need", the Court gave significant weight to economic evidence which demonstrated that the proposed service station would result in benefits to the public arising from increased choice, competition and convenience. This was particularly relevant given the surrounding population was car dependent and known to pay higher prices for fuel.

Withdrawal of an enforcement notice by a local government results in an award for costs against the local government

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Favero v Council of the City of Gold Coast* [2019] QPEC 61 heard before Kent QC DCJ

March 2020

In brief

The case of *Favero v Council of the City of Gold Coast* [2019] QPEC 61 concerned an application to the Planning and Environment Court (**P&E Court**) for costs arising out of an appeal commenced by an Appellant against the decision of the Gold Coast City Council (**Council**) to issue the Appellant with an enforcement notice for an alleged development offence under section 164 of the *Planning Act 2016* (**Planning Act**).

The Appellant made the application for costs under section 60 of the *Planning and Environment Court Act 2016* (**P&E Court Act**) after the P&E Court ordered that the appeal proceeding be allowed because the Council withdrew the enforcement notice the subject of the appeal.

The P&E Court found that the circumstances of the appeal warranted a departure from the general rule stated in section 59 of the P&E Court Act, that each party to a proceeding must bear their own costs for the proceeding, and allowed the application.

The Council was ordered to pay the Appellant's costs in respect of the appeal and the application on the standard basis.

Enforcement notice

The subject land was located on community title scheme land at Helensvale (**Land**) with creek frontage and access to a salt water creek to the north. The area of land between the Land and the salt water creek (**Covenant Area**) was common property subject to the requirements of a registerable planning covenant required to be complied with under condition 24 of a development permit for reconfiguring a lot granted by the Council in 2008 (**Development Approval**).

The Council issued the enforcement notice to the Appellant because the Council believed, contrary to the requirements of condition 24 of the Development Approval, that the Appellant had erected a fence in the Covenant Area, which area was required to be preserved for coastal protection and management purposes.

The Appellant commenced the appeal against the enforcement notice and contended that condition 24 of the Development Approval did not apply to the Appellant but rather to the applicant of the Development Approval, and that in any event, the Appellant had not caused any building or structure to be erected on the Covenant Area in breach of section 164 of the Planning Act.

Application for costs

Section 60 of the P&E Court Act gives the P&E Court the discretion to grant a costs order in, relevantly, one or more of the following circumstances:

- the proceeding was started or conducted for an improper purpose (section 60(1)(a));
- the proceeding was frivolous or vexatious (section 60(1)(b));
- a party to the proceeding introduced or sought to introduce new material (section 60(1)(e));
- a party has defaulted in the P&E Court's procedural requirements (section 60(1)(f));
- a local government failed to properly discharge its responsibilities in the proceeding (section 60(1)(i)).

Appellant's position

The Appellant sought an award for costs on the standard basis up to 2 May 2019, and on an indemnity basis thereafter, on the following alleged grounds:

- The conduct of the appeal proceedings by the Council up until its withdrawal of the enforcement notice was a breach of the obligations of a party bearing the onus under section 45(3) of the Planning Act to establish that the appeal should be dismissed, and therefore the Council acted for an improper purpose.
- The continued conduct of the appeal proceedings by the Council and its position that the Appellant had committed a development offence was frivolous and vexatious, because the Appellant had offered to the Council to resolve the appeal and each party bear their own costs, and the Council had no prospects of success in the appeal.
- The Council sought to introduce new material by contending that the Appellant occupied the Covenant Area.
- The Council failed to comply with the obligation of a local government to properly assess the merits of a case and acknowledge and address its shortcomings.

Council's position

The Council's position was that it ought not have costs awarded against it for the following reasons:

- There was no improper purpose as a local government's proper purpose is the enforcement of the planning laws within its local government area, as was identified in the case of *Warringah Shire Council v Sedevic* [1987] 19 NSWLR 335 [at page 340].
- The conduct of the proceedings by the Council was not improper or vexatious as the Council:
  - did not file a proper response to the appeal proceeding because the matter was summarily terminated;
  - was entitled to give an enforcement notice to the Appellant as either owner or occupier of the Land, and that it was undeniable that a development offence was committed by someone on the Land; and
  - rejected the Calderbank offer of the Appellant because the Council considered the conditions contained in the offer to be unreasonable and in breach of condition 24 of the Development Approval, which has been acknowledged by the P&E Court in *Moramou2 Pty Ltd v Brisbane City Council (No. 2)* [2019] QPEC 22 to be an unattractive and irrelevant consideration to a costs application in similar circumstances.
- The Council only introduced evidence to engage in the issues arising out of the notice of appeal.
- There was no loss or prejudice to the Appellant by the delay of the Council in filing for directions in the appeal proceeding and that the Appellant could have also taken such a step after filing the notice of appeal.
- There was no reported decision of the P&E Court awarding costs in similar circumstances.

P&E Court awards costs on the standard basis

The P&E Court noted the default position that each party bear their own costs, and that this position would only be varied where the circumstances contemplated by section 60 of the Planning Act have been made out.

The P&E Court held that the evidence submitted by the parties did not establish any of the following:

- an improper purpose;
- a default by the Council in complying with the P&E Court's procedural requirements;
- a default by the Council in the discharge of the Council's responsibilities as a local government.

The P&E Court did find, however, that the Council's giving of the enforcement notice to the Appellant and the Council's initial resistance to the appeal proceeding fell within the category of being frivolous and vexatious.

Conclusion

The P&E Court rejected the Appellant's arguments in respect of improper purpose, default of the procedural requirements, and default of the obligations of a local government, but allowed the application for costs on the standard basis as the resistance by the Council was within the category of frivolous and vexatious.

Noisy children held not to be a disturbance if the impacted area is part of the same development as that which generates the noise of the children

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Northern Properties Pty Ltd v Brisbane City Council* [2019] QPEC 66 heard before Williamson QC DCJ

March 2020

In brief

The case of *Northern Properties Pty Ltd v Brisbane City Council* [2019] QPEC 66 concerned an appeal by Northern Properties Pty Ltd (**Northern Properties**) against the decision of the Brisbane City Council (**Council**) to refuse a mixed use development application over land located at Dalmarnock Street, Enoggera (**Subject Land**).

The proposed development application for a mixed use development was impact assessable against the *Brisbane City Plan 2014* (**City Plan**), and comprised the following components (**Development**):

- two basement levels of car parking;
- a childcare centre for 106 children located on the ground floor (**Childcare Component**);
- 19 apartments across two levels situated above the childcare centre (**Multiple Dwelling Component**).

The Council alleged that the Development would, firstly, result in an unacceptable noise impact, and secondly, cater for more than a local community facility need, and therefore, the Development did not comply with the City Plan. The Court did not agree.

The Court held that the Council's decision to refuse the application be set aside and that the Council provide a draft suite of conditions in respect of the Development.

Noise impacts generated by the Childcare Component to be expected by owners and occupiers of the Multiple Dwelling Component

The Court considered evidence from a joint expert report drafted conjointly by two acoustic experts which determined that five of the nineteen apartment residences would be subject to a noise impact in excess of the noise limit prescribed by Performance Outcome PO10 of the Childcare centre code in the City Plan. However, unusually, despite not meeting Performance Outcome PO10, the Development does comply with the relevant acceptable outcomes in respect of Performance Outcome PO10.

The Court concluded that the noise impact generated from the Childcare Component falls within the range of impacts reasonably expected by the Multiple Dwelling Component of the Development having regard to the City Plan, for the following reasons:

- the characteristics of the noise, including the type, scale and area affected;
- the time that the noise is generated and its duration;
- the knowledge of the presence of the Childcare Component.

The Court noted that the provisions of the City Plan suggest that owners or occupiers of the Multiple Dwelling Component would not have an unassailable expectation that they will not be affected on their balcony by the noise generated by the Childcare Component of the same development.

The Court concluded that the City Plan does not prohibit sensitive uses "*not associated*" with the Development and that the Development will not generate a noise impact on sensitive uses outside of the boundaries of the Development, and, accordingly, the generated noise impacts from the Childcare Component do not warrant the refusal of the Development.

Non-compliance due to the Childcare Component catering for a need generated by employees and visitors to the local area was not considered to be a reason for refusal

The Court heard evidence from two economic experts which identified that although the local demand generated by the population of the local area is equivalent to 3.6 childcare centres, and that there are currently seven childcare centres operating in the local area, the local market is supply constrained. The Court, therefore, accepted that there is a need for the Development.

The Council alleged that the Childcare Component resulted in a material non-compliance with the City Plan, namely Overall Outcome (4)(p) of the Low-medium density residential zone code, which relevantly states:

> *(p) Development for any other non-residential use serves a local community facility need only such as a child care centre or a substation.*

The Council alleged that the demand was generated externally to the local area, by parents seeking to place their children in a childcare centre near their work, or near public transport nodes, and that the Development did not comply with Overall outcome (4)(p) of the Low-medium density residential zone code for the following reasons:

- whether it complies with the Overall outcome (4)(p) is a matter of fact and degree;
- the planning purpose of Overall outcome (4)(p) is to only permit smaller childcare centres in local areas;
- other sections of the City Plan permit larger childcare centres in areas with denser populations.

The Court held that employees and visitors to the non-residential uses in the zone do form part of the local community demand for the area, but that as the demand generated by the employees and visitors is substantial, there is non-compliance with Overall Outcome (4)(p).

However, as the relevant neighbourhood plan of the City Plan for the local area permits childcare centres that cater to residents, employees and visitors, the non-compliance with Overall Outcome (4)(p) was not considered a reason for refusal. Particularly as a neighbourhood plan is a finer grained local planning document directed at particular local planning issues.

Relevant matters

The following relevant matters were advanced by Northern Properties, and were accepted by the Court:

- there is a need for the proposed development;
- the need can be met on the land absent any unacceptable impacts.

Exercise of planning discretion

The Court noted that it has a broad planning discretion under the *Planning Act 2016*, which, among other things, required the Court to reach a balanced decision in the public interest.

Relevant to the Court's view that there are compelling reasons favouring approval was the compliance of the Development with the City Plan read as a whole, the technical nature of any non-compliance, and the significant weight given to the identified need.

Conclusion

The Court set aside the decision of the Council, as the Court was satisfied that the Development would represent a balanced decision in the public interest (in a planning sense).

COVID-19 and the built environment

Todd Neal

This article discusses the likelihood of new powers in planning and environmental laws in New South Wales due to COVID-19

April 2020

In brief – Expect new powers in planning and environmental laws

It is likely that the fear associated with the COVID-19 pandemic will lead to new government powers as we have now seen with the *Public Health (COVID-19 Public Events) Order 2020* in New South Wales. That Order criminalises certain public events where there are, or are likely to be, more than 500 people in attendance.

We see fear transposed into power regularly in our planning and environment laws. The fear of certain types of development leads to the exercise of government power curbing the extent to which one can use land, the conditions within which works can occur on land, and ultimately the design of the finished development itself.

We say this without criticism as the law seeks to provide an appropriate restraint to the way land is used so that one land use sits harmoniously with other surrounding land uses and contributes to the social and economic fabric of a city, town, or locality.

Given the economic impact the coronavirus has had and will have, and the impact on human health projected, combined with the fears and behaviours the coronavirus has generated, it will only be a matter of time before those fears translate into the exercise of new powers in our planning and environmental laws and the planning instruments that sit beneath them given the way design of the built environment can impact public health. In relation to COVID-19, we have already seen the first significant change to our planning laws with *State Environmental Planning Policy Amendment (COVID-19 Response) 2020* lifting the planning curfews on "retail supply chain premises" until 1 October 2020 given the supermarkets could not restock shelves fast enough.

Two aims within section 1.3 of the *Environmental Planning and Assessment Act 1979* (NSW) clearly facilitate this:

> *(g) to promote good design and amenity of the built environment,*
>
> *(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

Building design and public health

The way many buildings are designed adds to the threat to public health and productivity in the economy, particularly in dense urban environments: door handles in offices, restaurants and bathrooms; crowded lifts with buttons to press; offices without poor light, fresh air and greenery. Already, innovations such as pedestrian lights without needing to press buttons have been implemented in the City of Sydney.

The way our vulnerable are accommodated and the sick hospitalised should also be further considered so that they are protected and risks are mitigated when these events arise.

Our courts are not immune from these design problems and access to justice over the next few months will now be restricted as many of the nation's courts, including the High Court, close or reduce their functioning face-to-face. Again, it does not take long to see the design of many of the country's court rooms as potentially impacting public safety when it comes to a pandemic given the high stress environment our courts preside over, the crowded registrar's lists in crammed court rooms with no natural light, and at times poor functioning ventilation.

Our cities can contribute to better health and with good design can make it easy for people to make healthy choices. That might reduce some of the underlying conditions increasing the potential strain on the health system at this time. These measures should not and need not be at the expense of affordability and new supply.

Perhaps it is time to renew focus on these measures in development control plans (NSW), Australian Standards and Apartment Design Guide reducing pathogenic risk, and whilst it sounds trite, encouraging the creation of design that entices people into healthy activities - outdoor recreation, walking and bike riding - to avoid public health problems that increase disease threat.

The market also has a role. In addition to green ratings, perhaps it is now time for health ratings to be given, not just to food, but also to our built environment, since our environmental surroundings contribute to our physical (as well as mental) health.

Of course, viruses are not new and civilisation will continue. But our planning laws could better incentivise a deeper improvement in the underlying conditions that contribute to the vulnerabilities that make this pandemic such a significant risk, as well as engendering spaces designed to reduce exposure to pathogens (whilst at the same time being vibrant, interesting, and social).

Our laws sometimes narrowly concentrate on things that we do not need to, and ignore where urgent action is required. Health and safety may take a new direction in design after the dust settles.

Caution will need to be exercised to consider how these costs might be shared and allocated given the last thing the development industry needs now are more barriers and higher costs given the contribution to the economy the industry provides.

NSW planning industry responds to the COVID-19 crisis

Annabelle King | Katherine Edwards | Todd Neal

This article discusses the amplified powers and restrictions introduced to New South Wales' planning and environmental laws in response to COVID-19

April 2020

In brief – An overview of the unprecedented changes to NSW's planning laws

In the two weeks since our *COVID-19 and the built environment article*, amplified powers and restrictions have been introduced to NSW's planning and environmental laws in response to COVID-19, and to various pieces of cognate law - not least the *Constitution Act 1902* (NSW). As we stated then, human fear is transposed into executive power, which is exactly what has unfolded.

Through rapid and unprecedented regulation, the State's citizens are now in effect in "lockdown" (though that word is not formally used), unable to leave their residence without reasonable excuse. Many businesses have also been shut down under these new powers. Paradoxically, normal curfews that apply to some corporations have been lifted under the State's planning laws providing the most liberal operating hours some industries have seen ever.

The swift legal changes to our planning laws attempt to enable new industry practices and means of operation to adapt to society's needs, while the changes to our public health legislation institute behavioural changes in attempt to mitigate the potential impacts of the virus.

The enabling legislation is now in place. New regulations and orders underneath this will continue to be made to deal with the crisis.

New power for the Minister for Planning and Public Spaces

The *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* was passed in the NSW Parliament on 25 March 2020, allowing the NSW Government to make changes to a number of Acts, including our chief piece of planning and environmental legislation – the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

New sections introduced to Environmental Planning and Assessment Act 1979 (NSW)

Sections 10.17 and 10.18 are two new sections that were introduced to the EP&A Act. They apply for a minimum of 6 months and were effective immediately.

Section 10.17 gives the Planning Minister broad power to make an order that authorises development to be carried out on land without the need for any approval under the Act or consent from any person. Regard need not be had to environmental planning instruments or development consents. The exercise of the power would obviate the need for development consent under Part 4 of the EP&A Act and also the need to obtain owner's consent, or the consent of a Council (being a "person" because it is a body politic under section 220 of the *Local Government Act 1993* (NSW), which is included in the definition of persons under the *Acts Interpretation Act 1901* (Cth)).

In the second reading speech for the Bill, the Attorney General, Mark Speakman, said:

> *If we need to construct a COVID-19 clinic, we need, for the period of this crisis, to have the unfettered ability to be able to do that.*

Following on from this, the *Environmental Planning and Assessment (COVID-19 Development—Health Services Facilities) Order 2020* was announced, which aims to facilitate the use of buildings or places as health services premises, and to allow health services facilities under construction to be completed sooner. This means that construction of make-shift hospitals on public open space can be completed quickly if demand for hospital beds and health care facilities grows.

It appears that the difficulties involved navigating Part 5 of the Act, normally used when "activities" on behalf of a public authority occur, will have no work to do because the conditions for carrying out the development would be within the order, which is taken to be a grant of development consent (section 10.17(4) of the EP&A Act).

The power is conditional on the Minister consulting with the Minister for Health and Medical Research and also being reasonably satisfied that the making of the order is necessary to protect the health, safety and welfare of members of the public during the COVID-19 pandemic.

The power is unlikely to become a replacement to the old Part 3A, used to call in contentious new developments unrelated to health, safety and welfare of the public. The full extent of the power is yet to be seen and has not yet, for obvious reasons, been tested in the courts.

Section 10.18 confirms that the requirement to make a document available for inspection at a physical location (such as a Council chambers) is satisfied if the document is made available on the NSW Planning Portal or any other website approved by the Planning Secretary. This ensures consistency with the public health social distancing restrictions. Councils that were required to make documents physically available for inspection (eg development consents) now need to make the documents available online.

Amendments to Local Government Act 1993 (NSW)

The Bill has also amended the *Local Government Act 1993* (NSW) (**LG Act**), which is the source of power for local councils who primarily implement the planning laws. The LG Act was amended to:

- give the Minister for Local Government the power to postpone elections if the Minister believes that it is reasonable in the circumstances (see section 318B of the LG Act). The Minister for Local Government, Shelley Hancock, has enlivened this power and confirmed the September 2020 elections are to be postponed for 12 months. This is different to Queensland where local government elections proceeded over the weekend of 28 March 2020;
- remove the need for persons to attend council meetings and allowing the meetings to be held remotely by audio visual link (see section 747A of the LG Act). It should not necessarily be assumed all councils will move to online meetings as not all councillors have the technological ability to move to online meetings;
- allow the regulations made under the LG Act to modify the application of that Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. There are conditions of when this can occur directed towards urgently dealing with matters should they arise. See section 747B of the LG Act.

Retail, home businesses and construction

The biggest practical changes to NSW's planning laws have been in:

- lifting the curfews impeding supply;
- lifting the curfews on operating hours to allow consumers more flexible times to access goods; and
- enabling the construction industry to continue untrammeled.

Retail supply chain and retail trading operating hours

The *State Environmental Planning Policy Amendment (COVID-19 Response) 2020* introduced provisions to allow the use of retail supply chain premises **at any time** for the purpose of supplying goods directly or indirectly to retail premises. Retail supply chain premises means port facilities, warehouse or distribution centres and retail premises.

The *Environmental Planning and Assessment (COVID-19 Development – Extended Operation) Order 2020* (**Extended Operation Order**) allows retail premises such as supermarkets, pharmacies and corner stores to operate 24 hours per day. It does not affect the times when liquor may be sold, however.

This allows people the flexibility to shop at varied times throughout the day (if shops elect to increase their operating hours) and without fear of interacting with large numbers of people. However, some of the major supermarket operators (Coles and Woolworths) have reduced their store operating hours to allow restocking of shelves and implemented designated shopping hours for those with greater need.

The Extended Operation Order also allows for waste disposal from retail premises at any time, but did not go so far as to allow all waste facilities to operate 24 hours per day.

Where retailers operate as part of hotels and motels, they are able to provide food and beverages 24 hours per day for guests to consume in their rooms.

All other conditions continue to apply as normal, and where retailers are operating outside of normal hours, under this Extended Operation Order they must take steps to reduce noise.

The upcoming holidays in April, which are usually "restricted" working days under the *Retail Trading Act 2008*, are conditionally exempt in light of the COVID-19 pandemic. Supermarkets are allowed to operate all day on Good Friday, Easter Sunday and ANZAC Day, provided that the staff working on those days have "freely elected" to do so.

Home businesses and home industry operating hours

The Extended Operation Order also allows home businesses to operate 24 hours a day, and to employ more than two people, but not more than five, provided that they follow social distancing rules. This restriction does not conflict with the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* made under the *Public Health Act 2010* (NSW), which limits gatherings in a public place of more than two persons, as long as the gathering is essential for the purposes of work or education.

Home businesses are required to take steps to ensure no adverse impact on the amenity of the neighbourhood by reason of noise, smell, fumes or waste products. These measures are in place until the crisis is over, or another order amends these measures.

Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020

Under the NSW Government's public health laws, some types of gatherings have been banned based on **the use of land**.

"Gatherings" in public places have now been restricted to no more than two persons. The *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* also places a burden on owners and occupiers of premises to prevent overcrowding by not allowing persons to enter and stay on their premises. The Order also added a number of venues that would be closed to the public, and placed further restrictions on activities such as sport, property inspections and auctions, and weddings and funerals.

Section 10 of the *Public Health Act 2010* (NSW) provides that failure to comply with a Ministerial direction under the Act is an offence, with a maximum penalty of 6 months imprisonment, or a fine of up to $11,000 (or both), as well as a further $5,500 fine each day that the offence continues. For corporations, the fine is up to $55,000 and a further $27,500 for each day the offence continues.

Essential gatherings that are not subject to restrictions, include gatherings at construction sites, office building, factories, warehouses and mining sites that are necessary for the normal operation of the site. This means, for now, that construction may continue, provided that those on site adhere to social distancing rules.

Environmental Planning and Assessment (COVID-19 Development – Construction Work Days) Order 2020

On 2 April 2020, the government introduced a further *Order – the Environmental Planning and Assessment (COVID-19 Development – Construction Work Days) Order 2020* – to ease restrictions around operating hours of construction sites in a bid to keep people employed, to encourage businesses to continue to operate and to help the economy all the while making social distancing easier to achieve.

Construction sites will now be permitted to operate on weekends and public holidays, in the same way as their normal weekday hours. The Order applies to the carrying out of any building work or work, or the demolition of a building or work that are the subject of a development consent. All conditions (except for the restrictions on operating on weekends and public holidays) must be complied with. To balance the impact on residential neighbours, the work must not involve the carrying out of rock breaking, rock hammering, sheet piling, pile driving or similar activities. All feasible and reasonable measures to minimise noise must also be taken.

In some ways, construction has never been easier. With traffic eased, the pre-COVID-19 phenomenon of concrete pours occurring after hours due to late concrete trucks, with Council Rangers waiting to issue Penalty Infringement Notices, should disappear.

However, no orders have as yet been made in relation to the waste industry. The orders made to date allow industries that generate waste to expand their hours of operations. With that, comes the inevitable requirement for either increased or adjusted waste disposal and recycling needs. To ensure that waste is managed properly and the environment is protected, waste operators may need to be granted the same leniency with respect to hours of operation. Such an order is likely to be welcomed.

Environmental Planning and Assessment (COVID-19 Development—Takeaway Food and Beverages) Order 2020

The *Environmental Planning and Assessment (COVID-19 Development—Takeaway Food and Beverages) Order 2020* allows the "unrestricted operation" of "dark kitchens", which are commercial kitchens and restaurants without an eat-in component. This allows greater access to food and beverages on a takeaway basis where most eat-in options are now all closed.

Food trucks are able to operate on any land across NSW, provided they have consent from landowners to do so and do not obstruct the normal use of that land in any way. The Planning Minister said that the orders have been designed to "help keep people in work and also help keep our community safe".

Status of projects in the pipeline

The NSW Government has confirmed that construction and planning activities are currently essential services and can continue. We are also aware that consent authorities are being asked to consider their "risk profiles" and to ensure expedited decision-making occurs so that a larger number of "shovel ready" projects exist when the pandemic lifts. On Friday 3 April 2020, the NSW Government announced that it will cut red-tape and fast-track planning processes to help keep people in jobs and to ensure the strength of the construction industry is retained throughout the COVID-19 crisis.

For those whose projects are within the Land and Environment Court, the situation is not as straight forward - each matter listed before the end of June is being reviewed by the Court as to the practicability of the matter being run by AVL or telephone. The Court issued a Practice note regarding its arrangements, which directed parties to predominantly move online, with the Online Court and Online Registry operating 24 hours a day. Where the Online Court is not practicable, the Court is accessible via telephone, for judgements, submissions etc.

Regarding site inspections, parties must consider whether they are necessary and appropriate in the circumstances, and are able to be conducted in compliance with social distancing rules. Anecdotally, we understand that this has meant hearings have been (and are expected to continue to be) delayed where councils insist on the need for a site inspection and one cannot be enabled. Accordingly, there will be a backlog of litigated matters to clear after courts return to normal functioning impacting the desire to increase the number of shovel ready projects.

While the desire for efficiency is laudable, competence is important. As we saw post-GFC, there was a spike in the number of defects that arose. Poorly drafted conditions of consent and rushed developments can lead to more work as issues need to be regularised down the track. All of this is occurring at a time the new Building Commissioner is introducing significant reform in the development and construction industry to restore confidence in building products.

Conclusion

In January, we stated in our article *The bushfire crisis and its implications for NSW planning and environment laws* that 2020 will be a year marked by legal "VUCA" – volatility, uncertainty, complexity and ambiguity - for planning and environment law. That description could not be more apt since within the space of a few months there has been an extraordinary and unprecedented amount of unplanned change to the State's planning laws.

Temporary use licences are a new statutory mechanism allowing businesses to operate under changed development conditions in response to COVID-19

Alexa Brown | Ian Wright

This article discusses the issuing of temporary use licences in relation to business operations under changed development conditions in response to COVID-19

April 2020

In brief

The Minister for State Development, Manufacturing, Infrastructure and Planning (**Minister**) has issued an applicable event notice under section 275E of the *Planning Act 2016* (**Planning Act**) in response to the public health emergency caused by COVID-19. The applicable event notice is necessary for the Minister to access the powers in Chapter 7 (Miscellaneous), Part 4B (Applicable Events) of the Planning Act which includes the power to:

- make a declaration in respect of a use or class of uses (see sections 275N to 275P of the Planning Act);
- issue a notice of extension or suspension of periods under the Planning Act (see sections 275Q to 275S of the Planning Act); and
- issue temporary use licences (see sections 275G to 275M of the Planning Act).

To date, the Minister for the Planning Act has given one notice of declaration for use or classes of uses and has not given any extension or suspension notices. The declaration of use for classes of uses, which allows 24-hour, seven-days-per-week operating and supply conditions, has been given for shop uses and warehouse and transport depot uses where directly necessary for the supply of goods to a shop use.

The Department for State Development, Manufacturing, Infrastructure and Planning (**DSDMIP**) has, however, assessed and issued several temporary use licences which change the relevant development conditions for the period that the applicable event notice is in effect. The change to the development conditions could be the introduction of a new development condition or the alteration of an existing development condition. The changes made by the temporary use licences given to date include the alteration of operational hours for business or construction activities, or the introduction of a condition which allows a new use, such as ethanol storage or production, or short-term accommodation.

Temporary use licences

Unless the Minister extends the applicable event period for the applicable event notice under section 275F of the Planning Act, the temporary use licences given to date are in effect until 20 June 2020.

To date, the following temporary use licences have been approved by DSDMIP:

- *4 Lewis Place, Manly West* (Brisbane City Council) – removal of conditions in the relevant development approval which relate to the restriction of vehicle access onto Lewis Place, at all times, of vehicles associated with the approved multiple dwelling.
- *5 Josephine Street, Loganholme* (Logan City Council) – new use of premises for the distillation of ethanol for production of sanitiser and other products in accordance with the conditions in the relevant development approval.
- *264 E Drews Road, Westbrook* (Toowoomba Regional Council) – alteration of development conditions, and insertion of new temporary conditions, which increase the operational hours, and service vehicle movement hours, to include 7:00 am to 5:00 pm on Saturday for sand blasting and spray painting.
- *137-151 Landsborough Avenue, Scarborough* (Moreton Bay Regional Council) – varying a development condition to allow waterproofing to be undertaken on Sunday 5 April 2020.
- 2 Esplanade, Coconuts (Cassowary Coast Regional Council) – alteration of a development condition in relation to the operating hours such that the preparation, loading and transportation of ice can occur at relevant times on Monday to Saturday inclusive.
- *195-199 Potassium Street, Narangba* (Moreton Bay Regional Council) – alteration of a condition of the relevant development approval to allow decanting and storing of ethanol at the relevant site.

- *47 Manilla Street, East Brisbane* (Brisbane City Council) – new use of premises for the production of ethanol and sanitiser in accordance with conditions attached to the temporary use licence.
- *34 Sixth Avenue, 6, 8 & 11 Seventh Avenue, 39, 41, 43 & 45 Main Avenue, Coorparoo* (Brisbane City Council) – alteration of a condition in an approved infrastructure designation in relation to hours of construction, and the production of noise, vibration and dust emissions as a result of construction, to be in accordance with the *Environmental Protection Act 1994*.
- *6 Lake Street, Cairns City* (Cairns Regional Council) – new short-term accommodation use for the provision of short-term accommodation for tourists or travellers where the existing lawful use of the relevant unit is a holiday apartment (high density) use.
- *2 & 4 Smith Street, Cairns North* (Cairns Regional Council) – change to a development condition to allow increased operational hours to 6:00 am to 8:00 pm for a Food and Drink Outlet use.
- *76A, 78 & 80 Ardargie Street, Sunnybank* (Brisbane City Council) – change to a development condition in relation to the maximum number of children permitted to attend a child care facility.
- *32 Colmslie Road & 506 Lytton Road, Morningside* (Brisbane City Council) – change to a development condition which limited the development approval to the approved uses to insert a new use, and addition of a new condition limiting the use to an ancillary use within a specified building.
- *10-20 Wyandra Street, Newstead* (Brisbane City Council) – change to development conditions in a development approval relating to construction hours.
- *11-13 Bell Street, Ipswich* (Ipswich City Council) – alteration of a condition in a development approval in relation to hours of construction, and the production of noise, vibration and dust emissions as a result of construction, to be in accordance with the *Environmental Protection Act 1994*.
- *603-611 Coronation Drive, Toowong; 188 Vulture Street & 53 Tribune Street, South Brisbane; 116 Merivale Street & 88 & 90 Ernest Street, South Brisbane; 15, 17 & 19 Regent Street, Woolloongabba* (Brisbane City Council) – changes to relevant development conditions in several development approvals to allow short-term accommodation, particularly for off-site student accommodation.
- *66 The Esplanade, Webb* (Cassowary Coast Regional Council) – addition of a condition in a development approval allowing a short-term accommodation use for a maximum of two bedrooms.

Conclusion

A temporary use licence is a flexible way of making temporary changes to the conditions of a development approval to enable essential business owners to operate during the public health emergency.

Planning and Environment Court finds that the architectural and engineering merit of a development warranted approval despite technical non-compliance with the Gold Coast City Plan and the absence of a planning need

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Harta Pty Ltd v Council of the City of Gold Coast* [2019] QPEC 37 heard before Everson DCJ

April 2020

In brief

The case of *Harta Pty Ltd v Council of the City of Gold Coast* [2019] QPEC 37 concerned an appeal in the Planning and Environment Court against a deemed refusal by the Gold Coast City Council (**Council**) of a development application for a development permit for a material change of use to develop 27 townhouses on land that is located adjacent to a flood plain. The development application was impact assessable under the Gold Coast City Plan (**City Plan**). The issues raised by the parties on appeal concerned the character and density of the proposed development.

The Court allowed the appeal for the following reasons:

- Refusal was not warranted because although the proposed development did not comply with the requirement for a second vehicle access to the site, there was no evidence to suggest any utility in providing additional vehicle access.
- Acceptable Outcome 2 of the Limited Development (Constrained Land) Zone Code, which required site cover to be more than 10%, was "*hardly instructive*" because there was considerable variety in the densities contemplated by Conceptual Land Use Map 10.
- The proposed development was not otherwise inconsistent with the planning intent evident in the relevant codes of the City Plan, or the strategic framework.
- Although the absence of a planning need weighed against approving the application, the architectural and engineering merit of the proposed development weighed in favour of approval.

Proposed development

The land the subject of the development application shares a boundary with the extensive Merrimac/Carrara flood plain and is zoned as both Low Density Residential and Limited Development (Constrained Land). The area immediately surrounding the land is predominantly improved with single detached dwelling houses of one or two storeys in height.

The application proposed that 27 townhouses be built within eight two-storey building envelopes containing between two and four townhouses. The townhouses were to be accessed via a vehicle access road and a pedestrian access road. Eighteen of the townhouses were to be part of an elevated construction utilising suspended concrete platforms supported by concrete columns to reduce the risk of flooding from the adjacent flood plain.

Version of the Gold Coast City Plan to be used for assessment

Although version 4 of the City Plan was in effect at the time the development application was lodged, version 6 of the City Plan had commenced by the time the joint experts prepared their reports. The parties agreed that the assessment under section 45(5) of the *Planning Act 2016* (Qld) (**Planning Act**) ought to be carried out against version 6.

The Court agreed and accordingly applied version 6 of the City Plan to its assessment. In so doing, the Court quoted *Edwards & Alexander v Gold Coast City Council & Palm Beach Developments Pty Ltd* [2005] QPELR 236, where the Court stated (at [9]) that "*Planning Schemes are evolutionary and that a later Scheme would usually (but not necessarily) contain a more informed and timely understanding of all the relevant town planning issues*".

Council argued that the proposed development was inconsistent with the planning intent evident in the Low Density Residential Zone Code

Firstly, the Court considered whether the proposed development would be low intensity, blend in with the dwelling house character of the area, and achieve a dispersed or gentle scattering effect as required by the Overall Outcomes in section 6.2.1.2 of the Low Density Residential Zone Code (**LD Zone Code**). The Court also considered whether the proposed development would be low density as required by Performance Outcome 5 of the LD Zone Code.

The Court held that having regard to the fact that the proposed development would be low rise in terms of building height, and blend in with the existing character of the surrounding area, the Overall Outcomes in section 6.2.1.2 and Performance Outcome 5 were satisfied.

Secondly, the Court considered whether the proposed development would be on "*lots with dual frontages*" as required by section 6.2.1.2(2)(a)(iii)(A) of the LD Zone Code. The City Plan states that "*an allotment with dual frontage, can be safely accessed from at least two roads in accordance with the Driveways and Vehicular Crossing Code*" (**Driveways Code**).

The Appellant argued that the requirement was satisfied because the proposed development would have a pedestrian and vehicle access road. In particular, the Appellant argued that because the City Plan stated that a term used in it has the meaning assigned by the Planning Act, "*roads*" included "*a pedestrian or bicycle path*".

The Court held that the Driveways Code required a second vehicle access. Nevertheless, the Court concluded that although there was technical non-compliance, the Driveways Code also sought to minimise the number of vehicle crossings. Given there was no evidence to suggest any utility in providing an additional vehicle access, the Court held that this non-compliance did not warrant the refusal of the development application.

On this point, it is worthwhile referring to paragraph [53] of the decision in *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 referred to earlier in the Court's judgment (at [8]):

> *It will be a matter for the assessment manager (or this Court on appeal) to determine how, and in what way, non-compliance with an adopted statutory planning control informs the exercise of the discretion conferred by s.60(3) of the PA. It should not be assumed that non-compliance with an assessment benchmark automatically warrants refusal...*

Council argued that the proposed development was inconsistent with the planning intent evident in the Limited Development (Constrained Land) Zone Code

Firstly, the Court held that the proposed development would be low density, result in a "*continuous green space area*", and create a "*visually prominent green space*" as required by section 6.2.18.2 of the Limited Development (Constrained Land) Zone Code (**Limited Zone Code**). The Court also held that the proposed development would be consistent with Conceptual Land Use Map 10, which contemplated that development in the Limited Development (Constrained Land) Zone ought to be low density.

Secondly, the Court considered whether the proposed development would comply with Performance Outcome 2 which requires the site cover to reduce the dominance of buildings and structures, address site constraints, protect the semi-rural character of the area and minimise the extent of impervious surfaces. The Council argued that non-compliance arose because Acceptable Outcome 2 required that site cover not exceed 10%. The proposed development would have a site cover of 46.9%.

The Court found that the proposed development would comply with the Purpose and the Performance Outcomes in the Limited Zone Code. In so finding, the Court noted at [37] that Acceptable Outcome 2 was "*hardly instructive … where Conceptual Land Use Map 10 contemplates densities ranging from tourism and mixed residential/tourism uses to rural residential uses as well as open space and conservation areas*".

Appellant did not demonstrate that there was a planning need for the proposed development

The Appellant argued that there was a latent unsatisfied demand for the proposed development that was not being met or not adequately being met in circumstances where the Gold Coast is a growing city. The Court did not agree with that argument, stating that "*any latent demand for 27 townhouses of the type proposed could be addressed in another location in accordance with the planning scheme*".

Conclusion

The Court allowed the appeal. In doing so, the Court held that despite the absence of a planning need, the architectural and engineering merit of the proposed development, the absence of any unacceptable flooding impacts, and the immateriality of any non-compliance with the City Plan, weighed in favour of approval.

Local government successfully seeks the joinder of a third party and a joint hearing in relation to a long running enforcement proceeding

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fraser Coast Regional Council v Zacka & Ors* [2019] QPEC 21 heard before Kefford DCJ

April 2020

In brief

The case of *Fraser Coast Regional Council v Zacka & Ors* [2019] QPEC 21 concerned two applications in pending proceeding made to the Planning and Environment Court in a proceeding commenced by the Council seeking enforcement orders in relation to the alleged unlawful construction of a dam and a bund (**Enforcement Proceeding**).

The two applications in pending proceeding were made by the Council. One application sought an order that the Enforcement Proceeding be heard together with another enforcement proceeding against the same Respondents commenced by the adjoining landowner (**Adjoining Landowner**) in relation to materially the same facts and circumstances as the Enforcement Proceeding (**Other Enforcement Proceeding**). The other application sought an order that the Adjoining Landowner be joined as a party to the Enforcement Proceeding.

The Court found that a joint hearing "*would facilitate the just and expeditious resolution of the issues, and avoid undue delay, expense and technicality*" (see paragraph [6]), and therefore ordered that the proceedings be heard together. The Court also found that it would be "*desirable, just and convenient*" for the Adjoining Landowner to be joined as a party to the Enforcement Proceeding, and so ordered.

The Respondents were previously unsuccessful in an application to strike-out the Other Enforcement Proceeding (see *BGM Projects Pty Ltd v Zacka & Ors* [2019] QPEC 20).

Council's application for a joint hearing

The Court found that there was significant commonality in the issues and the evidence in the Enforcement Proceeding and the Other Enforcement Proceeding, that the same legislative instruments would be under consideration, that it was likely money and time would be saved by a joint hearing, and that there was common representation. The Court therefore ordered that the Enforcement Proceeding and the Other Enforcement Proceeding be heard together.

Council's application to join the Adjoining Landowner as a party to the Enforcement Proceeding

Rule 4(2) of the *Planning and Environment Court Rules 2018* (**P&E Rules**) states that where the P&E Rules do not provide for a matter in relation to a proceeding in the Court, the rules applicable in the District Court apply with necessary changes.

As the P&E Rules do not provide for the joinder of a party to a proceeding, the application was commenced by the Council under rule 69 of the *Uniform Civil Procedure Rules 1999* (**UCPR**), which relevantly states that the Court may order that a party be included as a party if their presence before the Court:

- is necessary to enable the Court to adjudicate effectually and completely on all matters in dispute in the proceeding; or
- would be desirable, just and convenient to enable the Court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.

The Court noted that rule 69 of the UCPR is not a rule to be approached as if it is intended to restrict a common law right of a person likely to be affected by a decision, but rather as facilitating the determination of proceedings according to the rules of natural justice.

Respondents' opposition to the Council's application to join the Adjoining Landowner as a party to the Enforcement Proceeding

The Respondents submitted the following nine reasons why the Adjoining Landowner ought not be joined, all of which were rejected by the Court:

- There was no application on foot for the Adjoining Landowner to be joined as an applicant and that the application sought to achieve indirectly that which couldn't be achieved directly, being the commencement of a proceeding by the Adjoining Landowner against the Respondents for a development offence. The Court found this submission was misdirected as the Council sought to join the Adjoining Landowner as a respondent and not as an applicant.
- The Council sought no relief against the Adjoining Landowner and therefore the only justification for them being joined was if the Adjoining Landowner would be bound by the result of the Enforcement Proceeding. The Court found this did not accord with rule 69 of the UCPR.
- There was no role for the Adjoining Landowner in the Enforcement Proceeding. The Court disagreed and found that particulars filed by the Respondent made allegations in respect of the Adjoining Landowner's knowledge of particular facts about the state of the relevant land and water flow across it.
- The Council can call any witnesses it chooses in the Enforcement Proceeding without having to join the Adjoining Landowner. The Court accepted that this may be the case but the interests of the Council are not coincident with that of the Adjoining Landowner and the Council ought not be expected to defend the Adjoining Landowner against potential adverse findings against it.
- The Enforcement Proceeding had been on foot for over 9.5 years and, by joining the Adjoining Landowner, many steps undertaken in the Enforcement Proceeding would need to be repeated. The Court found that this was not a compelling basis for finding that it was not desirable, just or convenient to join the Adjoining Landowner.
- The joinder of the Adjoining Landowner would increase costs. The Court was not persuaded that this was necessarily so.
- The Council could respond to any discretionary considerations raised against it by the Respondent by calling any relevant witnesses. As with the other submission regarding witnesses, the Court was not persuaded by this submission.
- The real reason for seeking to join the Adjoining Landowner was to attempt to negotiate an outcome between the Respondent and the Adjoining Landowner. The Court was not persuaded that the application for joinder was affected by this improper purpose.
- There is no case where an order for joinder has been made in similar circumstances. The Court found this submission was without merit and each case is to be decided on its own facts.

The Court therefore held that it was desirable, just and convenient to join the Adjoining Landowner as a party, satisfying the second limb of rule 69 of the UCPR. The Court held that it therefore wasn't necessary to consider the first limb of rule 69 of the UCPR.

Conclusion

The Court therefore ordered that the Enforcement Proceeding and the Other Enforcement Proceeding be heard together, and that the Adjoining Landowner be joined as a party to the Enforcement Proceeding as their presence would be desirable, just and convenient to enable the Court to adjudicate effectually and completely on all matters in dispute connected with the Enforcement Proceeding.

Indefeasible title trumps public rights in land dedicated at common law as public roads

Angelina Vukovic | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Orb Holdings Pty Ltd v WCL (Qld) Albert Street Pty Ltd* [2019] QSC 265 heard before Davis J

April 2020

In brief

The case of *Orb Holdings Pty Ltd v WCL (Qld) Albert Street Pty Ltd* [2019] QSC 265 concerned an originating application in the Supreme Court of Queensland seeking a declaration that land registered to the Respondent had been dedicated as, and is, a public road. The Respondent applied for a summary judgement on the basis that, inter alia, the Respondent's registered title is not subject to public rights allegedly created by dedication of its land as a road at common law.

Background

The dispute concerned Registered Plan 1073 (**RP1073**) which, at the time of its registration in 1876, comprised nine individual lots on the corner of Margaret, Albert and Alice Streets in Brisbane. Lot 11, an "L" shaped piece of land located at the rear of the other lots on RP1703, was marked as a "Right of Way" and provided access to all the other lots by foot or other means.

Between 1876 and 1881, the original registered proprietors, the trustees of the Brisbane Grammar School (**Grammar School**), disposed of the lots on RP1073 except for Lot 11. Historical documents relied upon by the Applicant suggested that from the 1880s onwards, Lot 11 was in use as a public road and commonly known as "Beatrice Lane".

In 1971, the Registrar of Titles conducted an investigation at the request of an interested party, which resulted in a notation on RP1073 stating: "*Right of Way (Lot 11) investigated 1971*". Nevertheless, in 1994 the certificate of title over Lot 11 registered to the Grammar School showed no encumbrances on the title beside rights and interests reserved by grant.

In 2012, Survey Plan 142332 (SP142332) became the last plan to be registered over the land. It shows "Beatrice Lane" as the reserve and there is no note of "Right of Way" on Lot 11. However, the Brisbane City Council's roads register still shows Lot 11 as "Beatrice Lane", which is recorded as a Brisbane City Council controlled road.

The Respondent became registered proprietor in fee simple of Lot 11 in 2014. The Applicant's land, Lot 12 on B118229, is south of Lot 11. The reserve runs along the northern boundary of the Applicant's land and the northern boundary of the reserve is common with the southern boundary of Lot 11. A building is located on the Applicant's land and access to the carpark of that building is gained over Lot 11 and the reserve.

The dispute

The Respondent commenced development on the corner of Albert and Margaret Streets and purported to close off access to Lot 11. The Applicant objected to this interference with its access across Lot 11 on two bases:

- Firstly, on the basis that Lot 11 had been dedicated at common law as a public road, thereby granting the public including the Applicant right of access over the land.
- Secondly, on the basis that the title in Lot 11 was vested in the State under section 369 of the *Land Act 1962* (**Land Act**), and therefore the Respondent has no right to close access.

Was Lot 11 dedicated as a public road?

The Applicant submitted that prior to the enactment of section 83C of the *Local Authorities Act 1902* establishing formal requirements for the dedication of land for public use, a private citizen could dedicate land in Queensland as a public road provided that two common law elements were satisfied:

- firstly, an intention to dedicate the land as a public road is manifested; and
- secondly, a public acceptance of the dedication of the use of the road.

The Applicant produced historical material which supported its submission that the Grammar School had satisfied the common law requirements for dedication. Without considering the evidence in detail, the Court concluded that the evidence was sufficient to prevent the Respondent from succeeding on summary judgement on the ground that there was no triable issue as to the dedication of Lot 11.

The Court also determined that other issues raised by the Respondent as fatal to the Applicant's claim could not be resolved without a trial. These included whether the Grammar School's intention was to create public rights or private rights in favour of the owners of Lots 1 to 9 on RP1073, and whether the Grammar School could lawfully dedicate the road under section 6 of the *Grammar Schools Act 1860*.

Nevertheless, the Court found that the Applicant's request for declaratory relief would be futile and declined on discretionary grounds if, as a matter of law, the title of a registered proprietor in fee simple is not subject to any unregistered interest or public rights that arise by dedication of land at common law.

Nature of indefeasible title and the public rights in question

Prior to the introduction of the Torrens Title System in Queensland, ownership of land was established through a chain of title from the original grantee to the present owner of the land. The system was designed to overcome the deficiencies associated with the derivative and retrospective nature of title at common law. It did so by implementing a scheme of "title by registration" rather than "registration of title", which effectively places each new owner in the position of a direct grantee from the Crown.

Since the Respondent's title is derived from the act of its registration under the *Land Title Act 1994* (**Land Title Act**), the Court went on to consider whether the Respondent's interest, as defined by the Land Title Act, was subject to the public rights created at common law. This necessitated a brief historical enquiry into what those public rights are or were.

The Court proceeded on the assumption that the Applicant had an arguable case that the Grammar School dedicated Lot 11 for public use, and considered historical Torrens Title legislation to ascertain whether such public rights were vested in the State by subsequent legislation. The Court concluded that section 369 of the Land Act had the effect of converting a public right of way into a proprietary interest in land in favour of the State, which thereby permitted the State to regulate roads and their use.

Notwithstanding these findings being accepted, the Court reiterated that the key problem in the Applicant's case was that the registered proprietor of Lot 11 was the Respondent, not the State.

Significance of the state of the register

Having regard to the object of the Torrens Title System, the Court explained (at [116]): "*the Torrens Title System presently in force in Queensland through the 1994 Act, requires reference to the register, not history, to determine the rights of the respective parties here*".

Accordingly, the Court turned its mind to the current state of the register which did not show the existence of any road, street passage or thoroughfare over Lot 11 on SP142332. There was no "Right of Way", dedication notice, or notification of Lot 11 as public use land on the register. Nor did the Applicant suggest that any exceptions to indefeasibility under section 184 of the Land Title Act applied.

It therefore followed that, in the absence of any statutory provisions outside of the Land Title Act which preserved the State's interest in Lot 11 against the registered proprietor in fee simple, the Respondent's registered title was free from any claim that a proprietary interest in the land had been vested in the State.

Other exceptions to indefeasibility?

Notwithstanding the provisions of the Land Title Act and a strong line of authority before and after *Breskvar v Wall* (1971) 126 CLR 376 which emphasised the significance of the principle of "title by registration", the Applicant submitted that there were two other exceptions to indefeasibility that were applicable in this case.

The first was that, according to *Vickery v Municipality of Strathfield* (1991) 11 SR (NSW) 354 (**Vickery**), the dedication of land as a public road at common law lies "wholly outside" the Torrens Title System. However, the Court distinguished *Vickery* on the basis that the indefeasibility provisions of the *Real Property Act 1900* (NSW) which applied in that case were capable of being construed as relating to private rights only. Ultimately, Vickery turned on the point that public rights were not interests in land and therefore not registerable.

In the Applicant's case, once Lot 11 had been vested in the State by force of section 369 of the Land Act, the public rights which may have existed over Lot 11 converted to an interest in land in favour of the relevant authority. The State's interest in Lot 11 therefore does not exist "wholly outside" the scope of the Torrens Title System.

The second exception to indefeasibility the Applicant raised was the proposition that a statutory provision outside of the Land Title Act may create an exception to indefeasibility and elevate an unregistered interest to priority over registered interests.

Whilst a number of authorities relating to statutory exceptions were considered, these cases were deemed unhelpful by the Court as they each turned on the construction of statutes distinct from those relevant to the Applicant's case.

After considering the statues that may be applicable to the present facts, the Court concluded that there was nothing in the Land Act, *City of Brisbane Act 2010*, or the *Transport Infrastructure Act 1994* to suggest that public rights in land dedicated as a road at common law and subsequently vested in the State could defeat the rights of a registered proprietor in fee simple.

Conclusion

The Respondent's interest as the registered proprietor of Lot 11 was not subject to any unregistered interest in the State arising from the potential common law dedication of Lot 11 as a public road prior to 1923. The Court therefore held that there was no need for a trial and dismissed the originating application with costs.

Planning and Environment Court sets aside a decision to refuse a development application for the demolition of a pre-1946 dwelling

Disa Johansen | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Taylor & Anor v Brisbane City Council* [2020] QPEC 5 heard before Williamson QC DCJ

May 2020

In brief

The case of *Taylor & Anor v Brisbane City Council* [2020] QPEC 5 concerned an appeal to the Planning and Environment Court against the Council's refusal of a development application for a development permit to carry out building work (demolition of a pre-1946 house).

The Court considered two questions at the hearing. The first question was whether the proposed demolition of the dwelling complied with the Traditional Building Character (Demolition) Overlay Code in the *City Plan 2014* (**Demolition Code**). The second question was, if the Court found the proposed demolition did not comply with the Demolition Code, whether the Court should then exercise its discretion in favour of approving the demolition pursuant to section 60(2)(b) of the *Planning Act 2016* (**Planning Act**).

The Court found that the proposed demolition of the dwelling would not result in a meaningful or significant loss of the traditional building character of the street and that there was therefore compliance with the Demolition Code. The Court held that the Planning Act mandated the approval of the Applicant's application given that compliance with the Demolition Code had been demonstrated.

Background

The Applicant made a code assessable development application to the Council for a development permit to carry out building work involving the demolition of a pre-1946 timber house located in Albion. The Council refused the development application on the basis that the proposed demolition did not comply with the Demolition Code.

At the hearing, it was agreed by the expert heritage architects for the Council and the Applicant, that the dwelling was of traditional building character. Whilst the dwelling had been altered over the years, the expert witnesses did not consider that the alterations materially diminished the dwelling's traditional building character.

The dwelling was situated on land that had a narrow street frontage. The dwelling was set back 16 metres from the street and reversed orientated, with the rear of the dwelling facing the street. The rear of the dwelling did not have any features that clearly exhibited a traditional building character.

Compliance with the relevant performance outcome

The Council argued that the proposed demolition of the dwelling did not comply with Performance Outcome PO5(c).

Performance Outcome PO5(c) of the Demolition Code relevantly states as follows:

> *Development involves a building which:*
>
> *…*
>
> *(c) does not contribute to the traditional building character of that part of the street within the Traditional building character overlay.*

At the hearing, it was agreed by the parties that if the Court found there to be compliance with one of the related acceptable outcomes, including Acceptable Outcome AO5(c), then there would be compliance with Performance Outcome PO5 of the Demolition Code. Relevantly, Acceptable Outcome AO5(c) of the Demolition Code states as follows:

> *Development involves a building which:*
>
> *…*
>
> *(c) if demolished will not result in the loss of traditional building character; or ….*

In considering whether there was compliance with Acceptable Outcome AO5(c), the Court considered what part of the street ought to be taken into account, and whether the proposed demolition would result in that part of the street experiencing a meaningful or significant loss of traditional building character.

Determining the relevant part of the street

The Court held that the relevant part of the street ought to be that part of the street from which the dwelling was visible. From that part, the Court noted that there are a number of dwellings with traditional building character. However, the Court held that these dwellings are all bookended or split by new dwellings and multi-storey buildings.

Determining whether demolition would result in a meaningful or significant loss of traditional building character

The Council's expert witness contended that the building displayed the characteristics of a traditional building and that the dwelling's setback on the land and reverse orientation was irrelevant in the assessment of the dwelling's traditional building character. This opinion was based on *Delta Contractors (Aust) Pty Ltd v Brisbane City Council* [2018] QPEC 41 (**Delta Contractors' Decision**), in which it was stated that "*[t]raditional character relates to streetscape or locality*" and that "*[t]raditional building character relates to a building*" (at [55]).

The Court rejected this opinion, and found that the Delta Contractors' Decision merely provides a distinction between the phrases, but does not deem other relevant facts and circumstance to be irrelevant in the assessment of traditional building character. The Court held that the examination of traditional building character and traditional character under the Demolition Code and the associated *Traditional Building Character Planning Scheme Policy* is to be informed by a number of relevant matters, including the setback and the dwelling's orientation.

The Court found that the proposed demolition of the dwelling would not result in a meaningful or significant loss of traditional building character. The Court's finding was based on the dwelling's limited visibility and setback from the street, reverse orientation and its limited visual connection with other traditional character buildings. The Court held that the dwelling made a negligible contribution to the streetscape.

As the demolition would not result in the loss of traditional building character, the Court held that the Applicant had demonstrated compliance with Acceptable Outcome AO5(c) of the Demolition Code. Furthermore, compliance with Performance Outcome PO5(c) had also been demonstrated as the dwelling did not contribute to the relevant part of the street's traditional building character.

Compliance with the relevant overall outcomes

The Council also submitted that the proposed demolition did not comply with Performance Outcomes 2(a) and 2(d) of the Demolition Code, which state as follows:

> (a) *Development protects residential buildings constructed in 1946 or earlier that individually or collectively contribute to giving the areas in the Traditional building character overlay their traditional character or traditional building character.*
>
> …
>
> (d) *Development protects a residential building or part of a building constructed in 1946 or earlier where it forms a part of a character streetscape comprising residential dwellings constructed in 1946 or earlier nearby in the street within the Traditional building character overlay.*

The Council submitted that the proposed demolition of the dwelling would not protect the traditional building character of the area, and therefore there was non-compliance with Overall Outcome 2(a) of the Demolition Code. The Council also submitted that demolition of the dwelling would be contrary to Overall Outcome 2(d) of the Demolition Code, as it formed a part of the streetscape by being visible from the street and proximate to the other dwellings with traditional building characteristics.

The Court rejected these submissions, and reiterated that the dwelling did not contribute to the traditional building character or traditional character of the street as it was both visually and physically disconnected from the street.

Conclusion

The Court held that there was compliance with the Demolition Code and set aside the Council's decision to refuse the development application. The Court adjourned the appeal to allow the parties to agree on conditions.

Planning and Environment Court allows appeal against local government's decision to refuse a development application because it would be inconsistent with the intended settlement pattern set out in the planning scheme

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cadmium Holding FW Pty Ltd v Gold Coast City Council* [2019] QPEC 51 heard before Williamson QC DCJ

May 2020

In brief

The case of *Cadmium Holding FW Pty Ltd v Gold Coast City Council* [2019] QPEC 51 concerned an appeal in the Planning and Environment Court against a decision by the Gold Coast City Council (**Council**) to refuse an impact assessable development application to reconfigure and develop land in Coomera. The sole reason for refusing the development application was that the proposed development would be inconsistent with the intended settlement pattern set out in the *Gold Coast City Plan* (**City Plan**).

The Planning and Environment Court ultimately allowed the appeal for the following reasons:

- The setting of the proposed development and its separation distance from surrounding development and the nearest multiple dwellings meant that the desired dispersal and scattering effect would be achieved.
- The proposed development would be consistent with other provisions of the City Plan relating to, inter alia, integration with the surrounding urban fabric, housing diversity, and walkability to services, facilities and transport.
- The proposed development would have a dwelling yield of 31.3 dwellings per hectare net and therefore would meet the stated minimum dwelling yield.
- The proposed development would comply with the City Plan, and the evidence demonstrated that it would result in a good planning outcome.

Proposed development

The subject land is located in Coomera, which is "*an area that has matured from a fringe area to an urban area, and is an integrated part of the urban fabric of the Gold Coast*" (at [13]). Although the land was zoned as "*Emerging Community*", the Court accepted that much of the locality of the area had progressed well beyond a greenfield area, and had been developed and rezoned to reflect its use for an urban purpose.

The subject land is a large site covering 6.926ha. The adjacent land to its west is zoned as rural residential and the land to the east is unimproved. The land is located within close proximity of public and private infrastructure, although it is separated from other new communities, existing and approved development in the area.

The development application sought approval to develop the land with a gated townhouse community containing 111 townhouses. The proposed development would have a development footprint of 3.569ha, with the remainder of the land to be dedicated for ecological purposes. The proposed development was described as "*generously landscaped*" in that it avoided the impression of a cluster or sea of townhouses. It was also accepted that the built form of the proposed development was comparable with existing houses in the area.

To succeed in the appeal, the Appellant had to demonstrate the following: firstly, that the proposed land use was contemplated on the subject land; and secondly, that the density of the proposed development would be appropriate.

Proposed development would achieve a dispersed or gentle-scattering effect pursuant to section 3.3.4.1(5) of the Strategic Framework

The Appellant relied predominantly on section 3.3.4 of the Strategic Framework in the City Plan which contained provisions relating to "*new communities*". In particular, the Appellant referred to section 3.3.4.1(5) which required that "*small lot housing, dual occupancy and multiple dwellings occur in new communities in low concentrations where they achieve a dispersed or gentle-scattering effect*".

The point of disagreement between the parties was whether the proposed development would "*occur in low concentrations and achieve a dispersed or gentle-scattering effect*". The parties' experts disagreed on whether the broader locality could be taken into account when considering whether the outcome was achieved.

The Court noted that whether the visual assessment was limited to the subject land, or extended to the broader locality was not prescribed by section 3.3.4.1(5) of the Strategic Framework. As such, the Court said that the assessment would turn on the circumstances of each case. The Court held that the size of the land and the urbanised character of the surrounding area meant that the visual assessment required consideration of the broader locality.

The Court ultimately preferred the Appellant's expert who was of the opinion that the setting of the proposed development and its separation distance from surrounding development and the nearest multiple dwellings meant that the desired dispersal and scattering effect would be achieved.

Proposed development was not constrained to larger urban lot housing

The Council argued that the Court had to consider a further 13 provisions in the City Plan which demonstrated that the location and density of development on the subject land was constrained to larger urban lot housing.

The main arguments put forward by the Council and the Court's corresponding conclusions are summarised as follows:

- The Council argued that the proposed development would not be "*an integrated part of the city's urban fabric*". The Court rejected this argument and said that the proposed development would integrate well into the surrounding locality, and the Coomera community which had matured into an urban area. The City Plan also anticipated that the area would include a mix of housing types, including both multiple dwellings and dwelling houses.
- The Council argued that the proposed development would not support a "*walkable community*". The Court concluded that the proposed development would support walkable communities by increasing the population mass required to support centres and public transport, and by making appropriate provision for internal and external pedestrian connectivity.
- The Council argued that the City Plan constrained higher intensity housing (such as the proposed development) to locations within walking distance of centres, high frequency transport and a range of goods, services and employment opportunities. The Court concluded that although the City Plan anticipated and encouraged higher density housing in particular locations, it did not constrain the location of multiple dwellings in "*new communities*".
- The Council argued that the proposed development was inconsistent with section 3.3.4.1(4) of the Strategic Framework because it was not designed to provide a diversity of housing choice on the land. The Court concluded that housing diversity did not need to be achieved on a site-by-site basis. Instead, housing diversity was sought across the entire area designated as "*new communities*", and the proposed development would contribute to the achievement of such diversity in that area.

Whether the density of the proposed development would be appropriate

The Court referred to section 3.3.4.1(3) of the Strategic Framework which dealt with development density in "*new communities*" and required that such "*communities achieve a minimum dwelling yield of between 15 to 25 dwellings per hectare net*". The proposed development would have a dwelling yield of 31.3 dwellings per hectare net and therefore would meet the stated minimum.

Additionally, the Court noted that section 3.3.4.1(3) of the Strategic Framework speaks of a minimum dwelling yield for "*new communities*" which ought to be understood to mean identified "areas" in the city (in contrast to a particular site). As such, it was appropriate to consider section 3.3.4.1(5) of the Strategic Framework when determining the dwelling yield that may be achieved for a particular development.

The Court concluded that the dwelling yield for the proposed development would be acceptable because it complied with section 3.3.4.1(5) of the Strategic Framework, and would not give rise to any unacceptable town planning impacts.

Re-exercise of the planning discretion

The Court held that the proposed land use was contemplated by the Strategic Framework, and that the density of the proposed development would be appropriate. In such circumstances, the Court rejected the Council's argument that the proposed development would be inconsistent with the intended settlement pattern expressed in the City Plan.

The Court held that given the proposed development would comply with the City Plan, and the evidence demonstrated that it would result in a good planning outcome, the development application ought to be approved, subject to appropriate conditions.

Planning and Environment Court allows appeal against a refused development application

Disa Johansen | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Vella's Plant Hire Pty Ltd v Mackay Regional Council & Anor* [2019] QPEC 60 heard before RS Jones DCJ

May 2020

In brief

The case of *Vella's Plant Hire Pty Ltd v Mackay Regional Council & Anor* [2019] QPEC 60 concerned an appeal to the Planning and Environment Court against the Mackay Regional Council's (**Council**) refusal of a development application for a development permit for a material change of use.

The Applicant made a development application for a temporary quarry that would operate for 12 months and remove up to 200,000 tonnes of material from the subject land. At the end of the excavation, the quarry would become a dam.

The Council's officer had recommended to the Council that the development application be approved, however, the Council decided to refuse the development application. After a minor change to the development application, the Council was willing to approve the development application subject to conditions.

The third Co-respondent by election (**Co-respondent**) argued that the development application ought to be refused based on several arguments. However, at the end of the hearing the Co-respondent's sole argument was that the development would conflict with the Mackay Regional Council's Planning Scheme (**Planning Scheme**), given that there was no demonstrated need for the proposed development.

The Court found that there was a demonstrated need for the proposed development and that the proposed development would benefit future agricultural activities on the subject land and therefore allowed the appeal.

Background

The appeal was against the Council's decision to refuse a development application for a development permit for a material change of use for "*farm works (dam) and temporary quarry for the removal of up to 200,000 tonnes of material (temporary use 12 months)*".

The Applicant sought to build the quarry on land that was predominantly used for cattle grazing, but had previously been used to grow sugarcane. The Council originally refused the development application, but subsequently proposed to approve the development application subject to conditions, including that the material was to be extracted within 12 months. The conditions also addressed dust and noise concerns, rehabilitation of the subject land, operating hours, the widening of a road on the haulage route, and the development of the proposed dam at the end of the excavation.

The Co-respondent maintained its opposition due to concerns in relation to environmental impacts on the subject land and on stormwater, flooding issues and water quality issues. However, after hearing the evidence of witnesses the Co-respondent's reason for opposition was narrowed to the lack of a demonstrated need for the proposed development.

Disputed conditions

The Applicant disputed two conditions relating to an environmental corridor and a water discharge point.

Environmental corridor

The Applicant disputed a condition of the development approval requiring a third environmental corridor.

The Joint Expert Report and the Supplementary Joint Expert Report both concluded that it was best practice for three environmental corridors to be implemented. However, at the hearing, the Applicant's expert refined his opinion and asserted that the Planning Scheme did not require the third environmental corridor, but that it would still be best practice to have all three.

The Court found that the condition requiring the third environmental corridor was a reasonable and relevant condition as it would have environmental benefits and was best practice.

Water discharge point

The Co-respondent asserted that a new water discharge point ought to be constructed and located solely on the subject land. The Co-respondent was concerned that the additional drainage impact created by the proposed development would be unable to be met by the existing drainage arrangement.

The Court found that having regard to the existing drainage arrangement and expert evidence it was satisfied that there was no scientific or engineering basis for an alternative discharge point to be required.

Demonstrable need

The Court then went on to consider the main point of contention, being whether there was a demonstrable need for the proposed development. Under the Planning Scheme, the subject land is in the rural zone which accommodates an extractive industry use. The Extractive Industry Code identifies demonstrated need as an assessment benchmark, and relevantly states as follows:

> ***PO1*** *– The extractive industry fulfils a demonstrated need for the resource in development projects in the region*
>
> ***AO1*** *– The need for an extractive industry is demonstrated through a report which details the:*
>
> *a) type of resource to be extracted and the nature of its use in development projects in the region; and*
>
> *b) proposed rate of extraction; and*
>
> *c) market demand for the resource.*

Definition of demonstrable need

The Court first considered what constitutes a demonstrable need. In *United Petroleum Pty Ltd v Gold Coast City Council* [2018] QPEC 8 (**United Petroleum case**), the Court found that "*[a] need does not have to be particularly strong to be a demonstrable need*", and that it should be interpreted with reference to being "*a real or substantive (rather than trivial, immaterial, minor or insignificant) need which is capable of being shown or logically proved*".

The Co-respondent submitted that the question of demonstrable need in this case could be distinguished from the United Petroleum case. It was submitted that the Planning Scheme set a higher standard than that stated in the United Petroleum case, for the reason that the Planning Scheme required a "demonstrated need" rather than "demonstrable need".

The Court rejected this submission and held that nothing turns on whether the term used in the Planning Scheme is "demonstrated" or "demonstrable". It was therefore held that demonstrated need is to be proved on the balance of probability, and is not to be conclusively proved.

Demonstrable need for the proposed development

At the hearing, the Co-respondent argued that there was no need for the quarry as there was already another quarry located in the area that could fulfil the need for local projects, and that the expert evidence was uncertain regarding the market for the proposed quarry.

The Applicant's expert evidence was that there were five separate projects that would require embankment fill. However, each project came with its own hurdles, including uncertainty about whether the projects would contract with the Applicant and a lack of certainty of State Government funding. One project was located closer to another quarry that could potentially meet the project's demands and the proposed quarry would be out of the economic range for the project.

The Applicant's expert evidence was that there was a demonstrated need which was more than medium but not critical, and the Applicant argued that such evidence should be preferred as the expert was the only economist to give evidence and is well regarded in the industry.

The Court found that there was a demonstrable need, but disagreed with the Applicant's expert assessment of the need being more than medium but not critical. The Court found that after ruling out the project that was out of economic range and taking into consideration the uncertainties surrounding the other projects, there was a moderate to medium need. The Court found that due to the flexibility in the commencement of the proposed excavations, the Applicant could wait to operate the quarry until actual demand arose.

Other relevant considerations

In assessing any other "relevant matters" under section 45(5)(b) of the *Planning Act 2016*, the Court considered the report of the Applicant's economist expert and a Joint Expert Report which set out the planning need for the quarry. The reasons included the following:

- the use of the land for the extractive industry is consistent with the intended purpose of the rural zone;
- the proposed development's impact on the subject land would only be temporary and would not diminish the land's rural productive capacity as the land is currently not being utilised for such a purpose;

- the dam would support the rural outcome through improving the productive capacity for rural activities;
- impacts such as noise and dust would be mitigated through conditions;
- the proposed development would not impact on the farming operations on the surrounding land; and
- the proposed development would not impact the safe and efficient operation of the area's road network.

The Co-respondent's town planner asserted that there were concerns around the proposed development's potential environmental impacts, amenity and agricultural impacts and that by allowing the proposed development the subject land would be unavailable for agricultural use.

The Court found that the subject land was not good quality agricultural land, and that the environmental, amenity and agricultural impacts could be addressed through conditions. The Court also held that the quarry would only marginally impact the subject land's productive capacity, and would result in a dam that would benefit the future activity carried out on the subject land.

Conclusion

The Court held that the appeal should be allowed and that it would hear further from the parties if consequential orders were needed.

Planning and Environment Court finds that permanent residential accommodation in a tourist resort would significantly conflict with the deliberate planning strategy to avoid the co-location of incompatible uses

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Trowbridge & Anor v Noosa Shire Council & Ors* [2019] QPEC 54 heard before Kefford DCJ

May 2020

In brief

The case of *Trowbridge & Anor v Noosa Shire Council & Ors* [2019] QPEC 54 concerned an appeal to the Planning and Environment Court against a decision by the Noosa Shire Council (**Council**) to refuse a development application lodged by owners of land which forms part of the existing development known as Beach Road Holiday Homes (**Appellants**). The development application sought flexibility to use 12 of the 48 houses within Beach Road Holiday Homes for permanent residential accommodation.

The Planning and Environment Court dismissed the appeal for the following reasons:

- The proposed development would offend the underlying planning policy to avoid the co-location of incompatible uses.
- The proposed development would offend the underlying planning policy to ensure that the listed uses do not displace the opportunity for consistent uses.
- The proposed development would undermine the Council's clear planning strategy which is to characterise all uses as either consistent or inconsistent uses in each zone and locality, and to sustain the tourism industry in Noosa.
- There were no sufficient grounds which warranted approval of the proposed development.

Proposed development

The subject land is located at Noosa North Shore and is zoned as Visitor Mixed Use in the *Noosa Plan (Amendment No 5)* (**Noosa Plan**). The existing development comprises 48 houses, a central facility area, a manager's residence and other infrastructure for the purpose of providing short-term visitor accommodation. The existing approval prevents the Appellants from using the houses for permanent accommodation.

The proposed development sought flexibility to use 12 of the 48 houses for either short-term visitor accommodation or permanent residential accommodation. The Council refused the application on the basis that the proposed use for permanent residential accommodation would conflict with the planning for the Noosa area.

Relevant conflict with the Noosa Plan

The *Sustainable Planning Act 2009* (Qld) (**SPA**) was in force at the time the development application was made and at the time the appeal was filed and therefore the SPA continued to apply to the appeal by force of the transitional provisions in the *Planning Act 2016* (Qld).

The Council argued that there are three conflicts with the Noosa Plan which justify refusing the application. However, the Court found the evidence demonstrated that only one of the asserted conflicts had any merit. That sole conflict was confined to specific outcome O22 in the Noosa Plan which relevantly stated as follows (underlining added):

> *O22 The following defined uses and use classes are inconsistent uses and are not located in the Visitor Mixed Use Zone -*
>
> *…*
>
> *k) Detached house;*

The Noosa Plan also contains the following relevant definitions:

- Inconsistent use – "*the use is strongly inappropriate in the relevant zones because it is incompatible with other uses generally expected in that zone*".
- Detached house – "*the use of premises for a single dwelling unit which comprises the whole of the building on one lot. The term includes uses and works incidental to and associated with the detached house. The term includes the temporary use as a display home or removal home. The use is not divided further*".

The Appellants argued that the conflict with specific outcome O22 would be so minor as to be wholly insignificant. It was argued that the proposed development would not interfere with the underlying planning policy of the specific outcome, which is to avoid the co-location of incompatible uses.

In response, the Council argued that the conflict would be significant for two reasons: firstly, the proposed development would offend the planning policy concerning co-location; and secondly, the proposed development would offend another underlying planning policy which ensures that the listed uses do not displace the opportunity for consistent uses.

The Court ultimately agreed with the Council, and concluded that the conflict would be significant and that there were no sufficient grounds otherwise warranting approval of the application.

Proposed development would offend the underlying planning policy to avoid the co-location of incompatible uses

In considering the nature and extent of the conflict, the Court held that the proposed development would offend the planning policy to avoid the co-location of incompatible uses.

The Court referred to specific outcome O21, which informs what uses are generally expected in the Visitor Mixed Use Zone (underlining added):

> *O21 The following defined uses and use classes <u>are consistent uses</u> and <u>are located in the Visitor Mixed Use Zone</u> -*
>
> *a) Entertainment and dining Type 1;*
>
> *b) Home-based business Type 1 or 2;*
>
> *c) Open Space; and*
>
> *d) Visitor accommodation Type 2 or 3.*

The Appellants argued that a "*Detached house*" use is not incompatible with the uses referred to in specific outcome O21 because paragraphs (b) and (d) of the specific outcome contemplate permanent residential occupation. It was said that therefore the drafters of the Noosa Plan plainly acknowledge that houses in the Visitor Mixed Use Zone will be permanently occupied.

The Court rejected this view and relevantly held as follows:

- The definition of "*Home-based business*" only includes the business use. If it were to include both the residential use and the business use, an application for a development permit could be approved for an inconsistent residential use by establishing a home-based business (at [56], [59]).
- When the Noosa Plan is read as a whole, it is clear that the Council's planning strategy is to characterise all uses as either consistent or inconsistent uses in each zone and locality (at [60]).
- The "*Visitors accommodation*" class only contemplates permanent residential occupation to facilitate on-site management of the visitor accommodation (at [62]).

The Court also stated that the clear planning strategy of the Noosa Plan was to sustain the tourism industry, and that a "*Detached house*" had the ability to reduce the extent of available visitor accommodation. The Court gave weight to evidence provided by the general manager of the parent company to Beach Road Holiday Homes, which highlighted significant difficulties arising from the co-location of short-term and permanent visitor accommodation within a resort.

Proposed development would offend the underlying planning policy to ensure that the listed uses do not displace the opportunity for consistent uses

The Court also held that the proposed development would offend the planning policy to ensure that the listed uses do not displace the opportunity for consistent uses.

This planning policy was said to arise because specific outcome O22 deliberately states that the inconsistent uses are "*not <u>located in</u> the Visitor Mixed Use Zone*". The Court stated that this "*additional requirement … reflects a planning policy to avoid the establishment of those uses in order to preserve the opportunity for establishment of uses that are encouraged (as consistent) in the Zone*".

The Court held that in this case, the proposed development would offend this planning policy. The establishment of permanent accommodation on the subject land would result in the exclusion of consistent uses as prescribed under specific outcome O21 of the Noosa Plan.

Appellant did not demonstrate that there were sufficient grounds to warrant approval despite the conflict with the Noosa Plan

The Court noted that despite the conflict, the development application ought to be approved if there were sufficient matters of public interest to justify approval despite the conflict. However, the Court noted that this had to be balanced against an assumption that it is in the public interest to maintain the terms of the Noosa Plan unless demonstrated otherwise.

The Court ultimately concluded that the Appellants did not demonstrate that there were sufficient grounds to warrant approval despite the conflict. A number of the key reasons for this conclusion are summarised as follows:

- The Appellants argued that the existing development and the surrounding locality had not been developed as planned, and that the maintenance of the status quo would involve maintaining an existing inconsistent use. The Court held that it was not satisfied that the replacement of one inconsistent use with another would result in a better planning outcome, nor did the Noosa Plan contain an express provision permitting such an approach.
- The Court noted that the lack of proximity to Noosa commercial centres would result in a slower rate of growth for Beach Road Holiday Homes. The Court noted that although greater utilisation of housing was desirable, the evidence suggested that there could be detrimental effects on the attractiveness of the resort if permanent accommodation was introduced. The Court was ultimately not persuaded that approval of the proposed development would produce increased occupancy rates or other economic benefit.
- The management rights for the Beach Road Holiday Homes had been recently acquired, and the evidence of the new manager demonstrated that there had been a significant improvement in occupancy rates since the management rights had been acquired.
- The Appellants argued the proposed development would not result in any detrimental impact on the tourism sector. The Court held that although the impact on the tourism sector would be small, it would still increase the likelihood that the houses would not be available for short-term accommodation. The Court stated that having a diverse range of accommodation types is consistent with the Council's planning strategies as articulated in the planning scheme.

Although the Court acknowledged that a number of factors weighed in favour of approving the proposed development, it was not persuaded that those matters were "*of sufficient weight to overcome the clear planning strategy with respect to tourism apparent in the Noosa Plan*". The Court held that it was not in the public interest to allow the development application, and the appeal was dismissed.

UK Supreme Court confirms that a promised community benefit fund donation is not a material consideration when granting a planning permission

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the United Kingdom Supreme Court in the matter of *Regina (Wright) v Forest of Dean District Council (Secretary of State for Housing, Communities and Local Government intervening)* [2019] UKSC 53 heard before Lady Hale, President, Lord Reed, Deputy President, Lord Lloyd-Jones, Lord Sales and Lord Thomas

May 2020

In brief

The decision by the Supreme Court of the United Kingdom in *Regina (Wright) v Forest of Dean District Council (Secretary of State for Housing, Communities and Local Government intervening)* [2019] UKSC 53 concerned an appeal by the developer and local planning authority (**Appellants**) against orders made by the appeal court upholding a trial judge's decision to set aside a planning permission. The planning permission allowed the developer to change the use of agricultural land to construct a wind turbine.

The key issue on appeal was whether a promised community fund donation, which formed part of the planning permission, was a "*material consideration*" under the relevant planning legislation.

The appeal was dismissed by the Supreme Court for the following reasons:

- The donations were not in pursuit of any planning purpose and were for an ulterior purpose.
- The community benefit fund did not affect the use of the land and could only be seen as an inducement to grant the planning permission.
- Policy changes are not relevant when determining the legal meaning of "*material considerations*".

Background

The application concerned the change of use of agricultural land in Gloucestershire to erect a single 500kW wind turbine to generate electricity. The developer proposed that the wind turbine would be operated by a community benefit society, and that an annual donation would be made to a local community fund, based on 4% of the society's turnover.

In approving the application, the local planning authority expressly took into account the community fund donation, and imposed a condition requiring the development to be undertaken by a community benefit society.

A local resident, Mr Wright, challenged the planning permission on the basis that the community fund donation was not a "*material consideration*" for the purposes of section 70(2) of the *Town and Country Planning Act 1990* (**1990 Act**) and section 38(6) of the *Planning and Compulsory Purchase Act 2004* (**2004 Act**). Mr Wright argued that the donation did not serve a planning purpose, was not related to the land use and had no real connection to the proposed development.

Legislative and policy framework

Section 70(1) of the 1990 Act states that a local planning authority may grant a planning permission, either unconditionally or subject to such conditions as it thinks fit.

Section 70(2) of the 1990 Act states that in dealing with an application for planning permission, the authority must have regard to the following:

> *(a) the provisions of the development plan, so far as material to the application,*
>
> *(aza) a post-examination draft neighbourhood development plan, so far as material to the application,*
>
> *(aa) any considerations relating to the use of the Welsh language, so far as material to the application;*
>
> *(b) any local finance considerations, so far as material to the application, and*
>
> *(c) any other material considerations.*

Section 38(6) of the 2004 Act states:

> *If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.*

At the time the planning permission was given, paragraph 97 of the National Planning Policy Framework (March 2012) (**NPPF**) relevantly stated that local planning authorities should:

- "*consider identifying suitable areas for renewable and low carbon energy sources, and supporting infrastructure, where this would help secure the development of such sources*"; and
- "*support community-led initiatives for renewable and low carbon energy, including developments outside such areas being taken forward through neighbourhood planning*".

The Department of Energy and Climate Change published a document in October 2014, which contains general guidance for onshore wind energy developments (**DECC Document**). The DECC Document is generally supportive of communities hosting renewable energy through community benefit funds. However, the DECC Document also relevantly states [our underlining]:

> *The primary role of the local planning authority in relation to community benefits is to support the sustainable development of communities within their jurisdiction and to ensure that community benefits negotiations do not unduly influence the determination of the planning application.*
>
> *There is a strict principle in the English planning system that a planning proposal should be determined based on planning issues, as defined in law. Planning legislation prevents local planning authorities from specifically seeking developer contributions where they are not considered necessary to make the development acceptable in planning terms. Within this context, community benefits are not seen as relevant to deciding whether a development is granted planning permission.*

Scope of "material considerations"

As a starting point, the Court noted that while section 70(1) of the 1990 Act permitted a local planning authority to make conditions as it "*thinks fit*", this power was not unlimited. Centrally, the Court referred to the judgment of Viscount Dilhorne in *Newbury* [1981] 1 AC 578, 599–600, which states what is commonly referred to as the "Newbury criteria":

> *the conditions imposed must be for a planning purpose and not for any ulterior one, and … they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them …*

The Court noted that it is well established that the "*Newbury criteria*" also applies when identifying the ambit of "*material considerations*". This was said to be a logical conclusion because the imposition of a planning condition would necessarily be a material consideration in granting planning permission (at [34]).

The rationale for applying the "*Newbury criteria*", when identifying "*material considerations*" is to ensure that a planning permission is not bought or sold. The Court said that this principled approach prevented a planning authority "*from extracting … benefits from a landowner as a condition for granting permission to develop its land, when … benefits* [have] *no sufficient connection with the proposed use*" (at [39]).

The Court held that the promised donations to the community benefit fund did not satisfy the "*Newbury criteria*". The donations were not in pursuit of any planning purpose and were instead "*for the ulterior purpose of providing general benefits to the community*" (at [44]). Additionally, the Court said that the community benefit fund did not affect the use of the land, and could only be seen as an inducement to the Council to grant the planning permission.

Could policy documents be taken into account when determining the meaning of material considerations?

The Appellants argued that the relevant legislation had to be regarded as "*always speaking*" when determining what is a material consideration. In particular, the Appellants argued that the meaning of "*material consideration*" had to be updated according to changing government policy (such as the NPPF and the DECC Document).

The Court rejected this argument stating that to do so was "*neither required nor appropriate*". In particular, the Court said the following:

- It was not possible to "*override*" or "*dilute*" a statute by general policies laid down by the executive government, nor by policies adopted by local planning authorities (at [42]).
- What qualifies as a "*material consideration*" is a question of law, and judicial interpretation "*provides a clear meaning which is principled and stable over time*" (at [45]).

- Parliament may amend the relevant legislative provisions when it considers it necessary to expand the range of factors to be treated as material (at [45]).
- In any event, the DECC Document itself said that it had to be read subject to the established legal position on what constitutes a material consideration (at [43]).

Interestingly, the Court said that policy alterations could be relevant when determining whether a local planning authority's decision is so unreasonable that no planning authority, appreciating its duty and applying the facts, could have come to that decision (referred to as the "*Wednesbury unreasonable*" test). Nevertheless, the Court emphasised that policy changes were not relevant when determining the legal meaning of "*material considerations*".

Relevance to the Planning Act 2016 (Qld)

This decision is an important reminder when considering the meaning of "*any other relevant matter*" in section 45(5)(b) of the *Planning Act 2016* (Qld) (**PA**). While the Courts are yet to identify a clear test for what is a "*relevant matter*" when carrying out an impact assessment, it has been stated that this term is subject to any implied limitation found in the subject matter, scope and purpose of the PA (*Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 at [81]).

While the ambit of what constitutes a "*relevant matter*" is yet to be fully explored, assessment managers and developers ought to be aware that what is "*relevant*" will likely depend on whether the matter is for a planning purpose and related to the particular land use. It is also clear that any test will not permit the buying and selling of development approvals.

Round 2 of the COVID-19 planning law amendments – a mixed bag for developers and investors

Anthony Landro | Todd Neal

This article gives an overview of the further changes to New South Wales' planning and environmental laws in the road to COVID-19 recovery

May 2020

In brief – An overview of further changes to NSW's planning laws in the road to COVID-19 recovery

The NSW State Government has passed a second round of amendments to the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) in response to the COVID-19 pandemic with the passing of the *COVID-19 Legislation Amendment (Emergency Measures—Miscellaneous) Act 2020* on 12 May 2020.

The amendments enable the Minister to issue directions that, if issued, might change the timeframes within which development contributions are paid, as well as how contributions are allocated to infrastructure needs instead of having them accumulate.

The changes will also extend lapsing periods in development consents, deferred commencements, and merit appeal rights over the next two years. Most of these changes will be welcomed by developers and investors.

However, under separate changes to the *Environmental Planning and Assessment Regulation 2000*, which came into effect on 15 May 2020, developers can no longer, for example, "place a peg in the ground" to activate a development consent that has been granted after 15 May 2020 with the threshold for physical commencement being elevated.

Main take-aways from these amendments at a glance

- The broadening of time limits under the EP&A Act should provide more flexibility to developers in project decision making over the next two years.
- The new powers granted to the Minister to make new types of orders on development contributions have the potential to facilitate better cash flows for developers during the project life cycle. The new powers could also lead to more immediate tangible outcomes from development contributions paid for by developers.
- Despite these changes, those who benefit from a newly granted development consent face more onerous thresholds for the physical commencement of that consent.

Amendments to the Environmental Planning and Assessment Act 1979 in context

The *COVID-19 Legislation Amendment (Emergency Measures—Miscellaneous) Act 2020* amends 34 separate pieces of legislation including the EP&A Act, the chief piece of planning legislation in NSW.

This is the second round of amendments to the EP&A Act as a result of the pandemic. The first being through the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*, which was assented to on 25 March 2020. You can read more about the first round in our article *NSW planning industry responds to the COVID-19 crisis*.

The first round of amendments was focused on creating new powers to facilitate swift emergency action and to ensure that key services could continue to be provided throughout the pandemic. The second round of changes are directed towards providing elasticity to some of the timeframes the development industry pay close attention to.

2 year "lifeline" to lapsing periods under the EP&A Act

Lapsing of development consents and deferred commencements

Section 4.53 has been amended to extend the period for the lapsing of development consents under the Act by **2 years**. This "lifeline" affects all development consents which could have lapsed between 25 March 2020 and 25 March 2022 (the prescribed period).

Development consents that come into operation within the prescribed period will now lapse **7 years** after the consent comes into operation (unless physically commenced). Prior to the changes, that period would have been 5 years unless a shorter period was specified in the development consent.

The 2 year "lifeline" does not apply to concept development applications (subsection 3(a)).

For consents granted after the prescribed period, a consent authority is still able to specify a shorter lapsing period in the development consent (subsection (2)). However, the lesser period must not be less than 5 years after the development consent comes into operation (subsection 3(b)).

For development consents subject to deferred commencement conditions, a 2 year extension has also been introduced, but only for consents that would have lapsed between 25 March 2020 and 25 March 2022 (subsection (6)).

Deferred commencement conditions will continue to have a 5 year time limit for consents granted after 25 March 2022 (subsection 6(a)-(b)).

Given construction certificate documentation can take a significant period to compile, this change provides a longer horizon to activate a consent over the next 2 years. Whilst this provides a more forgiving environment for new development if economic conditions impede commencement (which many in the industry would welcome), the changes may also slow down rather than fast- track development.

Consequences for strategic planning

These changes also have consequences for strategic planning, which the current government places great emphasis on, and can create friction within communities undergoing change.

Communities now face a reality where a development approved during the pandemic can lay dormant for 7 years.

This creates an obvious tension with strategic planning objectives, which becomes more difficult to implement when latent development approvals still exist.

Existing Use Rights

Existing use rights have similarly been granted a 2 year "lifeline" during the prescribed period of 25 March 2020 to 25 March 2022 through amendments to sections 4.66 and 4.68 of the EP&A Act. This means that an existing use right during this period will now expire only after 3 years of continuous abandonment (previously 12 months). This change will preserve existing use rights for buildings or developments which may have gone into a COVID-19 state of "hibernation" because tenants can't be found, or for other commercial reasons.

The 12-month period of abandonment in the EP&A Act sought to strike a balance between the rights of landowners whose uses of land become adversely affected by planning changes, and the public expectation that planning changes are implemented. The extension of this period is favourable to land-owners with existing use rights, but like the extensions to lapsing periods described above, they can also create tensions against strategic planning objectives.

Extensions to appeal rights

Amendments to section 8.10 of the EP&A Act have extended appeal rights to the NSW Land and Environment Court made under Division 8 of the EP&A Act.

The 6-month time limit on appeals brought by applicants for development consent has been extended to 12 months, if either the appeal right arises during the prescribed period of 25 March 2020 to 25 March 2022, or had arisen before this period but had not lapsed. In other words, the changes provide a lifeline to appeal rights that have not lapsed, but they do not resurrect appeal rights that had lapsed prior to the prescribed period.

In the case of an appeal brought by an objector, the 28-day time limit on appeals has been extended to 56 days. The changes therefore have benefits for both objectors and applicants.

An extension to the deemed refusal period of 42 days is noticeably absent from the changes. This means that consent authorities are still expected to assess and determine development applications within usual timeframes, although the extension to the applicant's appeal rights may mean that deemed refusal appeals are not commenced straight away in practice.

Opening up the door to new Ministerial orders – facilitating flexibility for development contributions

Amendments to section 7.17 of the EP&A Act have broadened the types of Ministerial Directions that the Minister for Planning and Public Spaces is able to make by permitting two additional types of directions to consent authorities. These amendments have created the legal mechanism for future changes to be implemented.

The first additional type of direction relates to the **pooling of funds** received by the consent authority for different purposes under a contributions plan or under different contributions plans (subsection (1)(g)). If such a direction is made by the Minister, this will lead to consent authorities more swiftly directing funds to local infrastructure projects, which might otherwise have been delayed because financial thresholds under certain contributions plans might not have been met.

The second permits the Minister to specify **the time** at which a monetary contribution or levy is to be paid (subsection (1)(h)). This could facilitate certain contributions being paid at different stages in a development to help developers better manage cash flows, prevent feasibility issues arising as a result of contributions needing to be paid at checkpoints in the project, which could be critical if project capital is constrained at the front end of a project or at some other point during the lifecycle. The Minister can only issue this type of order before 25 September 2020, unless the Regulations extend this by an additional 6 months.

Ultimately, both depend on Ministerial directions being made and we await any immediate practical change.

Council investigation powers brought into line with social distancing protocols

Section 9.23 enables an investigation officer (for example, a Council compliance officer with appropriate delegations) to require a person to answer questions about certain matters if the investigation officer suspects on reasonable grounds that the person has knowledge of the matter.

Amendments to this section now permit an investigation officer (for example, a Council investigation officer) to authorise that questions be answered using an audio link (eg by phone) or an audio-visual link (eg by video conference). The officer cannot compel a person to take up this technology in answering questions, however. The changes simply authorise the officer to enable answers to questions to occur by phone or AVL.

Previously, questioning had to be carried out in person.

These changes update councils' investigation powers so they harmonise with social distancing protocols, as well as enabling enforcement officers to better "work from home". They will be in effect until 13 November 2020. It remains to be seen whether a person/company subject to a section 9.23(3) request asks to respond by phone or AVL now authorised by these provisions, or instead cites social distancing protocols or COVID-19 risks to defer how, where and when questions are answered.

Similar changes have been made to investigations under the *Biodiversity Conservation Act 2016*, the *Crown Land Management Act 2016*, the *Protection of the Environment Operations Act 1997*, and the *Water Management Act 2000*.

Raising the threshold for physical commencement of a development consent

Separate from the above amendments, the *Environmental Planning and Assessment Amendment (Lapsing of Consent) Regulation 2020* commenced on 15 May 2020 and has significantly raised the threshold for physical commencement of a development consent.

A new clause 124AA has been inserted into the *Environmental Planning and Assessment Regulation 2000* (**EP&A Reg**), which specifies types of preliminary work that are not sufficient to prevent a development consent from lapsing. The changes mean that the following activities are no longer sufficient to physically commence a development consent:

- creating bore holes for soil testing;
- removing water or soil for testing;
- carrying out survey work, including the placing of pegs or other survey equipment;
- acoustic testing;
- removing vegetation as an ancillary activity; and
- marking the ground to indicate how land is to be developed.

The new clause does not apply to development consents granted before 15 May 2020, and therefore only applies to new consents. The previous law on physical commencement will continue to apply to consents that have already been granted.

The EP&A Reg was, until now, silent on any limitations on physical commencement. The law on physical commencement has instead developed through case law. Under the Court of Appeal's seminal decision in *Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council* [2005] NSWCA 169, survey work involving the placing of pegs, the removal of vegetation, and the establishment of permanent survey marks were held to constitute engineering works required for a subdivision, and were sufficient to physically commence a development consent.

This change to the EP&A Reg is a permanent change, unlike the other changes to the EP&A Act which only apply for 2 years. Applicants with newly granted development consents will now need to carry out more significant and costly work to activate a consent.

No doubt the intricacies of these changes will now lead to new controversies with certifiers and consent authorities given any lapse of a development consent involves the loss of valuable rights to develop land.

Further delay to the repeal of the Regulation

Finally, the *COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act 2020* (assented to on 14 May 2020) has extended the scheduled repeal of the EP&A Reg by another 12 months, moving the date for repeal out to 1 March 2022, unless repealed sooner.

This is another delay to the repeal of the EP&A Reg, which had seen a number of extensions to its original 1 September 2006 repeal date. The delay provides more time for the long awaited new Regulations to come into effect, which were expected to shortly follow the 1 March 2018 changes to the EP&A Act.

Presumably the reform to the Regulations was intended to be for "normal" conditions, rather than present circumstances, making the repeal problematic at present. It will be interesting to see what changes to the Regulations eventually arise in a post COVID-19 world.

Court of Appeal overturns Planning and Environment Court decision and requires Council to collect charges in accordance with the current infrastructure charging regime

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Gold Coast City Council v Sunland Group Limited & Anor* [2020] QCA 89 heard before Sofronoff P, Philippides and McMurdo JJA

June 2020

In brief

The case of *Gold Coast City Council v Sunland Group Limited & Anor* [2020] QCA 89 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) against a decision of the Planning and Environment Court (**P&E Court**) in which Sunland Group Limited and another (**Sunland**) relevantly sought declarations about the payment of infrastructure contributions under clauses 13 to 16 of a preliminary approval granted on 3 May 2007 over land located in Mermaid Beach (**Preliminary Approval**).

The P&E Court in its original judgment, *Sunland Group Limited & Anor v Gold Coast City Council* [2019] QPEC 14, relevantly held that the Gold Coast City Council (**Council**) had the power to collect infrastructure charges in accordance with clauses 13 to 16 of the Preliminary Approval, which required the payment of contributions for infrastructure to be calculated in accordance with certain planning scheme policies made by the Council under the now repealed *Integrated Planning Act 1997* (**IPA**).

By unanimous decision, the Court of Appeal disagreed with the P&E Court, dismissed the original decision, and held that clauses 13 to 16 of the Preliminary Approval were to be construed in light of the amendments to the infrastructure charging regime modified by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011* (**SPA Amendments Legislation**), such that the Council must issue an infrastructure charges notice (**ICN**) under the current infrastructure charging regime in the *Planning Act 2016* (**Planning Act**).

Background

Sunland lodged a series of development applications between 16 December 2015 and 30 September 2016, which were assessed and approved under the Preliminary Approval (**Development Applications**). The P&E Court held that the Council had the power to collect infrastructure contributions under clauses 13 to 16 of the Preliminary Approval, and had no power to issue an infrastructure charges notice under section 119 of the Planning Act.

On appeal, Sunland argued that the P&E Court erred in that the relevant law for determining contributions for infrastructure is the planning scheme policies referred to in the clauses of the Preliminary Approval, while Council argued that the current legislative charging regime under the Planning Act applies.

Clauses 13 to 16 of the Preliminary Approval

Clauses 13 to 16 of the Preliminary Approval are expressed in relevantly identical terms, with clause 13 relevantly stating as follows [underlining added]:

> 13 *Contributions toward Recreational Facilities Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 16 – Policy for Infrastructure Recreation Facilities Network Developer Contributions.*
>
> *Contributions shall be calculated at rates current at due date of payment.*

Clause 14 referred to "*Planning Scheme Policy 19 – Policy for Infrastructure Transport Network Developer Contributions*". Clause 15 referred to "*Planning Scheme Policy 3A – Policy for Infrastructure Water Supply Network Developer Contributions*". Clause 16 referred to "*Planning Scheme Policy 3B – Policy for Infrastructure Sewerage Network Developer Contributions*".

Preliminary approvals approve development but do not authorise assessable development to occur

The Preliminary Approval was originally given effect under the IPA, which relevantly provides that:

- a preliminary approval approved development, but did not authorise assessable development to occur (see section 3.1.5(1) of the IPA); and
- assessable development was authorised only by a development permit (see section 3.1.5(3) of the IPA).

Upon the repeal of the IPA and commencement of the SPA, section 808 of the now repealed SPA allowed for preliminary approvals, such as the Preliminary Approval, to continue as a preliminary approval under the SPA under similar provisions to those stated above for the IPA (see section 241 of the SPA).

The Preliminary Approval still continues to have effect in accordance with the transitional provisions of the Planning Act, and, as with the IPA and SPA, under the Planning Act a preliminary approval approves development but does not authorise development to occur (see section 49 of the Planning Act).

Old infrastructure charging regime – Planning Scheme Policies

The relevant planning scheme policies were given effect by section 6.1.20 of the IPA, which dealt with the creation of planning scheme policies that formed part of the old infrastructure charging regime. Relevantly, section 6.1.20(4) stated that the section ceased to have effect on 30 June 2008, or a later day nominated by the Minister. Planning scheme policies, therefore, were given a limited life under the IPA.

Planning scheme policies continued in force in accordance with the transitional provisions of the now repealed SPA. However, section 847 of the SPA, also contained a sub-section limiting the life of planning scheme policies to the 30 June 2010, which was extended to the 31 December 2011.

The Court of Appeal also noted that the SPA made no provision for the formulation of new planning scheme policies.

Did the Preliminary Approval create a present obligation to pay infrastructure charges on a future date or event?

Sunland argued that the terms in clauses 13 to 16 of the Preliminary Approval created a present obligation to pay infrastructure contributions in accordance with the old infrastructure charging regime on a future date or event.

The Court of Appeal disagreed and held that the phrase [underlining added] "*contributions toward … Network Infrastructure shall apply at the time application is made for a Development Permit*", was to be interpreted by reference to the purpose and effect of the Preliminary Approval, being a framework under which the Development Applications were assessed, but not permitted to occur. The Court of Appeal stated that the clauses did not themselves create an obligation to pay, and that the obligation to pay arises in relation to the current infrastructure charging regime which was applicable to the Development Applications.

Current infrastructure charging regime – Adopted charges and ICNs

The SPA Amendments Legislation inserted the forerunner to the current infrastructure charging regime into the SPA, including the process of adopting infrastructure charges and levying those charges through an ICN.

The infrastructure charging regime under the current Planning Act requires the Council to levy adopted charges through an ICN in accordance with section 119 of the Planning Act. An ICN must be given at the same time as, or as soon as practicable after, a development approval is given.

Effect of the SPA Amendments Legislation on the Preliminary Approval

The Court of Appeal noted that the evident intention of the SPA Amendments Legislation was that it would be by the current infrastructure charging regime that the Council would recover infrastructure contributions. Section 880 of the SPA was considered critical to the transition from planning scheme policies to the new regime as it "switched off" the Council's ability to impose conditions under the old infrastructure charging regime.

Section 880 of the SPA also provided that despite the infrastructure charging regime introduced by the SPA Amendments Legislation, a local government was not stopped from doing the following in accordance with the planning scheme policies (section 880(3)(b) of the SPA) [underlining added]:

> *(i) collecting an infrastructure charge or regulated infrastructure charge lawfully levied by the local government; or*
>
> *(ii) collecting an infrastructure contribution payable under a condition lawfully imposed under a planning scheme policy to which section 847 applies …*

The Court of Appeal held that section 880(3)(b) of the SPA only applied to infrastructure charges under planning scheme policies which had already been levied or were already payable under a condition.

The infrastructure contributions referred to in clauses 13 to 16 of the Preliminary Approval were not payable as the Preliminary Approval did not create an obligation to pay the infrastructure contributions.

The Court of Appeal therefore held that section 880 of the SPA did not apply for the reason that no charges were levied or payable under the old infrastructure charging regime.

The Development Applications were given effect after the SPA Amendments Legislation and are therefore subject to the current infrastructure charging regime.

Conclusion

The Court of Appeal held that, in relation to the Development Applications, the Council must issue an ICN in accordance with the current infrastructure charging regime in the Planning Act as no infrastructure charges were levied or payable under clauses 13 to 16 of the Preliminary Approval.

Need for a shopping centre outweighs the requirement that the development be "small-scale"

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fabcot Pty Ltd v Cairns Regional Council & Ors* [2020] QPEC 17 heard before Everson DCJ

June 2020

In brief

The case of *Fabcot Pty Ltd v Cairns Regional Council & Ors* [2020] QPEC 17 concerned four appeals (**Appeals**) to the Planning and Environment Court (**Court**) in relation to development approvals given by the Cairns Regional Council (**Council**), being a preliminary approval for a material change of use for a Shopping Centre and Health Care Services and for reconfiguring a lot into 14 lots, a development permit for a material change of use for a Child Care Centre, Service Station, and Food and Drink Outlet, a development permit for operational work for an Advertising Device, a development permit for reconfiguring a lot into four lots, and an access easement (**Proposed Development**).

The case involved the following four appeals which were heard together:

- *Appellant's Appeal* – The Appellant sought a development permit for the uses which were the subject of the preliminary approval.
- *First Co-Respondent by Election's Appeal* – The First Co-Respondent by Election, which owned the Smithfield Shopping Centre located approximately four kilometres south of the subject site, sought an order that the Proposed Development be refused.
- *Third Co-Respondent by Election's Appeal* – The Third Co-Respondent by Election sought an order that the Proposed Development be refused, however, withdrew its appeal prior to the hearing.
- *Fourth Co-Respondent by Election's Appeal* – The Fourth Co-Respondent by Election, which had lodged a development application which required code assessment for a shopping centre on land located between the subject site and the Smithfield Shopping Centre and within sub precinct 3b of the Smithfield Local Plan in the *CairnsPlan 2016 version 1.2* (**Planning Scheme**) (**TPI Development Application**), sought an order that the Proposed Development be refused.

The issues in dispute were as follows:

- *Issue 1* – Whether there was a need for the Proposed Development.
- *Issue 2* – In respect of the Planning Scheme, whether the Proposed Development was contrary to or would compromise the hierarchy of centres; whether the Proposed Development would have a function and scale which exceeded that intended for the low-medium residential zone; whether the uses comprising the Proposed Development ought to be located in an existing centre within the locality; and whether the Proposed Development would result in an unacceptable impact on the role, function, and economic viability of sub-precinct 3b of the Smithfield Local Plan in the Planning Scheme (**Sub-Precinct 3b**).
- *Issue 3* – The following relevant matters:
  - the extent of the need for the Proposed Development including whether it would deliver price benefits, employment opportunities, choice, competition and convenience, achieve a balance of demand for retail floor space in the Cairns Northern Beaches region or would exceed it, exceed the convenience needs of the locality, deliver a community benefit associated with the existence of a committed anchor tenant being Woolworths, and achieve efficiency by the co location of the uses comprising the Proposed Development;
  - whether the Proposed Development would be well located to serve the community;
  - whether an approval of the Proposed Development would prejudice the implementation of an existing approval for an extension to the shopping facilities at the Smithfield Shopping Centre;
  - whether the layout, amenity, and traffic arrangements of the Proposed Development support its approval;
  - whether the reasonable expectations of the community were being adhered to.

The development approvals in respect of reconfiguring a lot, the Advertising Device, and the Service Station and Food and Drink Outlet became uncontentious between the parties. The issues for the Court to decide were therefore limited to the preliminary approval for a material change of use for a Shopping Centre and Health Care Services, and the development permit for a material change of use for a Child Care Centre.

The Court held that the Proposed Development ought to be allowed to proceed with conditions, on the basis that:

- it met the need identified for a shopping centre with co-located uses which the Cairns Northern Beaches region lacked;
- would cater for local residents without compromising the existing hierarchy of centres or Sub-Precinct 3b in the Planning Scheme;
- was ideally located to meet the need of the community without having an adverse impact on character and amenity; and
- it could be justified as a new centre under the Strategic Framework of the Planning Scheme.

Subject site

The subject site is located on land approximately 15 kilometres north of the Cairns CBD and within the low-medium residential zone and the Smithfield Local Plan of the Planning Scheme, which relevantly includes Sub-Precinct 3b that is identified in the Planning Scheme for mixed use future retail and commercial development.

Of relevance to the Appeals was the subject site's location midway between and within four kilometres of, two shopping centres: the Smithfield Shopping Centre, a designated major centre in the Planning Scheme, and the Clifton Village Shopping Centre. Both shopping centres and the subject site were held by the Court to be within the primary trade area (**PTA**) of Cairns.

Issue 1 – There is a significant economic, community, and planning need

The Court found that the Planning Scheme has as a prerequisite to the establishment or use of a centre that there be a need for the development.

The Court held that where the term "need" is used in a planning scheme without qualification, as it was in the relevant Planning Scheme, need is to be interpreted to be reference to a "planning need", which "*will improve the ease, comfort, convenience and efficient lifestyle of the community*" and for which there is "*a latent unsatisfied demand which is either not being met at all or is not being adequately met*" (see [31]).

The Court held that in circumstances where proposed development will provide members of the community with day-to-day shopping necessities that the requisite need ought not be set too high, and that where a planning scheme has demonstrated a deliberate planning decision to provide for appropriate facilities to satisfy need, and there are no unacceptable outcomes on amenity, the effort required to establish need is not onerous.

The Court held that in the outer urban area of Cairns it was a realistic expectation to be located within three kilometres of a major supermarket and concluded that there is current significant economic, community, and planning need within the PTA for the Proposed Development that was not being met. In support of this, the Court found that the supermarkets in the Smithfield and Clifton Village Shopping Centres are producing sales substantially above the Australian average industry benchmark of sales for a full-line supermarket.

Issue 2

Proposed Development would maintain the hierarchy of centres

The Court held that the Proposed Development was not contrary to or would not compromise the existing hierarchy of centres for the reasons that:

- the Smithfield Shopping Centre would remain the major centre and focus of employment and economic activity in the region;
- other existing shopping centres would be impacted by the Proposed Development in an ordinary competitive way; and
- providing local residents with choice, which may result in them choosing to shop at the Proposed Development as opposed to an existing centre, was not supportive of the lesser foot traffic compromising the role and function of the existing centre.

Proposed Development would cater for local residents and is a suitable use for the locality

The Planning Scheme required that the Proposed Development be of a "*local*" focus and "*small-scale*", though the Planning Scheme did not define the meaning of either term.

The Court interpreted "local" to mean within the PTA and held that although the Proposed Development could not be described as small-scale, it would "*cater for local residents*" as required by the low-medium residential zone code of the Planning Scheme by providing a shopping centre for residents' weekly shopping needs, and was in a suitable location having regard to the impacts on amenity and character, the ability of residents to access the site by walking or cycling, and compliance with parts of the Planning Scheme.

The Court noted that the function and scale of the Proposed Development was not critical particularly given that the Strategic Framework in the Planning Scheme prevailed over other parts of the Planning Scheme to the extent of any inconsistency, which allowed for the establishment of a new centre on the basis of a need for the development.

Proposed Development would not unacceptably impact Sub-Precinct 3b

Sub-Precinct 3b is identified in the Smithfield Local Plan and the mixed use zone code of the Planning Scheme as a future retail and commercial area that permits a development application for the code assessment of a shopping centre with a mix of activities of not greater than 5,000m^2 gross floor area.

The Court did not consider the opportunity for code assessable development in Sub-Precinct 3b to mean that the Proposed Development would result in an unacceptable impact on the role, function, and economic viability of the precinct. This was particularly so because of the broad range of uses contemplated by Sub-Precinct 3b. The Court held that in any event development in Sub-Precinct 3b is intended to be of such a scale that it would not be able to meet the pressing need of the community that would be met by the Proposed Development.

Issue 3 – Other relevant matters

The Court held that the Proposed Development would:

- bring about price benefits, employment opportunities, competition, and convenience;
- provide a benefit to the community through the association of a committed anchor tenant by the establishment of another Woolworths;
- be centrally located to meet the 10,800 residents located outside of a three-kilometre radius of an existing supermarket;
- satisfy a need in the community for each of the proposed uses and would create efficiency by the co-location of those uses; and
- be an ideal location and opportunity for residents to shop without using the highway.

The Court also held that any potential impact the Proposed Development would have on any existing un-actioned approval to extend the shopping facilities at the Smithfield Shopping Centre is irrelevant, where the Proposed Development would not comprise that shopping centre's role and function in the region.

Conclusion

The Court determined that the Proposed Development would not compromise the existing hierarchy of centres in the Planning Scheme and warranted approval with conditions, despite the minor non-compliance with the Planning Scheme in circumstances where the need for the Proposed Development was strongly supported by expert evidence, and the Strategic Framework of the Planning Scheme, and the Proposed Development would not impact on existing shopping centres within the locality.

The Appellant's appeal was allowed and each appeal of the Co-Respondents by Election was dismissed.

Proposed child care centre use in a flood-prone area held to be inconsistent with planning controls

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Black Inc Architecture Pty Ltd v Ipswich City Council* [2020] QPEC 13 heard before Williamson QC DCJ

June 2020

In brief

The case of *Black Inc Architecture Pty Ltd v Ipswich City Council* [2020] QPEC 13 concerned an appeal to the Planning and Environment Court (**Court**) under section 229 of the *Planning Act 2016* against the Ipswich City Council's (**Council**) decision to refuse the Appellant's development application requiring impact assessment for a material change of use for a child care centre (**Development Application**).

The Court dismissed the appeal on the basis that the proposed development did not comply with the *Ipswich Planning Scheme* (**Planning Scheme**) for the following reasons:

- the proposed development would not avoid areas prone to flooding, as required by Specific Outcome (15)(a) of the Community Use Code in the Planning Scheme (**Code**) and Policy 4 in the State Planning Policy (**SPP**), as parts of the development would be below the adopted flood regulation line;
- the proposed child care centre would not be able to function effectively during and immediately after a flood as required by Specific Outcome (15)(b) of the Code and Policy 6 in the SPP, which was evidenced by the requirement in the Appellant's flood emergency plan that the child care centre be closed where flood waters exceed RL 17.50 metres and the evidence that the period of each closure would be determined on a case-by-case basis;
- during a flood event which required the closure of the child care centre, the need to contact others to aid in the evacuation of the children would increase the number of people impacted by the flooding risk, contrary to Overall Outcome 2(e) of the Development Constraints Overlay in the Planning Scheme (**Overlay**) and a number of other provisions in the Planning Scheme;
- the proposed development could not operate harmoniously with the flooding constraints of the subject land, particularly given that the proposed use must cease where flood waters exceed RL 17.50 metres, and therefore the new use was not compatible with the constraints of the land as required by Specific Outcome 41(a)(i);
- the Planning Scheme requires flood risks to be managed in a way that is consistent with the contemporary planning practice for natural hazards in Queensland, which the proposed development did not achieve.

Parties' positions

The Council refused the Development Application on the basis that the proposed development does not comply with a number of the assessment benchmarks in the Planning Scheme and the SPP relevant to flooding.

The Appellant contended that the non-compliances with the Planning Scheme and the SPP could be managed through the use of conditions that require the development to be constructed above the adopted flood regulation line and the 1 in 200 year flood, and through the implementation of and compliance with a flood emergency plan.

Proposed development does not avoid an area prone to flooding and cannot operate effectively during or after a flood

The Code applies to the proposed child care centre use and relevantly Specific Outcome (15) requires a consideration of whether the proposed development avoids areas prone to flooding and is able to function effectively during and immediately after a flood event. The corresponding requirements in the SPP are substantially similar.

The Court interpreted the words in the Planning Scheme literally and determined that Specific Outcome (15) requires that development 'keep away from' or 'keep clear of' or 'evade' an area prone to flooding. The Court held that it was not enough for the proposed development to be constructed above the flood regulation line.

The Court therefore rejected the Appellant's argument that the development ought to be approved because it was to be constructed at a height to avoid the impact of a flood event. The Court also rejected the Appellant's argument that the development ought to be approved because the Appellant proposed to reduce the life of the child care centre use to 50 years because, although such a restriction would have the effect of reducing the potential impacts of climate change and the risk of flooding, the Planning Scheme required the development avoid a flood prone area and that was not demonstrated.

The Court also found that it was not satisfied that the whole of the development proposed, in particular the staff car park and the foundations of the development, would be safely above the flood constraints of the subject land.

The Court found that a child care centre is a vulnerable use during a flood, a position supported by the SPP. The Court found that the evacuation of the child care centre in the event of a flood would create a higher risk to people and thus be contrary to Overall Outcome (2)(e) of the Overlay, as well as other provisions in the Planning Scheme.

Although the flood emergency plan went to great lengths to mitigate the impacts of a flood event, including through the closure of the child care centre when flood levels exceed RL 17.50 metres, the Court considered it to be undesirable for a child care centre to cease during a natural hazard.

The Court was therefore not satisfied that the child care centre could operate effectively during a flood event. Nor was it satisfied that the child care centre could operate effectively after a flood event, which was confirmed in the flood emergency plan which stated that the length of recovery would depend on the severity of the flooding and the time it took for water to recede.

A child care centre is incompatible with flooding constraints

Although Sub Area SA41 of the Planning Scheme envisaged that a child care centre may be a suitable use in that sub-area, the Court undertook an assessment of whether the child care centre could operate harmoniously with the flooding constraints on the subject land and concluded that the use gave way to the flooding constraint in the event of a flood, which was supported by the flood emergency plan put forward by the Appellant.

The Court therefore held that there was considerable non-compliance with the Planning Scheme.

Conclusion

The Appellant did not demonstrate that the proposed child care centre use complied with the assessment benchmarks relating to flooding in the Planning Scheme and the SPP. The Court therefore dismissed the appeal.

Change application for change of mind? The Queensland Planning and Environment Court says no

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Thomco (No. 2087) Pty Ltd v Noosa Shire Council* [2020] QPEC 8 heard before Rackemann DCJ

June 2020

In brief

The case of *Thomco (No. 2087) Pty Ltd v Noosa Shire Council* [2020] QPEC 8 concerned a change application for a minor change (**Change Application**) to a development permit for a material change of use comprising a dwelling component (**a manager's unit**) and a motel component (**Development Permit**) made to the Planning and Environment Court (**Court**) as the responsible entity for the Change Application.

The Noosa Shire Council (**Council**) gave a response notice under section 80(4) of the *Planning Act 2016* (**Planning Act**) objecting to the Change Application for the following reasons:

- the Change Application was not for a minor change;
- the Development Permit would not have been agreed to between the parties without the final staging of the development, which the Change Application sought to alter;
- the proposed change was in conflict with the *Noosa Plan* and the Council's draft planning scheme, the *New Noosa Plan*.

The Court held that the Change Application was not for a minor change as it would result in substantially different development, and dismissed the Change Application.

Background

At the time the Council initially refused the relevant development application, the proposed staging was in accord with what was sought by the Change Application. The Applicant appealed the Council's decision to refuse the relevant development application. The appeal was resolved on the basis that the Court approved the Development Permit, which relevantly authorises the construction of the following:

- the whole development without staging;
- the motel component followed by the dwelling component; or
- the motel component without constructing the dwelling component.

In consenting to the resolution of the appeal on the terms of the Development Permit, the Council was seeking to avoid a situation where the dwelling component is built and the motel component is not built.

Two months after the appeal was resolved, the Applicant made the Change Application which proposed to reverse the order of the approved stages.

Minor change provisions

Schedule 2 of the Planning Act defines a minor change to mean a change that, for a development approval:

> *(i) would not result in substantially different development; and*
>
> *(ii) if a development application for the development, including the change, were made when the change application is made would not cause—*
>
> > *(A) the inclusion of prohibited development in the application; or*
> >
> > *(B) referral to a referral agency, other than to the chief executive, if there were no referral agencies for the development application; or*
> >
> > *(C) referral to extra referral agencies, other than to the chief executive; or*

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

(E) *public notification if public notification was not required for the development application.*

The Court was satisfied that the Change Application did not cause any of the things listed in item (ii) of the definition, and therefore focused its attention on whether the Change Application would result in substantially different development.

An outcome not provided in the Development Permit is substantially different development

The Court noted that deciding whether a change application will result in something substantially different where development is staged is more complex than with non-staged development because the possibility arises that some, but not all, stages of the development will be completed.

The Court found the motel component was an integral component of the Development Permit, and that should the Change Application be allowed and the Applicant only construct the dwelling component, the development would be substantially different.

In coming to this conclusion, the Court was not satisfied that the Applicant's intentions at the time represented a sufficiently reliable basis to decide, on the balance of probabilities, that both the dwelling and motel components would be developed if the Change Application was approved.

The Court dismissed the Change Application because the Change Application did not satisfy section 78A(2)(a) of the Planning Act, as the Change Application would result in substantially different development and was therefore not for a minor change.

Conclusion

As the Applicant did not establish that the change would not result in substantially different development than allowed under the Development Permit, the Change Application was not for a minor change and the Court dismissed the application.

Subterranean compulsory acquisitions and corridor preservation

Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Opera Australia v Sydney Metro; Kritikos Developments Pty Ltd trading as Iron Duke Hotel v Sydney Metro* [2020] NSWLEC 28 heard before Robson J

June 2020

In brief – Issues for landowners to consider who may be impacted by NSW government's subsurface infrastructure plans

The recent matter of *Opera Australia v Sydney Metro; Kritikos Developments Pty Ltd trading as Iron Duke Hotel v Sydney Metro* [2020] NSWLEC 28 highlights the emerging jurisprudence we are likely to see under section 62 of the *Land Acquisition (Just Terms Compensation) Act 1991* (**Just Terms Act**) and Schedule 6B of the *Transport Administration Act 1988* (NSW) (**Transport Act**). Both provisions contain an exception to owners of land being paid compensation for various substratum compulsory acquisitions in certain circumstances.

As the Judge notes in the case, the matter involves a "tortuous" history, highlighting the difficulties subsurface acquisitions can raise where they impact a person's land.

This is occurring at a time where subsurface rights are becoming increasingly controversial, no doubt leading to the Department of Planning's proposed amendment to the *State Environmental Planning Policy (Infrastructure) 2007* (**Infrastructure SEPP**), in order to create a short-term protective underground corridor for the Sydney Metro West project.

This article looks at the case, and what is emerging in the courts and within Government on this issue.

Litigation concerned compensation payable under Just Terms Act and the separate determination of questions

The litigation involves two sets of proceedings, which relate to the Sydney Metro's compulsory acquisition of subsurface stratum on 11 October 2017 for the purpose of tunnelling works associated with the construction of the Sydney Metro City and Southwest project.

Proceedings were commenced by Opera Australia in June 2018, and by Iron Duke Hotel in August 2019. Opera Australia and Iron Duke Hotel (**Applicants**) made applications to the Land and Environment Court in relation to an order made on 2 October 2019 (**October Order**) regarding rule 28.2 of the *Uniform Civil Procedure Rules 1999* (**UCPR**) for the hearing of separate questions. The Applicants were seeking that the October Order be revoked (ie that there be no hearing on separate questions) and that the matter proceed to final hearing. Ultimately, the Court found the matter should proceed to final hearing.

The central dispute in the proceedings centred around Schedule 6B of the Transport Act which provides that compensation is **not** payable under the Just Terms Act if land under the surface is compulsorily acquired for the purpose of underground rail facilities unless:

- the surface of the overlying soil is disturbed; or
- the support of that surface is destroyed or injuriously affected by the construction work.

Sydney Metro maintained that while the land was acquired for the purpose of underground rail facilities, compensation was not payable under the Just Terms Act because neither of the exceptions had been fulfilled during the course of the development.

Importantly, if either applicant falls within the ambit of clause 2(1) of Schedule 6B (ie the two dot points above), they will be entitled to an amount of compensation to be determined in accordance with the Just Terms Act.

It was those issues that formed the basis for part of the separate questions for determination, given the appearance these matters could be resolved without preparing the broader matters required for a hearing. The Court ultimately held that the separate question relating to the above points should not be hived off to be separately heard before a full hearing even though they might be dispositive of the matter.

The decision is yet another matter in the Land and Environment Court demonstrating how difficult it can be to craft a separate question for determination when often these questions are intertwines with the broader fact and law matters ventilated at a final hearing. As his Honour mentions (at [58]) "*the Court usually begins with the proposition that it is ordinarily appropriate that all issues in all proceedings should be disposed of at one time*".

What the decision means is that those with property interests affected by proposed underground acquisitions will need to wait until the final hearing of this matter before further jurisprudence develops on the above three criteria, which are described in the judgment as a "*jurisdictional gateway*" to compensation being capable of being determined for the acquisition of the subsurface property rights.

Proposed amendment to Infrastructure SEPP

In addition to the limits on compensation benefiting subsurface Government infrastructure, the NSW Government is proposing further measures to strengthen future subterranean works for Sydney Metro West.

In this regard, the Department of Planning has proposed an amendment to the Infrastructure SEPP, in order to create a short-term protective underground corridor for the Sydney Metro West project. The proposal, if adopted, will require consent authorities to notify Sydney Metro of certain development applications within the corridor, and also require Sydney Metro to provide concurrence on notified development applications before they can be determined by a consent authority. The aim of the amendment is to prevent the loss of corridor alignment through interim corridor protections, thereby ensuring the successful and efficient delivery of the project as a whole.

Landowners potentially impacted will need to consider how this might impact their subsurface rights and development plans. With submissions on this now closed, careful monitoring of this is important by those with property above the proposed alignment given that future development rights may be impacted if the change is implemented.

NSW Government's plan to reach net zero emissions by 2050

Mollie Matthews | Todd Neal

This article discusses the New South Wales Government's plan to achieve net zero carbon emissions by 2050

June 2020

In brief – A summary of the key measures that will take place in New South Wales between now and 2030 to reach Stage 1 goals

On 14 March 2020, the NSW Department of Planning Infrastructure and Environment released *Net Zero Plan Stage 1: 2020-2030* of the plan to achieve net zero carbon emissions by 2050.

Stage 1 covers the years 2020-2030, and within this decade there are some ambitious and important targets which will have implications for NSW planning laws, but also practically to those industries impacted by the goals.

It is the first plan of its kind in Australia.

This article summarises the key priorities and goals of Stage 1.

Stage 1 key priorities

There are four simple priorities for Stage 1:

1. Drive uptake of proven emissions reduction technologies that grow the economy, create new jobs or reduce the cost of living.
2. Empower consumers and businesses to make sustainable choices.
3. Invest in the next wave of emissions reduction innovation to ensure economic prosperity from decarbonisation beyond 2030.
4. Ensure the NSW Government leads by example.

The Plan estimates that these four priorities will result in a reduction by 35.8 megatonnes of emissions by 2030 compared with 2005 levels (see Table A.2 "Expected reduction in carbon emissions by 2030"). That would be a 35% reduction of NSW's annual emissions from 2005 levels (see p.13). The key driver in those reductions (ie approximately 77% of those reductions) is expected to be the result of the uptake of "proven emissions reduction technologies" (**Priority 1**).

Specific goals of Stage 1

Priority 1 involves the three pillars of "*driving technologies that:*

- *grow the economy;*
- *create new jobs; or*
- *reduce the cost of living.*"

Presumably this means that if the measure does not drive one of these three things it would not be pursued. This is not insignificant given the carbonised economy in NSW. However, this Plan does not provide for any significant displacement of the coal industry, which based on the NSW Government's recent *Future of Coal Statement: Strategic Statement on Coal Exploration and Mining in NSW* predicts a long slow decline.

The Plan recognises that the mining sector is one of the biggest economic contributors in NSW, and that mining will continue to be an important part of the economy in the future. It states:

> *Mining will continue to be an important part of the economy into the future and **it is important that the State's action on climate change does not undermine those businesses** and the jobs and communities they support*. (emphasis added)

The Plan instead states that the NSW Government will invest in a Coal Innovation Program. That program would focus on providing incentives to coal operators to capture and reuse methane released during mining (for example, by using the gas on-site or via the gas system), and provide research and industry partnerships with funding to commercialise emerging technologies to reduce emissions at hard-to-mitigate sites. The Plan suggests that the capture and reuse of gas from mines could help offset emissions from gas used in homes and businesses in NSW.

Investment in regional and rural NSW

The Plan lists several economic benefits, particularly for regional and rural NSW including:

> *By delivering the Plan, New South Wales is expected to create almost **2400 jobs** and **attract over $11.6 billion of investment** over the next 10 years. Almost **two-thirds** of this investment will go **to regional and rural New South Wales**. The Plan is expected to save households $40 a year on their electricity bills.* (emphasis added)

NSW is planning to deliver three "Renewable Energy Zones" in the Central-West, New England and South-West to replace retiring generators in NSW with cheaper, renewable energy. Once fully established (over the next 20 years), these Zones are anticipated to drive up to $23 billion of private sector investment and create about 2000 construction jobs each year in regional NSW. Stage 1 will include fast-tracking the first of these Renewable Energy Zones.

Reducing electricity prices

Stage 1 also indicates that the NSW Government will support a **new regulatory framework** to promote generating new, lower cost electricity in NSW to reduce electricity prices, ensure reliable electricity supply, and protect the environment. Although this remains to be explained in more detail, based on the goals of this plan we expect that the lower cost electricity will be provided for by incentivising the development of technologies to generate this electricity, potentially with a combination of subsidies and reduction of "red tape" in the new regulatory framework.

Roll out technologies that reduce emissions and costs

As mentioned above, the main priority of Stage 1 is to develop and commercialise proven emissions-reducing technologies. This would create environmental and economic value for both households and businesses.

The cost of these technologies generally becomes cheaper as they are developed, which makes these more available. The classic example is the cost of generating solar energy. Electric vehicle battery prices have also fallen by more than 85% since 2010 (see p.7).

Falling prices naturally result in more availability of these technologies, which in turn supports economic growth and jobs such as manufacturing of the products, and associated businesses being established.

The flow on benefits of incentivising commercialisation of these products extends to consumers. Businesses and homes will be able to use these lower-emissions technologies to reduce their own running costs. For example, the Plan mentions that the recently installed solar panels at Ikea's Tempe store are expected to save $200,000 in electricity bills per year.

In encouraging the use of lower-emissions technologies, NSW planning laws are likely to evolve. In the last couple of years we have already seen:

- electric vehicle charging stations became exempt development under the *State Environmental Planning Policy Infrastructure 2007* (**Infrastructure SEPP**): see clauses 104A - 104B.
- Division 4 "Electricity generating works or solar energy systems" of the Infrastructure SEPP was amended:
  - to include "electricity storage" within the definition of "electricity generating works", in order to cover batteries (see clause 33); and
  - to list certain solar energy systems, wind monitoring towers, and small wind turbine systems as exempt development: see clause 39 of the Infrastructure SEPP.

Given the planning laws can make such technology easier and cheaper to implement, or alternatively more difficult and costly, we anticipate several changes to construction and planning laws following recent amendments to NSW planning policies.

The Plan foreshadows the following changes to incentivise the uptake of electric vehicles:

- New buildings will be required to be electric vehicle-ready, with changes to the National Construction Code and NSW Building Sustainability Index (**BASIX**). For example, they may be required to provide electrical conduits and wiring to simplify installation of electric vehicle charging equipment.
- Licensing and parking regulations will be amended to support the rollout of electric charging infrastructure and the uptake of electric vehicles.

Stage 1 of this Plan will support investigation into opportunities to create new market opportunities, for example the use of hydrogen as a fuel, so that NSW is positioned well to move early on new technologies and potentially develop globally competitive goods and new market opportunities.

The next six months will be pivotal for the companies in Australia leading hydrogen technologies, since funding for some of those investing in this area is contingent on progress being made, which has obvious difficulties given the economy's "hibernation" during the pandemic.

Informing consumers of lower emissions choices

Priority 2 involves empowering consumers so they can make lower emissions choices.

Importantly for the development industry, the NSW Government plans to advocate for the National Australian Built Environment Rating System (**NABERS**) to be expanded beyond commercial buildings, to allow other building users to compare energy efficiency, water usage and waste management services when looking to buy or lease building space. For example, the Plan suggests expanding the use of NABERS to schools, retirement living, industrial warehouses, retail tenancies, and supermarkets.

We also anticipate changes to the National Construction Code and BASIX for the delivery of cost-effective, low emissions outcomes for residential, commercial and public buildings.

This will drive emissions reductions in the building sector, and the demand for low emissions building materials. This ties back to Priority 1 ("Drive uptake of proven emissions reduction technologies") by incentivising the use of building materials such as bricks manufactured with a net zero emissions result.

Those new kinds of building products will also allow NSW building suppliers to maintain a competitive advantage against overseas imports.

NSW Government wants to lead by example

The NSW Government importantly recognises the need to lead by example in implementing the strategies outlined in the Stage 1 Plan. Some examples of the NSW Government's short-term goals include:

2021	Expand the national parks estate by at least 200,000 hectares by June 2021. This will include updating national parks legislation so that additions to the estate can better access carbon funding to help revegetate and improve our carbon sinks. We anticipate Government acquisitions of land under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) to reach this goal within the next year.
2023	30% of public sector staff fleet of vehicles (approx. 13,000 vehicles) to be electric or hybrid vehicles. Sydney buses will be replaced with electric buses, and hybrid electric passenger trains will be rolled out from 2023 for regional lines. The Government's bulk purchasing power in this regard will incentivise the sale of a greater range of electric vehicle models. That will assist in the electric vehicle market becoming more competitive and more affordable.
2024	Double the NSW's Government solar target by 2024 from 55,000 to 126,000 megawatt hours, to reduce the Government's electricity bill (currently around $400 million each year).

Regulatory changes anticipated once detailed delivery plan available, but impact of COVID-19 on timelines remains to be seen

We anticipate several regulatory changes as a result of the NSW Government incentivising the uptake of lower-emissions technologies, to assist those goals being realised. This may result in some significant changes to the building materials industry also. In this regard, changes will not be unveiled until the detailed delivery plan is published.

This Plan aligns with the Memorandum of Understanding entered into by the Federal Government and the State of NSW on 31 January 2020, setting out the actions and outputs in relation to solving NSW's emerging reliable energy generation problems.

Priorities 1 and 3 of NSW's Plan are also reflected in the Federal Government's "*Technology Investment Roadmap Discussion Paper: A framework to accelerate low emissions technologies*", released on 21 May 2020. That strategy goes towards fulfilling Australia's commitment under the Paris Agreement to limit emissions by the second half of this century. It contains several of the same goals as the NSW Plan, including backing gas and a shift towards renewables in reducing emissions. Echoing the priorities of the NSW Plan, Angus Taylor MP has said of the Technology Investment Roadmap:

> *We've got a very clear focus, it's about developing technologies that will bring down emissions and support jobs growth in critical industries like agriculture, manufacturing, transport…*

NSW's Plan was prepared in a pre-COVID NSW. It will remain to be seen whether the timelines for goals set out in the Plan will still be reached despite the pandemic. However, if the larger goal of net zero emissions by 2050 in NSW is to be realised, rather than remain an aspiration, meaningful changes need to start occurring now. Whilst 2050 is many electoral cycles away, 2030 is not so distant, and the Stage 1 horizon only extends 10 years.

Interim Report recommends reform to duplicative, inefficient and costly Environment Protection and Biodiversity Conservation Act

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the Interim Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

July 2020

In brief

This article concerns the recent publication of the Interim Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

Section 522A of the EPBC Act requires an independent review of its operation and the extent to which its objects have been achieved to be undertaken at least once every 10 years.

The Independent Review currently being undertaken by Professor Graeme Samuel AC is the second independent review of Australia's central national environmental law. The first independent review of the EPBC Act was completed in 2009 and was undertaken by Dr Allan Hawke.

Key issues of the EPBC Act

The following is a summary of the key issues of the EPBC Act that are identified in the Interim Report:

- *National level protection and conservation of the environment and iconic places* – The EPBC Act does not provide an effective and efficient regime to protect Australia's unique environment and iconic places as, among other things, the EPBC Act lacks clear national outcomes and effective mechanisms to achieve the objects of the EPBC Act, relevantly ecologically sustainable development.
- *Indigenous culture and heritage* – The administration of the EPBC Act does not recognise the role of Indigenous Australians, in particular to promote the use of Indigenous knowledge or views in the decision-making process.
- *Legislative complexity* – The EPBC Act is complex, which has resulted in confusion and inconsistent decision-making under the EPBC Act, and the process for stakeholders to understand their legal obligations and rights is cumbersome and expensive. This complexity is "*in part driven by underlying policy complexity*".
- *Efficiency* – There is duplication with state and territory regulatory frameworks for development assessment and approval which is "*inefficient and costly for the environment, business and the community*". Efforts to streamline assessment and approval under the EPBC Act has not eliminated the significant overlap between the Commonwealth, and state and territory laws and regulations.
- *Trust in the EPBC Act* – There is a lack of trust by community and industry of the EPBC Act and its regulatory regime. Slow decision-making, lack of information and transparency about the decision-making process under the EPBC Act were found to be key to this mistrust.
- *Data, information and systems* – The decision-making process under the EPBC Act is not conducted by the best available data, information and science as, among other things, the "*Department's systems for information analysis and sharing are antiquated*".
- *Monitoring, evaluation and reporting* – The current monitoring, evaluation and reporting of the EPBC Act is inadequate.
- *Restoration* – The EPBC Act does not support effective or efficient restoration of the Australian environment, in particular "*Environmental offsets are poorly designed and implemented*".
- *Compliance, enforcement and assurance* – Compliance with the EPBC Act is difficult, outdated and ineffective.

Key direction for reform

The Interim Report noted that submissions received in respect of the Independent Review proposed a "*complete revamp*" to the objects of the EPBC Act. However, the Independent Reviewer stated that "*amending the objects of the EPBC Act will not 'provide more clout' or deliver better outcomes unless other issues that diminish the effectiveness of the Act to protect the environment are addressed*".

A key reform direction of the Interim Report is the development of new, legally enforceable National Environmental Standards. The Independent Reviewer relevantly stated that "*Interim Standards could be developed immediately, followed by an iterative development process as more sophisticated data becomes accessible" and that "Standards should focus on detailed prescription of outcomes, not process*".

Next steps

The Final Report is due to be completed in October 2020.

The Independent Reviewer has invited feedback to the Interim Report for consideration in the finalisation of the Independent Review.

Planning and Environment Court considered the term "premises" under the Planning Act 2016 and held an easement was in the subject premises

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Scherbakov v Brisbane City Council* [2020] QPEC 29 heard before RS Jones DCJ

July 2020

In brief

The case of *Scherbakov v Brisbane City Council* [2020] QPEC 29 concerned an application by Scherbakov (**Applicant**) seeking declarations from the Planning and Environment Court (**Court**) in relation to a development application for a development permit for a material change of use for a new dwelling house in the traditional building character overlay (**Development Application**) over land located at 49 Daisy Street, the Grange, more properly described as lot 168 on RP19915 (**Subject Land**).

The Applicant relevantly sought the following declarations:

- that the subject premises, for the purpose of the Development Application, excludes an area of land identified as easement A;
- that the Development Application was properly made under the *Planning Act 2016* (**Planning Act**).

The Brisbane City Council (**Council**) opposed the declarations sought by the Applicant.

After considering the nature of land title and easements, the Court held that easement A did constitute part of the subject premises for the purpose of the Development Application and dismissed the application to the Court.

Layout of Subject Land

The Subject Land was formed when the Subject Land and the neighbouring land, more properly described as lot 167 on RP19915 (**Neighbouring Land**), were subdivided in or around the mid 1940s. A large dwelling has been constructed which spans the Subject Land and Neighbouring Land.

Easement A was registered in 2016 to secure and protect the dwelling and only covers the part of the Subject Land which the large dwelling encroaches upon. The Subject Land is the servient tenement and the Neighbouring Land the dominant tenement.

The Development Application seeks to establish a new dwelling on the Subject Land such that the part of the large dwelling encroaching on the Subject Land and the whole of the new dwelling will be situated on the Subject Land.

Easement constitutes part of the premises of the Development Application

The Applicant argued that:

- the proposed use is not a dual occupancy within the definition of the relevant planning scheme;
- the Applicant had provided all the necessary material, including the consent of the relevant owners of the premises;
- on a proper construction of the Planning Act, the premises the subject of the Development Application is limited to the Subject Land excluding easement A; and/or
- the premise should exclude consideration of the encroachment, which is properly a use of the Neighbouring Land and not the Subject Land.

The Court considered that there is no definition of "premises" in the relevant planning scheme, but that the term is relevantly defined in schedule 2 of the Planning Act to be:

> "*land, whether or not a building or other structure is on the land.*"

"Land" is relevantly defined in schedule 2 of the Planning Act as:

> "*an estate in, on, over or under land;*"

The Applicant held the Subject Land in fee simple, being a type of estate in land. The estate in fee simple was relevantly encumbered by easement A.

The Court determined that the fact that the estate in fee simple is encumbered by easement A does not, subject to the terms and conditions of easement A, detract from the fact that the subject premises is the relevant land, being the entirety of the Subject Land including easement A (at [16]).

Further arguments were considered by the Court

The Court went on to consider the further arguments of the Applicant and Council, however, the Court was not required to draw any final conclusions in relation to the further arguments.

When properly characterised, was the Development Application for a "dual occupancy"?

Firstly, the Court considered whether there would be a sharing of common property, which is a requirement in the definition of "dual occupancy" in the relevant planning scheme. Specifically, the Court considered whether the easement itself constituted common property of the Applicant and owner of the Neighbouring Land.

The Court determined that it would be difficult to see how it could be reasonably said that easement A was shared as common property.

Was the consent of the owners of the dominant tenement required?

Secondly, the Court considered whether the consent of the owners of the dominant tenement was required when submitting the Development Application. Consent is not required where a premises is excluded premises, which includes premises that are a servient tenement for an easement if the development is consistent with the easement's terms (see section 51(2)(c) and schedule 2 of the Planning Act).

The terms of easement A relevantly included ensuring that the easement be quietly held and enjoyed by the grantee without interruption or disturbance by the grantor. Further, the grantor is to refrain from using the servient tenement in a manner likely to obstruct or unreasonably hinder the use of the servient tenement.

Although the Court was not required to come to a final decision, the Court considered that the proposed new dwelling would be consistent with the easement's terms as it would not impact on the purpose of the easement, relevantly, to permit the large dwelling house to remain on the Subject Land for its lifetime.

Was the part of the large dwelling encroaching on the Subject Land properly described as a self-contained residence?

Thirdly, the Court's attention was brought to an argument that as only part of the large dwelling house is situated on the Subject Land, the large dwelling may not satisfy the definition of self-contained residence for the purpose of defining a dwelling house. As no evidence was put before the Court, the Court could not make a final determination on this matter.

Conclusion

After determining that the easement formed part of the subject premises for the Development Application for the purpose of the Planning Act, the Court dismissed the application and therefore did not make the declarations sought by the Applicant.

Queensland Court of Appeal construed a development approval in circumstances where "Hotel Suites" were approved under the relevant planning scheme as a motel use

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *13 Investment Company Pty Ltd & Ors v Sunshine Coast Regional Council* [2020] QCA 120 heard before Sofronoff P, Morrison JA and Boddice J

July 2020

In brief

The case of *13 Investment Company Pty Ltd & Ors v Sunshine Coast Regional Council* [2020] QCA 120 concerned an application to the Queensland Court of Appeal for leave to appeal against the judgment of the Planning and Environment Court by the owners of several units within a multiple dwelling (**Applicants**) that those units may not be used for permanent accommodation under the relevant development approval.

A resort on the Sunshine Coast obtained a development approval (**Development Approval**) for the following:

- basement carparks;
- restaurants, function rooms and kitchens on level one;
- 102 one-bedroom units, each with kitchenettes, on levels two to four (**Units**);
- 62 residential units with various layouts on levels five to twelve.

The Development Approval was given by the relevant Council on 17 October 2003 and was for a material change of use for "*a Hotel, Motel, Function Rooms, Restaurant and Multiple Dwelling*".

The Council argued that the use of the Units is restricted to temporary accommodation in accordance with the Development Approval. The Applicants argued that there is no constraint on the use of the Units and that they can therefore be used for permanent occupation.

The Court of Appeal upheld the decision of the Planning and Environment Court and held that the Development Approval was for separate Hotel and Motel uses which operated in conjunction, and that it was the Motel use which regulated the type of accommodation for which the Units may be used in accordance with the relevant definitions of the uses in the applicable planning scheme.

Development Approval inconsistently referred to the Units

The Development Approval referred to the Units in inconsistent terms as follows:

- *Decision notice* – The Units are referred to as "*a Hotel/Motel (102 suites)*" and as a "*proposed Motel*" in the part of the decision notice dealing with parking requirement reallocation.
- *Condition 1 and approved plans* – Condition 1 required the site to be developed in accordance with the approved plans, and the approved plans referred to that part of the building concerning the Units as a "*proposed hotel*" and "*102 KEY HOTEL*".
- *Condition 5* – This condition referred to the use definitions in the relevant planning scheme and relevantly stated that the use of the premises for a "*Hotel, Motel, Function Rooms, Restaurant and Multiple Dwelling*" shall accord with the use definitions in the relevant planning scheme.
- *Other references* –The decision notice also included references to the Units as follows:
  - "*Hotel Suites*" in condition 25 regarding the provision of a Community Titles Management Statement.
  - "*Hotel Rooms*" in the tables of contributions for Headworks.

It is relevant to note that the decision notice referred to a reduction in parking form the 242 spaces required by the relevant planning scheme to 214 spaces "*because of the nature of the use and the international nature of the proposed Motel many of the guests will arrive as part of organised coach tour groups…*".

Planning instruments contained the relevant definitions of the Hotel and Motel uses

The Court of Appeal noted the following relevant definitions in the planning scheme:

- *"Hotel" – "… any premises specified in a General Licence granted under the Liquor Act 1992. The term also includes a Totalisator Administration Board agency when operated as an ancillary use. The term does not include a Shop."*
- *"Motel" – "… premises used or intended for the temporary accommodation of travellers, where such accommodation is provided in serviced guest rooms or suites, each containing its own bathroom. The term includes an ancillary Caretaker's Residence, office and Restaurant."*

The Court of Appeal noted that the Hotel and Motel uses are considered by the relevant planning scheme to be separate uses.

Applicants' arguments

The Applicants made the following three arguments in relation to the allowable use of the Units for permanent accommodation:

- The Units may be used for permanent accommodation as the definition of Hotel does not contain a restriction as to the type of accommodation that might be involved.
- The Motel use could be held in reserve in some way, in the sense that it would only be brought into operation if the Hotel's licence did not provide for permanent accommodation in the Units.
- The conditions attached to the decision notice referred at times to the Units as "*Hotel Suites*" or "*Hotel Rooms*".

Court of Appeal held that Hotel and Motel uses were separate and operated in conjunction

The Court of Appeal held that properly construed the decision notice intended that the Hotel and Motel uses were separate albeit operated in conjunction with each other for the following reasons:

- *Conditions* – Condition 5 states that the relevant uses shall accord with the definitions in the planning scheme, being that the part of the resort to be used as a Motel is on the basis that it was reserved for temporary accommodation. Inconsistent terms such as "*Hotel Suites*" or "*Hotel Rooms*" was not considered to overcome the express reference in Condition 5 that each use must accord at all times with the relevant definitions in the planning scheme.
- *Hotel use* – A hotel use is defined under the relevant planning scheme by reference to premises "*specified in a General Licence granted under the Liquor Act*" (at [27]). A General Licence under the relevant *Liquor Act 1992* is a licence to only sell liquor for consumption off the premises identified in the *Liquor Act 1992*. No evidence was provided that the Units formed part of the premises of the General Licence. It is clear, therefore, that the development application sought two distinct uses, firstly, a Hotel use which comprised the liquor supply facilities on level one and, secondly, a Motel use for the Units.
- *Construction of Development Approval* – If the Development Approval was constructed so that the Motel use was held in reserve in some way, the Motel use would not be given any effective work, or in other words, it would have made the application for the Motel use pointless. The Court of Appeal concluded that the references to "*Hotel/Motel (102 suites)*" was intended to operate such that the Hotel uses on level one and Motel use for the Units operated separately, but in conjunction with each other.
- *Parking requirements* – The Court of Appeal noted that the decision notice states that a reduction in parking is allowed due to the nature of the guests in the Units being temporary, demonstrates an intention that the Units were approved as a Motel use only.
- *Design of building* – The building was designed so that there was a service lift between the facilities on level one and the Units. That the service lift was not designed to extend to the residential accommodation on levels 5 to 12 was considered to support the conclusion that the Hotel use and Motel use were to be operated in conjunction with each other.

Conclusion

The Court of Appeal concluded that the decision of the Planning and Environment Court was correct and that the Development Approval was for separate Hotel and Motel uses which operated in conjunction. The Court of Appeal refused the Applicants' application for leave to appeal.

Land Appeal Court finds that the Council's rating category demonstrated a clear intention to consider all land uses, not merely the predominant use, when determining categorisation for rating purposes

Maria Cantrill | James Nicolson | Ian Wright

This article discusses the decision of the Land Appeal Court of Queensland in the matter of *Western Downs Regional Council v Geldard* [2020] QLAC 1 heard before Boddice J, WA Isdale and PG Stilgoe OAM

July 2020

In brief

The case of *Western Downs Regional Council v Geldard* [2020] QLAC 1 concerned an appeal by the Western Downs Regional Council (**Council**) to the Land Appeal Court of Queensland (**Appeal Court**) in relation to the categorisation of land located at Fairymeadow Road, Miles (**Land**).

The issue before the Appeal Court was whether the Land Court had erred in concluding that the Land ought to be categorised for rating purposes as category 3/16 Rural rather than category 4/31 Petroleum Other.

In allowing the appeal, the Appeal Court relevantly held as follows:

- It is the use of the land, not solely the principal activity of the landowner, that determines categorisation.
- The Council's 2017-18 Revenue Statement (**Revenue Statement**) demonstrated a deliberate departure from the wording of previous rate resolutions which had regard to the primary use of land. The rating categories evidenced an intention to give consideration to all land uses, not merely the predominant use.

Brief background

The Land was freehold land comprising a 839 ha property in Miles, Queensland. The Land was previously used for the extraction of gas and categorised for rating purposes as category 4/31 Petroleum Other (>400 HA).

The Land was subsequently purchased by the respondent who used the Land for grazing and cropping. The previous landowner continued to use the gas wells and associated infrastructure on the Land for gas extraction pursuant to a petroleum lease. The rating category did not change after the respondent became the landowner.

The respondent objected to the categorisation, and successfully appealed to the Land Court which concluded that the Land ought to be categorised for rating purposes as category 3/16 Rural on the basis that the category reflected the principal activity being carried out on the Land by the registered owner.

The Council appealed the Land Court's decision, and submitted that the Land Court erroneously focused only on what the current landowner was using the Land for, rather than what the Land as a whole was being used for.

Conflicting rating categories

The Revenue Statement described category 3/16 Rural as follows (emphasis added):

> *Land used principally for rural purposes, which is not otherwise categorised, and has an area not less than 100 ha.*

The Revenue Statement described category 4/31 Petroleum Other (>400 HA) as follows (emphasis added):

> *Land, other than a Petroleum Lease, with an area 400 ha or greater, which is used or intended to be used, in whole or in part, and whether predominantly or not, for:*
>
> *(a) Gas and/or oil extraction; and/or*
>
> *(b) Processing of gas and/or oil; and/or*
>
> *(c) Transportation of gas and/or oil by pipeline; or*
>
> *(d) For any purpose ancillary to or associated with (a) to (c), including water storage, compressor stations or block valves.*
>
> *This category does not include land in Category 4/38.*

Land ought to be categorised as rating category 4/31 Petroleum Other (>400 HA)

The Appeal Court noted that the Land Court had to "*give a practical, sensible, broad and fair reading to the [Revenue Statement] and ratings categories in the context of the application of orthodox principles of statutory interpretation*" (at [27]).

The Appeal Court held that the Land Court erred in concluding that the Land ought to be categorised as category 3/16 Rural. In particular, the Appeal Court held that the Land Court erred in finding that categorisation of the Land required the Court "*to contemplate, given the rates are to be paid by the landowner, which is the "principal" activity carried on by that registered owner*" (at [30]).

In reaching that conclusion the Appeal Court relevantly held as follows:

- Rates are a tax on land, not on the landowner (at [29]).
- It is the use of the land, not solely the principal activity of the landowner, that determines categorisation (at [32]).
- A determination of the rating category required consideration of the words adopted by the Council (at [28]).
- The wording of category 4/31 Petroleum Other did not require land to be used exclusively, wholly or predominantly for gas extraction, which demonstrated a deliberate departure from the wording of previous rate resolutions which had regard to the primary use of land, and therefore evidenced an intention to give consideration to all uses of the land not merely its predominant use (at [33]-[34]).
- The wording of category 3/16 Rural expressly provided that the Land could not fall within that category if it is "*otherwise categorised*" (at [38]).

Conclusion

The Appeal Court allowed the appeal on the basis that the Land Court had made an error of law in construing the relevant rating categories in the Council's Revenue Statement.

The Appeal Court found that the Council's Revenue Statement devised a structure whereby "*[f]reehold land holdings above a certain size, which had a use or intended use of gas extraction or associated activities, although not its whole or predominant use, are subject to [a] specific categorisation*" (at [44]).

Accordingly, the Appeal Court held that, properly construed, the Land fell within category 4/31 Petroleum Other (>400 HA).

Application to revive a lapsed development permit dismissed as the Court lacked jurisdiction to make a declaration on the terms sought and the evidence was inadmissible or unconvincing

Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Monaco Street Pty Ltd v Ipswich City Council* [2020] QPEC 21 heard before Kefford DCJ

July 2020

In brief

The case of *Monaco Street Pty Ltd v Ipswich City Council* [2020] QPEC 21 concerned an application in pending proceeding to the Planning and Environment Court (**Court**) seeking relief intended to re-enliven a lapsed development permit for reconfiguring a lot at Riverview.

The applicant sought to have the currency period for the development permit extended to 19 March 2022. The Council did not resist the relief sought.

The Court had "*serious misgivings*" about the form of the relief sought by the applicant, and the reliability of the applicant's evidence, and refused to grant the relief sought.

Court restated the matters which an applicant ought to assist the Court with where seeking to invoke the Court's declaratory jurisdiction

The Court stated that it expects a party to assist the Court in the following three ways when seeking to invoke the Court's declaratory jurisdiction:

- Firstly, the party is to identify the jurisdictional source of the grant of the declaration, and persuade the Court that the declaration falls within the source.
- Secondly, the party is to precisely identify the declaration sought and persuade the Court that it ought to be made and is of utility.
- Thirdly, the party is to demonstrate that the Court ought to make the declaration sought taking into account any other relevant matters.

Court held that it did not have jurisdiction to grant the declaration that the development permit had lapsed in the terms sought

The first form of relief sought by the applicant was a declaration that the development permit had "*lapsed under section 85(1)(b)(i) of the Planning Act 2016 (Qld) on 19 March 2018*". The applicant submitted that the Court had the jurisdiction to grant the relief under section 11(1)(a) of the *Planning and Environment Court Act 2016* (**PEC Act**), which states that a party may start a proceeding in the Court seeking a declaration about "*a matter done, to be done or that should be done for this Act or the Planning Act*". The Applicant submitted that the declaration was in respect of a "*matter done*". The Court did not agree and held that it was a declaration about the legal status of a development approval.

The Court went on to consider the appropriateness of granting the declaration, if it was persuaded that it was appropriate to do so. It held that it was not appropriate for two reasons. Firstly, the Court was not convinced that the applicant was an entity directly affected by the relief sought. The applicant asserted it was the mortgagee in possession of the land. However, the Court was not satisfied that this fact was established on the evidence before it. Secondly, the Court was not convinced that the declaration would have utility in correcting the Court record in circumstances where, as submitted by the applicant, a previous Court judgment had purported to make a change to a development approval which did not exist at the time.

The Court held that, if that was the case, the granting of the declaration would result in two judgments of the Court that would be mutually inconsistent and, to correct the error, an application ought to be made under rule 667 or rule 668 of the *Uniform Civil Procedure Rules 1999*.

Court held that the applicant had not identified any relevant non-compliance under section 37 of the PEC Act and there was therefore no discretion to be exercised

The second form of relief sought by the applicant was an order under section 37 of the PEC Act that the lapse of the development permit be excused, and a consequential order that the development permit be revived under section 11(4) of the PEC Act.

The applicant argued that the following ten grounds justified the exercise of the Court's discretion to grant the relief sought:

- The applicant, the Council and the Court did not intend for the development permit to lapse prior to 19 March 2020.
- The Council supported the relief sought.
- The Department of State Development Manufacturing, Infrastructure and Planning had no objection to the relief sought.
- The applicant had not unjustifiably delayed seeking the relief sought.
- The development permit was consistent with, and encouraged by, the current planning for the land.
- The land is benefited by two related development permits.
- The proposed development was in line with community expectations for the land.
- The applicant would suffer undue delay and expense if the relief sought was not granted and a new development application was required.
- The Council had purported to approve the extension application.
- There was no public interest in refusing the relief sought.

The Court was not persuaded that the evidence supported these ten grounds and was not persuaded that it ought to excuse the lapse and order the revival of the development permit.

Court held that the evidence did not support matters relevant to an order that the relevant condition be changed so that the lapsing date is extended

The third form of relief sought by the applicant was an order under section 81A(2)(a) of the *Planning Act 2016* that the relevant condition of the development permit be changed so that the lapsing date is deleted and replaced with a reference to 19 March 2022.

The Court repeated its earlier stated concerns about the state of the evidence. The Court found that the evidence did not establish that the applicant was the mortgagee in possession, that the development application was properly made or that the correct extracts of the planning scheme had been exhibited to an affidavit. The cumulative relevance of these matters was that the Court was not satisfied that the applicant had adduced admissible evidence as to the relevant zoning at the time the acknowledgement notice was given and therefore the applicable planning scheme provisions at that time and whether they had since changed, such matters being relevant to the applicant's submission that the planning controls had not changed in any material way.

A representative for the applicant stated that the applicant did not intend to act on the development permit and intended to sell the land, which also weighed on the mind of the Court.

The Court also did not accept that the concerns raised by submitters in respect of the development application had been resolved by the passage of time since the development application was properly made, and this was another factor which weighed in favour of not granting the extension. The Court focused on the nature of the submissions, being about traffic impacts, and found that there was no evidence demonstrating safe and efficient operation of the local road network.

Lastly, the Court found that there was no evidence that the original residents are still there today and therefore did not accept the applicant's submission that no town planning purpose would be served by requiring the development application to be made again, and for the statutory assessment and decision-making process to be repeated.

Conclusion

The Court therefore held that the Court did not have jurisdiction to make a declaration that the development permit had lapsed, the evidence did not support the appellant's grounds as to why the Court ought to exercise its discretion to excuse the lapse and revive the development permit, and similarly that the evidence did not support the appellant's grounds as to why the relevant condition ought to be changed so that the lapsing date is 19 March 2022. The Court therefore dismissed the application.

Same, same but different: a proposal to change the description of a use by adding words narrowing the future occupiers held to constitute a proposal for a different use

Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Rochedale Piazza Pty Ltd v Brisbane City Council & Ors* [2020] QPEC 30 heard before RS Jones DCJ

July 2020

In brief

The case of *Rochedale Piazza Pty Ltd v Brisbane City Council & Ors* [2020] QPEC 30 concerned an application in pending proceeding to the Planning and Environment Court (**Court**) for a minor change to a development application for a development permit for a material change of use for what was described in the development application as a relocatable home park, at Rochedale.

The Council refused the development application and the applicant commenced an appeal in the Court against the refusal. The applicant then sought to make a change to the development application.

The applicant described the proposed development in the development application as being a material change of use for a relocatable home park being a defined use under the *City Plan 2014* (**City Plan**). The supporting material lodged with the development application described the proposed development with more particularity; being for a "*retirement and residential care facility*"; being for the provision of "*additional housing options for older persons within the catchment*" and to be carried out and operated by TriCare, which was stated to be "*recognised as industry leaders in the delivery of best practice retirement living and residential aged care housing options*" (see paragraph [6]).

The applicant sought to change the description to being for a material change of use for a relocatable home park (for seniors and retirees), and argued that the change was a minor change under the *Planning Act 2016* (**Planning Act**).

The change sought was unusual given that most minor change applications involve a physical change to the proposed development, whereas what was sought was a change to the description of the proposed development.

The Court considered the introduction of the words "*for seniors and retirees*", and found that such a change was not a "*benign change*" (see paragraph [38]), did not constitute a "*minor change*" under the Planning Act, and dismissed the application.

Applicant argued that the purpose of the change was for certainty and clarity

The Applicant argued that the purpose of the change was to "*provide certainty at an early stage of the appeal*" and that "*[i]t has the advantage of ensuring clarity in relation to the identification of issues; for the conduct of joint expert reports; and ultimately for the Court's determination of the appeal*" (see paragraph [17]).

The Applicant also argued that "*the change does no more than confirm something that was apparent from a proper objective, reading of the Development Application itself*" (see paragraph [18]).

Council argued that the purpose of the change was to change the use

The Council argued that the change was not for a change to the description of the proposed development. The Council argued that instead the change was for a change to the use for which the development permit was sought, the relevance being that the narrowing of the intended occupants contemplates a use as a retirement facility which is a defined use under the City Plan. The Retirement and Residential Care Facility Code commenced after the development application was made but before the decision notice was issued by the Council, and was not an assessment benchmark for the development application.

Court categorised the change as being for a change to the use

The Court accepted the Council's argument that what was being sought was a change to the use for which the development permit was sought, such that it could no longer be reasonably described as a relocatable home park. The Court was therefore satisfied that the change would result in a substantially different development, and was not a minor change.

The Court did not make a finding in respect of the proper categorisation of the proposed changed use, and stated that it was for either a retirement facility or for a retirement community relocatable home park, being the description suggested by the applicant's town planning expert. Whatever the categorisation, the Court found that the Retirement and Residential Care Facility Code ought to have played a role in the decision-making process by the Council, and it did not as the development application was described as being for a relocatable home park with no express limitation on the demographic of its occupiers.

The Court also considered the applicant's argument that the purpose of the change was to provide certainty and clarity. The Court held that the intended use was obvious from the development application. The Court adopted some of the language of the applicant's town planning expert, being that "*it is unnecessary to make any more explicit something that was otherwise clearly implicit from a reading of the Development Application and supporting material*".

Conclusion

In conclusion, the Court stated that "*[i]n circumstances where there is no need to make the change sought, to achieve the purpose identified by the applicant, the change ought not to be made*" (see paragraph [41]). The Court therefore dismissed the application for the minor change.

Concerns of submitters weigh on the mind of the Court in determining whether a change is a minor change

Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Tokyo 2 Pty Ltd v Brisbane City Council* [2020] QPEC 23 heard before Everson DCJ

July 2020

In brief

The case of *Tokyo 2 Pty Ltd v Brisbane City Council* [2020] QPEC 23 concerned an application in pending proceeding to the Planning and Environment Court (**Court**) for a minor change to a development permit for a material change of use for multiple dwellings (17 multiple dwellings) and for reconfiguring a lot (4 lots into 6 lots) at Indooroopilly.

The Court allowed part of the minor change application, but refused the part of the minor change application which related to changes to the environmental protection zone, which was relevant to the submissions and submitters in respect of the earlier appeal.

Court took into account the submissions in respect of the development application and the submitters in the appeal

The development application for the proposed development was the subject of an appeal to the Court. The Court stated that there had been a "*significant number of submissions and submitters*" actively involved in the appeal, whose attention was focused on landscaping and vegetation issues (see paragraph [5]). The Court ultimately issued the development permit for the proposed development.

The applicant sought to make a minor change to the development permit, and whilst the submitters had no active role in the minor change application, the Court held that their concerns and interests ought to be taken into account by the Court in exercising its discretion in determining whether the application for the minor change ought to be approved.

Court found that the proposed changes to the environmental protection zone would have an impact on adjoining owners

Of particular concern to the Court was the proposed change to the environmental protection zone, which would result in the possible removal of two previously protected trees and the expansion of the future building areas. The Court held that these changes would result in a very different outcome, both environmentally and aesthetically, for adjoining owners. The Court held that "*[g]iven the legitimate aesthetic and ecological concerns of nearby residents, the proposed changes in this regard will result in a materially and importantly different development*", and were therefore not minor changes (see paragraph [13]).

Conclusion

The Court therefore held that the changes, other than the changes to reduce the environmental protection zone, constitute a minor change under the *Planning Act 2016*.

No unlawful fetter of Council's discretion and obiter comments on whether a development consent was effective after Class 1 application dismissed

Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Supreme Court in the matter of *Central Coast Council v Pastoral Investment Land & Loan Pty Ltd* [2020] NSWSC 777 heard before Darke J

August 2020

In brief

Justice Darke's decision in *Central Coast Council v Pastoral Investment Land & Loan Pty Ltd* [2020] NSWSC 777 considers two unique and distinct areas of planning and local government law.

Firstly, the Court considered whether by entering into a Deed of Agreement the Council had unlawfully fettered its discretion to determine a development application agreed to be made by the other party to the agreement. This decision is unique because the common form of agreements entered into by Councils and developers relating to development since section 7.4 was introduced to the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) is through voluntary planning agreements.

Secondly, Darke J's obiter comments about the application of section 8.13 of the EP&A Act. Section 8.13(1) of the EP&A Act provides that a development consent the subject of a Class 1 appeal in the Land and Environment Court of NSW ceases to have effect. There was a dispute between the parties as to whether or not the development consent, which was the subject of a dismissed Class 1 appeal in the Land and Environment Court of NSW, was revived, or whether it remained in the state of suspension given that decision was being appealed.

Whilst Darke J did not express a concluded view, His Honour's view broadens the application of section 8.13(2) of the EP&A Act which provides that a consent is revived on the discontinuation of the appeal. That subsection does not expressly state what is to occur when an appeal is dismissed. This case contains comments suggesting that a development consent that is the subject of an appeal under the EP&A Act, is not only revived where a matter has been discontinued. There are now arguments for the revival of a consent on the dismissal of a matter.

This article summarises the facts of the case and then analyses the findings and comments of Darke J.

Facts of Central Coast Council v Pastoral Investment Land & Loan Pty Ltd

Central Coast Council (**Council**) commenced proceedings in the Supreme Court of NSW against the registered owner (**PILL**) of parcels of land totalling more than 24 hectares in Warnervale.

The parties had entered into a Deed of Agreement on or before 8 March 2007 in relation to the land, which provided that the parties would each do certain things, including:

- Council would use its best endeavours to obtain a certain re-zoning of the land.
- PILL would lodge a development application to subdivide the land in an agreed manner if the land was rezoned.
- If the development application was approved and the plan of subdivision registered, PILL would transfer a lot containing land of high environmental conservation value to the Council for $1.00.

The rezoning of the land as intended by the Deed of Agreement was effected in November 2008.

However, it was not until 2015 that PILL provided a draft plan of subdivision to the Council.

After discussions with the Council a development application was then lodged in 2017 for "*Subdivision (Boundary Adjustment) and Clearing of Vegetation ancillary to subdivision*". The Council opposed the component of the application relating to vegetation clearing and issued development consent in August 2018 for "*Boundary Realignment (Subdivision) only. Partial consent excludes proposed native vegetation clearing, land use and all other works*".

Condition 1.02 made it abundantly clear that no clearing of native vegetation was permitted under the consent.

Consequently, PILL commenced Class 1 proceedings in the Land and Environment Court of NSW appealing the determination of the development application. In those proceedings, PILL sought that the consent be modified to permit the clearing of the land.

After the Class 1 Land and Environment Court proceedings were commenced by PILL against the Council, the Council commenced Supreme Court proceedings against PILL. The Council argued that because PILL had failed to advance the subdivision, it had breached an implied term of the Deed of Agreement obliging it to cooperate with the Council with respect to the subdivision. The Council sought orders for specific performance.

PILL denied it was in breach of the Deed of Agreement, and by way of cross claim contended that the Deed of Agreement was entered into unlawfully by Council and comprised an unlawful fetter on Council's ability to exercise future statutory powers, amongst other things.

Important to the second matter we discuss in this article, at the time of the Supreme Court hearing, the Class 1 Land and Environment Court matter had progressed to the point whereby a Senior Commissioner of the Court had dismissed PILL's application and PILL had appealed that determination to a Judge of the Court. The appeal had not yet been heard and so there was a question over whether the development consent issued had effect.

We have summarised the questions addressed by the Court below.

Was the Deed of Agreement entered into by the Council ultra vires or unlawful?

Darke J considered the powers of the Council and the history of how the Deed of Agreement was executed.

The Court found that at the time the Deed of Agreement was entered into, the Council was a body corporate and had the power to do what was necessary for or incidental to the exercise of its functions. The Council had the power to acquire land by agreement for the purpose of exercising any of its functions (section 186(1) and section 187 of the *Local Government Act 1993* (NSW)). Further, a resolution passed by the Council on 28 June 2006 authorised Council's entry into the Deed of Agreement.

Does the Deed of Agreement constitute an unlawful fetter upon the future exercise of the Council's statutory powers?

In these proceedings, PILL relied on the well-known fettering of power doctrine set out in *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54:

> *There is a general principle of law that a public authority cannot preclude itself from exercising important discretionary powers or performing public duties by incompatible contractual or other undertakings.*

PILL argued in its cross claim that by entering into the Deed of Agreement, the Council had impliedly agreed to grant development consent to PILL. Council would not obtain the benefit of receiving the conservation lands if the development consent was not issued.

In response, the Council argued that the Deed of Agreement preserved the Council's discretionary powers. The Deed of Agreement required the Council to carry out its assessment of any development application "*in accordance with applicable legislation, including principally the [EP&A] Act, and may determine such an application in its sole discretion*". Another clause stated "*Insofar as any provision of this Deed constitutes an unlawful fetter on Council in its capacity as statutory authority required to exercise its statutory discretions, the provision is not binding and is subject to clause 10*". Clause 10 related to severability.

The Court was unable to detect an obligation or even an implied obligation on the Council to grant development consent from the provisions in the Deed of Agreement. The Council did not bind itself such that it was required to grant development consent.

In making these findings, the Court distinguished the case from numerous other cases where the fettering of power doctrine had been applied (at [49]).

Should orders be made for specific performance of the Deed of Agreement?

Having found that the Deed of Agreement was valid and enforceable, the Court considered whether orders for specific performance should be made.

The Council contended that PILL was in breach of the Deed of Agreement because it failed to lodge an application for a subdivision certificate as contemplated by the development consent. It was asserted that PILL was in breach of an implied term of the Deed of Agreement obliging it to cooperate with the Council. Orders of specific performance were sought to compel PILL to progress the subdivision.

In response, PILL asserted that it was entitled to challenge the conditions of development consent issued by the Council (which had the effect of delaying the subdivision contemplated by the Deed of Agreement). Implying such a term sought by the Council would be inconsistent with the exercise of that right.

Whilst the Court found that there was an implied term within the Deed of Agreement that each party was to do "*all that was reasonably necessary to be done on its part to facilitate the release by the Council of the signed plan of subdivision*", the Court also accepted that PILL was not prevented from challenging the development consent issued by the Council (at [59-60]). It was only after the appeal rights were exhausted that the Court said the process culminating in the release of a subdivision certificate and the requirement for the parties to comply with the implied term was to take place.

Obiter comments on section 8.13 of the EP&A Act

Having found the above, it was not necessary for the Court to deal with other issues in the case. However, Darke J took the opportunity to provide some commentary about the issue between the parties as to whether the development consent had effect (ie had been revived) given that the Class 1 challenge had been dismissed in the Land and Environment Court (notwithstanding the appeal to the Judge under section 56A of the *Land and Environment Court Act 1979* (NSW)).

Section 8.13 of the EP&A Act provides:

> *(1) If the granting of a development consent for development (other than State significant development) is the* ***subject of an appeal made under this Division, the development consent ceases to have effect****.*
>
> *(2) If an appeal under this Division is* ***discontinued****, the consent is* ***revived*** *on the discontinuation of the appeal.* (emphasis added)

The Council's position was that the development consent did have effect, whereas PILL asserted the dismissal of the Class 1 application did not revive the consent which would have occurred if the appeal was discontinued.

In providing its comments about the application of section 8.13 of the EP&A Act, the Court at [69] referred to the well-known authority for statutory construction in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [84] that:

> *…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 correspondence [sic] 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 cannons 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.*

The competing interpretations identified by the Court at [78] were whether the reference in section 8.13(2) of the EP&A Act to the revival of a consent on the "discontinuation" of an appeal should be taken to:

- be the only circumstance in which a development consent is revived such that the consent becomes effective again; or
- reflect an aspect of the existing state of the law, as opposed to the only circumstance.

The Court did not provide a ruling on the meaning of section 8.13(2) of the EP&A Act noting the matter was "*finely balanced*". However, the Court expressed a preference (in obiter dicta) that section 8.13(2) of the EP&A Act not be interpreted as providing the only circumstance in which a development consent that ceased to have effect under section 8.13(1), may be revived.

The brief reasoning behind the preferred (albeit non-binding) view was that if the discontinuation of an appeal was the only circumstance that would revive a development consent, a gap would be created. That is, appeals that are dismissed by the Court, for example for failure to prosecute the appeal with due despatch or failure to provide security for costs, could and would not be revived and would not be effective again. The Court opined that would seem to be an "*anomalous outcome*" (at [79]).

Lessons for developers and councils

The case serves as a useful reminder of the fettering of power doctrine and provides an example of its application in an unusual set of circumstances.

As we stated at the outset, voluntary planning agreements are the most common form of agreement entered into between councils and developers. Whilst planning agreement provisions were introduced in the EP&A Act in 2005, the Council and PILL chose to avoid that mechanism and entered into the Deed of Agreement in 2007. The reasons for this decision are not given in the judgment, but the parties went to the extent of clarifying in the Deed of Agreement "*This Deed is not a Planning Agreement as defined under the Act*".

Even though the parties chose not to create a planning agreement and subject themselves to the statutory provisions governing them, and instead entered into a Deed of Agreement, that agreement still contained a "no fetter" clause. In addition to the "no fetter" clause, the Deed of Agreement made it clear that it was possible development consent might not be granted because the agreement stated:

> *If development consent for subdivision to excise the conservation residue (Lot 1) and the proposed industrial area (Lot 2) is granted by Council…*

Later in the Deed of Agreement, further clarification is provided that:

> *Council is required to carry out its assessment of any development application lodged by or on behalf of the Landowner in accordance with applicable legislation, including principally the Act, and may determine such an application in its sole discretion.*

The Deed of Agreement did not fetter the Council's ability to determine any development application as asserted by PILL. Contrary to PILL's case, the Court found that the Council had not impliedly agreed to grant the subdivision development consent by entering into the Deed of Agreement.

The matter serves as a useful reminder for councils and developers regarding risks where it might be perceived the Council's discretions are being fettered. To avoid costly arguments, it is important the drafting of the entire agreement complies with the fettering of power doctrine.

The Court's obiter comments also provide support to applying a broader interpretation of section 8.13(2) of the EP&A Act relating to when development consents are revived, which could prove to be helpful for both councils and holders of development consents alike, depending on the circumstances.

However, the Court's obiter comments were somewhat confined because it did not comment on whether the appeal under section 56A of the Land and Environment Court Act that had been filed following the dismissal of the Class 1 application would have otherwise kept the development consent in a state of suspension preventing it from being revived.

With no judicial finding with respect to the interpretation of section 8.13 of the EP&A Act, councils and holders of development consents involved with dismissed Class 1 appeals need to be aware of the competing interpretations of the section, which has implications for whether the consent can be lawfully relied upon.

Public interest embodied in the Planning Scheme is relevant to a consideration of whether a sufficient ground is sufficient

Maria Cantrill | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Redland City Council v King of Gifts (Qld) Pty Ltd and HTC Consulting Pty Ltd & Anor* [2020] QCA 41 heard before Fraser, Philippides and McMurdo JJA

August 2020

In brief

The case of *Redland City Council v King of Gifts (Qld) Pty Ltd and HTC Consulting Pty Ltd & Anor* [2020] QCA 41 concerned an application for leave to appeal and an appeal to the Queensland Court of Appeal against a decision of the Planning and Environment Court (**P&E Court**). The development application the subject of the appeal concerned a material change of use for a service station (including an associated shop and car wash facility), a drive through restaurant and an onsite effluent disposal irrigation area.

King of Gifts (Qld) Pty Ltd and HTC Consulting Pty Ltd (**First Respondents**) successfully appealed to the P&E Court against the Redland City Council's (**Council**) decision to refuse the impact assessable development application. The development application had been made under the *Sustainable Planning Act 2009* (Qld) (**SPA**). The development application was refused on the basis that the proposed development materially conflicted with the Redlands Planning Scheme (**Planning Scheme**), and there were otherwise no sufficient grounds justifying approval.

The Court of Appeal held as follows:

- The application for leave to appeal was granted.
- The P&E Court did not err in its construction and application of the ecological provisions in the Planning Scheme.
- There was no error in the P&E Court's approach to the assessment of economic need. However, to the extent that economic need constituted a "*sufficient ground*", the primary judge failed to consider whether the need for the development was a matter of such public interest that it overrode the public interest embodied in the Planning Scheme.

Proposed development

The proposed development is to be located on the northeast corner of the roundabout intersection of Redland Bay, Boundary, Duncan and Taylor Roads in Alexandra Hills. The issues on appeal related to the southern part of the site, which was located in the Environmental Protection Zone (**EP Zone**) and the Kinross Road Structure Plan (**KRSP**) Overlay.

The built form of the proposed development is to be located on the southern part of the site and is for a combined service station, store and drive through restaurant. The proposed hours of operation are 24 hours a day, seven days a week.

Application for leave to appeal

Section 63 of the *Planning and Environment Court Act 2016* (Qld) provides that an appeal against a decision of the P&E Court may only be brought with the leave of the Court of Appeal and on the ground of error or mistake in law, or jurisdictional error. An application for leave to appeal must be brought within 30 business days of the appealable decision.

The First Respondents asserted that the Council's application for leave to appeal filed on 30 July 2018 was filed out of time. The First Respondents relied on Reasons given by the P&E Court on 6 November 2017 to the effect that the First Respondents had satisfied the onus with respect to the appeal. An Order was also made on that date which provided that the appeal would be adjourned "*for further hearing to allow for the formulation of reasonable and relevant conditions*".

A final Order was subsequently made by the P&E Court on 18 June 2018 allowing the appeal and providing that the development application was to be approved subject to the conditions attached to that Order.

The Court of Appeal ultimately granted the application for leave to appeal. However, the reasons for granting leave differed slightly between the judgments of Philippides JA, and Fraser and McMurdo JJA. The central difference related to their Honours' conclusion as to whether the Order made on 6 November 2017 was appealable to the extent of the substantive dispute between the parties. In the judgment of Philippides JA, Her Honour referred (at [28]) to a useful extract from *Clisdell v Commissioner for Police* (1993) 31 NSWLR 555 (at 558):

> *An appeal from a decision of a court is from an order or other judicial act which affects adversely the rights claimed by the appellant party. It is not an appeal from a pronouncement by the court of an opinion upon a question of law … It is directed to modifying or reversing the action of the court appealed from.*

Fraser and McMurdo JJA concluded in separate judgments that the judgment in November 2017 was adverse to the rights claimed by the Council, who had instead sought an order dismissing the appeal. Their Honours' concluded that the decision on 6 November 2017, could have been appealed on the same grounds as contained in the notice of appeal against the orders made in June 2018.

In contrast, Philippides JA concluded that the "findings, reasons and conclusions" delivered on 6 November 2017 were not an appealable decision, except to the extent that they supported an order for adjournment. Her Honour referred (at [28]) to the decision in *Maroochy Shire Council v Barns* [2001] QCA 273, where Thomas JA stated that "*the only order that has been made is an order for adjournment … the appeal is premature*".

P&E Court did not misconstrue or misapply the ecological provisions in the Redlands Planning Scheme

The Council asserted that the P&E Court erred in law by misconstruing and misapplying the relevant ecological provisions of the EP Zone Code and the KRSP Overlay Code in the Planning Scheme, and that this error materially affected the judgment.

Of particular relevance was the Council's assertion that the P&E Court incorrectly construed specific outcome S1.1(1) of the EP Zone Code. Specific outcome S1.1(1) relevantly states that "*Uses and other development maintain, enhance and protect environment values by…*", and then lists eight subparagraphs which it is said the development must comply with. In contrast to the P&E Court's decision, the Council asserted that the interpretation provisions of the Planning Scheme required that all subparagraphs had to be complied with. The Court of Appeal agreed with that assertion.

However, the Court of Appeal noted (at [144]) that "*the purpose of the prescribed Specific Outcomes was to contribute to the achievement of the Overall Outcomes*". The Court of Appeal held that although the specific outcomes contribute to the achievement of the overall outcomes, they are not essential conditions of that result. In relation to the proposed development, the Court of Appeal concluded that, on the findings of the P&E Court, the overall outcomes would be achieved, and the error was therefore moot.

P&E Court erred at law in failing to consider whether the need for the development overrode the public interest embodied in the Redlands Planning Scheme

The Council asserted that the P&E Court's application of section 326(1) of the SPA was inconsistent with the decision in *Bell v Brisbane City Council* [2018] QCA 84, which was given after the decision of the P&E Court in this case. In Bell, the Court stated as follows:

> *Section 326(1)(b) will be engaged only where there is a tension between the application of … a planning scheme, and the public interest. If that tension exists, it will be for the decision maker to consider whether there are sufficient grounds, in the public interest, to depart from the instrument. Necessarily, cases where that tension exists will be exceptional, because a planning scheme must be accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land.*

Section 326(1) of the SPA relevantly provided as follows:

> *The assessment manager's decision must not conflict with a [planning scheme] unless-*
>
> *(a) …*
>
> *(b) there are sufficient grounds to justify the decision, despite the conflict …*

The term "grounds" is defined to mean "*matters of public interest*".

The P&E Court concluded in this case that there was a "*need*" for the development, despite clear conflicts with the Planning Scheme. The Court of Appeal noted that the question of "*need*" was considered in the context of whether there were sufficient grounds to permit the development, pursuant to section 326(1) of the SPA.

The Court of Appeal concluded that although there was no error in the P&E Court's conclusion that there was a "*need*" for the proposed development, it did not follow from those findings that there was a ground for approving the development despite the inconsistencies with the Planning Scheme. In that regard, the Court of Appeal held as follows (at [169]):

> *… What had to be established was not just that there was a need for such a development in the area, but that there was a need for the development in a location where the planning scheme provided that it should not occur. It had to be shown that, in the public interest, it was necessary to override the scheme as it applied to this land.*

Conclusion

The Court of Appeal concluded that the appeal ought to be allowed on the basis that the P&E Court failed to consider whether there was a need for the proposed development, such that the public interest would not be served by requiring that the land be developed according to the Planning Scheme.

Proposed offset insufficient to overcome conflict with the assessment benchmarks

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Kenlynn Pty Ltd v Noosa Shire Council* [2019] QPEC 65 heard before Rackemann DCJ

August 2020

In brief

The case of *Kenlynn Pty Ltd v Noosa Shire Council* [2019] QPEC 65 concerned an appeal to the Planning and Environment Court (**Court**) against the Noosa Shire Council's decision to refuse the applicant's application for a development permit to reconfigure a lot located at Castaways Beach into five lots (**Proposed ROL**).

Under section 46(2) of *Planning and Environment Court Act 2016* (**PECA**), the Court was required to carry out an assessment of the Proposed ROL in accordance with section 45 of the *Planning Act 2016* (**Planning Act**). As the development application was code assessable, the assessment of the Proposed ROL was limited to the relevant assessment benchmarks in the Council's superseded *Noosa Plan 2006* (**Planning Scheme**), and any matters prescribed by the *Planning Regulation 2017*.

The issues to be determined by the Court were the following:

- Whether the Proposed ROL conflicted with a relevant assessment benchmark.
- If the Proposed ROL conflicted with a relevant assessment benchmark, whether compliance could be achieved by the imposition of a condition, including a condition in relation to a proposed offset or financial contribution.

The Court held that the Proposed ROL, although compliant with a majority of the relevant assessment benchmarks, did not comply with many of the specific and overall outcomes of the Biodiversity Code in the Planning Scheme because the Proposed ROL would result in the clearing of vegetation with vital ecological value greater than that envisaged by the code.

The Court did not consider that a proposed offset, including the replacement or maintenance of vegetation on adjacent land that was already protected and had ecological value, to be an adequate offset or to be a relevant matter in support of approving the Proposed ROL.

The Court found that the non-compliance with the Biodiversity Code was not able to be remedied by the imposition of development conditions, and was unwilling to condition the applicant's proposed offset or financial contribution, and therefore dismissed the appeal.

Proposed ROL of the Subject Land

The land the subject of the Proposed ROL (**Subject Land**) is 9,677m^2 and heavily vegetated with native and weed species, making it a bushfire prone area, except for approximately 2,000m^2. The Subject Land adjoins vegetated conservation land owned by the Council.

The following two prior approvals over the Subject Land were relevant to the appeal:

- *Duplex Approval* – A town planning consent granted in 1993, which included conditions in relation to landscaping and the retaining of certain trees, unless certain circumstances existed.
- *2016 Approval* – A development approval granted by the Council in late-2016 which had not been exercised for reconfiguring the Subject Land into two lots that included a vegetation protection covenant and the provision for the further clearing of approximately 2,000m^2 of the Subject Land.

The Proposed ROL involved the reconfiguring of the Subject Land into five lots of sizes varying between 1,062m^2 and 3,897m^2, with each of the five lots to include a building location envelope of approximately 500m^2 to 600m^2, and an environmental covenant area that was proposed to be subject to weed control, supplementary planting and maintenance. The access to the new five lots was proposed to be by way of a new driveway with easements to be registered over each lot.

The Proposed ROL would require additional clearing in the nearby road reserve in order to provide an appropriate sightline for the newly created access, which the Council did not agree to as the relevant road authority.

Applicant's proposed offset and financial contribution

The applicant submitted that the Proposed ROL could be conditioned to provide an offset on the adjoining conservation land, involving weed control, supplementary planting and maintenance for a period of at least three years (**Proposed Offset**). In the alternative, the applicant submitted that it would be prepared to pay a financial contribution to the Council or a combination of both.

The Council was opposed to the applicant's Proposed Offset and financial contribution.

Court's assessment of the Proposed ROL against the Planning Scheme

The Subject Land is in the Detached Housing Zone of the Eastern Beaches Locality under the Planning Scheme.

The relevant assessment benchmarks in the Planning Scheme relate to access to the Subject Land, impact on amenity and character, and clearing and earthworks.

Relevantly, the Planning Scheme states that an overlay prevails over other components of the Planning Scheme to the extent of any inconsistency, and that where code assessable development complies with the overall outcomes of a code, the development was taken to comply with that code.

Proposed ROL complied with certain codes

The Court held that the Proposed ROL complied with the following codes by meeting the stated overall outcomes:

- *Natural Hazards Overlay Code*, in relation to bushfire risk, as the Court found that access to the bushfire prone area on the Subject Land did not need to be by a fire-fighting appliance, where adequate access for fire-fighting appliances was provided elsewhere on the Subject Land.
- *Driveways and Carparking Code, Transport Roads and Drainage Code, and Reconfiguring a Lot Code*, in relation to access sightlines and the grade of the access, as the Court found that the question to be asked was whether the proposal warranted approval, or could be approved with conditions about, for example, advisory speed signs, and not whether there was a better access and traffic arrangement proposal available.
- *Eastern Beaches Locality Code*, in relation to character and amenity, as the Court found that the requirement in the Planning Scheme to have "*vegetated character*" or afford "*vegetated views*" did not mean that there was to be no development or that development was to be invisible, and in any event, the vegetation which provided substantive screening from the development on the Subject Land was proposed to be maintained.

Proposed ROL did not comply with the Biodiversity Code

The Council argued that the Proposed ROL would result in an unacceptable clearing of vegetation and earthworks, contrary to the Biodiversity Code.

Although the Court accepted that the existence of weeds on the Subject Land reduced the ecological value of the native vegetation on the Subject Land, it held that the forest communities provided a diversity of species of vegetation and resources for different fauna, and that the vegetation was contiguous with surrounding vegetation and at the junction of two habitat corridors.

The Court rejected the applicant's argument that the vegetation, which would remain on the Subject Land and that which was located in the broader locality, justified the destruction of the vegetation on the Subject Land and in the road reserve.

The Court notedly rejected a similar submission in *Rainbow Shores Pty Ltd v Gympie Regional Council & Ors* [2013] QPEC 26, where it stated (at [305]):

> *The destruction of habitat on the subject site is not, in my view, justified by pointing to habitat elsewhere which will provide for the survival of the species. The planning documents do not suggest that vegetation on the subject site is expendable having regard to what exists in the broader area…*

The Court held that the Proposed ROL did not respect the ecological values of the Subject Land, was a more significant proposal than the 2016 Approval, and that the clearing of the Subject Land would amount to more than that required for adequate bushfire protection.

Court did not entertain the Proposed Offset or financial contribution

The Council is the trustee of the land the subject of the Proposed Offset, and the road authority for the road reserve where the clearing was proposed to take place.

The Council disagreed with the Proposed Offset and submitted that it did not permit or accept the removal and maintenance of vegetation on the road reserve.

The Court noted that although it could not dictate the Council's decision as a road authority or as the trustee of the adjoining conservation land, the Court was not prevented from granting an approval of the Proposed ROL subject to an offset condition, which would depend on later agreement with the Council. However, the Court held that, depending on the terms of such a condition, an approval may not be able to be exercised until the Council had agreed.

The Court held that it should not approve development where the development is only appropriate in the context of an offset, and the offset is contingent on a later agreement or it is uncertain as to whether the offset will be achieved.

The Court held that a financial contribution would not achieve any type of offset for the impact of the Proposed ROL in the circumstances, and it was unprepared to rely on a financial contribution where it was not sought or agreed to by the Council.

The Court found that the Proposed Offset would not replace the loss of the vegetation communities on the Subject Land that would be removed as a result of the Proposed ROL, and therefore the Proposed Offset could not remedy the non-compliance with the Planning Scheme.

Conclusion

The Court held that the proposed clearing and earthworks would not avoid impacting on ecologically important areas as required by the Planning Scheme, and the impacts would not be remedied by the Proposed Offset or by the imposition of other conditions. The Court therefore dismissed the appeal.

Concrete batching plant use not abandoned despite lengthy period out of operation

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Neilsens Concrete Pty Ltd & Anor v Brisbane City Council* [2020] QPEC 3 heard before RS Jones DCJ

August 2020

In brief

The case of *Neilsens Concrete Pty Ltd & Anor v Brisbane City Council* [2020] QPEC 3 concerned an originating application to the Planning and Environment Court (**Court**) seeking a declaration that the use of land at Coorparoo as a concrete batching plant has not been abandoned, and that the land may be lawfully used consistent with the development approval issued by the Court on 25 March 1983.

The land was used as a concrete batching plant until the tenant decided to cease the operation in 2012 and removed all associated plant and equipment in 2014. During the time the land was not being used as a concrete batching plant, the owner of the land, being the Second Applicant, had been in protracted negotiations with the First Applicant to lease the land for the purpose of operating a concrete batching plant, and eventually the land was sold to the First Applicant.

Despite the length of cessation of the use of the land, the Court found that the use of the land as a concrete batching plant had not been abandoned and that the land may be used for purposes consistent with the development approval.

Abandonment of use

The Court adopted the approach taken by Wilson SC DCJ in *Mac Services Group Ltd v Beylando Shire Council & Ors* [2008] QPELR 503, 506 at [20]-[21], which relevantly stated as follows (at [22]):

> *… Those decisions show that the question of whether or not an abandonment has occurred is one of fact to be determined having regard to all the circumstances of the case, considered from the stance of* ***a reasonable person with knowledge of all of those circumstances; and also that, importantly, those circumstances will include the subjective intention of the relevant person*** *(and that subjective intention must involve an intention not to abandon the use, and not merely to preserve existing rights if that is possible) …*

The Court concluded that "*the question of whether or not a use has been abandoned is a question of fact to be determined objectively but where the subjective intentions of the owner/occupier is a relevant and important consideration*" (at [23]). The Court also agreed with the observation of Rackemann DCJ in *Benter Pty Ltd v Brisbane City Council* [2006] QPELR 451 at [15] - [19] that "*a conclusion of abandonment cannot be avoided simply by the assertion of an ongoing intention to preserve existing rights*" (at [23]).

Cessation of activities and vacant land

The Court considered whether the use as a concrete batching plan had been abandoned in circumstances where:

- from 25 March 1983 to December 2012, Boral Constructions Materials (Qld) Ltd (as it is now known) (**Boral**) operated a concrete batching plant from the land as a lessee;
- Boral remained in tenancy until April 2015, during which on 27 June 2014 it wrote to the Second Applicant and the Council stating that it did not intend to recommence the operation of a concrete batching plant; and
- all associated plant and equipment were removed by Boral in October or November 2014.

The Court noted the observation made by King CJ in *Leeming v City of Port Adelaide [No. 2]* (1987) 45 SASR 506, which provided as follows (at [42]):

> *A use may be discontinued by means of cessation of activity pursuant to that use accompanied by words or conduct on the part of the owner or occupier indicating unequivocally an intention to abandon or to terminate the use.* ***It may also be discontinued by cessation of activity pursuant to the use in such circumstances, or for such duration, or both, as to indicate from a practical point of view that such cessation is no mere interruption of activity pursuant to the use, but amounts to abandonment or termination of the use, irrespective of the subjective intentions of the owner or occupier as to the future****.* (emphasis added)

Prior to the removal of the plant and equipment, the Second Applicant wrote to Boral on 3 June 2014 stating that it intended to seek another tenant who would operate a concrete batching plant or "*similar operation*" and asked Boral whether the plant could be sold to another operator. The Second Applicant then wrote to the Council confirming on 21 July 2014 that it intended to lease the land for the operation of a concrete batching plant.

On 31 July 2014, the First Applicant made an offer to lease the land on a condition that the Second Applicant confirm that the current use could continue "*as of right*". After long negotiations, which included a draft heads of agreement being delivered to the First Applicant on 27 May 2015, the First Applicant indicated on 1 December 2016 that it did not intend to lease but to purchase the land.

After further negotiations, a contract of sale was entered into by the First Applicant and the Second Applicant on 21 December 2018.

Having regard to the above facts, amongst other things, the Court considered that the period for which the land was vacant and it was not used as a concrete batching plant could be satisfactorily explained by the "*protracted nature of the negotiations*" between the First and Second Applicants. The Court was satisfied that "*when the totality of the relevant facts and circumstances are concerned, it could not be reasonably said that the use of the site had been abandoned*" (at [73]).

Further, the Court considered that the duration of inactivity, or the vacant land, did not necessarily amount to abandonment of use; but that, "[e]*ach case will turn on its own facts*" (at 78]). The Court further observed that "[a]*s a general observation … it would be reasonable to expect that the longer the period of inactivity, the more difficult will it be for the Court to be satisfied that the use has not been abandoned*" (at [78]).

Conclusion

The Court found that the use of the land as a concrete batching plant had not been abandoned, with the result that a further development approval was not required for the use.

Court states the evolution of decision making under the Planning Act 2016 and finds no basis to refuse a development application where a condition regarding road access is imposed

Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brookside Estate Pty Ltd v Brisbane City Council & Anor* [2019] QPEC 33 heard before RS Jones DCJ

August 2020

In brief

The case of *Brookside Estate Pty Ltd v Brisbane City Council & Anor* [2019] QPEC 33 concerned a submitter appeal to the Planning and Environment Court against a decision of the Brisbane City Council to approve a development application for a development permit for 19 residential lots on Blunder Road at Doolandella.

The subject land is within the Doolandella Neighbourhood Plan Area, with proposed lots 1 to 18 included in the Emerging Community Zone and the balance lot, being the largest lot, included in the Rural Zone.

The submitter owns a site to the east of the subject land, which is in the process of being developed or is planned for future development.

The Court discussed at length recent developments in respect of the statutory regime for deciding a development application being, broadly speaking, that there is greater flexibility in the decision-making process as the starting point is not to refuse a development application that conflicts with a planning scheme.

The Court went on to consider the key issues in the appeal, being road access, planning for trunk infrastructure, orderly and sequential development for the locality, lot sizes and the location of a park. The Court observed that "*[a]t the heart of [the submitter's] case was that the proposed development constitutes an out of sequence development and, as a consequence, involves an inefficient use of existing infrastructure and results in an overall unacceptable interference with what would be reasonably expected had the land been developed in conjunction with surrounding land in a logical and sequential manner*" (see paragraph [12]).

The Court agreed with the submitter in respect of the road access issue, but was satisfied that the issue could be overcome with an appropriate condition. The Court was satisfied that the imposition of the condition overcame some of the other issues and what remained did not warrant refusal of the development application. The Court therefore dismissed the appeal subject to the imposition of the road access condition.

Court summarised recent developments in respect of the statutory regime for deciding a development application

The Court traversed the recent decisions in *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 (**Ashvan Decision**) and *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132 (**K & K Decision**) and stated as follows:

- The Court in the Ashvan Decision stated that section 47 of the *Planning and Environment Court Act 2016* gives broad discretionary powers to the Court and that discretion "*does not require the Court to refuse a development application in circumstances where 'conflict' is established with an adopted planning control and there is an absence of 'sufficient grounds'*" (see paragraph [18]). The discretion conferred by section 60(3) of the *Planning Act 2016* provides more flexibility in the decision-making process as the starting point is not to refuse a development application where there is a conflict with a planning scheme, allowing a balanced decision in the public interest.
- "*It should not be assumed that non-compliance with an assessment benchmark automatically warrants refusal. This must be established, just as the non-compliance must itself be established*" (see paragraph [20]).
- "*The manner in which the balance between rigidity and flexibility is struck in any given case does not lend itself to a general statement of principle, or precise formulation. The planning discretion, and the inherent balancing exercise, is invariably complicated, and multi-faceted. … It will turn on the facts and circumstances of each case, including the nature and extent of the non-compliances*" (see paragraph [20]).

- "*One would need strong reasons for refusing an application, which on its face, was consistent with the adopted planning controls*" (see paragraph [20]).
- The Court's observations in the Ashvan Decision need to, however, be considered having regard to the reasoning of the Court of Appeal in the K & K Decision. In particular, the Court of Appeal stated "*[a]t the heart of decisions like these is the acknowledgement that conformity with the Planning Scheme is, prima facie, in the public interest*". The Court of Appeal went on to state "*[t]he proposition can be put the other way around [being that] [i]t is, in general, against the public interest to approve a development that conflicts with the Planning Scheme*" (see paragraph [21]).

The Court therefore held that the starting point ought to be to determine the intent and desired outcomes stated in a planning scheme and that they represent what is in the best public interest. The Court went on to caution against any material departure from the intent or desired outcomes as that would be, prima facie, contrary to the public interest. Rather, what ought to occur is a construction of a planning scheme which achieves a "*balanced decision in the public interest*" or, put another way "*the balancing of the relevant facts, circumstances and competing interests in order to decide whether a particular proposal should be approved or rejected*" (see paragraph [25]).

Court considered the issues in the appeal and found the issue in respect of road access to be the only issue of material consequence

Five issues fell for determination by the Court: road access, planning for trunk infrastructure, orderly and sequential development for the locality, lot sizes and the location of a park.

In respect of road access, the proposed arrangements involved temporary road access to Blunder Road, to be replaced with permanent road access via Brookside Street and Sallyanne Street at the time that road access is available, and, which the Court found, relies upon road works being carried out on the adjoining lot 4.

The Court considered four issues raised by the traffic engineering experts in respect of road access and road design. Firstly, the timing for the permanent road access is "*completely at the hands of somebody else*" being the developer of the adjoining lot 4 (see paragraph [32]). Secondly, if another adjoining lot is developed before the adjoining lot 4 the traffic from that development would have to use the temporary road access to Blunder Road. Thirdly, the temporary road access was considered by the traffic engineering expert for the Council and the applicant to not be an optimal outcome and would prejudice the efficient development of the adjoining lot 4. Lastly, the traffic engineering expert for the Council and the applicant also argued that the proposed temporary road access to Blunder Road was not fatal to the approval of the development application, and that there were three potential alternate internal street layouts which would not warrant refusal on traffic grounds, all of which would provide potential road access to the adjoining lot 4.

The Court found that the proposed road access arrangements, in particular the failure to provide road access to the adjoining lot 4, did not comply with relevant traffic assessment benchmarks, being Overall Outcome 3(h) of the Emerging Community Zone Code and Performance Outcome 10 and 11 of the Subdivision Code, which concern an integrated, permeable, connected and safe transport network. The Court was satisfied that the imposition of a condition requiring the road access would adequately address the non-compliance.

The Court found that the imposition of the road access condition resolved the issues in respect of planning for trunk infrastructure, and the orderly and sequential development for the locality. The town planning expert for the submitter conceded that the issues in respect of lot size and density "*were lower order matters that would not warrant refusal*" (see paragraph [51]). The only remaining issue for the Court was therefore the location of a park.

Court considered the planning documents to determine the public's expectations in respect of the location of the future park

The parties disagreed in respect of the location of a park, which was identified as being in various locations but in the general locality in the Neighbourhood Plan, the Local Government Infrastructure Plan (**LGIP**), the Priority Infrastructure Plan (**PIP**) and the structure plan lodged by the applicant.

The town planning experts agreed that a local park east of Blunder Road and north of Brookside Street was a desirable planning outcome, but could not agree on its exact location. The Court stated that the park's location ought to be determined by accessibility, area and the public's expectations.

The Court found that the proposed location shown on the applicant's structure plan was in the southern extremity of the likely catchment area, but this did not materially affect accessibility. The Court found that the park is to be a district park, consistent with the Neighbourhood Plan, being a minimum of 0.8 hectares which could be accommodated in the proposed location. The Court also found that the public's expectations about the location of the park is informed by the Neighbourhood Plan, LGIP and PIP, understanding that they show only indicative locations for the park, and the incidents of departure from those planning instruments.

The Court found, on balance, that the proposed location of the park was not contrary to public expectations, and insofar as there might be a departure from public expectations created by the Neighbourhood Plan, LGIP and PIP, it was not an unacceptable departure. The Court therefore found that the proposed location of the park was acceptable and did not warrant refusal.

Conclusion

The Court therefore held that, subject to the imposition of a condition in respect of road access via the adjoining lot 4, there were not grounds that would warrant refusal of the development application. The Court refrained from making final orders until hearing further from the parties in respect of the form of the road access condition.

Submitter appeal against ideally located childcare centre fails

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Richards & Ors v Brisbane City Council & Ors* [2020] QPEC 26 heard before Everson DCJ

August 2020

In brief

The case of *Richards & Ors v Brisbane City Council & Ors* [2020] QPEC 26 concerned a submitter appeal (**Submitters**) to the Planning and Environment Court (**Court**) against the decision of the Brisbane City Council (**Council**) to approve a development application for a material change of use for a childcare centre located on land at 19 Melba Crescent and 56 Abbotsleigh Street, Holland Park (**Subject Land**).

The Court dismissed the appeal finding that there was no meaningful non-compliance with the *Brisbane City Plan 2014* (**City Plan**) and in the event that the Court was wrong, any non-compliance would be technical and of no planning consequence.

Proposed development is ideally located

The proposed development comprised a two-storey childcare centre catering for up to 84 children and 13 staff, a basement providing 20 car parking spaces and a built form design similar in bulk and scale to two separate residential dwellings (**Proposed Childcare Centre**). The Subject Land is located on a road of suitable capacity to accommodate the anticipated vehicle movements generated by the Proposed Childcare Centre, and is located diagonally opposite Holland Park State School.

Submitters alleged conflict with parts of the City Plan in relation to need and scale of the Proposed Childcare Centre

The Submitters alleged that the Proposed Childcare Centre is non-compliant with the following parts of the City Plan in relation to the need for, and the scale of, the Proposed Childcare Centre:

- *Low density residential zone code* (**Residential Code**) – non-compliance with section 6.2.1.1(4)(k), which states that development "*serves a local community facility need only*".
- *Holland Park - Tarragindi district neighbourhood plan* (**Holland Park NP**) – non-compliance with section 7.2.8.1.2(3)(g), which states that development must be of a "*height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions*" for the Subject Land and only be developed "*at a greater height, scale and form whether it is both a community need and an economic need for the development*".
- *Coorparoo and districts neighbourhood plan* (**Coorparoo Park NP**) – non-compliance with section 7.2.3.10.2(3)(j), which states that development must be of a "*height, scale and form which is consistent with the amenity, character and infrastructure assumptions*" for the Subject Land.
- *Childcare centre code* (**Childcare Code**) – non-compliance with section 9.3.4.2(2)(b), which states that development must be "*compatible with the residential character and amenity of the zone*".
- *Community facilities code* (**Community Code**) – non-compliance with section 9.3.5.2(2)(b), which states that development must be "*integrated or co-located with other community facilities where possible*".

Court concludes that there is both an economic and community need for the Proposed Childcare Centre

The Court considered that the Residential Code required that the Proposed Childcare Centre serve "*a local community facility need only*" (at 6.2.1.1(4)(k) of the City Plan) and the Holland Park NP required "*both a community need and an economic need for the development*" (at 7.2.8.1.2(3)(g) of the City Plan).

In determining whether there was a sufficient planning, economic and community need for the Proposed Childcare Centre, the Court accepted the evidence of two economists that the local catchment area has been undersupplied since 2016 and that the need for the Proposed Childcare Centre was more than sufficient to support the proposed development at a sustainable level.

The Submitters noted another proposed childcare centre development in a nearby location at 920 Logan Road, which has had the benefit of a development approval since June 2016 but which had not been given effect to (**Alternative Development**). The Court concluded that given the leasehold nature of the tenure and the extreme uncertainty in obtaining finance for the Alternative Development, the Court was not satisfied that the Alternative Development would proceed to serve the identified need.

Further, the Court had no doubt that the nearby Holland Park State School would generate sufficient community need for the childcare spaces generated by the Proposed Childcare Centre.

Therefore, the Court concluded that there was both an economic and community need for the Proposed Childcare Centre, which was more than sufficient to support the development at a sustainable level.

Court concludes that the scale of the built form of the Proposed Childcare Centre is not in conflict with the City Plan

The Court accepted the unchallenged evidence of a visual amenity expert that the design of the Proposed Childcare Centre was compatible with the surrounding residential character and amenity of the zone and was appropriately located near to Holland Park State School. Therefore, the Court did not find any conflict with the Childcare Code and Community Code.

The Court heard evidence from three town planning experts which considered the issue of the scale of the Proposed Childcare Centre. Two of the town planning experts addressed the issue of scale from the perspective of the proposed development's built form, and were of the opinion that the proposed development was consistent with the anticipated density and assumed infrastructure demand.

However, the third town planning expert considered the scale of the use of the development and the anticipated number of people and cars present in the Proposed Childcare Centre during the day, and was of the opinion that the scale exceeded that which is contemplated by the City Plan.

The Court also considered the relevant paragraphs in the City Plan and determined that the term "*scale*" in the relevant context merely refers to considerations of built form and not use, and therefore the Court accepted the evidence of the two town planning experts which addressed the built form of the Proposed Childcare Centre. The Court therefore found that the scale of the Proposed Childcare Centre was consistent with the requirements of the Holland Park NP and Coorparoo NP.

Conclusion

The Court dismissed the appeal, and stated that there was no meaningful non-compliance with the City Plan, and in any event, if there were non-compliance it would be technical and of no planning consequence.

Decision not to include a Key Resource Area in the State Planning Policy held to be a decision that cannot be subject to judicial review under the Judicial Review Act 1991

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Maroochydore Sands Pty Ltd v Minister for State Development, Manufacturing, Infrastructure and Planning* [2019] QSC 319 heard before Douglas J

August 2020

In brief

The case of *Maroochydore Sands Pty Ltd v Minister for State Development, Manufacturing, Infrastructure and Planning* [2019] QSC 319 concerned an application to the Supreme Court of Queensland (**Court**) for a judicial review under the *Judicial Review Act 1991* (**JRA**) of the Respondent Minister's decision not to identify an area of land as a Key Resource Area (**KRA**) in the relevant version of the *State Planning Policy* (**SPP**).

The Applicant had applied to the relevant Department seeking that part of a site of a proposed development for commercial sand extraction, wet screening and wash operation (**Land**) be included into the SPP guidance material and Interactive Mapping System (**IMS**) as proposed KRA 162 Eudlo Creek (**KRA 162**).

The Respondent Minister's decision on 16 May 2017 was that KRA 162 was not to be included in the SPP guidance material or IMS (**Decision**).

The Court dismissed the application as the Decision was not a decision to which the JRA applied, because the guidance material and IMS were not part of the SPP and the bundle of rights and obligations attaching to the Land were not affected.

Respondent Minister argued that the Decision was not one subject to judicial review

The Respondent Minister alleged that the Decision was not one to which the JRA applied for the following reasons:

1. The JRA applies to decisions to amend the SPP under section 10 of the *Planning Act 2016* (**Planning Act**); however, the Decision was not a decision for the purpose of section 10 of the Planning Act.
2. A decision to amend the SPP must be undertaken in accordance with certain initial steps, which were not undertaken.
3. The failure to include KRA 162 in the SPP guidance material and IMS did not affect the bundle of rights and obligations affecting the Land.

The Court considered the first and third reasons.

Court found that the guidance material and supporting mapping were not part of the SPP for the purpose of amendments to the SPP under the Planning Act

The Respondent Minister may make or amend a State planning instrument in accordance with the process stated in section 10 of the Planning Act. A State planning instrument includes the SPP (section 8(2) of the Planning Act).

The relevant version of the SPP stated that a KRA was an area that contained extractive resources of State or regional significance shown on the IMS. The IMS was referred to as being in the nature of supporting material which may be amended from time to time, independently of an amendment to the SPP.

In addition, the relevant guidance material which supported the IMS and provided a list of the KRA areas had no statutory basis.

The Respondent Minister stated that as the IMS and SPP guidance material were supporting material to the SPP they were not part of the SPP, and therefore were not the subject of the amendment process stated in section 10 of the Planning Act.

The Court agreed and concluded that "*... the process of including information in the IMS does not involve an amendment to the SPP of the type required by [section] 10(5) of the Planning Act*" (at [18]).

Court found that the bundle of rights and obligations affecting the land the subject of the proposed KRA 162 would not have changed had the Decision been to include the KRA 162 in the SPP

The Respondent Minister submitted that a decision in relation to the inclusion of KRA 162 in the SPP would not affect the bundle of rights and obligations in the sense discussed in *Griffith University v Tang* (2005) 221 CLR 99.

The Court noted the Respondent Minister's reliance on the Court's judgment in *Trask Development Corporation No. 2 Pty Ltd v Moreton Bay Regional Council* [2018] QSC 170 in which the Court determined that a refusal of a request to include an area on an environmental overlay map was not a decision to which the JRA applied because it did not affect the relevant developer's rights (see [22]).

The Court held that the substantive right of the Applicant to seek the inclusion of KRA 162 into the SPP guidance material and IMS was not exhausted as the Applicant may request its inclusion again. Further, the Court held that even if the Decision was to include the KRA 162 into the SPP, such a decision would not necessarily determine the Applicant's right to exploit the resources on the land as a development application would be required.

Therefore, the Court held that the Decision was not one from which new rights or obligations arose and did not affect the Applicant's bundle of rights and obligations over the Land.

Conclusion

The Court dismissed the application for judicial review under section 48 of the JRA as the Decision was not a decision to which the JRA applied, because the Decision:

- did not concern the amendment of the SPP for the purpose of the Planning Act as the Decision related to guidance material and the supporting mapping; and
- did not affect the bundle of rights and obligations affecting the land the subject of the proposed KRA 162.

Redeveloping existing residential flat buildings, clause 4.6 requests and existing use rights

Mark Evans | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Made Property Group Pty Limited v North Sydney Council* [2020] NSWLEC 1332 heard before Chilcott C

August 2020

In brief – What developers can learn from the decision in Made Property Group Pty Limited v North Sydney Council [2020] NSWLEC 1332, which highlights, among others, the highly technical requirements a written clause 4.6 request must meet

A developer sought to rely on existing use rights to replace an inter-war apartment building in Sydney that exceeded the height limit with another apartment building. The developer's appeal against deemed refusal of their application was denied.

This recent decision serves as an important reminder of some principles regarding existing use rights and clause 4.6 requests. Notably:

- the height, bulk and scale of the existing building does not automatically entitle replacement with a similar building of the same height, bulk and scale;
- a merit assessment of the application must still be conducted even if existing use rights are relied on; and
- clause 4.6 written requests must be properly prepared. Deficiencies in both clause 4.6 request and the justifications for exceedance of development standards may result in the consent authority lacking jurisdiction to grant consent.

Developer appeals North Sydney Council's deemed refusal of a development application

The applicant owned three inter-war apartment buildings in Neutral Bay, Sydney which all exceeded the current height development standard (8.5m).

The applicant appealed against deemed refusal of its application to replace the apartment buildings with one large building that exceeded the current height of buildings development standard (**HOB standards**).

The proposed development (at 12.52m) was taller than the existing apartment buildings (10m) and exceeded the HOB standards by approximately 47.3%. The applicant, in part, relied on the benefit of the existing-use rights, otherwise the proposed apartment building would not be permissible on the site.

Council acknowledged that the applicant enjoyed existing use rights in relation to its proposed development, but contended that the provisions of clause 4.3 of the *North Sydney Local Environmental Plan 2013* (**NSLEP**) (the HOB standards) applied because clause 4.3 did not derogate from the incorporated provisions referred to in section 4.67 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

What are the incorporated provisions?

Section 4.67 of the EP&A Act "Regulations respecting existing use" provides that the regulations may make provision for matters with respect to existing uses and those provisions (incorporated provisions) are taken to be incorporated in every environmental planning instrument. Importantly, an environmental planning instrument (of which the NSLEP is one) can contain provisions *extending, expanding or supplementing* the incorporated provisions but to the extent that the environmental planning instrument *derogates from* the incorporated provisions, it has no force or effect.

Accordingly, the applicant argued that clause 4.3 of the NSLEP did not apply because it would derogate from the incorporated provisions. As a result, the proposed apartment building did not need to comply with the HOB standards.

If it was wrong on this point and clause 4.3 did apply, the applicant contended that it had provided a clause 4.6 request that sought to vary the HOB standards and which it said was well founded and should be upheld. Clause 4.6 of the NSLEP allows proponents to seek an exception to a development standard to provide an appropriate degree of flexibility in applying certain development standards to particular development.

The application and judicial consideration of clause 4.6 in various Local Environmental Plans has a long and complex history, including recent decisions of *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

Does clause 4.3 of the NSLEP derogate from the incorporated provisions?

The Court found that clause 4.3 did not derogate from the incorporated provisions.

Following *Saffioti v Kiama Municipal Council* [2019] NSWLEC 57, the test is whether the clause in question detracts from or deleteriously impinges on any entitlement to make and have the consent authority consider and determine a development application seeking consent to enlarge, expand or intensify the existing use. Accordingly, provisions like clause 4.3 which fix development standards for development do not derogate from the incorporated provisions because these clauses do not impinge on any entitlement to make a development application.

The Court held clauses like clause 4.3 of the NSLEP may impose height standards because when read together with clause 4.6 of NSLEP, those provisions still allow a pathway for the grant of consent to the applicant's proposed development.

Additionally, the Court applied the judgment of Roseth SC in *Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71; that where the existing building is proposed for demolition, while its bulk is clearly an important consideration, there is no automatic entitlement to another building of the same floor space ratio, height or parking provision.

Is the applicant's 4.6 written request to vary the HOB standards well founded?

The applicant prepared and lodged a written request in accordance with clause 4.6 of the NSLEP seeking to vary the HOB standards (Clause 4.6 request).

The Court applied the approach described by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (**Initial Action**) to assess whether the clause 4.6 written request was well founded. Preston CJ (describing the jurisdictional hurdle) said in Initial Action (at [13]) that clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant consent for development that contravenes a development standard.

The formation of the opinions of satisfaction as to the matters in clause 4.6(4)(a) *enlivens the power of the consent authority* to grant development consent for development that contravenes the development standard (Preston CJ at [14]).

The Court found that, for a number of reasons, the applicant's clause 4.6 request did not clearly demonstrate how the proposed development achieved the objectives of the HOB standards, notwithstanding the exceedance of the HOB standards. Specifically it did not:

- demonstrate that compliance with the objectives of the standard were unreasonable or unnecessary;
- provide sufficient environmental planning grounds to justify the requested variation to the HOB standards; and
- demonstrate that it was consistent with the objectives of the R3 zone applicable to the site.

The Court held that because satisfaction in relation to matters provided in clause 4.6(3) is a precondition to enliven the Court's power to grant consent, and as the Court was not satisfied that those matters had been adequately addressed and was not satisfied that the proposed development was consistent with the objectives of the R3 zone, the proposed development was not in the public interest and the Court did not have jurisdiction to grant the consent.

This case again highlights the highly technical requirements a written clause 4.6 request must meet to enliven the jurisdiction of the consent authority to grant consent to a development that does not comply with the relevant development standards.

Developers should bear in mind that where the proposed development exceeds prescribed development standards and clause 4.6 is relied on for an exemption to those standards, the written request must be carefully considered and specify in detail how the objectives of the development standards are met, notwithstanding non-compliance with those development standards.

What developers need to know

Developers should not assume that an existing residential flat building provides an automatic entitlement to redevelop. Merit assessment of any replacement development will occur against current development standards. Developers should not take for granted opening the jurisdictional gate of clause 4.6 even where the original development breaches height standards, for example. Clause 4.6 requests should always be carefully prepared.

Court of Appeal sheds light on the operation of the infrastructure charges regime in Queensland

Min Ko | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Toowoomba Regional Council v Wagner Investments Pty Ltd & Anor* [2020] QCA 191 heard before Fraser, Morrison and Mullins JJA

September 2020

In brief

The case of *Toowoomba Regional Council v Wagner Investments Pty Ltd & Anor* [2020] QCA 191 concerned an appeal by the Toowoomba Regional Council (**Council**) to the Queensland Court of Appeal against the orders of the Planning and Environment Court in relation to various infrastructure charges notices issued by the Council under the now repealed *Sustainable Planning Act 2009* (**SPA**).

The Court of Appeal considered, amongst other matters, the following determinations of the Planning and Environment Court:

- *Additional demand for a reconfiguring a lot* – That the infrastructure charges levied for a reconfiguring a lot be set aside for the reason that there was no rational link between the reconfiguration of land and the additional demand that would be placed on the transport trunk infrastructure network.
- *Infrastructure charges for transport trunk infrastructure* – That the infrastructure charges levied for transport trunk infrastructure be set aside for the reason that there was no legitimate relationship between the gross floor area (**GFA**) methodology adopted by the Council and any additional demand placed on the transport trunk infrastructure network.
- *Infrastructure charges for stormwater trunk infrastructure* – That the infrastructure charges for stormwater infrastructure be set aside for the reason that there was no stormwater trunk infrastructure identified for the proposed development, and that there was no additional demand placed upon the stormwater trunk infrastructure network.

Construction of infrastructure charging provisions

The Court of Appeal construed section 635 (When charge may be levied and recovered) and section 636 (Limitation of levied charge) of the SPA, which are materially the same as section 119 (When charge may be levied and recovered) and section 120 (Limitation of levied charge) of the *Planning Act 2016* (**Planning Act**) respectively.

The Court of Appeal relevantly stated as follows:

- *Preconditions to giving an infrastructure charges notice* – In order to give an infrastructure charges notice under section 635 of the SPA (which is equivalent to section 119 of the Planning Act) "[t]*here must be demand which links the development with the relevant trunk infrastructure, but there must be additional demand over and above what the current uses of the subject land generate in respect of that trunk infrastructure*" (at [78]).
- *Calculation of additional demand* – The calculation under section 636 of the SPA (which is equivalent to section 120 of the Planning Act) of the additional demand on the trunk infrastructure generated by a development, does not require a calculation of the actual additional demand generated by the development. Rather, "*the appropriate infrastructure charge for additional demand generated by the development is reflected in the "broad brush" application of the adopted charge*" (at [79]).

Additional demand for a reconfiguring a lot

The Court of Appeal considered whether the proposed reconfiguration of a lot would generate additional demand and that an infrastructure charges notice could be issued in respect of a reconfiguring a lot.

The Court of Appeal stated that the relevant development for calculating additional demand was "*the proposed use of the land as a result of the reconfiguration and the accompanying application for a material change of use. … What was relevant was that the reconfiguration of a lot is one of the trigger points for the issuing an ICN in relation to that development*" (at [115]).

The Court of Appeal further stated that the charges could not exceed the maximum adopted charge for the development in accordance with the Council's Charges Resolution, and that it would be a matter of timing as to which infrastructure charges notice was paid first.

The Court of Appeal held that the Council could give the infrastructure charges notices for the proposed reconfiguration of a lot, and that the Planning and Environment Court's decision setting aside the infrastructure charges notices for the reconfiguring a lot was in error.

Infrastructure charges for transport trunk infrastructure

The Court of Appeal considered whether the Planning and Environment Court's decision was in error in respect of the infrastructure charges for trunk transport infrastructure "*by concluding it was unreasonable to adopt gross floor area (GFA) to calculate infrastructure charges for the uses*" (at [6]).

The Court of Appeal stated that the "*assessment of use and demand*" required by the Charges Resolution was to calculate demand generated by the development by selecting the appropriate development category from Table 3 of the Charges Resolution that relates to the proposed development. This was considered to be consistent with the methodology stated in the *State Planning Regulatory Provision (adopted charges)*.

The Court of Appeal held that it was correct to calculate the demand generated by the proposed development on the transport infrastructure network based on the GFA methodology stated in the Charges Resolution, and that the Planning and Environment Court's decision to set aside the infrastructure charges notices was in error.

Infrastructure charges for stormwater trunk infrastructure

The Court of Appeal considered whether the Planning and Environment Court's decision was in error in respect of determining that Westbrook Creek was not trunk infrastructure, and that there was no additional demand placed on the stormwater trunk infrastructure.

The Court of Appeal stated that "*… Westbrook Creek falls within the identified trunk infrastructure for the purpose of stormwater management quantity*" (at [101]).

The Court of Appeal further stated that the evidence before the Planning and Environment Court established that there was no additional demand on the stormwater trunk infrastructure network which would be generated by the proposed development, and that therefore the statutory pre-condition under section 636(1) of the SPA for the purpose of issuing an infrastructure charges notice was not satisfied.

The Court of Appeal held that there was no error in the Planning and Environment Court's decision to set aside the infrastructure charges notices in respect of infrastructure charges for stormwater trunk infrastructure.

Conclusion

In conclusion, the Court of Appeal determined that:

- *Additional demand for a reconfiguring a lot* – An infrastructure charges notice for a reconfiguring a lot could be given.
- *Infrastructure charges for transport trunk infrastructure* – An infrastructure charge could be worked out by reference to the GFA and did not require an individual assessment of demand on the transport trunk infrastructure network.
- *Infrastructure charges for stormwater trunk infrastructure* – An infrastructure charges notice could not be given because on the basis of the evidence before the Planning and Environment Court there was no additional demand on the stormwater trunk infrastructure network.

Supreme Court declares resumption application void

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Genamson Holdings Pty Ltd v Moreton Bay Regional Council & Anor* [2020] QSC 84 heard before Callaghan J

September 2020

In brief

The case of *Genamson Holdings Pty Ltd v Moreton Bay Regional Council & Anor* [2020] QSC 84 concerned an application to the Supreme Court of Queensland (**Court**) for declarations in respect of the proposed resumption (**Proposed Resumption**) for flood mitigation purposes of part of the applicant's land (**Resumption Land**) by the Moreton Bay Regional Council (**Council**).

The declarations sought were as follows:

- *Under section 10 of the Civil Proceedings Act 2011 (**CPA**) or section 30(1)(c) of the Judicial Review Act 1991* – a declaration that the decision of the Council to apply (**Resumption Application**) to the Minister for Natural Resources, Mines and Energy (**Minister**) for the Proposed Resumption is void and of no effect, because of the Council's failure to take into account a material consideration in respect of the Proposed Resumption.
- *Under section 10 of the CPA* – because the Resumption Application involved jurisdictional error resulting from the Council's failure to take into account a material consideration in respect of the Proposed Resumption:
  - a declaration that the Resumption Application is void and of no effect;
  - a declaration that the Proposed Resumption is discontinued.

The Minister agreed to abide by the ruling of the Court and put the consideration of the Resumption Application on hold pending the determination of the proceeding.

The Court observed that legislation which takes away private rights and interests in respect of land ought to be strictly construed. The Council did not take into account an expert report it was required to consider in deciding to make the Resumption Application, and the Resumption Application was not properly made as it did not include all of the objections to the Proposed Resumption.

The Court declared the decision of the Council to make the Resumption Application and the Resumption Application itself void and of no effect, and discontinued the Proposed Resumption, which in any event had passed the relevant time period in the ALA.

Background

The Council, in its role as a constructing authority under the *Acquisition of Land Act 1967* (**ALA**), gave the applicant a notice of intention to resume (**First NIR**) the Resumption Land, which is located at Caboolture and is improved with a shopping centre.

The applicant, in accordance with section 8(1) of the ALA, objected to the First NIR and asked to be heard by the Council. The Council appointed a delegate (**Delegate**) to conduct the hearing, and was therefore required by section 8(2)(b) of the ALA to consider a report prepared by the Delegate in the Council's consideration of the Proposed Resumption.

The Council, after considering the Delegate's report, issued an amended NIR (**Second NIR**).

The applicant objected to the Second NIR and was again heard by the Delegate who produced a second report (**Second Report**).

Delegate's reference to an expert report made it a material consideration

An expert report of an engineer, which considered the suitability of the Resumption Land for flood mitigation purposes, was before the Delegate at the time of the second objection hearing (**Expert Report**).

The Delegate in his Second Report referred to the Expert Report and inter alia stated "*the Council should give due consideration to the report … when it formulates its opinion as to how it intends to proceed*". However, it was agreed between the parties that the Expert Report was not considered at the meeting in which the Council resolved to make the Resumption Application.

The Court noted that the Council was required by section 8(2)(b) of the ALA to take the Expert Report into account; but that the weight to be attributed to the Expert Report was a matter for the Council.

The Court held that the Council's decision to make the Resumption Application was void and of no effect, or ought to be set aside, on the grounds that the Council failed to take into account the Expert Report.

Council's failure to provide "every objection" to the Minister resulted in a deficient application being made

Section 9(3) of the ALA states the material that the Council is required to provide to the Minister in making the Resumption Application. Section 9(5) of the ALA states that the Minister is required to consider the material provided by the Council to relevantly ensure that the Resumption Land could and should be taken for its stated flood mitigation purpose, and that the Council took reasonable steps to comply with section 7 and section 8 of the ALA.

The Resumption Application did not include copies of the applicant's objections to the First NIR and Second NIR or the reports of the Delegate, and the form given to the Minister to make the Resumption Application recorded in error that no objection had been received by the Council.

The Council emailed the applicant's objection to the First NIR and the Delegate's reports to the Minister, some 12 months after the First NIR was issued to the applicant.

It was agreed between the parties that the Minister had never received a copy of the applicant's objection to the Second NIR, and the Court therefore held that the Resumption Application was not an application within the meaning of section 9 of the ALA because "*every objection*" had not been provided.

The Court rejected the Council's submission that the ALA contemplates non-compliance with the requirement for every objection to accompany an application at the time it was lodged. The Court considered that it would be nonsensical to allow for the provision of material relevant to the Minister's determination of an application for resumption at any period, which could result in a decision of the Minister being based on inadequate or incomplete information.

The Court also observed that if the Minister is not provided with every objection, the Minister is hindered from performing the responsibility of ensuring that the constructing authority has complied with sections 7 and 8 of the ALA, as is required by section 9(5) of the ALA.

The language of the ALA was held to be mandatory, despite section 9(4) of the ALA stating that the Minister may request further information, and the Court held that upon the expiration of 12 months from the First NIR being given to the applicant on 12 October 2017, section 7(4B) of the ALA operated so as to deem the discontinuance of the First NIR.

Conclusion

The Court held that the non-compliance with the process for resumption in the ALA resulted in the Resumption Application not being an application for the purposes of section 9 of the ALA. The Court therefore, under section 10 of the CPA, declared void the Council's decisions in respect of the Resumption Application, and in accord with the expiration of the 12 month period stated in section 7(4B) and section 9(2) of the ALA, made a declaration that the Proposed Resumption was deemed to be discontinued.

Court finds that development is not "consistent " with a prior approval and is prohibited

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brennan v Brisbane City Council & Anor* [2020] QPEC 39 heard before Everson DCJ

September 2020

In brief

The case of *Brennan v Brisbane City Council & Anor* [2020] QPEC 39 concerned an originating application to the Planning and Environment Court (**Court**) seeking a declaration that a development application (**Development Application**) made to the Brisbane City Council (**Council**) for a development permit, for reconfiguring a lot into three lots with a cottage to be constructed on each lot and the creation of an access easement (**Proposed Development**), was a properly made development application under the *Planning Act 2016* (**Planning Act**).

The issue for the Court was whether the Proposed Development was contrary to the provisions of the *South East Queensland Regional Plan 2017* (**SEQ Plan**) in respect of the Rural Landscape and Regional Production Area and was prohibited development within the meaning of section 44 of the Planning Act and section 23 of the *Planning Regulation 2017* (**Planning Regulation**).

The applicant submitted that the Proposed Development was "*consistent*" with a prior development approval granted by the Council in 2001 (**Prior Approval**) under the repealed *Integrated Planning Act 1997* (**IPA**), and was therefore an exempt subdivision as defined in Schedule 24 of the Planning Regulation and not prohibited development.

The Court, interpreted the word "*consistent*" as requiring more than simply existing in "*harmony*" with, and held that the Proposed Development was not consistent with the Prior Approval as the Proposed Development was not contemplated by the Prior Approval and therefore did not meet the definition of exempt subdivision.

The Court held that the Proposed Development was therefore prohibited development and dismissed the application.

Background

The Prior Approval was for a material change of use for short-term accommodation (two eco-tourism cottages) and had been acted upon by the Applicant by the time of the making of the Development Application.

The Development Application, if approved, would permit the subdivision of the subject lot into three lots allowing for the improvement of each of the two new lots with an eco-tourism cottage.

The Council did not issue a confirmation notice under section 51(4) of the Planning Act accepting the Development Application because it had formed the view that the Proposed Development was prohibited development under section 44(2) of the Planning Act.

Whether the Proposed Development was prohibited development or not was the critical issue in the proceeding.

Statutory framework

Section 44 of the Planning Act states that prohibited development is "*development for which a development application may not be made*" and that development may be categorised by a categorising instrument. The categorising instrument relevant to the proceeding was the Planning Regulation.

As the subject land was within the Rural Landscape and Regional Production Area of the SEQ Plan, section 23(1) of the Planning Regulation was relevant, which relevantly states that "*reconfiguring a lot is prohibited development to the extent the lot is in the SEQ regional landscape and rural production area, if the reconfiguration - (a) is a subdivision; and (b) is assessable development…*".

It was uncontroversial that the Proposed Development was a subdivision that was assessable development under the Planning Act.

Section 23(2) of the Planning Regulation states that section 23(1) does not apply if the reconfiguration is an "*exempt subdivision*".

Exempt subdivision is defined in Schedule 24 of the Planning Regulation, which lists development in items (a) to (f) that are an exempt subdivision. Item (e) was relevant to the proceeding, and relevantly states that an exempt subdivision means a subdivision that "*is consistent with a material change of use approved under a development approval that applies to the lot being subdivided…*".

Parties' positions

The applicant submitted that the Proposed Development was "*consistent*" with the Prior Approval and was therefore exempt subdivision as defined in the Planning Regulation, which was not, as stated in section 23(2) of the Planning Regulation, prohibited development.

The respondents submitted the converse, urging the Court not to find for a liberal construction of the phrase "*consistent*".

Liberal construction is inappropriate where it would lead to an improbable result

In the context of the Planning Act, and relying on the statutory interpretation principles stated in section 14A of the *Acts Interpretation Act 1954* (Qld) and by the High Court in *R v A2* [2019] HCA 35 [at 32], the Court found it appropriate to find against a construction of the term "*consistent*" which reflected its ordinary meaning of "*agreement, harmony, or compatibility*".

The Court therefore held that what was required in the circumstances was evidence that the Prior Approval had contemplated a subdivision of the subject land. However, the Prior Approval had only contemplated a short-term accommodation use on one lot.

The Court held that the Proposed Development was not consistent with the Prior Approval and therefore did not fall within the meaning of exempt subdivision under the Planning Regulation, and was prohibited development under section 23(1) of the Planning Regulation.

Conclusion

The Court dismissed the originating application seeking a declaration that the Development Application was a properly made development application under the Planning Act because the Proposed Development was prohibited development for which a development application may not be made.

Proposed development that complies with a local government's planning scheme refused by the Planning and Environment Court

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Roubaix Properties Pty Ltd v Somerset Regional Council* [2020] QPEC 34 heard before Everson DCJ

September 2020

In brief

The case of *Roubaix Properties Pty Ltd v Somerset Regional Council* [2020] QPEC 34 concerned an appeal by Roubaix Properties Pty Ltd (**Applicant**) to the Planning and Environment Court against the Somerset Regional Council's (**Council**) decision to refuse an impact assessable development application for a relocatable home park (**Proposed Development**) located at 11 Banks Creek Road, Fernvale (**Subject Location**).

The Applicant maintained that the Proposed Development complied with the requirements of the Somerset Region Planning Scheme (version 3) (**Planning Scheme**) and that such compliance was sufficient to warrant approval of the Proposed Development.

The Council effectively submitted that the Proposed Development did not comply with the State Planning Policy (July 2017) (**SPP**) as the development:

- failed to avoid the natural hazard area;
- did not mitigate risks to people and property to an acceptable or tolerable level; and
- hindered disaster management response or recovery capacity or capabilities.

The Court considered the planning need for the Proposed Development, its character and amenity, location in the area mapped on the flood overlay mapping, the relevant matters submitted by the parties, and whether the Council's Planning Scheme was inconsistent with the SPP. The Court held that the Proposed Development was non-compliant with the SPP and that therefore the Proposed Development ought to be refused.

SPP contained the relevant assessment benchmarks in respect of flooding

The Court was critical of the Planning Scheme, which had not been amended to make allowance for the effects of climate change in the flood overly mapping, and noted that the Planning Scheme was therefore inconsistent with the SPP as to what was necessary to avoid flooding on the Subject Location. As the SPP was not integrated into the Planning Scheme, the Court found that the SPP applied to the extent of any inconsistency (see section 8(4) of the *Planning Act 2016*).

No planning need was found for the Proposed Development

The Court heard evidence from two economists regarding planning need and preferred the evidence of the Council's expert who concluded that:

- absent the flooding risk, the Subject Location would have been an excellent location for a relocatable home park;
- there was insufficient economic need for the Proposed Development within the next 15 years; and
- there was no planning need of any consequence for the Proposed Development as there is other available land for the development in the Local Government Area.

The Court considered the evidence and held that there was no demonstrated planning need for the Proposed Development and that the demand for the Proposed Development could be met in an area not subject to flooding.

Planning Scheme was inconsistent with, and the Proposed Development did not comply with, the SPP

Acceptable Outcome AO13.1 of the Planning Scheme required that the buildings be located above the "*defined flood level*". "*Defined flood level*" was not expressly defined in the Planning Scheme, but the Court held that if a practical reading of the whole of the Planning Scheme is applied, the term ought to be read as meaning the inundation level associated with a 1% AEP flood event.

Two engineers gave evidence to the Court in relation to flooding and both agreed that:

- inundation of the Subject Location occurred in the 1974 and the 2011 floods; and
- the Proposed Development complies with the requirements of Acceptable Outcome AO13.1 of the Planning Scheme.

However, the Court accepted evidence from the Council's expert engineer who stated that the demonstrated compliance with the Planning Scheme was insufficient to avoid significant inundation of the site when climate change was allowed for. The Court therefore determined that:

- the Planning Scheme was inconsistent with the SPP as it failed to account for the effects of climate change on flood levels; and
- the Proposed Development did not comply with the SPP as it did not avoid the natural hazard area.

Whilst the Court accepted that the Proposed Development would not hinder a disaster management response or recovery capacity, the age and possible financial vulnerability of the prospective residents would have resulted in a significant risk to people in a flood event.

The Court held that the Proposed Development ought to be refused given its findings in respect of flooding.

Court agrees that the standard of amenity of the Proposed Development was poor

Two experts gave evidence in respect of visual amenity and the Court agreed with the Council's town planning expert that, ignoring the compliance with the Planning Scheme, the Subject Location would be overdeveloped.

However, the Court determined that the discretionary matters relating to the poor design from an amenity perspective were not sufficient to warrant refusing the Proposed Development.

Relevant matters

The Applicant submitted to the Court the following three relevant matters as justification for approving the Proposed Development:

- the Subject Location has been filled to a level which complies with the Planning Scheme;
- the Proposed Development will have a lower density of people per dwelling than a current reconfiguration approval granted over the Subject Location; and
- there is an economic and community need for the Proposed Development and it will assist in achieving the development supply benchmarks in South East Queensland.

On balance, the Court did not agree that the Applicant's relevant matters justified the approval of the Proposed Development given the findings of the Court in relation to need and flooding and the inability to condition the development to address the unacceptable impacts identified.

Conclusion

The Court refused the Proposed Development and dismissed the appeal on the basis that the Proposed Development was inconsistent with the SPP for the following reasons:

- the Proposed Development did not avoid a natural hazard area in circumstances where significant flooding is likely to occur on the Subject Location when allowance is made for climate change;
- the Proposed Development would not mitigate the risks to prospective residents and their homes to an acceptable or tolerable level.

Planning and Environment Court holds that a tavern may remain open till 2 am in face of a local government argument that it should close at midnight

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Pimpama Commercial Pty Ltd v Council of the City of Gold Coast* [2020] QPEC 33 heard before RS Jones DCJ

September 2020

In brief

The case of *Pimpama Commercial Pty Ltd v Council of the City of Gold Coast* [2020] QPEC 33 concerned an application to the Planning and Environment Court (**Court**) by Pimpama Commercial Pty Ltd (**Developer**) about the Council of the City of Gold Coast's (**Council**) decision to partly refuse a change (other than a minor change) application which sought to extend a condition which constricts the operating hours of a tavern from 12 midnight each day to 4 am each day in relation to a development approval for a tavern (**Tavern**) located at 3-5 Dixon Place, Pimpama.

The Developer appealed the Council's decision to partially refuse the Developer's application to extend the Tavern's operational hours to 4 am. During the course of the appeal the Developer also submitted an alternative position that the operational hours for bar service cease at 2 am and for gambling at 4 am.

The Council maintained that the bar service and gambling ought to cease at 12 midnight in accordance with the development approval for the Tavern.

The Tavern itself was approved in an earlier development approval, therefore, the only disputed issue in the appeal was whether the proposed extended operational hours of the Tavern were appropriate. The Court was therefore required to undertake a balancing exercise of "*the genuine potential positives that might arise from the extended trading hours against the negatives (in the overall community well-being including health and sense of amenity including anti-social conduct) that might result*" (at [39]).

The Court considered evidence in relation to amenity, social planning and town planning and concluded that there was a need for the operational hours of the Tavern to be extended to 2 am on Thursday, Friday and Saturday nights, but sought submissions from the parties about whether the Court could or should make a distinction between trading hours for different nights.

Amenity impacts caused by the extended operating hours were considered to be minimal

The Court heard evidence form a mechanical engineer relied on by the Developer and an environmental consultant relied on by the Council regarding the potential amenity impacts generated from patrons leaving the Tavern after midnight. The potential amenity impacts included noise and antisocial behaviour such as property offences, violence and loud and abusive language.

The Court accepted evidence that antisocial behaviour may occur during the proposed extended operational hours, and that there would be a staggered departure of patrons between midnight and 4 am.

On balance, the Court concluded that "*with the imposition of appropriate conditions, no unacceptable impacts on residential and/or on community amenity would arise and, that the tavern ought not be prevented from trading beyond midnight for that reason*" (at [37]).

Court concluded that there would be minimal social planning impacts as the Pimpama community was not vulnerable

The Court then went on to consider evidence from the social planners and was satisfied, on balance, that the Pimpama community was not vulnerable to risks associated with gambling and alcoholic consumption.

The Court balanced the risks associated with gambling and alcoholic consumption against the employment and social benefits provided by the Tavern including the "45 electric magnetic gambling (EGM's) available to inject further joy into [the patrons'] lives", and was satisfied that there was a sufficient level of community need to extend the operational hours past midnight till 2 am, but no meaningful benefit in extending the operational hours till 4 am (at [62]).

Court held that there were no matters of non-compliance and the views of the relevant submitters opposing the change were relevant but unpersuasive against the expert evidence

The Court considered the views of eight properly made submissions, six of which were against the extended operational hours, and recognised the relevance of the submissions. However, the Court did not consider the evidence informative one way or the other, and ultimately determined that the evidence of the town planning experts was more persuasive.

The Court noted that under the relevant planning scheme a tavern is generally expected to close at midnight, but the Court also noted that:

- a reasonably informed Pimpama community member would probably have been aware of nearby taverns trading till 2 am; and
- any non-conformity with the relevant planning scheme in relation to the general requirement to close at midnight would not of itself warrant refusal.

After concluding that there would be no meaningful negative impacts on amenity or the general health of the community if the operational hours were extended to 2 am, the Court addressed the evidence of two town planning experts and found that the extension of the trading hours would not create any genuine non-compliance with the relevant planning scheme in relation to amenity or social and health issues.

Conclusion

After concluding that there is a community need to extend the operational hours of the Tavern on Friday, Saturday and likely Thursday night from midnight to 2 am, the Court noted that there may be a reduced community need on the remaining days of the week.

The Court therefore requested submissions from the Council and the Developer about whether the Court could or should make a distinction between operational hours for different nights and withheld its orders in anticipation of further submissions.

In the case of *Pimpama Commercial Pty Ltd v Council of the City of Gold Coast (No. 2)* [2020] QPEC 48 the Court heard submissions from the parties in respect of the extension of trading hours to 2 am for every night of the week and stated that it was inclined to make orders limiting the trading hours of the Tavern to 2 am on seven nights of the week. The Court refrained from making final orders until hearing from the parties about the form of the orders.

Section 11 of the Planning and Environment Court Act 2016 cannot be used to circumvent the Court's inability to make an enforcement order under section 180 of the Planning Act 2016

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Director, Fisheries Queensland, Department of Agriculture and Fisheries v Scooter Farm Pty Ltd* [2020] QPEC 35 heard before Rackemann DCJ

September 2020

In brief

The case of *Director, Fisheries Queensland, Department of Agriculture and Fisheries v Scooter Farm Pty Ltd* [2020] QPEC 35 concerned an originating application to the Planning and Environment Court (**Court**), in which the Applicant sought the following:

- *Unlawful development* – a declaration that destroying or damaging marine plants in a tidal area was assessable development for which there was no effective development permit and therefore such development was unlawfully carried out.
- *Rehabilitation works* – orders requiring rehabilitation works, such as "*returning the tidal area to the marine characteristics that existed prior to the development*" (at [1]).

The Applicant had initially sought orders in respect of rehabilitation works under section 11 of the *Planning and Environment Court Act 2016* (**PECA**); or in the alternative under section 180 of the *Planning Act 2016* (**Planning Act**). Subsequently, the Applicant withdrew its application under section 180 of the Planning Act, as it was accepted that "*since any development offence in this case was one committed under the SPA, it is not one which can form the basis of an application for an enforcement order under section 180 of the PA*" (at [4]) in light of judicial consideration in *Benfer v Sunshine Coast Regional Council* [2019] QPEC 6).

On the first day of the hearing, the parties had proposed that consent orders were to be made by the Court. The consent orders included declarations that the development was carried out unlawfully, and orders which required the Respondent to carry out rehabilitation works (**Rehabilitation Orders**).

Prior to ultimately making the declarations that the development was carried out unlawfully, the Court considered whether it had jurisdiction to grant the Rehabilitation Orders.

Does the Court have jurisdiction to grant an order requiring the Respondent to undertake rehabilitation works under section 11 of the PECA?

The Court considered that in order to grant the Rehabilitation Orders under section 11(4) of the PECA, the provision required that "*the order be about the declaration or one or some of those that the Court makes. That calls for attention to be given to the declarations and to the nexus between them and the orders sought, to see whether the latter is about the former*" (at [9]).

In considering the nexus between the Rehabilitation Orders and the declarations about the unlawful development, which was destroying or damaging marine plants in a tidal area, the Court observed that:

- The Rehabilitation Orders were not about the declarations that the development was unlawful.
- The Rehabilitation Orders were about new obligations, which did not flow from the declarations that the development was unlawful.
- The Rehabilitation Orders "*compel the* [R]*espondent to address the impacts of the underlying unlawful conduct*", which was the kind of relief that was to be sought under section 180 of the Planning Act.
- The Respondent did not have an obligation to undertake the actions proposed in the Rehabilitation Orders and would not have such an obligation by reason of the declarations.

Conclusion

The Court concluded that it did not have jurisdiction to make the Rehabilitation Orders as those orders were not about the declarations that the development was carried out unlawfully.

However, the Court ultimately made the consent orders proposed by the parties, save for the Rehabilitation Orders.

Contempt of Court: Planning and Environment Court finds respondents in wilful contempt of a Court Order after using a tub grinder to remove wood stockpiles

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Moreton Bay Regional Council v Meredith & Others* [2020] QPEC 36 heard before RS Jones DCJ

September 2020

In brief

The case of *Moreton Bay Regional Council v Meredith & Others* [2020] QPEC 36 concerned an originating application to the Planning and Environment Court seeking that the respondents be committed or otherwise dealt with for contempt of court.

The alleged contempt related to the respondents' failure to comply with a Court Order dated 5 December 2019 (**Court Order**) requiring them to restrain from carrying out a material change of use for a "*medium impact industry*", as defined in the *Moreton Bay Regional Council Planning Scheme* (**Planning Scheme**). The Court found that the respondents were wilfully not complying with the Court Order and were therefore in contempt.

Legislative framework

Section 36(1) of the *Planning and Environment Court Act 2016* (Qld) provides that the Planning and Environment Court has the same power to punish a person for contempt as the District Court.

Section 129(1) of the *District Court of Queensland Act 1967* (Qld) provides that a person is in contempt if that person, without lawful excuse, fails to comply with an order of the court (other than an order of the type mentioned in section 129(1)(e), which did not apply in the circumstances of this case).

Background facts

Paragraph 1 of the Court Order stated as follows:

> *It is ordered by consent that (1) the first, second, third and fourth respondents by themselves, their servants or agents, are restrained from carrying out a material change of use for a medium impact industry as defined by the Moreton Bay Regional Council Planning Scheme including wood chipping on the subject land save for where authorised by an effective development permit.*

The evidence before the Court was that on several occasions, Council officers attended the subject land following the receipt of a complaint to investigate an alleged unlawful use. On each occasion, the relevant Council officer observed that a woodchipper was being used on the subject land, including a conveyor and large piles of fill.

The subject land is located in the rural residential zone. In that zone, activities defined as "*medium impact industry*" in the Planning Scheme require a development permit. A medium impact industry includes: manufacturing, producing, processing, repairing, altering, recycling, storing, distributing, transferring or treating of products, which results in noticeable impacts on sensitive land uses due to offsite emissions (such as particle, smoke, odour and noise).

The respondents were of the view that the Court Order permitted them to operate the machinery. In addition to paragraph 1, the Court Order separately provided that the respondents were required to "*remove and lawfully dispose of the fill*" and "*any stockpiles of material*". The Court Order also stated that the respondents were to use their own plant and equipment to carry out those works.

An affidavit was filed by each of the first and third respondents, and by an employee. These affidavits variously stated as follows:

- "*The plant and equipment that is being used on the site is the fastest and quickest way to achieve the desired outcome of the court*".
- "*A tub grinder was chosen for use on the site for this process … this does not involve nor is this process wood chipping*".

- "*A tub grinder and woodchipper are two completely different machines. A tub grinder does not chip wood and it is not a woodchipper*".
- "*The plant and equipment being used on the site is considerably quieter than the woodchipper that was previously in use*".
- "*… there is no application that could be applied in this situation able to complete the orders of the court which does not have noise impact on surrounding properties*".

The unchallenged evidence of neighbouring property owners was that they saw no material difference in the noise emanating from the woodchipper when compared with the tub grinder. They also said that there were similar nuisance outcomes, including dust or woodchip debris which would drift onto their properties.

A lay witness also relevantly gave evidence that he saw "*large trucks leaving the land filled with wood chips*" and "*large trucks coming to the property filled with wood to replace the wood piles*".

Findings of contempt

The Court found as follows:

- Despite the evidence of the lay witness, the respondents were not importing more timber onto the subject land for processing. The Court stated that "*the timber might have been delivered to the subject land but was then transported to other sites for further processing*".
- The respondents continued to process larger pieces of timber into materially small pieces of wood on a regular basis, and that this use fell within the definition of "*medium impact industry*".
- The Court rejected oral evidence of the first respondent that alternative methods for removing the timber would have taken considerably longer and would be a significantly greater financial cost.
- The respondents decided to use the tub grinder, rather than alternative methods, for commercial advantage and to maximise their returns.

The Court held that it was satisfied beyond a reasonable doubt that the conduct of the respondents was in breach of the Court Order, and that the respondents had no lawful excuse for failing to comply with the Court Order.

In so concluding, the Court held that the Court Order was not directed at preventing activities on the subject land involving the use of a woodchipper per se. Paragraph 1 required that the respondents be restrained from carrying out "*a material change of use for a medium-impact industry* ***including*** *woodchipping*".

Conclusion

The Court referred to the decision in *Bundaberg Regional Council v Bailey* [2017] QPEC 31 where it was said that contempt is a serious matter that "goes significantly to the heart of the justice system".

The Court held that the circumstances of this case justified an order that the respondents pay a fine of $5,000 in total, and the applicant's costs of $20,000.

Biodiversity Offsets Scheme for landowners in NSW

Mark Evans

This article discusses the Biodiversity Offsets Scheme and that while landowners may benefit from establishing a biodiversity stewardship site on their land, close consideration needs to be given to the process and requirements

September 2020

In brief

If you own a rural property you may have heard something about "biobanking" or "biodiversity stewardship sites". Equally, you might just be wondering why the government would pay you good money for native scrub suitable for raising goats, feral pigs and not much else… What's the catch? What's required? How can you, as a landowner, benefit?

New changes in the law – introduction of the Biodiversity Offsets Scheme

The *Biodiversity Conservation Act 2016* (**BC Act**) and accompanying regulations commenced in August 2017.

The BC Act introduces a Biodiversity Offsets Scheme (**BOS**), which replaces the old biobanking scheme. In a nutshell, the BOS is designed to create a system for the creation and sale of biodiversity credits by landowners to those impacting the environment.

One of the main aims of the BOS is to establish and encourage an open market between those impacting biodiversity values (usually developers) and those managing and protecting biodiversity values in areas nearby (usually landowners).

How can this benefit you?

There can be significant benefits in establishing a site on your land.

The areas of your land that contain threatened species or areas of biodiversity value are likely to be heavily vegetated and probably not suitable for grazing. Additionally, establishing a site on your land can, if done properly and in the right areas, prove to be lucrative.

Your accredited assessor can give you an idea of the likely number of credits generated by your site and the potential return in doing so.

How to establish a biodiversity stewardship site and sell credits

- Determine whether you are eligible.
- Get an accredited assessor to draft a report and calculate credits.
- Enter into a biodiversity stewardship agreement (**Agreement**) with the Biodiversity Conservation Trust (**Trust**).
- Sell your credits.
- Receive annual payments and manage the biodiversity stewardship site (**site**).

Who needs credits?

Developers, mining companies, government departments (and in some cases the Trust) need biodiversity credits to offset the impact of developments on the environment.

How do you generate credits?

Landowners generate credits by setting aside and managing tracts of their land, and entering into a biodiversity stewardship agreement. In return, they receive classes of credits which can be publicly traded through the public register.

Step One – The land must meet certain eligibility criteria

Among other things (like not already being a reserve or already subject to conservation measures), your land must contain threatened species or areas of biodiversity value to be considered for a site. Usually, this can be answered quickly through a report by an accredited assessor. You will also need to pass a "fit and proper" person test if you choose to go ahead and establish a site.

Step Two – Establishing the site

If you want to test the waters, you may lodge an expression of interest through the Trust "expression of interest register" to identify potential purchasers of credits, before you proceed with making a formal application.

If you proceed with a formal application, you will need to get an accredited assessor to prepare a biodiversity stewardship site assessment report (**Stewardship Report**).

Once your assessor has prepared the Stewardship Report, you submit an application including the Stewardship Report to the Trust via the Biodiversity Offsets and Agreement Management System (**BOAMS**), together with applicable fees.

Step Three – Assessment by the Trust

The Trust will assess your application against relevant legal and technical requirements and agree on the terms of the BSA. This is not a quick process and registration of the BSA on title is a legal obligation that will remain over the property title forever.

The Agreement will include a management plan that sets out proposed management actions and the cost of those actions over a determined period, (usually 20 years, but can be longer or shorter). The Agreement will also determine the ongoing maintenance costs.

Once the BSA is agreed and entered into by the Trust and the landholder, the agreement and credits will be registered on the Biodiversity Offsets Scheme Public Register.

Step Four – Sell the credits, manage the site

By establishing a site, you effectively receive two streams of income:

- the Stewardship Report will calculate a deposit you must make into the Biodiversity Stewardship Payments Fund (**Payments Fund**) for ongoing management of the site (**Deposit**). The Payments Fund then pays you scheduled management payments from the Deposit over the number of years determined in the Stewardship Report and by the Fund, and
- any profit you make from selling credits above and beyond the payments you need to make into the Payments Fund.

Buying credits – what happens next?

In most cases, the credit will be transferred by the credit holder to the developer on settlement of the purchase. The purchaser of a credit must apply in writing to the Department to retire the credit.

Caution here – the Department of Planning, Industry and Environment (**Department**) can refuse an application to retire a credit for a number of reasons. Most importantly, if the Department becomes aware that you have not made the required payment into the Payments Fund, it will refuse to register the transfer of the credit.

This area of law is new and rapidly evolving. Investigating and establishing a site, complying with your management obligations, and handling the sale and transfer of credits must be carefully managed.

Biodiversity Offsets Scheme for developers in NSW

Mark Evans

This article gives an overview of how the Biodiversity Offsets Scheme works and the options available to developers purchasing and retiring biodiversity credits

September 2020

In brief

If you are engaging in development that is going to impact the environment, offsetting that impact can play a decisive role in the success (or not) of the project.

The *Biodiversity Conservation Act 2016* (**BC Act**) and accompanying regulations creating the Biodiversity Offsets Scheme (**BOS**) represent a substantial overhaul of conservation laws in NSW.

Depending on your site, you will often have four choices to offset environmental impacts:

- find and buy suitable biodiversity credits (**credits**);
- pay an amount directly into the Fund;
- undertake other biodiversity actions that qualify as biodiversity conservation measures; or
- any combination of the above.

How does the new Biodiversity Offsets Scheme work?

The new BOS replaces the biobanking scheme. The BOS provides a new process for the assessment and offsetting of impacts on biodiversity values in connection with proposed development.

In a nutshell, the BOS is designed to create a system for the creation and sale of biodiversity credits by landowners to those impacting the environment.

One of the main aims of the BOS is to establish and encourage an open market between those impacting biodiversity values (usually developers) and those managing and protecting biodiversity values in areas nearby (usually landowners).

Does the Biodiversity Offsets Scheme apply to your development?

The following developments are subject to the BOS and applications for development consent must include a Biodiversity Development Assessment Report (**BDAR**):

- development needing consent under Part 4 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) (excluding complying development);
- activities under Part 5 of the EP&A Act; and
- State significant development and State significant infrastructure.

If your proposed development impacts biodiversity above a certain threshold (**BOS Threshold**), you will need to engage an accredited assessor to prepare a BDAR.

The BOS Threshold takes into account the impact of:

- clearing of native vegetation and the loss of habitat;
- development on the following habitat of threatened species or ecological communities:
  - karst, caves, crevices, cliffs and other geological features of significance;
  - rocks;
  - human made structures;
  - non-native vegetation;
- development on the connectivity of different areas of habitat of threatened species;
- development on the movement of threatened species that maintains their lifecycle;

- development on water quality, water bodies and hydrological processes that sustain threatened species and threatened ecological communities, and
- wind turbine strikes or vehicle strikes on protected animals.

Further, if your proposed development is "likely to significantly affect threatened species", you will need to submit a BDAR. Whether development is "likely to significantly affect threatened species" is determined by:

- the test in section 7.3 of the BC Act, and
- whether the development is in a declared area of "outstanding biodiversity value".

The BDAR will determine the impact of your proposed development on biodiversity values and the biodiversity conservation measures (including the retirement of credits) needed to avoid or minimise that impact. This is a key document in the process and will govern the actions you need to take to proceed with your development. Engaging a professional and experienced accredited assessor to prepare the BDAR at this stage is critical.

A consent authority must consider the BDAR when determining whether to grant development consent for the proposed development and if consent is granted, the consent authority must impose a requirement to retire credits by conditions of consent.

Serious and irreversible impacts on biodiversity values

The determination of "serious and irreversible impacts on biodiversity values" varies but generally means an impact that is likely to contribute significantly to the risk of a threatened species or ecological community becoming extinct. For example, reducing the population size of a species that has a very small population size or impacting the habitat of a species that only occurs within a very limited geographic distribution.

This determination in your BDAR can relate to only some areas or sometimes the whole area of the proposed development, meaning those areas cannot be cleared or impacted, regardless of any proposed offsets or biodiversity conservation measures. If your development will have serious and irreversible impacts on biodiversity values, the consent authority cannot consent to your development in its current form.

Offsetting the impact of your development

Depending on the requirements contained in the BDAR and determined by the consent authority, the measures to offset your development impact are any one or a combination of the following:

- retirement of the required number and class of like-for-like credits ("like for like" means the same threatened ecological community or class of vegetation located in the same sub region as the impacted site or within 100kms of the site);
- payment of the value of the credits (determined by the Biodiversity Conservation Trust (**Trust**) calculated using the offsets payment calculator (**Calculator**)) directly into the Biodiversity Conservation Fund (**Fund**) to satisfy the requirement to retire credits;
- the retirement of the required credits in accordance with the variation rules; and
- the funding of a biodiversity conservation action that would benefit the relevant threatened species or ecological community, and that is equivalent to the cost of acquiring the required like-for-like credits.

Biodiversity conservation measures requirements

The BDAR and Consent conditions will set out the biodiversity conservation measures required to offset the impact of your development. Where biodiversity conservation measures are required, developers can propose a combination of the four options above for approval, though these options are constrained and will involve further delay.

For example, before seeking approval from the consent authority or Native Vegetation Panel, applicants must seek written agreement from the Department of Planning, Industry and Environment (**Department**) to the proposed action being delivered through the NSW Government *Saving our Species* program. To use a biodiversity conservation action, it must be imposed as a condition of consent or approval. The cost of using a "biodiversity conservation action" to meet an offset obligation must also be financially equivalent to the cost of acquiring the required credits.

An example of a biodiversity conservation action:

Five-clawed worm-skink	*Anomalopus mackayi*	▪ Identify key threats to the species' viability at critical sites and associated relevant management actions. ▪ Research the species' movement patterns, habitat use and response to management.

The Regulations state that the ancillary rules may set out reasonable steps an applicant must first take before the variation rules can be applied, such as:

- checking the public register of biodiversity credits; and
- lodging an entry in the public register of persons seeking biodiversity credits for a minimum specified period; and
- contacting landholders who are entered on the public register of biodiversity stewardship site expressions of interest.

Review of the ancillary rules show that they do not yet include these requirements though we expect this oversight will soon be remedied.

Buy credits from a credit holder privately or pay into the Fund?

Landowners generate credits on biodiversity stewardship sites. They do this through setting aside and managing tracts of their land in return for classes of credits, which can be publicly traded through the Biodiversity Offsets Scheme Public Registers. Credit holders (usually landowners) seek to sell the credits to developers at a price negotiated privately between the parties.

In practice, paying an amount into the Fund will often be the most convenient (and often only) choice for a developer. The amount per credit you must pay into the Fund is determined by the Department according to the formula provided in the Calculator. It's best to get the accredited assessor you engage for the BDAR to calculate this amount.

An example from the Calculator:

PCT Common Name	Baseline Price per Credit	Risk Premium	Administrative Cost	Price per Credit
999 – Norton's Box – Broad leaved peppermint…	$1373	21%	$20	$1681

The Calculator uses a "base price" for each type of credit needed multiplied by a risk factor and an administration fee. The base price fluctuates and reflects the number of trades recently conducted and the price paid per credit under those trades. The risk factor represents a risk loading the Department applies in the Calculator to cover the risk in undertaking biodiversity conservation measures later with the money you pay into the Fund now. Usually the price per credit charged by credit holders would be less than the cost to pay directly into the Fund as credit holders would not charge the risk factor or administration fee and both parties can negotiate a better deal.

In areas where many "trades" have already been made, the data used by the Department in the Calculator is robust and credits are publicly available for developers to purchase. In most areas outside of metropolitan Sydney, the Hunter Valley and the Illawarra region, this is not the case and the Department will be indirectly setting the market price through the Calculator base price for some time to come.

Buying credits – that's the end of the story?

In most cases, the credit will be transferred by the credit holder to the developer on settlement of the purchase. The purchaser of a credit must apply in writing to the Department to retire the credit.

Buyer beware – the Department can refuse an application to retire a credit for a number of reasons. Most importantly, if the Department becomes aware that any payment required to be made to the Biodiversity Stewardship Payments Fund by the landowner in relation to the credit has not been made it will refuse to register the transfer of the Credit.

It is important for developers to ensure that appropriate checks are made and the purchase of credits is undertaken by a professional adviser with experience in this area.

This area of law is new and rapidly evolving. Complying with your biodiversity conservation measures and purchasing credits must be carefully managed.

A guide to buying biodiversity credits in New South Wales

Mark Evans

This article discusses some practical tips for developers, public authorities and others in relation to buying and transferring biodiversity credits in NSW

October 2020

In brief

Engaging in development that will impact the natural environment (in particular biodiversity) may necessitate the purchase, transfer and retirement of biodiversity credits. Negotiating the purchase directly with the owner of those credits can lead to significant costs savings.

This article gives some practical tips for things you should look out for in NSW when negotiating the purchase and transfer of biodiversity credits. Like any market, players need to consider and guard against potential distortions.

Landowners in NSW can generate credits by establishing biodiversity stewardship sites. They do this through setting aside and managing tracts of their land in return for classes of credits, which can be publicly traded. There is a statutory process to register these sites. Credit holders (usually landowners) then seek to sell the credits to developers at a price negotiated privately between the parties.

We have written in detail about how the NSW Biodiversity Offsets Scheme works and what it means for developers in our recent article *Biodiversity Offsets Scheme for developers in NSW*.

We have been involved in a number of transactions in this emerging market involving the sale and transfer and retirement of credits. This space is still relatively new and untested and there are a number of potential pitfalls to be wary of.

Identify the owner of the credits

The "owner" of the credits will ordinarily be the landowner but not always so. Though less frequent, there is scope under the scheme for the vendor of the biodiversity credits to be someone other than the owner of the biodiversity stewardship site.

Adequate due diligence should be undertaken to ensure the vendor has the right to transfer the biodiversity credits.

Outstanding breaches of the Biodiversity Conservation Act

There is provision under the *Biodiversity Conservation Act 2016* (NSW) for the Department to cancel or suspend biodiversity credits where, for example, the landowner has failed to carry out management actions or is in breach of their biodiversity stewardship agreement (see sections 6.23-6.25).

Appropriate checks should be undertaken (and warranties included in the transfer agreement) to ensure that the landowner is not currently in breach of their obligations or the Department has not indicated an intention to suspend or cancel the biodiversity credits.

Ensure the number and type of credits being traded are available

We have seen instances where the owner of a stewardship site has lost track of the number of credits previously traded and offered to sell more credits than what was remaining. This only became apparent after a check of the register.

It is important to ensure that the number and type of credits the vendor is purporting to sell are still available for transfer.

Payment of the Total Fund Deposit

The owner of the credits is obliged to pay a portion of the funds they receive from the sale into the Biodiversity Stewardship Payments Fund. The obligation to pay into the Biodiversity Stewardship Payments Fund arises on the first transfer of the biodiversity credits and the amount is calculated based on the ratio of credits transferred (see section 6.21).

The rules as to how this amount is calculated and when it is paid vary under the old Biobanking Scheme and the new Biodiversity Offsets Scheme but from a purchaser's perspective the risk is the same. If the Fund deposit is not made, the Department will refuse to register the retirement of the biodiversity credits. The risk for a purchaser is that payment is made to the vendor, the vendor does not make the required Fund deposit and, some time later when the purchaser seeks to retire the purchased credits the Department refuses to register the retirement of the credits.

Owners of credits will understandably be reluctant to disclose the amount of the Fund deposit required and there is currently no mechanism to check whether this amount has been paid other than seeking confirmation directly from the Department.

Careful drafting of the sale agreement and adequate due diligence and understanding of the NSW Biodiversity Offsets Scheme is required to ensure this risk is dealt with and the purchaser obtains what they are paying for to satisfy their obligations under the scheme.

Development proposed for a historic and heritage residence built in Queensland, circa 1920, is refused

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Blu Con Pty Ltd v Brisbane City Council* [2020] QPEC 32 heard before Everson DCJ

October 2020

In brief

The case of *Blu Con Pty Ltd v Brisbane City Council* [2020] QPEC 32 concerned an appeal to the Queensland Planning and Environment Court (**Court**) against the refusal by the Brisbane City Council (**Council**) of a development application for a development permit for the clearing of vegetation, and for the partial demolition and extension of a house described as "Mount Lang" (**Proposed Development**), which had been built on three lots at Bulimba during the interwar period, circa 1920, by the Harrison family.

The relevant assessment benchmarks in the appeal related to the preservation and maintenance of important historical and heritage places under the *Brisbane City Plan 2014* (**Planning Scheme**).

The Court dismissed the appeal, holding that the Court had not been directed to any relevant matter under section 45(5)(b) of the *Planning Act 2016* (**Planning Act**), and that the part of the Proposed Development in respect of partially demolishing and extending Mount Lang was noncompliant with the assessment benchmarks and that the clearing of the vegetation was to enable the development of Mount Lang.

Background

The Proposed Development in respect of Mount Lang included the following:

- Demolishing and reconstructing parts of Mount Lang's internal fittings and rooms.
- Relocating Mount Lang to be contained on two lots.
- Raising and constructing internal rooms underneath Mount Lang.
- Reconstructing the exterior frontage and stairs of Mount Lang.
- Adding new landscaping to the whole of Mount Lang.
- Constructing a garage, an outdoor area, a pool, and a pool house at the rear of Mount Lang.

Planning Scheme

The subject land is identified as a place of local heritage in the Heritage Overlay under the Planning Scheme because the Council had identified in a heritage citation prepared under the Heritage Planning Scheme Policy (**Heritage Policy**) the cultural heritage values that are applicable to Mount Lang (**Heritage Citation**).

The Heritage Citation identifies the following cultural heritage values of the Heritage Policy as being applicable to Mount Lang:

- "*it is important in demonstrating the evolution or pattern of the city's or local area's history*".
- "*it 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*".

The Heritage Citation stated inter alia the importance of Mount Lang in demonstrating Bulimba's history and its residential growth during the interwar period, and Mount Lang's special association with the Harrison family who is of importance to Bulimba's history and after whom Harrison Street is named.

The Planning Scheme includes the following in respect of the protection of locations of cultural heritage significance:

- *Strategic Framework* – Specific outcome 19 and land use strategy 19, which relevantly states Brisbane's buildings and places that are important to the city's history are to be protected and that places and precincts with cultural heritage significance or special significance to Aboriginal people are to be identified and protected in accordance with the Burra Charter.

- *Heritage Overlay Code* – The overall outcome and the performance outcomes, which relevantly states that development is to provide for the future protection of, not cause damage to, and take account of, cultural heritage significance of a local heritage place.
- *Bulimba District Neighbourhood Plan Code* – The overall outcome, which relevantly states that the history of the neighbourhood plan area is to be protected and places of cultural heritage significance are to be conserved to "*preserve the area's identity*".

Proposed Development offends the assessment benchmarks

The Court observed that the specific protection given to Mount Lang by it being included as a place of local heritage afforded it greater protection than it otherwise would have had under the Planning Scheme.

The Court acknowledged the residential nature of Mount Lang and accepted the desire to change it to be more suited to a contemporary residential use, but nevertheless held that the Proposed Development would be noncompliant with the identified assessment benchmarks.

The Court held that the Proposed Development "*showed little respect for the cautious approach to change urged by the Burra Charter*", which, in Article 3, states an approach of "*changing as much as necessary but as little as possible*".

Although the Court held that the vegetation on the subject land was not afforded specific additional protection by the Heritage Citation, the Court held that the development application for the development permit to clear the vegetation was made in the context of the development proposed for Mount Lang.

The Court therefore held that the extent to which the Proposed Development "*offend[ed]*" the assessment benchmarks in the circumstances was simply inappropriate, and dismissed the appeal.

Land Court of Queensland finds that mining resource companies' activities said to cause loss did not satisfy the test of causation to warrant compensation

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Conway & Ors v Australia Pacific LNG CSG Transmissions Pty Ltd & Anor* [2020] QLC 26 heard before PG Stilgoe OAM

October 2020

In brief

The case of *Conway & Ors v Australia Pacific LNG CSG Transmissions Pty Ltd & Anor* [2020] QLC 26 concerned an application by Landowners to the Land Court of Queensland (**Court**) seeking compensation from two mining resource companies, together called APLNG, for the diminution of the value of their land, known as Tecoma, which was alleged to have been caused by APLNG taking a sample of a tree that was later determined to be an Ooline tree and providing the sample of the Ooline tree to the Queensland Herbarium (**Activities**).

The Landowners alleged that the Activities resulted in a new version of the Flora Survey Trigger Maps for Clearing Protected Plants in Queensland (**FSTM**), which mapped as a high-risk the area on Tecoma within a two kilometre radius of the Ooline tree, which the Landowners argued diminished the value of Tecoma by $700,000.

The Landowners argued that their entitlement to compensation arose out of the following:

- a breach by APLNG of the Option for Easement and Conduct and Compensation Agreement (**OECCA**) between APLNG and the Landowners in relation to the construction of the Eurombah Pipeline on Tecoma;
- under section 81 of the *Mineral and Energy Resources (Common Provisions) Act 2014* (**MERCP**), because of the breach of the OECCA or under the terms of section 81 of the MERCP itself;
- an action in trespass to land.

The Court considered whether a right to compensation had been established under section 81 of the MERCP, in that APLNG had "*caused*" the Landowners to suffer a compensatable effect, namely the diminution in the value of Tecoma, and did not make a finding in respect of the other causes of action.

The Court held that the Activities and the loss alleged by the Landowners was too remote to satisfy the test of causation, because irrespective of the Activities occurring, the ecological condition existed, namely the Ooline tree.

In the event that there ought to have been a finding that causation was established, the Court determined that the quantum of the diminution in the value of Tecoma due to the Activities be limited to $20,000.

Background

The Landowners purchased Tecoma in 2012, at which time they were aware that there were Ooline trees on the south-east corner of the land.

APLNG has an authority to prospect and a petroleum lease over the whole of Tecoma, under which it issued a notice to the Landowners that indicated that APLNG intended to conduct a site survey that relevantly included investigations and surveys about environmental, flora and fauna issues to determine the land's suitability for development.

The environmental scientists engaged by APLNG to conduct a flora survey observed an Ooline tree on Tecoma, and later when re-called to Tecoma to conduct a weed survey arising out of the OECCA, took a sample and provided it to the Queensland Herbarium, which confirmed the tree was an Ooline tree.

Version 6 of the FSTM, which was issued subsequent to the confirmation of the existence of the Ooline tree, mapped the land on Tecoma within a two kilometre radius of the Ooline tree as high-risk vegetation.

The Court observed that part of Tecoma has been protected as a matter of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) since 2001, and that version 6 of the FSTM largely mirrored the EPBC Act vegetation management map, with the addition of a small area to the west of the Ooline tree.

Loss and Activities too remote to satisfy the test of causation

The Landowners needed to establish a compensatable effect to give rise to a right to compensation under section 81 of the MERCP, which the Landowners argued was the diminution in the value of the land as a result of the Activities.

The Court held that the undertaking of an ecological survey was a preliminary activity and therefore an authorised activity under section 81 of the MERCP, and noted that such a survey might well reveal a pre-existing ecological condition that has adverse impacts for a landowner. However, the Court did not accept that a resource authority holder could be responsible for the loss occasioned by the revelation of an ecological condition that existed on the land independent of the resource companies' activities.

The Court also noted that it would be "*frankly, absurd given the numerous people and steps involved*" to suggest that version 6 of the FSTM arose solely on the basis of the discovery of the Ooline tree on Tecoma. The connection between the Activities and the loss alleged by the Landholders was held to be too remote to satisfy the Court as to causation.

The Court also observed that the MERCP does not allow compensation for hurt feelings, disappointment, or anger.

Court not required to consider the claim in trespass

The Court determined that it was not required to consider a claim for compensation arising out of trespass given its findings in respect of compensation under section 81 of the MERCP, but nevertheless noted that it did not disagree with the submission that it had jurisdiction under section 363 of the *Mineral Resources Act 1989* to do so.

Conclusion

The Court determined that the Landowners were not entitled to compensation on the basis that they had not established causation for the purposes of section 81 of the MERCP, and that the loss of $700,000 alleged by the Landowners was too remote. The Court stated that in the event there ought to have been a finding that causation was established, the Court determined the quantum of the loss to be $20,000.

Jurisdictional facts: Supreme Court of Queensland considers whether the decision to grant a mining lease would be invalid if there was non-compliance with notice requirements under the Mineral Resources Act 1989 (Qld)

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Lonergan v Stilgoe & Ors* [2020] QSC 86 heard before Applegarth J

October 2020

In brief

The case of *Lonergan v Stilgoe & Ors* [2020] QSC 86 concerned an application to the Supreme Court of Queensland for the statutory review of a decision by the Land Court to recommend that a mining lease be granted, and an environmental authority be issued, over property in North Queensland. The application was filed by the current owners of the property (**Landowners**), who objected to the grant of the mining lease, and the conditions imposed in the draft environmental authority.

The Supreme Court dismissed the application and held as follows:

- The evidence demonstrated that there was a factual basis for the Land Court to be satisfied that the requirements of section 252A of the *Mineral Resources Act 1989* (Qld) (**MRA**) had been complied with.
- Section 252B of the MRA was not a jurisdictional fact, such that a recommendation to grant a mining lease would be invalid if the section was not complied with.
- The Land Court did not err in failing to take into account a relevant consideration, being evidence adduced by an expert about the impact of the mining lease on koala habitat.
- The Land Court did not breach the rules of natural justice by failing to put the Landowners on notice that the Member would not consider the evidence relating to koala habitat.

Background

A small scale gold miner had been mining gold at Rolfe Creek under two mining leases negotiated with the previous owners of the property. He applied for the grant of a new mining lease over the property and an environmental authority. The Landowners objected to the new mining lease and the conditions recommended in the draft environmental authority.

The objections proceeded to a hearing before a Member of the Land Court, who recommended that the mining lease be granted, and that the environmental authority be issued. The Landowners applied to the Supreme Court for a statutory order of review of the decision by the Member of the Land Court.

The following issues were at the centre of the hearing of the application before the Supreme Court:

- Whether compliance with section 252A and section 252B of the MRA were each a jurisdictional fact, such that a recommendation to grant a mining lease would be ineffective unless the requirements of the relevant section were complied with.
- Whether the Member failed to take into account a relevant consideration, namely the impact of the proposed mining lease on the local environment in relation to koala habitat.

Was compliance with sections 252A and 252B of the Mineral Resources Act 1989 jurisdictional facts?

Section 252A of the MRA provides that the applicant for a proposed mining lease is to give certain documents and information listed in that section, to each "*affected person*". An affected person includes an owner of the land the subject of the proposed mining lease.

Section 252B of the MRA provides that the applicant for a proposed mining lease is to give the chief executive a statutory declaration that the applicant has complied with section 252A within a stated period.

There was some confusion in the Landowners' submissions as to whether they asserted non-compliance with section 252A, 252B, or both. Despite this confusion, for completeness, the Supreme Court dealt with both.

The Supreme Court was satisfied that there was a factual basis for the Land Court's conclusion that the applicant had satisfied the requirements of section 252A of the MRA, although it noted that the evidentiary position with respect to compliance with section 252B was deficient. In any event, the key issue to be determined was whether compliance with those sections were a "*jurisdictional fact*", such that their non-compliance would invalidate the decision to grant the mining lease.

In considering that question, the Court had regard to the High Court decision in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 262 CLR 510. That decision concerned non-compliance with section 74(1)(ca)(ii) of the *Mining Act 1978* (WA), which requires an application for a mining lease to be accompanied by a mineralisation report prepared by a qualified person. The High Court held that compliance with section 74(1)(ca)(ii) is an essential preliminary step to the exercise of the power conferred on the Minister to grant a mining lease. The Supreme Court noted the following in respect of that High Court decision (at [48]):

> *Forrest & Forrest … requires a close consideration of the language of the relevant provision, in context, including its objects and purpose. This includes consideration of the consequences of non-compliance on the administration of the Act and the interest of other parties. Having had regard to the language of the relevant provision and its purpose, the ultimate question is whether it was a purpose of the legislation that an act done in breach of a provision should be invalid.*

The Supreme Court concluded that it was unnecessary to resolve the issue of whether compliance with section 252A of the MRA was a "*jurisdictional fact*", because the evidence before the Land Court indicated that section 252A had been complied with. However, the Supreme Court noted the following (*per curiam*, at [50]):

> *A substantial argument may be made that the purpose of the statutory scheme would be advanced by holding that an exercise of decision-making power by the Land Court affected by a failure to comply with s 252A is invalid … the public interest is not served by allowing non-compliance with a legislative regime that requires certain documents and information to be given to an affected person and that the provision of the informed views of those who object to an application is apt to improve the quality of decision-making by those charged with the administration of the Act.*

With respect to whether compliance with section 252B of the MRA was a "*jurisdictional fact*", the Supreme Court concluded that it was not. The Supreme Court noted that while section 252A imposed important requirements which serve the public interest and protect the interests of affected parties, it would be an "*odd and apparently unintended consequence*" for the Land Court's jurisdiction to be invalidated in a case where there was no dispute about compliance with section 252A.

Did the Land Court fail to take into account a relevant consideration?

The Landowners' objections to the application for the mining lease contended that the conditions in the draft Environmental Authority were inadequate and that any Environmental Authority ought to contain a condition that the leased area be fully fenced.

During the course of the Landowners' closing submissions before the Land Court, it was also asserted that the proposed mining activities would have a detrimental impact on koala habitat in the leased area. The Landowners had not included this as a ground of objection.

The Land Court concluded that it was unable to consider the evidence in relation to koala habitat as a result of section 268(3) of the MRA, which relevantly provides that:

> *The Land Court shall not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application.*

The Landowners asserted that the Land Court erred in failing to consider the impact on koala habitat. The Landowners also asserted that the Member breached the rules of natural justice by failing to advise them that she would not consider the evidence relating to koala habitat.

On both counts, the Supreme Court rejected the Landowners' assertions. The Supreme Court held that section 268(3) of the MRA precluded the Land Court from entertaining an objection or any evidence in relation to the issue of koala habitat. Additionally, the Supreme Court stated that the Landowners did not explain how the Land Court raising the issue with their legal representatives before the decision was made could have made a difference.

Conclusion

The Supreme Court ultimately held that the Landowners had not established their grounds for judicial review, and the application was dismissed.

Future applicants for mining leases ought to bear in mind the importance of ensuring compliance with the notice requirements under section 252A of the MRA. Although the Supreme Court did not come to a definitive conclusion on the issue of whether compliance with section 252A is a "*jurisdictional fact*", its comments emphasise the importance of this section in serving the public interest, and the interests of affected persons.

Queensland Planning and Environment Court allowed an appeal against the Development Tribunal's decision regarding a development approval for building work

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Super Turnkey Pty Ltd & Anor v Queensland Fire and Emergency Service* [2020] QPEC 43 heard before Rackemann DCJ

October 2020

In brief

The case of *Super Turnkey Pty Ltd & Anor v Queensland Fire and Emergency Service* [2020] QPEC 43 concerned an appeal to the Planning and Environment Court (**Court**) against a decision made by the Development Tribunal (**Tribunal**), which purported to change the development approval for building work given by a building certifier.

Background

A development application for a development permit for building work in respect of a 30-room motel development had been approved by a building certifier, subject to development conditions which included a performance solution with respect to fire safety.

The Queensland Fire and Emergency Service (**QFES**) issued a non-compliant inspection report twice. After each non-compliant inspection report was given, Super Turnkey made an application to change the development approval to require an alternate performance solution for fire safety to satisfy the QFES. The building certifier approved both change applications.

The QFES appealed to the Tribunal against the building certifier's decision to approve the second change application.

Development Tribunal made an error or mistake of law and a jurisdictional error

In considering whether the Tribunal made an error or mistake of law, or a jurisdictional error, the Court made the following observations and determinations:

- *Mischaracterisation of the appeal* – The Tribunal characterised the appeal as one against a decision notice approving a development application rather than a decision notice approving a minor change application.
- *Incorrect jurisdiction* – The Tribunal incorrectly identified that the appeal was made under section 229, and schedule 1, table 3, item 1 of the *Planning Act 2016* (**Planning Act**), "*which is relevant to the giving of a development approval for building work, to the extent the building work required code assessment against the building assessment provisions*". However, the Court held that the relevant jurisdiction is that described under schedule 1, table 1, item 2 of the Planning Act, to the extent that the QFES was "*an affected entity that gave a pre-request notice or response notice*".
- *Reasons for the decision* – The Tribunal's reasons for its decision included that "*[t]he building development application should have been refused*", and that the amended decision notice "*approving the development application on certain conditions should not have issued*". The Court found that the Tribunal made an error by not addressing the question as to whether the further change to the changed development approval should be allowed. Further, the reasons provided by the Tribunal were insufficient.
- *Conditioning the non-compliance* – In finding that there was a non-compliance with the assessment benchmarks, the Tribunal "*did not consider, if it did consider, did not give sufficient reasons with respect to, whether conditions could have achieved compliance*".

Conclusion

The Court held that the Tribunal fell into error, allowed the appeal and set aside the Tribunal's decision. Further, the Court approved the change to the development approval subject to conditions as agreed between the parties rather than remitting the matter to the Tribunal.

Stay application against Queensland local government's original decision granted despite non-compliance with procedure, a lack of evidence and no explanation for delay

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Smith v Cairns Regional Council* [2020] QPEC 37 heard before Fantin DCJ

October 2020

In brief

The case of *Smith v Cairns Regional Council* [2020] QPEC 37 concerned an application to the Queensland Planning and Environment Court for the stay of an original decision pursuant to section 522 of the *Environmental Protection Act 1994* (Qld) (**EPA**).

The Court exercised its discretion to make an order granting the stay, but stated that it would not have done so if not for the concessions made by the respondent, Cairns Regional Council. In particular, the Court was critical of the applicant's non-compliance with the Court's procedure, the lack of evidence supporting the stay application and the lack of any explanation for the delay in filing the stay application.

Background

Section 522(1) of the EPA relevantly provides that if an application is made for a review of an original decision mentioned in Schedule 2 Part 2 of the EPA, the applicant can immediately apply for a stay of the original decision.

Section 522(2) of the EPA relevantly provides that the Court can stay the original decision to secure the effectiveness of the review and any later appeal to the Court. Section 522(3) also provides that the Court can impose conditions it considers appropriate when granting a stay.

The original decision related to a notice given to the applicant requiring an environmental investigation to be conducted or commissioned, and submit an environmental report in relation to activities associated with a boat repair and maintenance business located at Trinity Inlet in Cairns. The notice stated that the Council was satisfied that the activities were causing, or would likely cause, environmental harm.

The notice was issued by the Council on 2 April 2020, and it required the applicant to take certain steps by 9 April 2020 in order to prepare for the provision to the Council of an environmental report by 5 June 2020.

The stay application was heard by the Court on 8 April 2020. In support of the stay application, the applicant asserted that he no longer owned, possessed or controlled the subject land, and that compliance with the notice would put him to not insubstantial cost and expense which he would not be able to recover.

Conclusion

The Court was critical of the applicant's stay application. In particular, the Court noted the following:

- The procedural requirements with respect to filing and serving the application and supporting affidavit had not been complied with (at [2]).
- Contrary to section 522 of the EPA, the applicant applied for a stay of the original decision before he applied to the Council for a review of the original decision (at [5]).
- There was a lack of evidence relating to the applicant's assertions and the application for review to the Council was itself not in evidence (at [13]).
- There was no explanation in the evidence about why the applicant delayed bringing the stay application (at [19]).

Despite the above, the Council did not oppose the Court waiving the procedural non-compliances, and consented to an order for a stay until the earlier of 22 business days after the day the Council gave notice of any decision on the review application, or the applicant commenced an appeal. Having regard to those concessions, the Court granted the stay application.

The Court also noted that the Council had been given limited time to respond to the application, and that its solicitors had not received instructions from the Council as to whether there was any ongoing risk of environmental harm associated with the stay application.

Consequently, the Court made an order giving the parties leave to apply to the Court on two business days' notice before the stay expired. In particular, the Court stated that this would ensure the Council could bring the matter urgently before the Court if it formed the view that there was an ongoing risk of environmental harm associated with the stay application.

Recent amendments

We note that section 522 of the EPA was amended by section 85 of the *Environmental Protection and Other Legislation Amendment Act 2020*, which commenced on 20 August 2020, and is now section 539A of the EPA.

The rise of jurisdictional facts and the challenge to the Coastal Management SEPP in Reysson v Minister Administering the Environmental Planning and Assessment Act 1979 [2020] NSWCA 281

Anthony Landro | Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Reysson v Minister Administering the Environmental Planning and Assessment Act 1979* [2020] NSWCA 281 heard before Bell P, Gleeson JA and Payne JA

November 2020

In brief – NSW Court of Appeal dismisses a challenge brought by a landowner in Tweed Heads against the validity of coastal wetlands mapping in the State Environmental Planning Policy (Coastal Management) 2018

Reysson v Minister Administering the Environmental Planning and Assessment Act 1979 [2020] NSWCA 281 (**Reysson**) highlights the increasing prevalence and importance in planning law of jurisdictional facts as a ground for challenge in planning and environment matters. Whilst the challenge was unsuccessful, it nevertheless serves as an important reminder for legislators and policy makers on one hand and applicants and landowners on the other to be alive to language in legislative instruments that might be argued to constitute a jurisdictional fact.

Legislative framework of the SEPP

The recent introduction of the *Coastal Management Act 2016* (NSW) (**Act**) creates the framework for managing coastal issues in NSW. The Act defines four distinct "coastal management areas", with each being defined in Part 2 of the Act, and assigned a set of management objectives:

- Coastal wetlands and littoral rainforests area.
- Coastal vulnerability area.
- Coastal environment area.
- Coastal use area.

Underneath the Act, the *State Environmental Planning Policy (Coastal Management) 2018* (**Coastal Management SEPP**) identifies the four coastal management areas with individual maps (clause 6).

The Costal Management SEPP is an environmental planning instrument made under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**). The stated aim of the Coastal Management SEPP is to:

> *promote an integrated and co-ordinated approach to land use planning in the coastal zone in a manner consistent with the objects of the Coastal Management Act 2016, including the management objectives for each coastal management area.*

The Act and the Coastal Management SEPP play an important role for development within these four areas.

Landowner challenges validity of mapping of its land as coastal wetlands and littoral rainforests area

In Reysson, a Tweed Heads landowner brought judicial review proceedings challenging the validity of the mapping of its land as "coastal wetlands and littoral rainforests area" under the Coastal Management SEPP.

The case was previously dismissed by Pain J in Class 4 of the NSW Land and Environment Court, and was appealed by Reysson to the NSW Court of Appeal.

There were 10 grounds of appeal, which were grouped into three distinct issues:

- **Issue 1** (grounds 1-8) had at its heart an important administrative law principle, and concerned whether clause 6(1) of the Act contained a *jurisdictional fact* (ie a precondition to be satisfied of before the statutory power could be exercised) to identify land as being within a coastal wetlands and littoral rainforests area.

- **Issue 2** (ground 9) concerned whether the proximity area in the Coastal Management SEPP (which was mapped as a 100m zone) was reasonably appropriate and served the objects of the Act. Expert evidence was relied on by the appellant to argue 100m was not reasonably appropriate and adapted to serving the objects of the Act and the Coastal Management SEPP.
- **Issue 3** (ground 10) concerned an administrative procedural issue and was whether the Governor of NSW needed to have had regard to or approve the relevant map in the SEPP.

Issue 1 – Was there a jurisdictional fact that was not satisfied?

Reysson argued that the power to identify land as being within the "coastal wetlands and littoral rainforests area" in a SEPP for the purposes of the Act extended only to land which meets the statutory description in section 6(1) of the Coastal Management Act. The statutory description is:

> *… land identified by a State environmental planning policy to be the coastal wetlands and littoral rainforests area for the purposes of this Act,* ***being land which displays the hydrological and floristic characteristics of coastal wetlands or littoral rainforests and land adjoining those features****.* (emphasis added)

The essence of Reysson's argument was that land needed **to display the hydrological and floristic characteristics of coastal wetlands or littoral rainforests in order to be identified and mapped as a "coastal wetland and littoral rainforest area**". Reysson argued that this was a jurisdictional fact which was a precondition to the exercise of the statutory power to actually map the land. It followed from Reysson's argument that there was no power to identify land as a coastal wetland or littoral rainforest if it did not meet the description in section 6(1) of the Act, ie display the relevant characteristics.

Reysson failed on this ground. The Court found that section 6(1) of the Act did **not** impose a jurisdictional precondition to the exercise of power to map any land as part of the coastal wetlands and littoral rainforests area. Accordingly, the Court had no power to determine for itself whether Reysson's land fell within the mapping for a "coastal wetlands and littoral rainforests area".

The Court cited the High Court case of *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 and stated at [53]:

> *Whether legislation creates a jurisdictional fact of the kind to be objectively ascertained by the Court is a question of statutory construction.*

In answering the question of statutory construction, the Court found that the structure of the Act tended against characterisation of the description in section 6(1) as a jurisdictional fact, and that it was "*improbable that the legislature intended that these provisions turn on objective jurisdictional facts*". See [66] and [72].

In other words, whatever the map states, the map states, and it could not be impugned based on the argument the mapping exercise involved a jurisdictional fact.

Issue 2 – Was the mapping of a 100m proximity zone reasonable?

Reysson argued that the identification of land "adjoining" coastal wetlands was required to be "*reasonably and appropriately adapted to achieving the objects and aims of the Coastal Management Act and the Coastal Management SEPP*". Otherwise, it would lack proportionality. Expert evidence was adduced about whether the 100m proximity area was reasonable, but this evidence was rejected by the primary judge as irrelevant.

Reysson also failed on this ground. The Court of Appeal found that the Coastal Management SEPP was not disproportionate in any sense to the objectives of the Act, the EP&A Act or the Coastal Management SEPP. It concluded at [105] that "*the technique of imposing a generic proximity area of buffer zone is both rational and proportionate as a legislative device to serve the objects*" of the EP&A Act and the Act, especially in circumstances where it is used to trigger an analysis of adverse development impacts.

Issue 3 – Did the mapping itself need to be before the Governor?

In a novel argument, Reysson argued that as the Governor makes the SEPP, the Governor needed to have approved the relevant mapping, but in this case, it was approved by the Minister administering the EP&A Act.

Reysson also failed on this final ground. The Court of Appeal found at [112] that nothing in the EP&A Act or the Act required the Governor to identify land as the "coastal wetlands and littoral rainforests area" through any particular process of "approval", and that it was open to the Governor to make an instrument which identified land through the device of adopting by reference a map which had been approved by the Minister.

Takeaway message

The decision enables the use of the mapping within State Environmental Planning Policies to impose restrictions on and control the development of land.

As the Court of Appeal found that the identification of land with the Coastal Management SEPP maps was not a jurisdictional fact, developers will need to address certain matters (sometimes at great cost) even where mapping may be inaccurate or not display the relevant characteristics (often at great expense and effort). Certain matters will need to be addressed within these generic proximity or buffer zones.

The Court's comment that the technique of imposing a generic proximity area or buffer zone is both rational and proportionate in the context of State-wide mapping legitimises the practice throughout NSW.

The failure of the novel argument that the mapping needed to be before the Governor ensures that the "status quo" is maintained and no additional procedural obstacles to State planning are created for the Government in implementing planning policies.

Queensland Supreme Court dismisses judicial review challenges in respect of rating decisions for properties used to provide rental accommodation to permanent residents or itinerants

Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2020] QSC 145 heard before Applegarth J

November 2020

In brief

The case of *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2020] QSC 145 concerned an originating application to the Queensland Supreme Court seeking judicial review of the Council's decision to adopt certain differential rating categories and levy a minimum general rate for each category, and the Council's decision to issue rates notices in relation to approximately 70 properties owned by the Applicant within the Couran Cove Resort on South Stradbroke Island.

The Applicant argued that, in respect of the Council's decision to adopt certain differential rating categories and levy a minimum general rate for each category, the Council had taken into account an irrelevant consideration being the personal characteristics of the persons occupying the properties, which is not an attribute or characteristic of the property.

Further, the Applicant argued that, in respect of the Council's decision to issue rates notices in relation to the relevant properties, the Council failed to take into account relevant considerations being in relation to the value of the properties and the services provided to the properties. The Applicant also argued, in the alternative, that the Council's exercise of power in the circumstances was so unreasonable that no reasonable person could so exercise the power.

The Court held that the Council had permissibly defined the differential rating categories by reference to the use to which the land might be put, and had therefore permissibly levied the minimum general rate for each category. The Court also held that the considerations identified by the Applicant were not relevant considerations, and was not persuaded that the Council's exercise of power was so unreasonable that no reasonable person could so exercise the power. The Court therefore dismissed the application and ordered that the Applicant pay the Council's cost of and incidental to the proceeding to be assessed on the standard basis.

Background

Between 2014 and 2019 the Council passed resolutions adopting differential rating categories and a corresponding minimum general rate within those categories. Each relevant Revenue Statement and Resolution of Rates and Charges contained a statement along the following lines:

> *When categorising land for differential rating purposes, Council has also had regard to the extent to which tourism and tourism-related business and industry uses continue to contribute to the demand for the provision of Council services across the City. Council considers that land used for those businesses (including premises used to provide rental accommodation to itinerants) and industries should generate a greater contribution to general rate revenue than land that is not used for a commercial purpose (including premises used to provide rental accommodation to itinerants.*

In each resolution, the Council adopted relevantly two rating categories being 2T and 3T.

Category 2T is relevantly described in each resolution as "*[a] residential lot … used to provide rental accommodation to permanent residents at any time during the financial year;*".

Category 3T is relevantly described in each resolution as "*[a] residential lot … used to provide rental accommodation to itinerants at any time during the financial year.*" An "*itinerant*" is defined as "*a visitor or tourist, as distinct from a permanent resident*" and a "*permanent resident*" is defined as "*a person who lives in the local government area, as distinct from an itinerant*".

The Applicant sought judicial review of the following decisions:

- *First Decision* – The Council's decision to adopt Category 2T and levy the corresponding minimum general rate in 2014, 2015 and 2016, and the Council's decision to adopt Category 3T and levy the corresponding minimum general rate in 2016, 2017, 2018 and 2019.
- *Second Decision* – The Council's decision to issue rates notices pursuant to the First Decision, in accord with which the Council determined that the properties were within Category 2T up to and including 31 December 2016, and thereafter in Category 3T.

The Applicant relied on the following grounds:

- *Irrelevant consideration* – In making the First Decision, the Council took into account an irrelevant consideration, being the personal characteristics (either a "resident" or an "itinerant") of the person occupying the relevant properties.
- *Relevant consideration* – In making the First and Second Decisions, the Council failed to take into account the following relevant considerations:
  - The unimproved value of each of the relevant properties was only $12,500.
  - The Council does not provide any services to the relevant properties of the type falling within the definition of "general rates" under section 92 of the *Local Government Act 2009*.
  - The Applicant, or the body corporate for the relevant properties, provides the essential and other services to the relevant properties, being the subject of an agreement between the Council and the developer.
  - The minimum general rates comprised almost 20% of the unimproved value of the relevant properties.
- *Wednesbury unreasonableness* – The Council's exercise of power in the circumstances was so unreasonable that no reasonable person could so exercise the power.

Use of the relevant properties by itinerants or permanent residents is a permissible consideration

The Applicant argued that each relevant resolution made a distinction between accommodation which is let to permanent residents or to itinerants, being a personal characteristic of the person occupying the relevant property, and that this distinction bears no relation to the burdens of tourism upon the provision of the Council's services.

The Council relied upon the decision in *Xstrata Coal Qld Pty Ltd v Council of the Shire of Bowen* [2010] QCA 170 (**Xstrata Decision**) in which the Queensland Court of Appeal recognised "*that it is permissible to take into account:*

(a) the use to which land might be put, including its highest and best use;

(b) the burden the land or its use may place upon the Council's budget;

(c) the value of the land; and

(d) the potential for the land to earn income for its owner" (at [29]).

The Court held that the distinction between letting to a permanent resident or an itinerant relates to an attribute of the land, namely the use to which it is put, and "*did not accept the applicant's key submission that a decision by an owner to let to a permanent resident, as opposed to an itinerant, is an irrelevant consideration in setting categories and minimum rates*".

The Court went on to also hold that "*[t]he use of land is a relevant consideration in making a decision as to differential rating categories*" and relied on the Xstrata Decision in so finding, as well as *Otswald Accommodation Pty Ltd v Western Downs Regional Council* [2016] 2 QD R 14; [2015] QSC 210 (all at [55]). The Court made this finding emphatically, also stating "*[l]est it not be clear, I conclude that it is permissible to define differential rating categories and levy a minimum general rate for such a category by taking into account the use to which the land might be put or the use to which it is in fact put, and the burden that use may place upon the Council's budget*" (at [59]).

This ground of the judicial review challenge therefore failed.

Matters which the Applicant contended were relevant considerations were irrelevant considerations

The Court held that a local government may decide to create a separate differential rating category for land with an unusually low unimproved value. The Court also held that a local government is not bound to take into account the unimproved value of land when making rating category decisions.

The Court held that the Applicant had not established that the Council did not provide any services falling within the definition of "general rates" under section 92 of the *Local Government Act 2009* as many of the services that the Council provides are for the community at large. In particular, the Court stated "*one would have thought that the provision of services, facilities and activities on the mainland benefited residents on the island, including tourists, who might use local roads to come and go from the island, to shop and to seek a range of services such as medical treatment*" (at [94]).

This ground of the judicial review challenge therefore failed.

Council's exercise of power in the circumstances was reasonable

The Court held that there was a rational basis for the Council to make the First Decision and the Second Decision.

This ground of the judicial review challenge therefore failed.

Conclusion

The Applicant's judicial review challenges failed on all accounts, and the Court dismissed the originating application. The Court ordered that the Applicant pay the Council's costs of and incidental to the proceeding to be assessed on the standard basis.

Human rights considerations found to apply to Land Court of Queensland in making its recommendations on applications for a mining lease and environmental authority

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 heard before FY Kingham

November 2020

In brief

The case of *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 concerned an application to the Land Court of Queensland brought by Waratah Coal Pty Ltd to strike-out objections made under the *Mineral Resources Act 1989* (Qld) (**MRA**) or alternatively to obtain a declaration that the Court's jurisdiction did not extend to the consideration of objections made under the MRA and the *Environmental Protection Act 1994* (Qld) (**EPA**) to the extent the objections relied upon the *Human Rights Act 2019* (Qld) (**HR Act**).

Waratah Coal Pty Ltd applied to the Minister for Natural Resources Mines and Energy for a mining lease and to the Chief Executive administering the EPA for an environmental authority to develop a thermal coal mine in the Galilee Basin (**Applications**).

Youth Verdict Ltd, the Bumble Box Alliance Inc and others objected to the Applications on the ground, amongst others, that the grant of the Applications would not be compatible with section 58(1) of the HR Act. Section 58(1) of the HR Act relevantly provides as follows:

> *It is unlawful for a public entity—*
>
> *(a) to act or make a decision in a way that is not compatible with human rights; or*
>
> *(b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.*

The Court found that the HR Act applies to it in fulfilling its function under the MRA and the EPA in making recommendations on the Applications because it is a public entity for the purpose of section 58(1) of the HR Act. Accordingly, the Court held it was satisfied it had jurisdiction to entertain the objections because it was required to comply with section 58(1) of the HR Act.

The Court dismissed the application filed by Waratah Coal Pty Ltd.

Court held it is a public entity under the HR Act

The Court found, and Waratah Coal Pty Ltd conceded, that the Court is a public entity under the HR Act in fulfilling its function under the MRA and the EPA.

The HR Act excludes certain entities as falling within the meaning of public entity. Relevantly, section 9(4)(b) of the HR Act states that a public entity does not include "*a court or tribunal, except when acting in an administrative capacity*".

Section 10(1) of the HR Act relevantly states as follows:

> *(1) In deciding whether a function of an entity is of a public nature for this Act, any of the following matters may be considered—*
>
> *(a) whether the function is conferred on the entity under a statutory provision.*

In considering its function under the MRA and the EPA, the Court relevantly stated that where an objection has been made to an application for a mining lease under the MRA and to an application for an environmental authority under the EPA, the Court's function is to "*hear the applications and the objections to them and, considering the statutory criteria, make a recommendation to the ultimate decision maker …*" that the application for a mining lease be "*granted or rejected in whole or in part, or … granted subject to conditions*" and the application for an environmental authority be "*granted, but on different conditions; or the application be refused*" (see [10]-[11]).

The Court found that in conducting the hearing the Court was performing the functions conferred on it by the MRA and the EPA. It was not disputed that the Court's function was administrative.

Court held that the making of a recommendation by the Court is a 'decision' and an 'act' under the HR Act

Waratah Coal Pty Ltd contended that the Court ought to interpret the word 'decision' in accord with Chief Justice Mason's (as his Honour then was) interpretation in the case of *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 (**Bond**). In Bond, his Honour construed 'decision' to mean "*final, or operative and determinative*" and not "*merely a step taken in the course of reasoning on the way to the making of the decision*".

The Court considered the textual context of the word 'decision' in the *Administrative Decisions (Judicial Review) Act 1977* (**ADJR**). Section 3(1) of the ADJR relevantly qualifies the word 'decision' as a decision of an administrative character made, proposed to be made or required to be made under enactment. The Court observed that in contrast, the absence of similar textual indications in the HR Act favoured a less restrictive interpretation of the word.

The Court also observed that the "*limited and prescribed consequences that attended the unlawfulness of an act or decision*" under section 58(1) of the HR Act supported a generous interpretation of the word (see [45]).

In noting the practical effect of interpreting 'decision' under the HR Act in accord with Bond, the Court relevantly stated as follows (see [53]):

> *If the question of compatibility with human rights is beyond the Court's jurisdiction, the Minister and the Chief Executive of the statutory authority will not have the benefit of a recommendation made after consideration of the engaged human rights. Both decision makers would likely have to develop some additional process to comply with s 58.*

The Court therefore held that 'decision' as it appears in the HR Act includes the Court's recommendation under the MRA and its objections decision under the EPA.

Given the absence of textual and contextual factors, the Court also held that the word 'act' as it appears in the HR Act is broad enough to capture the act of making a recommendation.

Court held it has jurisdiction to consider HR Act issues

Waratah Coal Pty Ltd contended that the Court lacked jurisdiction to hear the objections because there were no specific provisions under the MRA and the EPA in respect of human rights issues.

The Court referred to section 108(1) of the HR Act, which applies the HR Act to "*all Acts and statutory instruments, whether passed or made before or after the commencement*" and held that whether or not an objector raises human rights based objections, the Court is required to consider human rights in deciding what recommendation to make on the Applications (see [72]).

Court held section 59 of the HR Act is not applicable to the Court's hearing of the applications and objections

There is no standalone remedy for contravention of the HR Act. Section 59 of the HR Act, known as the piggyback provision, provides that a person may seek relief or remedy on the ground of unlawfulness arising under section 58 of the HR Act if the person may seek any relief or remedy in relation to an act or decision of a public entity on the ground that that act or decision was, other than because of section 58, unlawful.

Waratah Coal Pty Ltd contended that the unlawfulness under section 58 of the HR Act could not be raised absent any relief or remedy captured by section 59 of the HR Act. The objectors submitted, and the Court agreed, that the objectors did not rely on and were not constrained by section 59 which applies to a proceeding and not when the Court is performing its function under a recommendatory provision.

The Court held that it was not being asked to review the validity of an act or decision made by a public entity; it was "*being invited to conclude that it should not recommend the grant of the Applications because, to do so, would not be compatible with human rights and would therefore be unlawful*" (at [85]).

Court held that standing was not an issue that it should address

Waratah Coal Pty Ltd contended that the objectors, as corporate entities, did not have standing to seek relief or remedy for the unlawfulness of an act or decision under the HR Act.

The Court observed that if section 58(1) of the HR Act applies to the Court in its administrative function "*there need be no mover to raise human rights issues, because that section requires the Court to properly consider engaged human rights and to not act or make a decision that is not compatible with human rights*" (see [90]). Accordingly, the Court held that if standing is in contest it is appropriate for that question to be determined in the proper forum.

Planning and Environment Court of Queensland holds that proposed changes to a development application for an extension to a landfill facility and waste transfer station were minor

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cleanaway Solid Waste Pty Ltd v Ipswich City Council & Ors* [2020] QPEC 47 heard before Williamson QC DCJ

November 2020

In brief

The case of *Cleanaway Solid Waste Pty Ltd v Ipswich City Council & Ors* [2020] QPEC 47 concerned an application by Cleanaway Solid Waste Pty Ltd (**Applicant**) to the Planning and Environment Court of Queensland that the proposed changes to the Applicant's development application were minor changes and that the appeal against the decision of the Ipswich City Council (**Council**) to refuse the development application (**Appeal**) be determined using the development application plans as changed.

The Court considered the expert evidence before the Court and the arguments of Dr Turni (**Third Co-Respondent**) and concluded that the proposed changes did not result in "*substantially different development*" and would not cause a matter referred to in subparagraph (a)(ii) of the definition of "*minor change*" in schedule 2 of the *Planning Act 2016* (**Planning Act**) to apply.

Development application for expansion to a landfill facility and waste transfer station and the proposed changes

The development application the subject of the Appeal was for an expansion to a landfill facility and waste transfer station at Chum Street and Rhondda Road, New Chum.

The Court summarised the proposed changes to the development application, which relevantly included the following (at [19]):

- greater detail and clarification of specific elements of the development application;
- changes to the landform contours which change the level but not the overall volume or peak height of the landfill;
- relocation of the proposed leachate pond and the configuration of the sediment basins;
- introduction of temporary screening bunds to provide greater screening of the landfill;
- changes to the rehabilitation strategy; and
- correction of design errors.

Minor change application requirements

The Court noted the definition of "*minor change*" in schedule 2 of the Planning Act and that the following elements of the definition were in dispute:

> *(i) does not result in substantially different development; and*
>
> *(ii) if the application, including the change, were made when the change is made—would not cause—*
>
> *…*
>
> *(C) referral to extra referral agencies; or*
>
> *(D) a referral agency, in assessing the application under section 55(2), to assess the application against, or have regard to, a matter, other than a matter the referral agency must have assessed the application against, or had regard to, when the application was made; or …*

Whether the proposed changes resulted in a "substantially different development"?

After considering the definition of "*minor change*" in the Planning Act, the Court noted the following reasons and concluded that the proposed changes did not result in a substantially different development as the proposed changes (at [22] to [26]):

- will not result in a new use;
- will not change the nature, scale and intensity of the material change of use sought in the development application;
- will not change the manner in which the use is intended to operate;
- will achieve the following objectives:
  - provide design detail;
  - ameliorate visual impacts;
  - ameliorate impacts on environmental values;
  - improve environmental rehabilitation;
  - improve the design of stormwater and leachate management measures; and
  - correct errors.

Court did not accept the arguments of the Third Co-Respondent in opposition to the minor change application

The Court addressed the following arguments of the Third Co-Respondent as follows:

- The proposed changes are not clearly defined.

  The Court noted that the proposed changes were clearly expressed in a large body of expert evidence which examined the consequences of the proposed changes.

- The evidence is unreliable as the experts have only provided provisional assessments.

  The Court confirmed that the plans of the proposed changes were not suitable for construction purposes and were not completely finalised in all respects. However, the Court noted that there was sufficient detail for the relevant experts to form concluded views.

- A new assessment is required by relevant entities including the Council, the Department of State Development, Manufacturing, Infrastructure and Planning (**DSDMIP**) and the Environmental Protection Authority.

  As all the parties in the Appeal were required to review the proposed changes in accordance with section 10(2) of the *Planning and Environment Court Act 2016* (**PECA**), the Court determined that a review of the proposed changes by the Council and DSDMIP as parties to the Appeal was not an indicator that the proposed changes resulted in a "*substantially different development*".

- The review of the proposed changes will incur additional costs.

  The Court did not consider this argument relevant to the minor change application before the Court.

- Technical matters relevant to the Appeal.

  The Court relied on the submissions of counsel that the technical matters were not relevant to the minor change application before the Court and ought more properly be addressed in the Appeal.

- Specific elements of the proposed changes were substantially important changes.

  The Court referred to the limitation on the Court's power to assess the proposed changes in section 46(3) of the PECA and the definition of "*minor change*" in the Planning Act, and stated (at [43]) [underlining in original]:

  Rather, the provisions, taken in combination, permit the court to consider a change where it is satisfied that, inter alia, it would not result in substantially different development. Central to this test is the result of the change to a development application, rather than the significance of the change itself.

- Specific elements of the proposed changes are required to be approved in a further approval by the Department of Environment and Science and referred to DSDMIP.

  The Court agreed with the expert evidence that no referral was triggered and also noted that a need for a further approval was not an element of the definition of "*minor change*" in the Planning Act.

Changes in law to the koala habitat provisions of the Planning Regulation 2017 not engaged

Whilst the development application was properly made before the changes in the law occurred, the Council's counsel nevertheless noted that the current law in relation to koala habitat mapping may now result in an additional trigger to a referral agency.

The Court considered the relevant sections of the *Planning Regulation 2017* (**Planning Regulation**), and noted that the proposed changes fell within a statutory exception and therefore the proposed changes did not give rise to assessable development.

Conclusion

The Court held that the Appeal was to be heard and determined on the basis of the plans as amended in accordance with the proposed changes, for the reason that the proposed changes did not result in a substantially different development and would not cause a matter referred to in subparagraph (a)(ii) of the definition of "*minor change*" in schedule 2 of the Planning Act to apply.

Planning and Environment Court of Queensland determines two connected cases; a minor change application and an originating application relating to the minor change application

Alexa Brown | Ian Wright

This article discusses the decisions of the Queensland Planning and Environment Court in the matters of *11 Ludlow Pty Ltd v Brisbane City Council* [2020] QPEC 55 and *Glamston Pty Ltd v 11 Ludlow Pty Ltd & Anor* [2020] QPEC 54 both heard before Everson DCJ

November 2020

In brief – Minor Change Application

The case of *11 Ludlow Pty Ltd v Brisbane City Council* [2020] QPEC 55 (**Ludlow Decision**) concerned an application in pending proceeding by 11 Ludlow Pty Ltd (**Appellant**) to the Planning and Environment Court of Queensland seeking that the proposed changes to a development application for a material change of use and building work for a Food and Drink Outlet, Office and Shop on land situated at 2 Oxford Street, Bulimba (**Development Application**) are minor changes.

The Court noted that the Court may consider a change only where the change is a "*minor change*", which is defined in Schedule 2 of the *Planning Act 2016* (**Planning Act**) and relevantly includes a change that does not result in a "*substantially different development*".

Proposed changes to the Development Application include a basement carpark and a revised appearance of the building

The Development Application, a four-storey mixed use commercial building, was a code assessable development that was situated on land which adjoined the Bulimba Ferry Terminal, which is a State Heritage Place on the Queensland Heritage Register. The Court considered the following proposed changes to the development to be contentious:

- *Basement carpark* – Addition of a basement with 19 car-parking spaces beneath the building and a vehicle cross-over for vehicular access.
- *Architectural design* – A starkly different architectural design which was changed from a neutral curved façade to an angular amalgam of arched terraces above ground vegetation with a large circular window above the proposed cross-over.

Court determines that the proposed changes were material and important and therefore resulted in a substantially different development

The Appellant relied upon the expert evidence of a traffic engineer in relation to the proposed Basement Carpark change, who stated that the Basement Carpark would not generate high volumes of traffic. The Appellant also relied on expert evidence in relation to the proposed Architectural Design change. The town planner described the change as "*having a different architectural expression*" and the architect described the change as "*somewhat visually heavier than the previous proposals*" (at [11]).

The Court considered the proposed changes and the location of the Development Application adjoining the Bulimba Ferry Terminal and noted the following:

- *Basement carpark* – The proposed change is a material and important change that results in a substantially different development as there was no on-site parking or vehicular access previously in the Development Application and the proposed change creates a whole new level and new impacts.
- *Architectural design* – Although a design change may not assume much importance, the location of the adjoining a State Heritage Place and the radically different architectural treatment resulted in a material or important change that results in a substantially different development.

Conclusion

The Court concluded that the proposed changes resulted in a substantially different development and where therefore not minor changes in accordance with the definition of "*minor change*" under the Planning Act. The Court dismissed the application in pending proceeding.

In brief – Originating Application

The connected case of *Glamston Pty Ltd v 11 Ludlow Pty Ltd & Anor* [2020] QPEC 54 concerned an originating application by Glamston Pty Ltd (**Applicant**) to the Planning and Environment Court of Queensland for relief under section 11 of the *Planning and Environment Court Act 2016* (**PECA**) that, relevantly, the proposed changes sought by the Appellant in the Ludlow Decision were not minor changes (**Originating Application**). The Appellant sought an order that the Originating Application be summarily dismissed.

The Court relevantly noted that the Applicant owns land neighbouring the land the subject of the Development Application referred to in the Ludlow Decision. The Court also noted that as the Development Application was code assessable, the Applicant did not have the opportunity to make a submission in respect of the Development Application and therefore did not have any appeal rights in relation to the Development Application.

Court determined that the Originating Application was attempting to give the Applicant a right to be heard where the legislature did not contemplate that right and dismissed the Originating Application

The general declaratory jurisdiction of the Court is relevantly stated in section 11 of the PECA as follows:

> ***11 General declaratory jurisdiction***
>
> *(1) Any person may start a P&E Court proceeding seeking a declaration (a declaratory proceeding) about—*
>
> *(a) a matter done, to be done or that should have been done for this Act or the Planning Act;*
>
> *…*
>
> *(4) The P&E Court may also make an order about any declaration it makes.*

The Court referred to the case of *Ferreyra v Brisbane City Council* [2016] QPELR 334; [2016] QPEC 10, which stated that the jurisdiction of the Court in proceedings that seek declaratory relief are analogous to judicial review proceedings (see [11]). Upon consideration of the Originating Application, the Court noted that the Originating Application did not demonstrate any relief analogous to a judicial review proceeding.

The Court determined that there were strong discretionary reasons for dismissing the Originating Application as "*… the originating application is but a thinly veiled attempt to effect a joinder in circumstances where the legislature does not give the applicant a right to be heard in an interlocutory application which involves factual determinations within the jurisdiction of the court*" (at [14]).

The Court also noted that third party submissions are not contemplated by the legislature in relation to proposed changes to a code assessable development application and that the Originating Application sought to determine the same question as the question the subject of the Ludlow Decision.

Conclusion

The Court therefore held that the Originating Application be dismissed, and did not make orders that the proposed changes sought by the Appellant in the Ludlow Decision were not minor changes.

A search order in Queensland is extraordinary and not a mere investigatory tool

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Adani Mining Pty Ltd & Anor v Pennings* [2020] QCA 169 heard before Sofronoff P and Philippides JA and Davis J

November 2020

In brief

The case of *Adani Mining Pty Ltd & Anor v Pennings* [2020] QCA 169 concerned an appeal to the Queensland Court of Appeal against the refusal of an application seeking a search order under rule 261A of the *Uniform Civil Procedure Rules 1999* (**UCPR**).

The Court of Appeal dismissed the appeal on the basis that a search order was an extraordinary exercise of the Court's jurisdiction and held that the evidence before it was "*wholly inadequate to justify the order sought*" (at [22]).

Brief background

Adani Mining Pty Ltd is the developer of a coal mine in the Galilee Basin in Queensland, and Carmichael Rail Network Pty Ltd is the developer of an associated railway line (**Appellants**). The Respondent is the principal of a group of political activists whose object is to prevent the development of the mine and associated railway line.

At first instance, the Appellants filed an application for a search order to be made under rule 261A of the UCPR (also known as an "*Anton Piller*" order), which relevantly states that:

> *The court may make an order (**a search order**), in any proceeding or in anticipation of any proceeding in the court, for the purpose of securing or preserving evidence and requiring a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence which is, or may be, relevant to an issue in the proceeding or anticipated proceeding.*

Rule 261B of the UCPR relevantly states that:

> *The court may make a search order if the court is satisfied that -*
>
> *(a) the applicant has a strong prima facie case on an accrued cause of action; and*
>
> *(b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and*
>
> *(c) there is sufficient evidence in relation to a respondent that -*
>
> *(i) the respondent possesses important evidentiary material; and*
>
> *(ii) there is a real possibility that the respondent might destroy the material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.*

The search order was sought ex parte and in aid of potential proceedings against the Respondent for breach of confidence, including breaches of contract, intimidation and conspiracy to injure. The Appellants asserted that the Respondent held confidential information which allowed him to identify the Appellants' existing and potential contractors and tenderers, and permitted him to undertake a coordinated effort to prevent the development of the mine and associated railway line.

The application was refused and the Appellants filed an appeal against the decision. That appeal was also heard ex parte and was brought under rule 763 of the UCPR as a renewed application to be heard de novo.

Legal principles

The Court of Appeal referred to the following legal principles that arise with respect to the consideration of an Anton Piller order:

- "*The harm likely to be caused to the respondent by the execution of the order must not be excessive or out of proportion to the legitimate objects of the order*" (at [19]).

- "*Every unauthorized entry upon private property is a trespass, the right of a person in possession, or entitled to possession of premises, to exclude others from those premises being a fundamental common law right*" (at [19]).
- "*The court must be careful to avoid this extraordinary jurisdiction being subverted to a mere investigatory tool and must be astute to prevent its use for any purpose other than the preservation of vital evidence. There must, therefore, be convincing evidence that the defendant has possession of incriminating documents or things*" (at [20]).
- "*… the making of a search order, a highly intrusive order made ex parte, is contrary to the normal principles of justice and can only be justified when there is a paramount need to prevent a denial of justice to the plaintiff*" (at [20]).

Conclusion

The Court of Appeal dismissed the appeal and held that the evidence was "*wholly inadequate to justify the order sought*". This conclusion was based on the following findings:

- The Appellants failed to establish the likelihood that the Respondent had any confidential information or that such confidential information was stored at his home.
- The Appellants' evidence of loss was "*expressed in the broadest and most impenetrable terms and nothing is known about projected profits*". The Court of Appeal concluded that "*mere assertions fall short of what is required on an application seeking the extraordinary relief claimed*".
- The Appellants threatened (through their solicitors) to seek an injunction restraining the misuse of the Appellants' confidential information in February 2017. However, no such injunction was sought or any other relief was ever sought until the application for a search order.
- The premises to be searched was not a business premises, and was also the home of the Respondent's partner and children. The evidence was inconclusive as to whether the Respondent was the sole registered owner of the premises. The Appellants did not say anything about their right to require the Respondent's partner to give them permission to enter and search the premises, the right of the children to be protected, or that confiscated electronic devices may belong to the Respondent's partner or children.

The Court of Appeal held, having regard to the above matters, that the application for a search order ought to be refused.

Supreme Court of Queensland holds that an electronic link is not sufficient to effect service of an application under the Building Industry Fairness (Security of Payment) Act 2017

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *McCarthy v TKM Builders Pty Ltd & Anor* [2020] QSC 301 heard before Martin J

November 2020

In brief

The case of *McCarthy v TKM Builders Pty Ltd & Anor* [2020] QSC 301 concerned an application by McCarthy (**Applicant**) to the Supreme Court of Queensland in relation to whether TKM Builders Pty Ltd (**Respondent**) had properly served on the Applicant supporting submissions to the Respondent's adjudication application for an adjudication under the *Building Industry Fairness (Security of Payment) Act 2017* (**BIF Act**).

The Respondent attempted to serve on the Applicant an adjudication application in relation to a dispute regarding progress payments connected with a construction contract for a building project at Bells Creek.

The Respondent sent the adjudication application to the Applicant via an email with the adjudication application attached to the email and the supporting submissions accessible through a Dropbox link contained in the text of the email. The Applicant did not open the Dropbox link and argued that the supporting submissions were not served in accordance with the BIF Act.

The Court considered the provisions of the BIF Act and the *Acts Interpretation Act 1954* (**AIA**) and concluded that the adjudication application had not been served.

Service requirements

The Court firstly considered the relevant law. The BIF Act sets out the regime for the adjudication of disputed progress payment claims and section 79 required that a copy of the adjudication application be given to the Applicant.

The BIF Act states in section 102 that service of a notice, which includes the giving of an adjudication application, may be by the following:

- in accordance with the way, if any, stated in the relevant construction contract; or
- in accordance with the methods stated in the AIA.

The AIA states in section 39 that a document may be served on an individual by the following:

- delivering it to the person personally; or
- by leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person.

How was the adjudication application given to the Applicant?

The Respondent sent an email to the Applicant, which relevantly included the following terms (at [7]):

> *Please find below link to correspondence and attached adjudication claim lodged with the QBCC today.*
>
> *https://www.dropbox.com/sh/jt7427ejjhz70ik/AACVuiCVC1Ug2YG6X27CFBuca?dl=0*

Whilst the email attached a copy of the adjudication application to the email, the supporting submissions, which adjoined the adjudication application, were only accessible via the Dropbox link.

The Respondent argued that an inference ought to be drawn from the Applicant's evidence that the Applicant's solicitors accessed the Dropbox link for the purpose of preparing a response to the adjudication application.

The Applicant argued that the Court ought follow the decision of *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265; [2014] QSC 30 (**Basetec Decision**) in which the Supreme Court of Queensland considered the now repealed *Building and Construction Industry Payments Act 2004* (**BCIP Act**). The Court noted that the BCIP Act was the predecessor to the BIF Act and that there was no relevant difference between the sections of the BCIP Act and BIF Act that deal with the requirement to give an adjudication application.

The Court in the Basetec Decision determined that under the BCIP Act the supporting submissions form part of the adjudication application and must be served as part of, and therefore in accordance with, the service requirements for the adjudication application. The Court noted that the Basetec Decision concluded that "*a document will be served if the efforts of a person who is required to serve it have resulted in the person to be served becoming aware of the contents of the document*" (at [20]).

Having considered the Basetec Decision, and the methods of service stated in section 39 of the AIA, the Court stated that the Applicant had not become aware of the contents of the supporting submissions merely by being referred to a Dropbox link. Therefore, the Court held that the supporting submissions were not served in accordance with section 39 of the AIA or section 79 of the BIF Act.

Jurisdiction of the Adjudicator

In the adjudication following the Applicant's receipt of the adjudication application, the Adjudicator held that he had the relevant jurisdiction to determine the matter as it had been demonstrated that the Applicant was in possession of the adjudication application and the supporting submissions.

The Adjudicator went further and stated as follows (quoted at [11]):

> *Notwithstanding the statutory provisions in respect to the service of documents under the BIF Act and other legislation, the fact is that it has been demonstrated that the respondent was in possession of a copy of the adjudication application and its supporting submissions. If a document has been received by the other party, the manner in which it was served is unlikely to matter.*

However, the Court concluded that the statutory time period prescribed in the BIF Act for making a decision in respect of the adjudication application did not commence, and the Adjudicator, therefore, did not have the necessary jurisdiction to make a decision.

Conclusion

The Court, following the Basetec Decision, held that the Applicant had not become aware of the contents of the supporting submissions provided by the Dropbox link and that therefore the Respondent had not served the adjudication application on the Applicant in accordance with section 39 of the AIA or section 79 of the BIF Act. As the adjudication application had not been validly served on the Applicant, the Adjudicator did not have the relevant jurisdiction to make a decision in relation to the progress payment dispute the subject of the adjudication application.

While the case of *McCarthy v TKM Builders Pty Ltd & Anor* [2020] QSC 301 concerned service under the BIF and AIA, the author notes that service under the *Planning and Environment Court Act 2016* and the *Planning and Environment Court Rules 2018* is generally in accordance with chapter 4 (service) of the *Uniform Civil Procedure Rules 1999* rather than section 39 of the AIA. However, in particular circumstances service under the *Planning Act 2016* may be in accordance with Part 4A (service of documents) of the *Planning Act 2016*, which states that a person may serve a document on the receiver by:

- giving the receiver another document stating that the relevant document can be viewed on a stated website or other electronic medium; or
- where the receiver has provided an electronic address for service, by sending to the electronic address a notice stating the relevant document can be viewed by opening a stated hyperlink.

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Queensland Court of Appeal refuses leave to appeal the Planning and Environment Court's decision reinforcing the use of the Coty principle and the discretion to approve a development application despite inconsistency with a planning instrument

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253 heard before Fraser and Morrison JJA and Henry J

December 2020

In brief

The case of *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253 concerned an application by the Brisbane City Council (**Council**) for leave to appeal to the Queensland Court of Appeal against the decision of the Planning and Environment Court (**P&E Court**) to allow (subject to conditions) an appeal by YQ Property Pty Ltd (**Respondent**) against the decision of the Council to refuse a development application for multiple dwellings at Eric Road, Holland Park (**Subject Site**).

The Court of Appeal considered the following two grounds of appeal:

- That the P&E Court misapplied the principle in *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117 (***Coty***) by failing to give determinative weight to the draft Amendment Package H.
- That the P&E Court misapplied the Biodiversity Areas Overlay Code (**Overlay Code**) by failing to find that the development application ought to be refused by reason of the removal of native trees on the Subject Site, an action being inconsistent with the Overlay Code.

The Court of Appeal refused to grant leave and stated the following (at [4]):

> *The application confronts the obstacle that the decision of the primary judge involved a reasoned exercise of discretionary decision-making, applying well settled principles. In its quest to avoid that obstacle, the Council ultimately attempted to deny the existence of any real discretion in respect of two aspects of decision-making … [being the application of the Coty principle and the discretion to approve a development application despite inconsistency with a planning instrument] …*

Background to the Council's application for leave to appeal to the Court of Appeal

The Respondent made an impact assessable development application (**Development Application**) for a material change of use and building work for multiple dwellings over the Subject Site (**Proposed Development**). The Subject Site was included in the Low-density residential zone.

The Council decided to refuse the Development Application and the Respondent subsequently appealed the decision to the P&E Court (the relevant judgment is *YQ Property Pty Ltd v Brisbane City Council & Ors* [2020] QPEC 2).

The P&E Court allowed the appeal (subject to the imposition of lawful conditions), and relevantly noted the following in the written judgment:

- Whilst three 'significant trees' would be retained, four 'significant' trees would be removed by the Proposed Development.
- Whilst the Council had resolved to make Amendment Package H to amend the Council's planning scheme to limit multiple dwellings in the Low-density residential zone prior to the Development Application, the Amendment Package H did not come into effect until after the conclusion of the hearing in the P&E Court.

Court of Appeal considers the Coty principle and the weight to be given to a draft planning scheme amendment in the assessment and decision process

The *Planning Act 2016* (**Planning Act**) requires that the P&E Court apply section 45 of the Planning Act as if the P&E Court were the assessment manager for the Development Application. Section 45 (Categories of assessment) of the Planning Act relevantly requires that [underlining added]:

> *(5) An impact assessment is an assessment that—*
>
> *(a) must be carried out—*
>
> *(i) against the assessment benchmarks in a categorising instrument for the development; and*
>
> *(ii) having regard to any matters prescribed by regulation for this subparagraph; and*
>
> *(b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise.*
>
> *…*
>
> *(7) The assessment manager must assess the development application against or having regard to the statutory instrument, or other document, as in effect when the development application was properly made.*
>
> *(8) However, the assessment manager may give the weight the assessment manager considers is appropriate, in the circumstances, to—*
>
> *(a) if the statutory instrument or other document is amended or replaced after the development application is properly made but before it is decided by the assessment manager—the amended or replacement instrument or document; or*
>
> *(b) another statutory instrument—*
>
> *(i) that comes into effect after the development application is properly made but before it is decided by the assessment manager; and*
>
> *(ii) that the assessment manager would have been required to assess, or could have assessed, the development application against, or having regard to, if the instrument had been in effect when the application was properly made.*

The Court of Appeal noted that if Amendment Package H had come into effect at the time of the P&E Court's decision, the P&E Court could have given the weight the Court considered was appropriate to Amendment Package H under section 45(8) of the Planning Act. However, as Amendment Package H was not yet in effect, the common law *Coty* principle applied.

The Court of Appeal noted that the *Coty* principle, as relevantly stated in the *Coty* judgment, comprises the following two public interest considerations (at 125):

- First public interest consideration – "*avoid, as far as possible, giving a judgment or establishing any principle which would render more difficult the ultimate decision as to the form the scheme should take*".
- Second public interest consideration – "*arrive at its judgment, as far as possible, in consonance with town planning decisions which have been embodied in the local scheme in the course of preparation*".

The P&E Court had considered the relevant circumstances of the Proposed Development, including the location of numerous multiple dwellings in the vicinity and the impacts of the removal of the native trees, and held that it was not appropriate to give effect to the draft Amendment Package H.

The Council argued that the P&E Court had misapplied the second public interest consideration as the P&E Court ought to have made a judgment that accorded with the draft Amendment Package H. The Court of Appeal disagreed and relied on the decision of *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306; [1996] QCA 226 which stated that "*the weight to be accorded to either consistency or inconsistency between the draft planning scheme and the application will depend on the circumstances*" (at 328).

Court of Appeal considered the Council's submissions that the P&E Court misapplied the Overlay Code regarding the removal of native trees

The Council also submitted that the P&E Court had misinterpreted Performance Outcome 6 of the Overlay Code, which applied to seven native trees on the Subject Site. Performance Outcome 6 of the Overlay Code relevantly stated as follows:

> *Development ensures that ecological features and ecological processes, koala habitat trees, areas of strategic biodiversity value and wetlands within the General ecological significance sub-category area are protected, conserved and restored to ensure the area's long-term viability.*

The Court of Appeal found no error in the P&E Court's conclusion that despite the loss of four of the native trees the Proposed Development would actually deliver a net gain in the ecological quality of the Subject Site. The Court of Appeal also found no error in the P&E Court's consideration of the juxtaposition of the relative significance of the non-compliance with the Overlay Code against the significance of the matters in favour of approval.

The Council further submitted that the Overlay Code entitled the native trees to a "*blanket protection*". The Court of Appeal did not accept the Council's submission and stated that "*the interplay of ss 45 and 60 thus gives an assessment manager the discretion to approve an application notwithstanding inconsistency with a planning instrument*" (at [62]). The Court of Appeal went on to state that (at [63]):

> *However, a case like the present, in which an inconsistency with the Biodiversity Areas Overlay Code was outweighed by the overall ecological benefits of the development, well illustrates the utility of the discretion which the Planning Act reserves to the assessment manager.*

Conclusion

The Court of Appeal therefore dismissed the application for leave to appeal the decision of the P&E Court.

Bulky appearance of proposed commercial facility at Noosa, Queensland results in its refusal

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Andema Pty Ltd v Noosa Shire Council* [2020] QPEC 46 heard before Kefford DCJ

December 2020

In brief

The case of *Andema Pty Ltd v Noosa Shire Council* [2020] QPEC 46 concerned an appeal to the Planning and Environment Court (**Court**) against the decision of the Noosa Shire Council (**Council**) to refuse a development application for a material change of use of a single-storey vacant grocery store facility into a three-storey mixed use retail, office, and commercial facility (**Development Application**), in respect of land at Peregian Beach (**Site**).

The Council carried out a code assessment and determined that the proposed development would result in unacceptable visual, design, and traffic impacts, and was non-compliant with the relevant assessment benchmarks in the Eastern Beaches Locality Code of the *Noosa Plan 2006 Version No. 9* (**Planning Scheme**) because of the excessive bulk and scale of the proposed development.

The Court considered the following issues in assessing the Development Application under section 45(3) of the *Planning Act 2016* and section 45 and section 46 of the *Planning and Environment Court Act 2016*:

- *Issue 1* – whether the built form of the proposed development is inappropriate.
- *Issue 2* – whether the proposed development provides sufficient car parks.

The Court observed that Issue 1 was required to be decided by reference to the whole of the proposed development considered in its relevant context, including the extent of the built form that will be visible to and impact on public space.

The Court held that the minimal punctuations in the solid form of the first level and the rooftop of the proposed development would create an impression of a "*box-like structure*" looming over the street, which would visually dominate the street, adjacent properties, and surrounding spaces.

In respect of Issue 2, the Court held that conditions could be imposed, such as a condition which limited the hours of use of the proposed rooftop bar in order to achieve compliance with the car parking requirements in the Planning Scheme.

The Court dismissed the appeal for the reason that the non-compliance with the built form requirements of the Planning Scheme were material and could not be complied with by the imposition of conditions.

Prior development approval over the Site

The Council granted a prior development approval over the Site in 2012 (**Prior Approval**), which supported the retail, office, and commercial mixed use proposed in the Development Application. The Prior Approval expired in June 2020, prior to being acted upon.

Whilst the Council was supportive of the use proposed by the Development Application, it was opposed to the Development Application because of non-compliance in respect of the built form, character, traffic and amenity requirements of the Planning Scheme.

Issue 1 – The built form of the proposed development would cause unacceptable visual impacts by visually dominating the surrounding area

The Court held that the non-compliance with the assessment benchmarks in the Eastern Beaches Locality Code of the Planning Scheme in respect of building height, plot ratio and storey levels were not material to its decision that the proposed development would cause unacceptable visual impacts to the area surrounding the Site.

The Court held that the following assessment benchmarks in the Eastern Beaches Locality Code of the Planning Scheme were material to its decision that the proposed development would cause unacceptable visual impacts to the area surrounding the Site:

- *Specific outcomes O6, O61(b) and O61(d)* – The Court held that the proposed development was not consistent or compatible with the bulk and scale of the buildings on the land adjoining and nearby the Site because its bulk and scale would be excessive and would not positively contribute to the setting or street.
- *Specific outcome O4(c)* – The Court held that the height and design of the proposed development presented a heavy, solid appearance, which would visually dominate the street, adjacent properties, surrounding spaces including a pivotal street corner, and the existing skyline.
- *Specific outcome O12(a) to (c) and probable solutions S12.1 and S12.2* – The Applicant conceded that the proposed development did not comply with specific outcome O12(c) and performance outcomes S12.1 and S12.2 because the proposed development incorporates a roof terrace and a flat roof structure and not a pitched or curved roof, and the Court held that the form of the roof would not contribute positively to the local skyline as required by specific outcome O12(a) nor would it complement the beachside character of the locality as required by specific outcome O12(b).

The Court observed, having regard to the intended character of the existing locality, that the proposed development presented an overdevelopment of the Site in its locational context and would have unacceptable visual impacts on the existing street.

The Court held that the nature of the non-compliance with the Planning Scheme went to more than the incidental features of the design of the proposed development, which could not be addressed by the imposition of conditions.

Issue 2 – The issue of sufficient car parks can be addressed by limiting hours of operation

The Court did not need to consider Issue 2 given its determination in respect of Issue 1. However, the Court observed that the alleged non-compliance in respect of the provision of sufficient car parking and car parking that does not impact on existing landscaping or native vegetation could be remedied by the imposition of a condition, which limited the hours of operation of the rooftop bar.

Conclusion

The Court held that the non-compliance with the built form requirements of the Planning Scheme were material and was not persuaded by the matters raised by the Applicant, which the Applicant argued supported the Court exercising its discretion to approve the Development Application. The Court therefore dismissed the appeal.

Queensland Planning and Environment Court upholds condition requiring road dedication for a future road beyond the LGIP planning horizon as a lawful non-trunk infrastructure condition

Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Traspunt No. 7 Pty Ltd v Moreton Bay Regional Council* [2020] QPEC 50 heard before Kefford DCJ

December 2020

In brief

The case of *Traspunt No. 7 Pty Ltd v Moreton Bay Regional Council* [2020] QPEC 50 concerned an appeal to the Queensland Planning and Environment Court against the Moreton Bay Regional Council's decision to impose a condition in respect of the dedication of land to the Council as road reserve in respect of a development application for reconfiguring two lots into 46 lots and an access easement for premises at Morayfield.

The relevant condition, being condition 6, states as follows:

> *Transfer to Council the area of land identified on the approved layout plan as "Road Resumption" (1,264m2) as road reserve. The land is to be dedicated at no cost to Council. This condition is imposed under section 665 of the Sustainable Planning Act 2009.*

The appeal was heard and determined under the *Planning Act 2016* (**Planning Act**), under which section 145 is the equivalent of section 665 of the *Sustainable Planning Act 2009*.

The applicant sought the deletion of condition 6 in its Notice of Appeal and subsequently changed its position to contend that it ought to be amended to record that the condition is imposed under section 128 of the Planning Act, being the power to impose a necessary infrastructure condition.

The issue in the appeal was therefore:

> *Whether the dedication required by condition 6 of the Negotiated Decision Notice of 6 July 2018 satisfies the requirements of s 128(2) and (3) [of] the Planning Act 2016 (PA) for the imposition of a "necessary infrastructure condition" under s 128, namely:*
>
> *(a) the LGIP does not identify adequate trunk infrastructure to service the subject premises;*
>
> *(b) the development infrastructure services development consistent with the assumptions in the LGIP about type, scale, location and timing of the development; and*
>
> *(c) the development infrastructure is necessary to service the premises.*

The Court held that the LGIP does identify adequate trunk infrastructure to service the subject premises and that the dedication required by condition 6 is not necessary to service the subject premises. The Court therefore upheld the imposition of the condition without the amendment, and dismissed the appeal.

LGIP identifies adequate trunk road infrastructure to service the subject premises

The subject premises adjoins an unconstructed portion of Clark Road. The development permit did not require construction of Clark Road, however, condition 6 required an area adjacent to the unconstructed Clark Road to be dedicated at no cost to the Council.

The Court heard evidence from the traffic engineering experts of the parties as to the adequacy of the existing and planned trunk road infrastructure.

The Council's traffic engineering expert opined that external access to the proposed development will be obtained via a road to the north and a road to the south, and the proposed dedication in condition 6 is necessary for future development beyond the planning horizon in the LGIP. The Applicant's traffic engineering opined that external access to the proposed development will be obtained via the same road to the south and via a different road to the west, and agreed that the LGIP identifies adequate trunk infrastructure to service the subject premises without the proposed road widening to which the dedication in condition 6 relates.

Despite this, the Applicant contended that the LGIP is inadequate in its identification of trunk infrastructure. The Applicant's contention was based on the following arguments, with the Court's findings as stated.

- *Clark Road, when constructed, will be a trunk road.* The Court held this is not relevant to the conditioning power in section 128(2) of the Planning Act and that for a condition to be imposed under section 128(2) of the Planning Act the development infrastructure must be necessary to service the subject premises, which was not established on the evidence.
- *Clark Road is to become a future trunk road.* The Applicant sought to rely upon pre-lodgement meeting notes for another development in the same locality, which states "*provision of road reserve widening is required on the Clark Road frontage to facility development of the Clark Road extension and provision of future connectivity for development of the Morayfield South Area*". The Court found that the quote relied upon did not include pertinent words at the start of the sentence, being "*Current concept planning (Clark Road Concept interim, Clark Road Concept ultimate) indicates that …*", and that the words indicate that there is some uncertainty about the need for Clark Road to be upgraded.
- *The planning scheme identifies Clark Road as a future trunk road.* The Court was not convinced by the Applicant's argument and held that the planning scheme provisions relied upon do not identify the unconstructed part of Clark Road as trunk infrastructure but, rather, refer to it as a possible future trunk road.
- *"Adequate trunk infrastructure" means development infrastructure required either now or in the future.* The Court held that such an interpretation involved unnecessarily reading words into the provision.
- *The traffic engineering experts agree that the dedication is required for the planned trunk road infrastructure network and the LGIP does not identify the land as trunk infrastructure.* The Court did not accept the Applicant's interpretation of the evidence of the traffic engineering experts, and found that the evidence of the traffic engineering experts was that Clark Road is an indicative location of a potential future trunk road identified in the Council's long-term planning, but is not part of the identified infrastructure required under the LGIP for the period to 2031.
- *The dedication will service the subject premises.* The Applicant argued that the Council cannot argue, on one hand, that the dedication does not service the subject premises yet, on the other hand, argue that condition 6 can be imposed as a non-trunk infrastructure condition under section 145 of the Planning Act on the basis that the dedication is required to connect the premises to the external road infrastructure networks and is necessary to protect or maintain the safety or efficiency of the road infrastructure network. The Court found that the Applicant's submission misstated the Council's position, being that if the land to be dedicated does form part of a constructed Clark Road, it will connect the subject premises to the external road infrastructure networks, and the land will also protect or maintain the safety or efficiency of the road infrastructure network. The Court was not persuaded by the Applicant's argument, and held that it was open for the Council to say that the dedication meets the requirements of section 145 of the Planning Act, and that it does not meet the requirements of section 128 of the Planning Act.

Having dismissed the Applicant's six arguments, the Court found that it accepted the evidence of the traffic engineering experts and held that the LGIP identified adequate trunk infrastructure to service the subject premises.

Dedication is not necessary to service the subject premises

The Court accepted the evidence of the Applicant's traffic engineering expert, being that the land to be dedicated does not connect the proposed development to Clark Road and does not connect the proposed development to the external road infrastructure networks. The Court repeated its earlier findings that the access will be via road extensions to be constructed as part of the proposed development. The Court therefore held that the dedication in condition 6 is not necessary to service the subject premises.

Reservation about whether the Court could substitute a section 128 condition in place of a section 145 condition

In concluding, the Court expressed reservation about whether it could make the order sought by the Applicant. The Court noted that the decision to change a condition from a non-trunk infrastructure condition under section 145 of the Planning Act to necessary infrastructure condition under section 128 of the Planning Act is one for the Council to make under section 142 of the Planning Act after deciding a conversion application. Whilst the Court queried its power to make such an order, it did not make a finding on the matter.

Conclusion

The Court dismissed the appeal and made an order allowing the Council to make an application for costs.

Deletion of conditions requiring compliance with an acoustic report found to result in a substantially different development by the Queensland Planning and Environment Court

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Tonic Projects Pty Ltd v Ipswich City Council* [2020] QPEC 58 heard before Everson DCJ

December 2020

In brief

The case of *Tonic Projects Pty Ltd v Ipswich City Council* [2020] QPEC 58 concerned an originating application by Tonic Projects Pty Ltd (**Applicant**) to the Planning and Environment Court that sought an order that the proposed changes to a development approval for a material change of use for a tavern where "minor changes" under the *Planning Act 2016* (**Planning Act**).

Background

The Applicant sought changes to a development approval for a material change of use for a Liquor Barn, public bar, gaming room, bistro, function room and beer garden (**Development Approval**) over land located at 406 Warwick Road, Yamanto (**Site**). The Site is surrounded by community and commercial uses, including a childcare centre and a school, and a significant number of residences.

The Court noted that the Development Approval had been impact assessable and had received submissions raising concerns about noise impacts.

The Development Approval was in the first instance approved by the Ipswich City Council (**Council**), however, a submitter appealed to the Court against the Council's decision. The Court dismissed the submitter appeal on 15 June 2001 (see *Ballymont Pty Ltd & Ors v Ipswich City Council & Ors* [2001] QPEC 40).

Court considered law in relation to minor change applications

The Court noted that the relevant issue for determination was whether the Proposed Changes to the Development Approval would result in a "*minor change*" as defined in Schedule 2 of the Planning Act. In particular, the Court was required to address whether the Proposed Changes would result in a substantially different development.

The Court referred to the relevant law in relation to the determination of an application that proposed changes be "*minor changes*", and relevantly concluded as follows:

- The Court must be cognisant that while properly made submitters have a right to be heard in an appeal against a development application, they are not accorded any further rights to be heard in an application seeking a minor change (see *Tokyo 2 Pty Ltd v Brisbane City Council* [2020] QPEC 23 at [4]).
- Whether a proposed change constitutes a "*minor change*" under the Planning Act is a matter of fact and degree. Guidance can be found in Schedule 1 of the Development Assessment Rules and qualitative and quantitative matters may be of relevance (see *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 19 at [14]).
- Substantial, where used in "*substantially different development*", is generally defined as "*essential, material or important*" in the content of the relevant development application (see *Northbrook Corp Pty Ltd v Noosa Shire Council* [2015] QPEC 24 at [13]).

Proposed changes to a condition relating to an approved acoustic report

The Applicant sought the deletion of condition 37(b) and 37(c) of the Development Approval (**Proposed Changes**), which were stated in the following terms:

> *Noise*
>
> *The Developer shall comply with the approved acoustic report dated 29 November 1999 by David Moore and Associates Pty Ltd, as amended by the requirements below, to the satisfaction of the Health and Environmental Protection Manager:*
>
> *(a) All refrigeration and air conditioning motors shall be positioned and 'noise attenuated' to the satisfaction of the Health and Environmental Protection Manager.*
>
> *(b) Amplified music shall only be performed in rooms which are air-conditioned, where all externally opening doors are self-closing and an airlock facility is provided and where windows are sealed and kept closed at all times.*
>
> *(c) There shall be no amplified noise outside the tavern building, including in the beer garden.*

The Council had no objection to the Proposed Changes.

Court concluded that the Proposed Changes would result in a substantially different development

The Court considered the Applicant's submissions, including that there will be no unacceptable noise impacts where the Applicant's noise expert's recommended mitigation measures are implemented. The Court also noted that the occupiers of the surrounding community and commercial uses would not have an opportunity to be heard in respect of any potential noise impacts arising from the Proposed Changes.

The Court concluded that the Proposed Changes were not "*minor changes*" as defined by the Planning Act and was therefore a substantially different development for the following reasons:

- The Proposed Changes will result in a material and important change to the use of the tavern.
- The Proposed Changes will introduce a new impact.
- The Proposed Changes will potentially increase the severity of a known impact, which was the subject of a particularly onerous suite of conditions.

The Court therefore dismissed the application.

Costs under the Sustainable Planning Act 2009 awarded by the Planning and Environment Court of Queensland for a wholly unsuccessful case

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Donovon v Brisbane City Council & Ors (No. 2)* [2020] QPEC 41 heard before RS Jones DCJ

December 2020

In brief

The case of *Donovon v Brisbane City Council & Ors (No. 2)* [2020] QPEC 41 concerned an application for costs by the Applicant/Second Respondent (**Applicant**) from the Respondent/Applicant (**Respondent**) to the Planning and Environment Court of Queensland in relation to a four-day hearing which occurred in March 2020.

The Brisbane City Council (**Council**) did not have an active part in the application for costs.

The Court held that the Respondent was to pay the Applicant's costs for the four-day hearing in the Court, which occurred on the 2nd to the 5th of March 2020 on a standard basis.

Background

The Applicant and Respondent occupied adjoining lots at Dewar Terrace, Corinda, which are subject to specific building location envelopes and covenants which protect the plants and animals on the lots and, as a consequence of, required the Applicant and Respondent to share joint access arrangements to the lots.

The Respondent in the substantive original application of 24 March 2016 sought orders from the Court to enable the Respondent to construct a two-storey building, which would involve rearranging the existing access arrangements. The Applicant opposed the proposed structure.

At the substantive hearing, which resulted in the judgment of *Donavon v Brisbane City Council* [2020] QPEC 9, the Respondent was vague as to the use of the upper storey of the proposed structure, and provided inconsistent descriptions of the proposed use. The Respondent, or the Respondent's legal representatives stated that the use was for a range of potential options, for storage, for various projects or hobbies, or for a final use yet to be decided.

Costs regime under the Sustainable Planning Act 2009 applied

The Court considered that the relevant costs regime was the regime provided under the now repealed *Sustainable Planning Act 2009* (**SPA**) and, in particular, section 457 of the SPA. The current *Planning Act 2016* and *Planning and Environment Court Act 2016* were not relevant for the purpose of the costs application but were nevertheless referred to by the Respondent.

Under the SPA, the costs of a proceeding, or part of a proceeding, are at the relatively broad discretion of the Court. In exercising that discretion, the Court may relevantly have regard to the following (see section 457 of the SPA as quoted at [12]):

> *(a) the relative success of the parties in the proceeding;*
>
> *…*
>
> *(d) whether a party commenced or participated in the proceeding without reasonable prospects of success;*
>
> *…*
>
> *(i) whether a party had acted unreasonably in the conduct of the proceeding …*

The Court considered relevant common law and noted that there is no presumption that costs follow the event but that "*the success or otherwise of a party in proceedings under the SPA is clearly a relevant consideration and a significant one*" (at [15]).

Respondent argued against an unfavourable costs order but the Court ultimately did not accept the Respondent's submissions

The Respondent argued that the Court ought not to make a costs order against the Respondent for, inter alia, the following reasons:

- *New originating application* – The Respondent could have lodged an originating application at any time from 19 May 2017, and had the Respondent done so the Court would not have had a general discretion as to costs.
- *Summary judgement* – That the Applicant did not bring an application seeking summary judgement is a good indicator that the Applicant did not consider that the Respondent had no reasonable prospects of success or saw some benefit out of the continuation of the proceeding.
- *Vagueness* – A determination in respect to costs would be unfair without acknowledging that the vagueness in the description of the use arose from a willingness of the Respondent to provide an outcome beneficial for the Applicant and the Respondent.
- *Council support* – The Council in a statutory pre-request notice stated that the Council was willing to support the proposed changes.
- *Benefits* – The Respondent was attempting to take steps to ameliorate the unfortunate circumstances arising from the deficiencies in access, parking and manoeuvring arrangements, therefore, limited weight ought to be given to the success of the Applicant.
- *Failed agreement* – The parties made efforts to reach an "*Agreement in Principle*".

The Court addressed the Respondent's submissions and relevantly stated as follows:

- *New originating application* – The Court stated that the submissions of the Respondent were sufficiently hypothesised as to not warrant any discussion. However, the Court noted that the Applicant was wholly, resoundingly and unequivocally successful, and therefore the Respondent commenced proceedings without reasonable prospects of success.
- *Summary judgement* – The Court rejected the submission as the Respondent's case was not one suitable to have been summarily dismissed.
- *Vagueness* – The Court stated that the vagueness existed due to the Respondent trying to formulate an end use that might have been acceptable to the Court rather than difficulty or inability in identifying the real end purpose of the proposed structure.
- *Council support* – The Court concluded that the position of the Council in the statutory pre-request response was of no material consequence as the particulars of the matter had changed by the conclusion of the hearing of the substantive application.
- *Benefits* – The Court stated that the submissions were disingenuous and a mischaracterisation of the litigation as any benefits to the Applicant were by-products of the Respondent's intention to construct the proposed structure.
- *Failed agreement* – The Court noted that the Respondent, once the negotiation for the "*Agreement in Principle*" failed, could have abandoned the substantive application.

Conclusion

The Court held that the Respondent was to pay the Applicant's costs of the four-day hearing in the Court, which occurred on the 2nd to the 5th of March 2020 on a standard basis in accordance with the broad discretion of the Court under section 457 of the SPA, as the Applicant had been wholly successful and the Respondent had no reasonable prospects of success.

The year in review – A look at NSW planning and environment law in 2020

Sanaz Towhidi | Mollie Matthews | Anthony Landro | Mark Evans | Katherine Pickerd | Todd Neal

This article reviews New South Wales planning and environment law in 2020

December 2020

In brief

Planning, government, infrastructure and environmental law in 2020 has like most areas of law been impacted by COVID-19, but the following various other developments have featured this year also:

- A series of orders were quickly issued to assist the state to deal with the impacts of COVID-19, which has also turned into further relaxation of previous restrictions via the *Liquor Amendment (24-hour Economy) Bill 2020*, which prioritises Sydney's 24-hour night-time and entertainment economy (winding back previous lock out laws).
- With adjusted court hearing arrangements, significant decisions have been handed down by the courts with a focus on jurisdictional power in the likes of *Reysson v Minister Administering the Environmental Planning and Assessment Act 1979* [2020] NSWCA 281 and *HP Subsidiary Pty Ltd v City of Parramatta Council* [2020] NSWLEC 135.
- A number of criminal cases relating to duplicity have been clarifying how prosecutors need to lay charges, with the Court of Criminal Appeal confirming the rule against duplicity has and continues to apply strictly in criminal proceedings. It is no different in environmental criminal proceedings.
- There was good news for developers with the announcement of the introduction of a right of merit appeal from decisions about planning proposals. While this is not expected to apply until mid-2021, it is welcomed by many.

In this year in review, we have focused on what we consider to be the more significant moments of 2020 from a legal perspective, and forecast what lies ahead in 2021.

Noteworthy Appellate cases

Universal Property Group Pty Ltd v Blacktown City Council [2020] NSWCA 106

This case concerned an appeal against a decision of the Land and Environment Court refusing a development application for the construction of a secondary dwelling located within a principal dwelling on land in Schofields. The land was 250 square metres, which was below the minimum "lot size" development standard of 450 square metres set out in the Growth Centres SEPP. The Council refused the development application on this basis.

However, clause 22(4)(a) of the Affordable Housing SEPP precluded the Council from refusing consent on the basis of "site area".

In the Land and Environment Court, Moore J accepted that there was an irreconcilable inconsistency between the Affordable Housing SEPP and the Growth Centres SEPP. His Honour held that the Growth Centres SEPP prevailed. His Honour found that the proposed development was prohibited and refused the grant of consent.

This appeal in the Court of Appeal was dismissed.

Basten JA (with whom Gleeson JA agreed) found that:

- There is a very strong longstanding presumption that a legislative authority does not intend to contradict itself.
- The principle of harmonious operation gives preference to a reasonable construction of the statutory instrument if the result is consistent with the operation of another statutory instrument.
- An implied intention that the Affordable Housing SEPP varied the Growth Centres SEPP as requirements as to minimum lot size should not be found absent "actual contrariety" between the two instruments. As a matter of statutory construction, there was no actual contrariety.

Emmett AJA provided a separate judgement and found that the terms "lot size" and "site area" as used in the Growth Centres SEPP and the Affordable Housing SEPP referred to two separate and distinct concepts. Accordingly, he found that there was no inconsistency between the two SEPPs.

The following two cases are appeals from Class 3 compensation proceedings:

Apokis v Transport for NSW [2020] NSWCA 39

Land near Dirty Creek was the subject of this appeal from the Land and Environment Court's determination of compensation following the compulsory acquisition of a 19ha strip of land running through the middle of the property. Following the acquisition, one million cubic metres was excavated from the acquired land and then used for a highway. The two issues before the Court of Appeal related to market value and disturbance costs. Firstly, in relation to the market value, whether the primary judge mistook his function in assessing the market value of the acquired land. Secondly, in relation to disturbance costs, whether he erred in rejecting Mr Apokis' claim for lost royalties based on the resource excavated from the acquired land and used in the construction of the highway.

On the market value issue, the Court of Appeal restated the judicial function of the Court under section 56(1) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) that it is to determine the amount a hypothetical willing but not anxious purchaser and a willing but not anxious vendor would have agreed upon for the acquired land at the date of acquisition, noting it is essentially a factual exercise. One of Mr Apokis' arguments was that the result was "unfair" and he felt aggrieved because the compensation amount had no regard to a large and potentially valuable resource which was then used by excavating and cutting the highway. However, the trial judge found there was no market for the quarrying resource on the acquired land absent the major upgrade of the highway and it is well established law that the market value of the acquired land cannot include any increase in value caused by the carrying out of the public purpose the land was acquired for.

The second issue was also directed to recovering lost royalties from the excavated resource used in the construction of the highway, however, was cast as a disturbance claim under section 59(1)(f) of the Just Terms Act. The Court of Appeal found that the value, which could have been extracted from continued ownership of the land, was not a financial loss due to disturbance. Rather, it was an element to be included in the market value which was rejected for the reasons above. Furthermore, this claim did not relate to the actual use of the land by the former owner. While there was a quarry operating in the north eastern corner of the property before acquisition, the land acquired was not used for that purpose as at the date of acquisition.

Consequently the appeal was dismissed.

Alexandria Landfill Pty Ltd v Transport for NSW [2020] NSWCA 165

The long-running compulsory acquisition case concerning the former Alexandria Landfill site for the St Peters Interchange (part of the M8 Motorway) was dismissed with costs in the Court of Appeal. In summary, the Court of Appeal found that the owner of the land did not have a claim for future lost profits as agent for another entity who was carrying out business activities on the land.

The land in this case involved a 15ha parcel used for landfilling and recycling operations, and an 1800 square metre lot used for storage. The land was owned by Alexandria Landfill (**ALF**) but leased to a tenant, Boiling Pty Ltd (**Boiling**). The operations themselves were carried out by a separate entity, Dial and Dump Industries Pty Ltd (**DADI**), who lacked an interest in the land and was not entitled to compensation (decided in an earlier string of cases).

In the Land and Environment Court, Sheahan J awarded compensation of $45,742,270 for the market value of the lot and $424,910.68 for disturbance under the Just Terms Act. This was substantially lower than both:

- the Valuer-General's determination of $70,019,285 (being $56,900,000 for market value, plus $13,119,285 for disturbance); and
- ALF's claim, which exceeded $500 million (comprised of some $273 million for market value of the land, $60 million for special value) and $179 million for disturbance).

ALF was unsuccessful on all 9 grounds of appeal.

Grounds 1 and 2 concerned the failure to exercise jurisdiction and failure to provide adequate reasons. Ground 3 concerned a lack of procedural fairness because Transport for NSW's forensic accountant expert was preferred. Ground 4 concerned apprehended bias.

Grounds 5, 6 and 7 related to disturbance, and is the part of the judgment that will be of particular interest to other claimants. The Court confirmed that disturbance can only be claimed by the person with an interest in the land - and therefore found that DADI was not entitled to compensation. The Court also rejected an agency argument advanced by ALF, and an estoppel argument. The Court also found that the disturbance claim amounted to double recovery as the value of the land acquired had incorporated the profits from future business operations through discounted cash flow analysis.

Grounds 8 and 9 related to the special value claim. These grounds were rejected as the agency argument had failed.

The decision also affirms the refinement to the interpretation of section 59 of the Just Terms Act that has occurred in recent Court of Appeal decisions. This was confirmed by all three of the sitting judges - Basten JA, Macfarlan JA and Leeming JA. It is interesting to note that Basten JA and Macfarlan JA were also on the bench in *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41 (and in that instance were joined by Payne JA, Sackville AJA, and Preston CJ of the LEC) - Leeming JA was the only judge not on the bench in United Petroleum.

Reysson v Minister Administering the Environmental Planning and Assessment Act 1979 [2020] NSWCA 281

The NSW Court of Appeal dismissed a challenge brought by a landowner in Tweed Heads against the validity of coastal wetlands mapping in the *State Environmental Planning Policy (Coastal Management) 2018*. Our separate article on the *Reysson* case explained how this case highlighted the apparent increasing prevalence and importance in planning law of jurisdictional facts as a ground for challenge in planning and environment matters, and how the decision enables (and legitimises) the use of mapping within State Environmental Planning Policies to impose restrictions on and control the development of land.

Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd [2020] NSWCA 50

This was an appeal to the Court of Appeal from a well-publicised decision of the Land and Environment Court ordering the proprietor of a Greek restaurant in Sydney to remove a large (8m x 5m) flag from the rear wall. The flag was created by removing part of the cement render on the wall leaving parts of the brickwork underneath exposed in the 1821 Hotel in Sydney, which is a heritage listed premises. Council orders were made to remove the depiction of the flag and reinstate the concrete render because the carving of the flag occurred without planning approval contrary to section 4.2 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) and without approval under section 57(1) of the *Heritage Act 1977*. The restaurant proprietor had possession of the premises under a registered lease.

The Council did not give the restaurant proprietor, but did give the owner of the building, an opportunity to make representations to the Council regarding the proposed Order before it was made.

The restaurant proprietor appealed to the Court of Appeal on the basis that:

- it had been denied procedural fairness in relation to the making of the Order principally because this was a breach of a common law obligation the Council owed to the restaurant proprietor; and
- the carving of the Greek flag into the wall's render was not a separate item of development that required development approval or Heritage Council approval but it was, in any event, approved in both respects as part of a 2016 renovation works approval.

The Court of Appeal rejected these contentions and dismissed the appeal with costs.

The appeal was dismissed because the Order was correctly directed by Council to the owner of the premises as was permitted in Part 1 of Schedule 5 of the EP&A Act. It did not give notice to the restaurant proprietor on the basis that the restaurant proprietor was not a person to whom the Order was intended to be directed. The restaurant proprietor submitted that, as a matter of procedural fairness, the Council should have given it the opportunity to make representations to the Council because the restaurant proprietor, as the occupier of the premises, would inevitably be affected by the making of the Order. Universal's principal submission was that a right to procedural fairness arose under the general law.

The Court of Appeal held that a requirement under the general law to afford procedural fairness can only be excluded by "plain words of necessary intendment" and in this case Schedule 5 of the EP&A Act, under which the Orders were made, contained sufficiently plain words to exclude any right the restaurant proprietor might otherwise have had to be afforded procedural fairness in relation to the issue of the Order.

Clause 7 in Schedule 5 provided that an enforcement authority such as the Council "is taken to have observed the rules of procedural fairness" if it complies with certain provisions of the Schedule. These provisions included the requirement to give notice of a proposed order to the person to whom the order was to be directed and to consider any representations made by that person. The legislation thus identified to whom notice of a proposed Order was to be given and what had to occur in consequence. This specification left no room for the restaurant proprietor's argument that it was someone else to whom the Council was required to give notice of the proposed Order.

Rule against duplicity in environmental proceedings

There have been several cases relating to the rule against duplicity in criminal proceedings this year.

The general rule against duplicity is that a prosecutor may not roll up multiple charges into one charge. There are only two exceptions to this rule:

- **Continuing offence:** where the alleged offence is of a continuing nature, such as maintaining a brothel or carrying on a business without a statutory licence (ie the conduct continues over an extended period, any part of which would constitute the offence).
- **Single criminal transaction:** where multiple acts that may each individually constitute a separate offence are sufficiently connected with each other to amount to a single compendious instance of offending.

The Court applies the rule against duplicity strictly, and has done so consistently.

The recent judgments relating to duplicity in environmental proceedings this year include:

- *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2020] NSWCCA 74 (in the Court of Criminal Appeal);
- *Secretary, Department of Planning and Environment v Goodman Property Services (Aust) Pty Ltd; Secretary, Department of Planning and Environment v Burton Contractors Pty Ltd* [2020] NSWLEC 52 (in the Land and Environment Court); and
- most recently, *Kiangatha Holdings Pty Ltd v Water NSW* [2020] NSWCCA 263 (in the Court of Criminal Appeal).

In Kiangatha, the offences alleged were of polluting waters, contrary to section 120 of the *Protection of the Environment Operations Act 1997* (NSW), over a number of months.

The allegation was that during the construction of an unsealed road (8-10km in length), there was a failure to implement sufficient erosion and sediment controls, resulting in sediment either being deposited into gullies, or placed in a position where it was likely the sediment would be washed into the drainage lines in rain events.

At first instance, the primary judge held that the pollution charge was a continuing offence and that "the construction of the Road is able to be regarded as one activity which involved various acts which were closely related to the next and were part of one overall transaction with one underlying factual matrix."

On appeal, the Court of Criminal Appeal found that the charges had not particularised as a "continuing offence", and that the charge did not involve a single criminal transaction. The Court of Criminal Appeal did not accept that the alleged conduct was a single criminal transaction either, and stated at [56]:

> *The fact that the numerous placements of soil and sediment took place in the course of building one road has been a constant refrain in the respondent's submissions at first instance and in this Court. But it is not a significant consideration when one has regard to the fact that the construction took place over five months (from early May to the beginning of October) and extended over a length that has been alternately referred to as 8 km or 10 km, through variable features of terrain and in proximity to a significant number of distinct dry gullies.*

Importantly, given the number of duplicity judgments this year alone, the Court of Criminal Appeal in this case at [68] made a general comment emphasising that the rule against duplicity has and continues to apply strictly in criminal proceedings. It is no different in environmental criminal proceedings.

Noteworthy Land and Environment Court cases

At the recent Environmental Planning Law Association Conference, Justice Robson informed attendees that the Land and Environment Court has delivered 430 judgments in the 12 months since 1 November 2019. 186 of those judgments were from judges, and 244 of those judgments were from commissioners.

There has been a spotlight on **all** jurisdictional requirements this year. This expands on the trend in the last couple of years of scrutinising clause 4.6 requests, which are just one of many jurisdictional facts that must exist in order to enliven the power to grant development consent.

HP Subsidiary Pty Ltd v City of Parramatta Council [2020] NSWLEC 135

Preston CJ made it clear in this case at [16] that the Court in class 1 proceedings must be satisfied of **all** jurisdictional preconditions to the grant of consent, even if not raised by the parties. The judgment then addresses each of the jurisdictional preconditions. This case is a reminder that parties must provide the court with all evidence necessary for the court to be satisfied that the preconditions have been met.

This reflects the current practice of the court requiring the parties to provide jurisdictional statements, summarising how all jurisdictional facts (even those not in issue) are satisfied in order to allow the court to be satisfied that all of those requirements have been met.

Despite the cost and time involved in preparing these, the importance of satisfying the consent authority of these jurisdictional facts is clear. It is a necessary step that if unfulfilled may leave the decision vulnerable to an appeal.

UTSG Pty Ltd v Sydney Metro (No. 6) [2020] NSWLEC 63

This case related to the determination of compensation for the compulsory acquisition of a leasehold interest. While an applicant in these types of proceedings is usually entitled to its costs reasonably incurred, this case was quite unusual.

The Court determined the amount of compensation payable to the applicant. However, that amount was less that the rental arrears owing by the applicant to the respondent, so no compensation was payable.

In addition, and despite conventional practice, the applicant was ordered to pay the respondent's costs of the proceedings, as the applicant conducted the litigation in an unreasonable and improper manner. This included causing delays (and so increasing costs), fabricating documents and other evidence (both in affidavits and in oral evidence).

This is a reminder that there are serious consequences for unreasonable and improper conduct in proceedings.

Made Property Group Pty Limited v North Sydney Council [2020] NSWLEC 1332

A developer sought to rely on existing use rights to replace an inter-war apartment building in Sydney with another apartment building. The applicant owned three inter-war apartment buildings in Neutral Bay, Sydney, which all exceeded the current height development standard (8.5m). The applicant proposed one, new apartment building that (at 12.52m) was taller than the existing apartment buildings (10m) and exceeded the height of building standards by approximately 47.3%. The applicant, in part relied on the benefit of the existing-use rights, otherwise the proposed apartment building would not be permissible on the site.

The applicant appealed against deemed refusal of its application to replace the existing apartment buildings with one large building that exceeded the current height of buildings development standard.

The developer's appeal against deemed refusal of its application was denied.

This decision serves as an important reminder of some principles regarding existing use rights and clause 4.6 requests:

- the height, bulk and scale of the existing building does not automatically entitle replacement with a similar building of the same height, bulk and scale;
- a merit assessment of the application must still be conducted even if existing use rights are relied on; and
- clause 4.6 written requests must be extremely well considered and detailed. The Court applied the approach described by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 to assess whether the clause 4.6 written request was well founded. As in this case, deficiencies in both the clause 4.6 request and the justifications for exceedance of development standards will result in the consent authority lacking jurisdiction to grant consent.

Boomerang & Blueys Residents Group Inc v New South Wales Minister for the Environment, Heritage and Local Government and MidCoast Council (No. 3) [2020] NSWLEC 150

In Class 4 of the Land and Environment Court's jurisdiction the general rule is that "costs follow the event", that is, usually, the successful party will be entitled to their costs (see UCPR Rule 42.1).

Robson J had dismissed *Boomerang & Blueys Residents Group Inc's* (**Residents Group**) judicial review proceedings brought against the New South Wales Minister for the Environment and MidCoast Council in relation to the validity of the Great Lakes Coastal Zone Management Plan and ordered that the Residents Group pay the costs of both the Minister and Council. In this case, the Residents Group submitted that each party should bear its own costs on the basis that the proceedings were brought in the public interest pursuant to rule 4.2(1) of the *Land and Environment Court Rules 2007* (NSW).

Robson J held that the general rule should apply and the Residents Group should pay 60% of Council's costs and 40% of the Minister's costs of the proceedings. The Residents Group was not able to demonstrate that it brought the proceedings "in the public interest" and therefore should not be subject to a costs order.

There are a variety of considerations which may determine whether litigation can be properly characterised as having been brought in the public interest (*Engadine Area Traffic Action Group Inc (No. 2)* at [15]; *Caroona (No. 3)* at [21]).

While the litigation had some public interest characteristics, the Residents Group was not able to show that the litigation featured "something more" such that the ordinary rule that costs follow the event should not apply. Simple characterisation of litigation as having been brought in the public interest is, as noted by Preston J in *Caroona (No. 3)* at [16], too crude a criterion to enable the Court to differentiate between the potentially large pool of matters as could be characterised as being brought in the public interest.

The Court held that the mere characterisation of the litigation as being in the public interest is not sufficient to justify a departure from the ordinary costs rule because, put simply, the subject matter and the issues raised in this case were not of sufficient moment or magnitude as to be sufficient to depart from the usual order for costs.

This case serves as a reminder to small community groups to take care, when considering commencing proceedings against Council or an authority, that the public interest matter in question must normally relate to subject matter that impacts more than a relatively small number of members who are concerned with relatively private interests. If the test is not made out, the general rule will apply and costs will be awarded against the community group.

Palm Beach Protection Group Incorporated v Northern Beaches Council [2020] NSWLEC 156

On 20 November 2020, Preston CJ handed down an important decision on, among other things, the application of Part 5 for public authorities: *Palm Beach Protection Group Incorporated v Northern Beaches Council*. The decision warrants its own article due to its application of the duties for public authorities under Part 5 of the EP&A Act and given it draws together important points from existing case law.

The subject of this case was Station Beach located in Palm Beach, which is a reserve for public recreation. The Council made two resolutions with respect to the use of the area by the public with their dogs. In August 2019, a resolution for a dog off-leash 12-month trial area was passed and in December 2019, a resolution for a dog on-leash area was passed. Both decisions were the subject of judicial review proceedings in the Land and Environment Court.

The Court found that the Council had breached section 5.5(1) of the EP&A Act by not examining and taking into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of dog on-leash activities. The Council's assessment undertaken for the purpose of assessing the likely impact of the dog *off-leash* trial did not suffice to assess the activity of allowing dogs *on-leash*. As stated by the Court at [268], an environmental assessment under section 5.5(1) of one activity does not suffice to discharge the duty under section 5.5(1) to consider the environmental impact of another activity.

This finding also meant that the Court found the Council to be in breach of the implied duty under section 5.7 of the EP&A Act to consider whether the activity was likely to have a significant effect on the environment (in particular, a species of seagrass and a sea horse species).

The Court also considered whether the Council had breached its duty under section 5.7 of the EP&A Act with respect to dog *off-leash* activities. The challenge brought by the resident action group in respect of *off-leash* activities was the Council's finding that these activities were not likely to significantly affect the environment.

The Court agreed with the incorporated association that there was likely to be a significant affect from the *off-leash* activities because:

- The Council did not adopt the finding in the review of environmental factors (REF) of no likely significant effect because it did not adopt the recommendation in the REF for implementation and enforcement of all the mitigation measures. These measures were a condition of the finding of no likely significant effect. Therefore, the Council did not in fact find that the activity of conducting the dog off-leash area trial that the Council approved was not likely to significantly affect the environment.
- The Court found that the dog off-leash activity was likely to significantly affect the environment when properly assessed. This was a jurisdictional fact. The effects included a range of direct and indirect impacts over the immediate, short term, and long term.

For similar reasons to the above, the Court also found that the dog on-leash activities were, as a matter of jurisdictional fact, likely to significantly affect the environment.

Finally, the resident action group sought injunctive orders restraining the carrying out of the activities. The Court also made comments about the problems with seeking an injunction against members of the public. Because the injunction restraining the carrying out of an activity needs to be directed to some identifiable person(s), it was not possible to order one where the persons carrying out the activity are simply members of the public and an undifferentiated and changing group of people.

The decision reaffirms the importance of Part 5 when public authorities are determining activities. It will have far reaching impacts for proponents of activities and various other parties involved with the activities proposed by a public authority.

Thomas v Georges River Council [2020] NSWLEC 1473

In this case involving resolution of the proceedings through a section 34 conference, Acting Commissioner Clay clarified the circumstances in which costs thrown away are payable under section 8.15(3) of the EP&A Act.

At [60], the circumstances were summarised:

> *in order for there to be a costs order in favour of a respondent pursuant to s 8.15(3) , then there needs to be:*
>
> - *an amendment to the application for development consent;*
> - *which is other than a minor amendment;*
> - *in respect of which there have been costs thrown away.*

However, Clay AC particularly focused on what is meant by "an amended application for development consent".

While "application for development consent" is not defined in the EP&A Act, Clay AC found that it means "development application", which is defined.

The Council's application for costs thrown away was rejected because Clay AC found that the documents that the applicant sought leave to rely on were not an amendment of the development application. Rather, they were documents which accompanied the development application, and a statement of evidence in the proceedings. That is despite the possibility that an accompanying document may have the effect of amending the development the subject of the development application.

This does not mean that applicants can escape payment of costs altogether. A council could still apply to the Court under rule 3.7 of the *Land and Environment Court Rules 2007* for costs, if they are "fair and reasonable in the circumstances".

Update on Land and Environment Court statistics

In 2019 (the 2020 Annual Review has not been issued yet), the Land and Environment Court reversed the trend of increasing matters being filed, which had existed since 2013. However, the total finalisations of hearings also decreased, and saw the Land and Environment Court return to more expected numbers in terms of the pre-trial/hearing disposal ratio.

In terms of percentages, in 2019:

- Merits review appeals and other civil proceedings finalised in class 1, 2 and 3 proceedings comprised 83% of the Court's finalised case load, being unchanged from the previous year.
- Class 1 registrations were at their lowest, recording less than 1000 cases.
- Civil and criminal proceedings finalised in class 4, 5, 6, 7 and 8 proceedings comprised 17% of the Court's finalised caseload, also being unchanged from the previous year.
- The Court's means of finalisation were 67% pre-trial disposals with the remaining 33% of requiring adjudication by the Court.

Accordingly, if you file an appeal a large proportion of cases will not reach hearing.

Read the Land and Environment Court of NSW 2019 Annual Review.

Noteworthy Federal Court environmental law cases

Friends of Leadbeater's Possum Inc v VicForests (No. 4) [2020] FCA 704

This case concerned forestry operations of numerous logging areas in Victoria's Central Highlands region and the impact on two native fauna species, the Leadbeater's Possum and the Greater Glider.

VicForests had been relying on an exemption under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) to the operation of section 18 of the EPBC Act. That section provides that a person must not take an action that has, will have or is likely to have a significant impact on a listed threatened species.

However, the exemption (under section 38) only applied if the forestry operations were conducted "in accordance with" a regional forest agreement (**RFA**).

The Court previously answered the question of what this phrase meant, and had found that it meant "in compliance with". This meant that VicForests needed to have complied with the *Code of Practice for Timber Production 2014* (**Code**).

The Court found that it failed to comply with the Code both in relation to logging it had already done, and future planned logging, by not applying the precautionary principle to the conservation of biodiversity values (which was required by the Code).

The Court gave considerable weight to the Applicant's expert evidence and evidence of witnesses, which included that one or both of the species had been detected in or around the area being logged.

The Court also was not convinced that VicForests was likely to engage in a careful evaluation of management options to avoid the threats of serious damage to the Greater Gilder which are posed by its forestry operations in the Central Highlands.

The Court found that the operations of VicForests were likely to have a significant impact on the Greater Glider, or the Leadbeater's Possum, or both.

In August 2020, judgment in *Friends of Leadbeater's Possum Inc v VicForests (No. 6)* [2020] FCA 1199 was delivered. This included declarations that forestry operations were not covered by the section 38 exemption, and declarations that VicForests had therefore contravened section 18 of the EPBC Act as it had both taken an action and proposed to take an action that was and would be likely to have had a significant impact on the Greater Glider and the Leadbeater's Possum. Further logging in this area was therefore restrained, and is subject to the orders in this judgment.

Changes to legislation

Koala SEPP

2020 saw a year of significant uncertainty surrounding the NSW Government's *Koala State Environmental Planning Policy* (**SEPP**). This was implemented for a short period of time after a 2016 report by NSW's chief scientist, which found that much more needed to be done to stabilise and increase the koala populations, and without urgent government intervention, koalas will become extinct in NSW before 2050. It also found that 30% of NSW's koala population died in the summer bushfires which occurred between the end of 2019 and the start of 2020.

The new *Koala Habitat Protection SEPP* caused friction within the coalition where Nationals leader John Barilaro threatened to cross the floor with his entire party if the new policy was not dropped.

In November 2020, the NSW Government implemented the *State Environmental Planning Policy (Koala Habitat Protection) 2020* in response to its decision to revert to operations under the former SEPP 44, while a new policy is being developed in 2021. Both the Premier and Deputy Premier have agreed to sit down with farmers in the new year and develop a new policy which protects koalas and allows for sustainable farming practice.

More to come in the new year, but a more delicate balance between farmers rights and koala protection will be needed if there is to be further change.

Liquor amendment

The *Liquor Amendment (24-hour Economy) Bill 2020* (**Liquor Amendment Bill**) was introduced in May 2020 as part of the NSW Government's initiative to prioritise Sydney's 24-hour night-time and entertainment economy. It amends various acts and instruments including the *Environmental Planning and Assessment Act 1979* and the *Exempt & Complying SEPP*. Some parts of the Bill have already commenced.

The Liquor Amendment Bill also amends the *Liquor Act 2007* and *Liquor Regulation 2018* to:

- establish an integrated demerit points and incentives scheme with fee discounts for licensed venues that maintain a clear record;
- remove live music restrictions and promote live performance and music venues;
- provide for cumulative impact assessments; and
- improve management and monitoring of same day deliveries of liquor.

Forecast for NSW planning and environment law in 2021

Planning Proposal merit appeals

There is currently no merit based appeal mechanism to the Land and Environment Court for the rejection of a Planning Proposal. In mid-2020, the NSW Government announced plans to create such a mechanism through a new class of Land and Environment Court appeals, as part of the Government's *Planning Reform Action Plan*. This will be a welcome change for developers and investors who have seen rezoning applications locked into the system for long periods of time. Estimated timings on the reforms are mid-2021, but expect to see consultation occur beforehand.

Government stimulus

Recent NSW Government announcements in 2020 shed some light on what we can expect in 2021, especially in light of the Government's plan to boost economic recovery. These announcements include:

- Pushing the "build to rent" model directed to diversifying existing housing and providing more affordable housing. Cuts to land tax have been announced to drive this sector.
- The introduction of a new Housing Diversity State Environmental Planning Policy, which was exhibited between July and September 2020.
- The intention to reform employment zones, which is aimed at increasing productivity and supporting economic recovery.
- $10 million in grants to be given to Councils and partner organisations to plant 40,000 trees in greater Sydney.
- The Priority Assessment Program and the Planning System Acceleration Program, which accelerates the assessment and determination of selected projects, as well as the new Planning Delivery Unit targeted at resolving road blocks for development.
- The appointment of 100 experts to the State Design Review Panel whose role it will be to provide advice on State Significant Development and infrastructure projects.
- The appointment of more commissioners to the Land and Environment Court to assist with the backlog of appeals.
- That the Government will be considering a report from the NSW Productivity Commission recommending changes to the infrastructure contributions system, which is said to have the potential to unlock $12 billion of productivity benefits.

All of these initiatives highlight that 2021 will be a year of significant change in response to the unnerving year of 2020.

The year in review – A look at the NSW waste industry in 2020

Katherine Pickerd | Todd Neal

This article reviews New South Wales waste industry in 2020

December 2020

In brief

The waste industry has responded well to the impacts of COVID-19 in continuing to provide essential waste services throughout NSW. Regulatory activities have also continued despite restrictions as well as court activity, which has seen significant penalties and another gaol sentence handed down.

A snapshot of the key 2020 events impacting the waste industry is below:

Two of these events warrant further comment:

- **Sentencing for knowingly supplying false and misleading information about asbestos waste disposal**

  Following the first gaol sentence being handed down for repeat waste offences in 2018, this year the Court has ordered another gaol sentence. In *Environment Protection Authority v Mouawad (No. 2); Environment Protection Authority v Aussie Earthmovers Pty Ltd (No. 3)* [2020] NSWLEC 166, the NSW Environment Protection Authority charged two defendants with offences relating to knowingly supplying false and misleading information about waste. In this case, the offence involved asbestos contaminated soil which attracted a higher penalty.

  The Court found that a term of imprisonment of 12 months was warranted in the circumstances of the individual defendant. A report is currently being prepared to ascertain whether it is appropriate for the sentence to be served by the defendant by way of intensive correction in the community under the supervision of Community Corrections. Monetary penalties in the amount of $450,000 against the company were also ordered.

- **Sentencing for transporting and disposing of waste at sea**

  Generally speaking, in the waste industry, criminal charges for (a) transporting waste to a place that could not lawfully be used as a waste facility and (b) using a place as a waste facility without lawful authority are commenced by the NSW Environment Protection Authority. Such charges typically relate to vehicles transporting waste to a site that does not have the relevant approvals.

  However, in an unusual prosecution this year, Transport for NSW as the prosecutor charged two defendants under the *Protection of the Environment Operations Act 1997* (NSW) in relation to waste (including pontoons) that had been unlawfully transported to sea and sunk to the seabed. The case was *Transport for NSW v East Coast Wharf Constructions Pty Ltd; Transport for NSW v King* [2020] NSWLEC 112.

  The defendants pleaded guilty to the two offences and were fined in total $133,000. A publication order was made as well as orders for the defendants to pay the costs of the prosecutor. The facts of this case appear to be a first.

What will 2021 bring?

Waste energy generation and the diversion/capture of useful materials from the waste collection chain and the implementation and roll out of new technologies in this area are expected to be a continued area of focus and investment in 2021.

There are a number of State Significant Projects in the pipeline for energy from waste that are being assessed by the NSW Department of Planning, Industry and Environment. The Department even has a webpage devoted to the topic. It appears to be a matter of time before one is approved, paving the way for more of these projects as landfills continue to be filled.

On a somewhat smaller scale, the design and implementation of alternative methods to divert materials that would otherwise be sent to landfill continues to be encouraged through NSW EPA grants.

Publishing pollution monitoring data – What are the requirements?

Katherine Pickerd | Todd Neal

This article gives an overview of what environment protection licence holders in New South Wales should do if a monitoring condition is attached to their licence

December 2020

In brief

We discuss below what environment protection licence holders in New South Wales should do if a monitoring condition is attached to their licence.

Takeaway message

- Holders of environment protection licences (**EPLs**) issued under the *Protection of the Environment Operations Act 1997* (NSW) (the Act) need to comply with a large number of requirements contained in their EPLs, the Act and associated regulations. The requirement to publish pollution monitoring data is but one of those requirements.
- As the requirement to publish, including what information to publish, applies differently to each EPL holder, it is important to be aware of, and comply with the relevant obligations to ensure compliance with these requirements and to avoid any regulatory action being taken.

Non-compliance with requirement to publish pollution monitoring data remains an issue

EPL holders are subject to many requirements directed to protecting, restoring and enhancing the quality of the environment. One such requirement that generally appears as a condition in an EPL is for licensees to monitor aspects of their activities on a regular basis. Where that obligation arises, there is also a requirement for licensees to publish the results so that they are available to members of the community.

While one of the objects of the Act is to ensure that the community has access to relevant and meaningful information about pollution, the NSW Environment Protection Authority (**EPA**) has previously shown that a significant number of EPL holders were wholly or partly non-compliant with the requirements for publishing pollution monitoring data in 2012.

Given there are criminal offences associated with failing to comply with the legislated requirements, it is important for EPL holders be aware of and implement requirements for publication.

In this article we identify the requirement to publish pollution monitoring data and discuss how it can apply to EPL holders generally.

Source of the requirement to monitor

The requirement to publish monitoring data is found in section 66 of the Act. As will be seen, the requirement is only triggered where there are conditions in an EPL that require monitoring. Accordingly, if there are no conditions in an EPL that require the holder to monitor (see section 66(1)(a) below), there is no requirement to publish data.

Relevantly, section 66(1) of the Act states:

> ***66 Conditions requiring monitoring, certification or provision of information, and related offences***
>
> *(1)* ***Monitoring*** *The conditions of a licence may require—*
>
> *(a) monitoring by the holder of the licence of the activity or work authorised, required or controlled by the licence, including with respect to—*
>
> *(i) the operation or maintenance of premises or plant, and*
>
> *(ii) discharges from premises, and*
>
> *(iii) relevant ambient conditions prevailing on or outside premises, and*
>
> *(iv) anything required by the conditions of the licence, …*

Examples of the types of monitoring that an EPL might require a holder to carry out include air quality (such as odour and dust) and water quality (such as ground water and surface water).

It is important to note that the categories of monitoring referred to in section 66(1)(a) above are not exhaustive and include "*anything required by the conditions of the licence"*.

Careful audits should be taken of EPLs to identify any conditions that could be caught.

Source of the requirement to publish

If an EPL contains a condition of the type specified in section 66(1)(a) of the Act, the licence holder is required to comply with section 66(6) which states:

> *(6)* ***Publication of results of monitoring*** *The holder of a licence subject to a condition referred to in subsection (1)(a) must, within 14 days of obtaining monitoring data as referred to in that subsection—*
>
> *(a) if the holder maintains a website that relates to the business or activity the subject of the licence—make any of the monitoring data that relates to pollution, and the licensee's name, publicly and prominently available on that website in accordance with any requirements issued in writing by the EPA, or*
>
> *(b) if the holder does not maintain such a website—provide a copy of any of the monitoring data that relates to pollution, to any person who requests a copy of the data, at no charge and in accordance with any requirements issued in writing by the EPA.*

We now make a number of observations about the requirement to publish or provide monitoring data to any person who requests a copy.

Written requirements published by the EPA

Section 66(a) of the Act requires monitoring data to be published "*in accordance with any requirements issued in writing by the EPA*".

In October 2013, the EPA published a guideline setting out the '*Requirements for publishing pollution monitoring data*' (**2013 Guideline**).

This publication explains what is expected with respect to:

- Making the data publicly accessible.
- The meaning of "publicly and prominently available".
- How to provide meaningful information.
- What data must be published.
- How long the data must be published.
- What information must be published with the data.

Requirement to publish on a website or otherwise

The requirement to publish on a website only arises where the licensee maintains a website that relates to the business or activity that is the subject of the EPL. Some companies may have in place complex company structures (eg parent and subsidiary companies) with each company operating websites, which means that consideration will need to be given to how the requirement to publish applies to each company.

For holders of EPLs who do not have websites related to the business or activity that is the subject of the EPL, there is no requirement to publish the monitoring data. However, if any person requests a copy of the monitoring data, licensees without websites are required to provide a copy of the monitoring data, free of charge, in accordance with any requirements issued by the EPA in writing, like the 2013 Guideline.

14 day trigger to publish monitoring data

Section 66(6) of the Act requires the publication of the pollution monitoring data within "14 days" of obtaining monitoring data. While that could be interpreted to be calendar days, the 2013 Guideline clarifies that the timeframe for publishing or providing data is *14 working days*.

The obvious purpose of the publication requirements, including the short timeframe in which data must be published, is to provide the public with access to information about the environmental performance of licence holders. It is also another way that the EPA can access and assess the monitoring data for the purpose of carrying out its regulatory function.

Criminal offences

It is a criminal offence to contravene section 66(6) of the Act with the maximum penalty for a corporation presently being $4,400 and in the case of an individual $2,200. There have been no prosecutions reported under section 66(6) of the Act to date.

A person also must not make available or provide monitoring data in accordance with subsection 66(6) if the monitoring data is false or misleading in a material respect. A separate criminal offence is created by section 66(7) of the Act for providing monitoring data that is false or misleading in a material respect.

While there have also been no prosecutions reported under section 66(7) of the Act, other offences for the provision of false and misleading information under the Act have increasingly been the subject of the EPA's regulatory enforcement.

EPA's powers to publish and provide monitoring data

While section 66 of the Act requires licence holders to publish or provide monitoring data, section 320 of the Act empowers the EPA or other regulatory authority to disclose monitoring data by publishing it in such as manner as it considers appropriate.

In addition, if a written request is made to an appropriate regulatory authority, it is to provide that person with access to the monitoring data in the same form that access is required to be provided under section 72 of the *Government Information (Public Access) Act 2009* (NSW).

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