COLIN BIGGERS & PAISLEY LAWYERS

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PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

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

COLIN BIGGERS & PAISLEY LAWYERS

Our Planning Government Infrastructure and Environment group

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

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

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

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

Our specialist expertise and experience

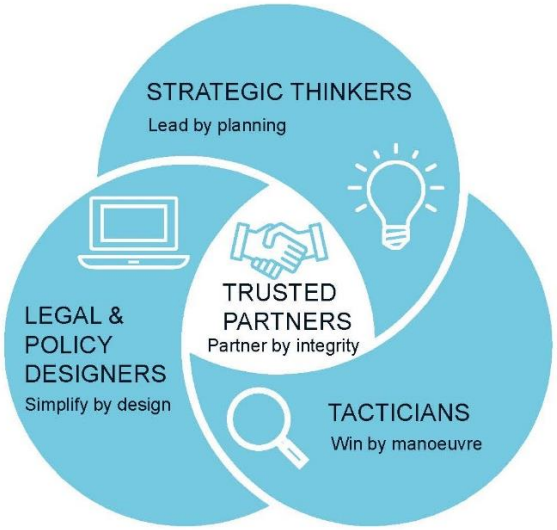
Our Planning Government Infrastructure and Environment group is recognised for our specialist expertise and experience:

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

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

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

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



Lead, Simplify and Win with Integrity

Our Team of Teams and Credo

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

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

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

COLIN BIGGERS & PAISLEY LAWYERS

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Court found that the wholesale nursery was an existing lawful use and no approval was required

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Allen & Anor v Cairns Regional Council & Anor* [2015] QPEC 28 heard before Andrews SC DCJ

January 2016

In brief

The case of *Allen & Anor v Cairns Regional Council & Anor* [2015] QPEC 28 concerned an application made to the Planning and Environment Court by Mr Barry Allen and Edgewill Pty Ltd for a declaration in respect of the lawfulness of the wholesale nursery on land located at 29-31 Zanzoo Close, Crystal Cascades, Redlynch.

The court found that the wholesale nursery was an existing lawful use under section 681 of the *Sustainable Planning Act 2009* and the development application for the wholesale nursery was not required.

Court was required to satisfy itself that the wholesale nursery fitted within the definition of agriculture under the 1978 town planning scheme and that it commenced before 29 November 1996

Until 29 November 1996, the land was zoned Rural Residential A under the Town Planning Scheme for the Balance of the Shire of Mulgrave gazetted in July 1978 under the *Local Government Act 1936*. Agriculture on the land would have been lawful under the 1978 town planning scheme without the consent of the council.

The various town planning schemes commenced on and from 29 November 1996 would have required a development approval to be obtained to lawfully carry out agriculture on the land. Accordingly, the court had to be satisfied that the wholesale nursery commenced prior to 29 November 1996 and fitted within the definition of agriculture under the 1978 town planning scheme.

Mr Allen demonstrated and satisfied the court that through his continuous activities on the land the wholesale nursery commenced its use on the land before 29 November 1996

The court was satisfied that the wholesale nursery commenced before 29 November 1996 based on the evidence of a series of continuous activities carried out by Mr Allen since the early 1990s up to 29 November 1996, which included the several years of planting stock in the ground, the maintenance of growth plants with irrigation, mulching, fertiliser and weeding, a large portion of the land being used for nursery purposes, increased planting of dracaenas, propagation of dracaenas in pots and sale of pots.

Court was satisfied that the primary use of the land was agriculture and that it was a lawful use in November 1996

The owners of the neighbouring land submitted that the propagation process was the dominant use of the land and the growth of the dracaena stock was an incidental use. It was asserted by the owners that the "cutting of the canes from the mother stock in combination with the propagation phase was 'Rural Industry'" and as such it was not a lawful use.

The court disagreed with the neighbouring landowners' assertions. The court was of the view that the primary use of the land was for growing stock and the propagation phase formed part of the growing phase. The cutting of the canes was incidental to the primary use of the land. Accordingly, it was satisfied that the use of the land was agriculture, which was lawful in November 1996.

Court was not satisfied that there had been material intensification or abandonment of the wholesale nursery use

The neighbouring landowners asserted that there had been material intensification of the use of the land after 30 March 1998 or abandonment of the use in 1993 and 2013.

The court found that there had not been material intensification of the use for the following reasons:

- since 1994, the proportionate use of the land for the purpose of wholesale nursery had remained roughly the same;
- there had not been an increase of the volume of the production of pot plants;
- there had been a consistent number of deliveries of mulch, fertiliser and potting mix;
- the volume of pesticides or herbicides sprayed and vehicles or equipment used on the land had not been increased.

The court also found that the use of wholesale nursery was not abandoned even though when the previous company owned by Mr Allen was liquidated in 1993 so long as the use commenced and before and was continuing after 29 November 1996. The asserted abandonment in 2013 was not consistent with the evidence.

Court found that the past use of a shade house without a building approval would not warrant a refusal of making the declaration sought in this case

The neighbouring landowners sought to submit that the shade house was unlawfully erected on the land. Based on the evidence before the court, it was not satisfied that the shade house was unlawful.

Nonetheless, the court did not consider Edgewill Pty Ltd had wilfully not obtained a building approval and where such approval was required, the council could take remedial actions.

In any event, the court was not persuaded that the previous use of the shade house constructed on the land without a building approval if that was the case would warrant a refusal of making the declaration sought.

Using an existing structure to realise otherwise unrealisable yield

William Lacy | Ben Caldwell | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Aspinall & Ors v Brisbane City Council* [2015] QPEC 31 heard before Horneman-Wren SC DCJ

January 2016

In brief

The case of *Aspinall & Ors v Brisbane City Council* [2015] QPEC 31 concerned an appeal commenced in the Planning and Environment Court by submitters against a decision made by the Brisbane City Council to approve the development application of Butterfield Projects Pty Ltd for a development permit for 35 units in a disused aged care facility on a site located at 6 Southerden Avenue and 4a Gawler Street, Grange.

The submitters argued that the development application should be refused as it conflicted with the relevant planning instruments, being the *Brisbane City Plan 2000* and the *Brisbane City Plan 2014*, and there was a lack of sufficient grounds to justify the approval of the development application despite the conflicts.

The court found that there were sufficient grounds to justify the approval despite substantial conflict with the gross floor area limits. In particular, the court considered that the conflict was largely a product of the existing built form, and that the proposed development would improve amenity, reuse a structurally sound building for a purpose envisaged in the planning scheme and facilitate the potential for residents to remain in their neighbourhood throughout their lives.

The proposed development conflicted with the planning scheme as it was over twice the density specified in the intent of Low Density Residential Area

The site was an island block with a total area of over 3,600m^2. The existing building on the site was the legacy of an aged care facility which had been in operation on the site for approximately 40 years since the 1970s. The existing building, which had a gross floor area of over 3,300m^2 and was up to four storeys in height, had ceased operating as an aged care facility and fallen into disrepair. However, the structural engineers agreed that the existing building was in good structural condition and remained suitable for the proposed residential use.

The existing building was not consistent with the surrounding area which was predominately comprised of one to two-storey dwelling houses many of which were of pre-1946 "timber and tin" character. The proposed development sought to reuse the existing building to create 35 residential units while reducing its overall gross floor area and enhancing its appearance. Despite the reduction in gross floor area the proposed development would still be 77% of the total site area substantially exceeding the 30% of site area specified as the maximum gross floor area of a multi-unit dwelling for the low density residential area in which the proposed development was sited.

The submitters contended that the existing building on the site was discordant with the predominant character of the area, and that this discordance would be entrenched with the approval of the proposed development.

Court considered the proposed development was consistent with the community's reasonable expectations as to future amenity

The submitters' central argument was that the reasonable expectations of the community, which were based on the planning scheme, were that the existing building would be demolished at the cessation of its use as an aged care facility to return the site to low density residential development. The court found that the reasonable expectations of the community were to be judged in the context of not just the planning scheme but the broader statutory planning controls.

The court emphasised two particular aspects of the broader statutory planning controls. Firstly, that the proposed development could be approved despite the conflict with a relevant planning instrument where there are sufficient grounds to justify an approval despite the conflict. Secondly, that a planning instrument could not require a lawfully constructed building to be altered or removed.

In the context of the broader statutory planning controls, the evidence given by the submitters and the fact that built form had existed on the site for almost 40 years the court found that it was not beyond the reasonable expectations of a person considering the locality that the built form would continue to exist on the site and might be redeveloped so as to be put to a different use.

Court dismissed the remaining arguments raised by the submitters

The submitters also contended that the proposed development was in conflict with the desired environmental outcomes of the planning scheme; discordant with the predominant character of the area; not consistent with the bulk, scale and density limits in the planning scheme; and that there should be demolition of at least part of the built form on the basis of the planning philosophy that existing non-conforming development was phased out.

The court dismissed the submitters arguments for a variety of reasons but largely on the basis that the submitters' contentions focused on the demolition of the existing building which could not be compelled by the planning scheme. The court distinguished a number of cases relied on by the submitters in support of their arguments as the cases considered the establishment or expansion of a built form. The court found that there was a fundamental distinction between a case where there was an existing built form, and the statutory planning controls prevented its demolition, and where a new built form was to be establish or an existing built form was to be expanded.

The court found that there were sufficient grounds to justify approving the proposed development despite the conflict with the planning scheme

The court emphasised that it was not permitted to approach the development application by considering some more preferable development on the site, particularly one that would require demolition of the existing structure. In considering whether there were sufficient grounds the decision maker should not be distracted by hypothesised alternative proposals that would not be in conflict with the planning scheme.

The court found that despite there being substantial conflict with the gross floor area limits in the intent for the Low Density Residential Area in the planning scheme this conflict was a direct product of the existing built form, and the reuse of that form was a sensible, practical and appropriate outcome. Ultimately the court found that there were sufficient grounds to justify the approval of the proposed development despite conflict with the planning scheme.

Court found that the Building and Development Dispute Resolution Committee made an error of law in deciding that a building without fire separation measures was not dangerous

Eva Coggins | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brisbane City Council v Erlbaum* [2015] QPEC 46 heard before Rackemann DCJ

January 2016

In brief

The case of *Brisbane City Council v Erlbaum* [2015] QPEC 46 concerned an appeal against the Building and Development Dispute Resolution Committee's decision about the validity of an enforcement notice issued by the Brisbane City Council.

The council issued an enforcement notice for a building that did not have the fire separation measures required for a building of its class. The council did not give a show cause notice before giving the enforcement notice.

Michael and Erez Erlbaum, the owners of the building appealed to the Committee against the council's decision to issue the enforcement notice without first giving a show cause notice, and the Committee set aside the enforcement notice. The council then appealed to the Queensland Planning and Environment Court. The main issue in dispute was whether the Committee had made an error of law in deciding that the lack of fire separation measures was not "dangerous" and therefore did not justify the council's decision to issue the enforcement notice without first giving a show cause notice.

The court found that the Committee had made an error of law by relying on the *Queensland Building Work Enforcement Guidelines 2002* and the presence of smoke alarms in the building to make its decision. The court allowed the appeal and remitted the matter back to the Committee to re-determine the matter according to law.

The Committee found that the building did not comply with the BCA in relation to fire safety for class 2 buildings but nonetheless set aside the enforcement notice as it was not so dangerous which warranted the giving of an enforcement notice without a show cause notice

Mr and Mrs Erlbaum built additions to the building that they owned, which was a dwelling house, resulting in three discrete living areas within the building. There had been longstanding dispute between the council and Mr and Mrs Erlbaum in relation to the building.

In 2013, the council issued an enforcement notice relating to fire safety, including the lack of fire separation between the independent living areas. However, the council did not first give a show cause notice.

Under s 248(4) of the *Building Act 1975*, the council may give an enforcement notice without first giving a show cause notice where the matter that the enforcement notice relates to is of a dangerous or minor nature.

In that instance, the Committee set aside the enforcement notice but required Mr and Mrs Erlbaum to make an application to change the Building Code of Australia classification of the building from class 1a (detached house) to class 2 (2 or more occupancy units each being a separate dwelling). The Committee found that the building did not comply with the Building Code of Australia in respect of fire safety for class 2 buildings. However, it was not "dangerous" for the purpose of justifying the council's decision to give an enforcement notice without first giving a show cause notice.

The Committee did not consider the building to be dangerous given the presence of individual smoke alarms in the building and set aside the further enforcement notice given by the council which was given in the absence of a show cause notice

In 2014, the council issued another enforcement notice relating to fire safety, similar to the one issued in 2013. Again, the council did not give a show cause notice as it held the view that the building was dangerous due to the inadequacy of fire separation measures.

The Committee set aside the enforcement notice, maintaining its earlier view that the building was not dangerous.

In its consideration of whether the building was dangerous as a result of the lack of fire separation measures between the separate dwellings, the Committee observed that the word "dangerous" was not defined for the purposes of section 248 of the *Building Act 1975* and it was to be interpreted according to its ordinary meaning.

Nonetheless, the Committee sought interpretation assistance from the 2002 guidelines, in particular section 4.2.2 which provided that:

> *What constitutes a 'matter of dangerous or minor nature' is not defined, nor has it been tested in court. However it is reasonable to assume dangerous is intended to refer to some circumstance where a building or structure is structurally unsound and could collapse or present another immediate hazard.*
>
> *A building or structure that was lawfully constructed and remains structurally sound or intact cannot be considered dangerous because it does not meet current safety standards.*

The Committee observed that individual smoke alarms which were present in the building were subject to the final determination by the building certifier on the development application for building works. Nonetheless the Committee assumed that they "*would function as required to give an early warning of a fire to the residents and allow them the opportunity to escape the premises*".

It was on this basis and having regard to section 4.2.2 of the 2002 guidelines, the Committee concluded that "*although it may be inferred the building is unsafe due to the absence of any early warning or protection for occupants in the upper level from a fire situation originating in the lower level of the subject building, there are nevertheless individual smoke alarms present in each of the SOU's. The degree of risk does not represent an immediate hazard such as to find a building "dangerous" as that term is commonly understood.*"

The council appealed to the court, asserting that the Committee made an error of law by making its findings on the question of dangerous by reference to the 2002 guidelines.

Court found that the Committee had failed to properly consider whether the smoke alarms would sufficiently fulfil the function of the fire separation measures and these matters should have been expressly considered rather than basing them on assumption

The court had difficulties to see how the 2002 guidelines would assist the Committee with its interpretation of the word "dangerous", particularly given its purpose. In the court's view, the Committee should have applied the plain ordinary meaning of the word rather than adopting the meaning given in the guidelines. Nonetheless, after a closer examination of the Committee's reasoning, the court did not find any specific error of law made by the Committee as a result of its reference to the guidelines.

However, the court relevantly noted that the Committee in making its findings mainly relied on the presence of individual smoke alarms, which in its view would mitigate the fire danger caused by the absence of fire separation between the dwellings. The court observed that the two fire safety measures had different purposes. Smoke alarms served to give warning of a fire, and fire separation measures would slow the spread of fire, giving time and opportunity to escape. As such a building with smoke alarms but without adequate fire separation could still be dangerous.

The court found that the Committee had not properly considered whether the smoke alarms would adequately fulfil the function of the fire separation measures. These matters should not have been the subject of an assumption or presumption and the Committee should have expressly considered them. Accordingly, the court was satisfied that the Committee's fact finding exercise was materially affected by an error of approach which indicated an error of law.

Blasting of boats held to have breached the general environmental duty and an environmental authority

William Lacy | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cuthbert v Moreton Bay Regional Council* [2015] QPEC 63 heard before Morzone QC DCJ

February 2016

In brief

The case of *Cuthbert v Moreton Bay Regional Council* [2015] QPEC 63 concerned an appeal commenced in the Planning and Environment Court by Mrs Heather Cuthbert against the Moreton Bay Regional Council's internal review that affirmed the issuance of an environmental protection order under the *Environmental Protection Act 1994* in respect of Mrs Cuthbert's boat maintenance and repair facility at 48 Bishop Parade, Toorbul.

The court considered whether the operator of the facility had breached conditions of the relevant environmental authority issued for the facility and the general environmental duty under the *Environmental Protection Act 1994* and whether an environmental protection order was required to secure their future compliance.

The court found that there had been non-compliance with both the general environmental duty and the environmental authority. However the court considered that the environmental protection order that had been issued by the council was unnecessarily restrictive, prescriptive and onerous.

On this basis the court allowed Mrs Cuthbert's appeal in part, setting aside the council's environmental protection order but ordering that a substituted environmental protection order be issued requiring Mrs Cuthbert to prepare and lodge with the council a stormwater management plan and a site based management plan.

The facility was surrounded by a sensitive environment part of the Ramsar Convention Wetland

The boat maintenance and repair facility had been operated by various owners since 1962 which included a boat ramp, slipway and jetty. Following the introduction of the *Environmental Protection Act 1994* the use of the facility was identified as an environmentally relevant activity and subsequently an environmental authority was issued.

It was the use of the slipway to repair, sand, spray, fibre glass, water-blast and anti-foul boats that the court described as being the "*nucleus of disputation with the respondent council amid a chorus of complaints from local residents*". The slipway was adjacent to the Elimbah Creek which is near to the Pumicestone Passage. Being located as such meant that the facility was surrounded by a sensitive environment part of the Ramsar Convention Wetland.

The use of the facility was the subject of two previous appeals involving the environmentally relevant activity; the first against an enforcement notice and the second against a refusal of a development application.

Court accepted the evidence of the expert witnesses and local residents and was satisfied that conditions of the environmental authority relating to air quality, noise, water quality and land contamination had not been complied with

The council asserted that there had been non-compliance with the environmental authority due to a failure to comply with certain conditions. In response Mrs Cuthbert submitted that there was no probative or substantive evidence before the court that would prove the non-compliance on the balance of probabilities.

The court had the benefit of evidence from local residents, a number of experts, Mrs Cuthbert and Mr Cuthbert, who were primarily responsible for the operation of the facility. The court found the evidence of the expert witnesses called by the council and the local residents to be credible. In contrast the evidence given by Mrs Cuthbert and Mr Cuthbert was not viewed favourably by the court.

The court considered a number of conditions of the environmental authority in turn, finding that during the operation of the facility, and in contravention of the environmental authority:

- contaminants were released which caused noxious or offensive odour beyond the boundary of the premises;
- dust/particular matter was released beyond the boundaries of the premises;

- spray painting had been conducted in the absence of an authorised spray booth;
- noise contaminants had been released at levels likely to cause environmental harm and likely to exceed prescribed levels;
- contaminants had been caused or permitted to be released directly or indirectly into Elimbah Creek;
- contaminants had likely been released onto land by irrigation using contaminated water;
- inadequate waste management arrangements had been adopted.

Court found that there had been a breach of the general environmental duty under the Environmental Protection Act 1994 as the activity had caused, or was likely to cause, environmental harm

The *Environmental Protection Act 1994* imposes a general environmental duty requiring a person to not "*carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm.*"

For the same reasons the court found that Mrs Cuthbert had breached the conditions of the environmental authority, the court found that she had breached her general environmental duty on the basis that her activity was carried out in a way that had caused, or was likely to cause, environmental harm.

Court found that the environmental protection order given by the council was not appropriate but decided to exercise its discretion to issue an amended environmental protection order

The court has a discretion as to whether to issue an environmental protection order having regard to the particular circumstances of a given case. The court was not bound by the council's previous decision to issue an environmental protection order and had to undertake its own assessment of the relevant criteria to determine whether to issue such an order in this case.

In considering the nature and the extent of non-compliance with the environmental authority and the general environmental duty the court was satisfied that there was scientific certainty that the operation of the facility had caused serious environmental damage. The court relevantly observed that the damage had been caused by ongoing non-compliance with both the environmental authority and the general environmental duty and that Mrs Cuthbert had had ample opportunity to rectify such non-compliance.

In considering the environmental protection order that had been issued by the council the court was of the view that it was "*unnecessarily restrictive prescriptive and onerous, with the potential to derogate from the original grant of the environmental authority*". The timeframes in the environmental protection order proposed by the council were viewed by the court as unreasonable, impractical and as having the potential to create intolerable immediate material financial implications for Mrs Cuthbert.

However the court did find that an environmental protection order was necessary to secure compliance with the environmental authority and the general environmental duty. The court therefore made an environmental protection order requiring Mrs Cuthbert to prepare and implement an appropriate site based management plan and stormwater management plan. The court imposed a timeframe for compliance of 90 days as opposed to the 7 day timeframes imposed under the council's original environmental protection order.

There was no "overlapping" evidence to justify a single hearing

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Corporation of the Sisters of Mercy of the Diocese of Townsville v Queensland Heritage Council* [2015] QPEC 59 heard before Durward SC DCJ

February 2016

In brief

The case of *The Corporation of the Sisters of Mercy of the Diocese of Townsville v Queensland Heritage Council* [2015] QPEC 59 concerned a preliminary hearing in an appeal before the Planning and Environment Court to determine whether the following disputed issues should be heard and decided in one hearing or separate hearings:

- whether the St Patrick's Convent which was constructed in 1883 satisfied the cultural heritage criteria identified in section 35(1)(a), (d) or (h) of the *Queensland Heritage Act 1992*;
- whether the Convent should be on the Queensland Heritage Register having regarding to its physical condition and structural integrity.

The court decided that the issue concerning the cultural heritage criteria should first be determined. Depending on the outcome of that hearing, if necessary the court would then determine whether the Convent should be on the Queensland Heritage Register.

Court observed that an order to decide a question separately from another question before the trial of the proceeding under rule 483 of the Uniform Civil Procedure Rules 1999 was not appropriate if the question of fact was in dispute

The court first considered its power to make an order to decide on a question separately from another question before the trial of the proceeding under rule 483 of the *Uniform Civil Procedure Rules 1999*. Rule 483(1) relevantly states that "*The court may make an order for a decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding.*"

The court noted that the term 'question' is defined under rule 482 to include "*a question or issue in the proceeding, whether a fact or law or partly of fact and partly of law and whether raised by pleadings, agreement of parties or otherwise*".

The court by reference to *Body Corporate for Sun City Report CTS 24674 v Sunland Constructions Pty Ltd & Ors* [2010] QSC 463 at [19] observed that "*A number of discretionary considerations that apply in making an order for a separate decision appear in the judgement of Branson J and Reading Australia Pty Ltd v Australian Mutual Providence Society, an authority which has been referred to with approval by judges of this Court. The factors identified in Reading and other authorities favour the making of an order under UCPR 483 on the present application. The question has been appropriately formulated. The facts that are relevant to its determination are not in dispute. The question is ripe for determination*".

Court found that a separate hearing was appropriate as there was no "overlapping" evidence and that hearing costs and delay were not properly established to convince the court for a decision to have a single hearing

The Corporation of the Sisters of Mercy of the Diocese of Townsville submitted that the disputed issues should be heard and determined in a single hearing in that:

- there were a number of important facts in dispute between the parties;
- separate hearings were not desirable as the assessment of the physical condition of the Convent was relevant to the determination of both disputed issues;

- separate hearings could result in multiple applications for leave to appeal which would cause further delay and undesirable financial impact on the Sisters of Mercy by having to divert funds away from charitable work in order to maintain the Convent in its current condition.

On the other hand, the Queensland Heritage Council argued that separate hearings would be more desirable in that:

- if it was determined that the Convent did not satisfy the cultural heritage criteria, it would result in a resolution of the matter as the Convent would be removed from the Queensland Heritage Register;
- if the Sisters of Mercy failed to make out at least one of the grounds of appeal in relation to the issues associated with the cultural heritage criteria, it would also result in a resolution of the matter;
- a single hearing was not desirable as expert witnesses would need to make assumptions on the court's views in relation to the cultural heritage significance issue;
- the delay and financial impact contended by the Sisters of Mercy were not warranted as the magnitude of time and cost between a single hearing and two separate hearings were immaterial.

The court did not find that there was an "overlapping" evidence that needed to be considered in a single hearing and that the Sisters of Mercy's arguments in relation to hearing costs and delay were sufficiently made out to justify a single hearing.

The court therefore decided that the first disputed issue in relation to the cultural heritage criteria should be decided first and if necessary, the court would then decide whether the Convent should be on the Queensland Heritage Register.

In dismissing the appeal, the court adopted a holistic assessment of the planning scheme in finding that landslide risk minimisation strategies were not matters of public interest and, therefore, insufficient grounds to justify an approval despite the conflict

Kathryn O'Hare | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Duffy v Sunshine Coast Regional Council & Anor* [2015] QPEC 58 heard before Long SC DCJ

February 2016

In brief

The case of *Duffy v Sunshine Coast Regional Council & Anor* [2015] QPEC 58 concerned an appeal in the Planning and Environment Court against the Sunshine Coast Regional Council's decision to refuse an application for a development permit for a reconfiguration of one lot into four lots with an access easement at Buderim.

The council refused the development application on several grounds but prior to the hearing those issues were resolved other than for conflicts with the Strategic Plan, the Code for Development on Steep or Unstable Land and the Code for Configuring Lots of the *Maroochy Plan 2000* relating to the steeply sloping nature of the land. Therefore, the court had to determine "*whether, from a geotechnical perspective, the proposed development, as it involves obviously steep land, can be undertaken so as to be safe to persons and property*".

The court considered the conflicts with the *Sunshine Coast Plan 2014* and concluded that it was clear that there was an explicit and substantial conflict. Under section 326(1)(b) of the *Sustainable Planning Act 2009*, the applicants had to establish that there were sufficient grounds to justify the approval of the application despite the conflict. The applicants submitted that the implementation of risk minimisation strategies on the advice of their town planner and the geotechnical experts would serve to remove any conflict with the *Maroochy Plan 2000*. The court found that the risk minimisation strategies put forward identified rather than removed the conflicts in issue and, as such, there were not sufficient grounds to justify the approval of the application despite the conflict.

The court adopted a broad consideration of the planning scheme and found that the risk minimisation strategies were not sufficient enough to waive the substantial conflict with the planning scheme

The court firstly had to determine whether there was a conflict with the former *Maroochy Plan 2000*, the planning scheme which was in force at the date the development application was lodged. In respect of the geotechnical issues, the joint expert report stated that the implementation of risk minimisation strategies would "*reduce the risk to persons and property from the potentiality of landslides to very low to low*" which, it was further stated, was an acceptable rating to regulators. In addition to this, however, there were town planning issues that related to the "*stability of the site and the potential for landslide hazard.*"

It was submitted by the applicants that in light of the geotechnical evidence, the proposed development complied with the provisions of the *Maroochy Plan 2000* as the risk minimisation strategies, if adopted, would protect people and property from the risk of landslide. However, upon a "*holistic assessment*" of the *Maroochy Plan 2000*, this was considered a substantial conflict. The court adopted the reasoning of the council that a broad consideration of the planning scheme revealed a three limbed planning approach in relation to the development of the subject land. Firstly, the *Maroochy Plan 2000* actively discouraged the creation of new lots in the precinct the subject land was located in. Secondly, it discouraged development on land with a gradient greater than 25% upon which the subject land was located. Thirdly, it discouraged development that increased the risk of harm to people or property.

Whilst the court contended that the geotechnical evidence dealt with the third limb, with reference to the relevant aspects of the Strategic Plan, the Code for Development on Steep or Unstable Land and the Code for Configuring Lots, the applicants failed to address the other two limbs.

The conflicts of the proposed development with the Sunshine Coast Plan 2014 were relevant in respect of establishing whether there were sufficient grounds to justify an approval of the development despite the conflict

The court also found that that the proposed development conflicted with the *Sunshine Coast Plan 2014* which commenced at the date the development application was lodged. Firstly, it conflicted with the Limited development (landscape residential) zone code in that the proposed development did result in the creation of additional lots. Secondly, it conflicted with the Buderim local plan code because the subject land is located outside the immediate urban growth boundary to which urban and rural residential development is limited. Further, the subject land was deliberately excluded from the urban growth area and zoned in a way that restricted the creation of additional lots, therefore, conflicting with the Landslide hazard and steep land overlay code and the reconfiguring a lot code.

The court considered whether any weight could be given to the *Sunshine Coast Plan 2014* in making its decision. The court held that under section 495(2)(a) of the *Sustainable Planning Act 2009*, appropriate weight may be given to the planning scheme. However, after considering the decisions of *Coty (England) v Sydney City Council* (1957) 2 LGRA 117, *Lewiac Pty Ltd v Gold Coast City Council* (1996) 2 Qd R 266 and *Yu Feng Pty Ltd v Maroochy Shire Council* (1996) 92 LGERA 41, the court concluded that it was only appropriate to give weight to the conflict with the *Sunshine Coast Plan 2014* when considering whether there were sufficient grounds to justify an approval of the development, despite the conflict.

The risk minimisation strategies identified rather than removed the conflict as issues were found to be matters of personal circumstance and not matters of public interest and were, therefore, not sufficient grounds to justify the approval despite the conflict

Under section 326(1)(b) of the *Sustainable Planning Act 2009*, the applicants had to establish that there were sufficient grounds to justify the approval of the development application despite the conflict. On that basis, the applicants submitted that the implementation of risk minimisation strategies on the advice of their town planner and the geotechnical experts would serve to remove any conflict with the *Maroochy Plan 2000*.

The court rejected the applicants' submission. Further, the court found that section 495(2) of the *Sustainable Planning Act 2009* expressly allowed the court to consider the conflicts with the *Sunshine Coast Plan 2014* in its decision and concluded that it was clear that there was an explicit and substantial conflict. The risk minimisation strategies put forward by the applicants' experts were found to identify rather than remove the conflicts in issue and, as such, the applicants were unsuccessful in establishing that there were sufficient grounds to justify the approval of the application despite the conflict.

In dismissing the appeal, the court further stated that such grounds must be found to be matters of public interest. Instead, the grounds submitted by the applicants were found to be matters of personal circumstances.

COLIN BIGGERS & PAISLEY LAWYERS

Court found council had failed to properly assess applications but declined to make an order requiring remedial works after balancing discretionary factors

William Lacy | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Birkdale Flowers Pty Ltd v Redland City Council & Anor* [2016] QPEC 4 heard before Jones DCJ

March 2016

In brief

The case of *Birkdale Flowers Pty Ltd v Redland City Council & Anor* [2016] QPEC 4 concerned an application commenced in the Planning and Environment Court by Birkdale Flowers Pty Ltd and Tarsem and Harbans Sihotas against Wilson Four Pty Ltd and Redland City Council seeking declarations and orders about reconfiguring a lot and operational work approvals issued by the council in respect of Wilson Four's residential development at Birkdale.

The applicants were primarily concerned with a retaining wall and an acoustic fence at the shared boundary between the land and Wilson Four's land. The applicants sought declarations that the approvals issued by council were invalid for the following reasons:

- the council had failed to assess the applications against the excavation and fill code of the council's planning scheme;
- the council had failed to take into account a relevant consideration being a conflict with the excavation and fill code;
- the approvals were so unreasonable that no reasonable council could have granted them.

The applicants also sought an order that remedial works be undertaken by Wilson Four and that the approvals be amended in response to those works.

The court did not find that the approvals were so unreasonable that no reasonable council could have granted them. However the court did find that the council had failed to assess the proposed works against the excavation and fill code in a meaningful way and that this failure could have resulted in the approvals being set aside. Nonetheless, the court decided not to exercise its discretion to order the remedial works be carried out.

Court found that the retaining wall and acoustic fence conflicted in a material way with council's planning scheme but the negative effect of the conflict was limited to the applicants' land

The approvals issued by the council in respect of Wilson Four's land were for reconfiguring a lot and operational works associated with a residential development of land at Birkdale. The approvals were granted in late 2011 and mid 2012 respectively and were both amended in early January 2014. These approvals had been acted on by Wilson Four.

The applicants were the owners and occupiers of land adjoining Wilson Four's land which was used for an extensive nursery business. During the initial assessment of the approval for reconfiguring a lot some of the applicants made a written submission which raised concerns about reverse amenity impacts. In response to these reverse amenity concerns and other concerns in respect of stormwater drainage the proposal was amended to provide for a more substantial retaining wall and an acoustic fence at the shared boundary between the applicants' and Wilson Four's land.

While the applicants advanced a number of issues in their application the main issue was the negative visual amenity created by the retaining wall and acoustic fence constructed on "one plane" on the shared boundary. The retaining wall ranged in height from less than 0.5 metres to over 2.4 metres, ran the full 250 metre length of the boundary and was topped by a 2 metre high acoustic fence which was intended to reduce reverse amenity impacts associated with the nursery business.

The court found that the existing retaining wall, with or without the associated acoustic fence, conflicted in a material way with the relevant provisions of the council's planning scheme. However it was noted that the negative effects of the conflict were largely constrained to the applicants' land.

Court found that the proposed works were not assessed by the council against the excavation and fill code in a meaningful way

The applicants submitted that there had been no assessment of the reconfiguring a lot application against the excavation and fill code by the council and that this failure was so profound as to warrant both approvals being set aside.

The court considered evidentiary principles stated in *Weal v Bathurst City Council* (2000) 111 LGERA 181 and *Jones v Dunkel* (1959) 101 CLR 298 relating to when a court may draw an inference in the absence of direct evidence. The court was satisfied that in the circumstances of this case it could draw an inference that the council had failed to assess the proposed works against the excavation and fill code in any meaningful way.

The court considered that the "*retaining wall and acoustic fence combination is so starkly in conflict with the EFC [excavation and fill code] that some indication that that issue had actually been given consideration ought to have become apparent during the course of evidence.*" While not a decisive factor, the court also took into account the fact that the council had not adduced any evidence from a council officer that an assessment of the excavation and fill code was carried out.

Court did not accept the applicants' submission that the council's approvals were so unreasonable that no reasonable assessment manager could have reached those decisions

Despite finding that there had been an improper assessment of the application the court was not able to find that this was one of those "rare cases" where it could be said the decision of the council in approving the retaining wall and acoustic fence was so unreasonable that no reasonable local government could have approved it.

In the court's view, the council's decision could not be characterised as irrational or devoid of plausible justification. It was in fact a decision motivated by a desire to reduce reverse amenity issues.

Court declined to exercise its discretion to make an order requiring remedial works after balancing a range of discretionary factors

Despite finding that the approvals had not been validly given the court was not placed in a position where it must make the declarations and order requested by the applicants. By reference to *Bon Accord Pty Ltd v Brisbane City Council & Ors* [2010] QPELR 23 the court highlighted that the discretion in respect of making declarations and orders in such circumstances is wide and unfettered with each case turning on its own facts and circumstances.

The court considered that there were a number of discretionary factors which weighed heavily against making an order requiring remedial works, which included the following:

- that there was an absence of bad faith on the part of the council and Wilson Four;
- that the applicants had delayed in bringing the proceedings and no reason had been provided for such delay;
- that some parts of the Wilson Four land had already been sold to third parties whose interests would potentially be affected by an order requiring remedial work;
- that the court was not satisfied that the remedial works were a proportional response to negative effects of the retaining wall and acoustic fence;
- that the court was not satisfied that the remedial works were likely to result in a materially better outcome for the applicants' land.

Balancing the relevant discretionary factors the court decided not to exercise its discretion to order the remedial works be carried out. Consequentially the application was dismissed.

The shed constitutes a material change of use but falls within the defined use of a detached house

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Carrigan v Goondiwindi Regional Council* [2016] QPEC 8 heard before Jones DCJ

March 2016

In brief

The case of *Carrigan v Goondiwindi Regional Council* [2016] QPEC 8 concerned an appeal commenced by Grant Carrigan against the decision of Goondiwindi Regional Council to refuse a development application for building work for a new shed which had already been constructed on Mr Carrigan's land.

The court was requested to determine two preliminary issues, namely whether the use of the new shed constituted a material change of use; and if so, whether the use fell within the definition of a detached house or storage facility under the *Waggamaba Shire Council Planning Scheme 2006*, or alternatively whether it was not a defined use under the planning scheme.

The court found that the use of the new shed constituted a material change of use but fell within the definition of a detached house under the planning scheme.

Council refused a development application for building works which was lodged to regularise the construction of a new shed without the requisite development approval

A shed of 135m^2 with a height of 5m was lawfully constructed on Mr Carrigan's land and used for "home industry (machinery storage)" under an approval given in 2002. In 2012, a development application for a material change of use for an extension of the machinery shed and the construction of a helicopter landing site was lodged with the council. The proposal was to store helicopters in the extended machinery shed.

While the application was being assessed, Mr Carrigan demolished the machinery shed and constructed a new shed without obtaining any approvals for building work or a material change of use. The new shed was 454.8m^2 with a height of 7.6m, which was materially larger than the old machinery shed and the proposed extended machinery shed.

In 2014, Mr Carrigan lodged a development application for building work for the new shed seeking to "regularise his unlawful conduct in constructing the new shed without the necessary development permit", which was subsequently refused by the council.

Court found that the new shed was not a storage facility but rather it was predominately used for personal storage purposes

The court first dealt with the council's contention that the use of the new shed was a storage facility for the purposes of the planning scheme. The council sought to rely on the size of the new shed and a number of circumstantial matters such as the character and previous conduct of Mr Carrigan to support its contention.

Based on the evidence before the court, it was not satisfied that use of the new shed was a storage facility. Rather, in the court's view, the intended use of the new shed was predominately for personal storage purposes which would include "the storage of large 4WD vehicles and other typical plant and equipment associated with large rural residential properties". The council's contention was therefore rejected.

Court found that the additional storage space of the new shed constituted a new use of premises

In considering whether a new use was introduced, the court noted that approximately 135m^2 of the new shed would be used for home industry purposes in accordance with the 2002 approval. As such any new use would relate to the additional storage space of approximately 319m^2.

Whilst the court acknowledged that the additional storage space would be used to store personal plant and equipment, it would constitute a new use of the premises and therefore a material change of use for the purposes of the *Sustainable Planning Act 2009*.

Court was satisfied that the home industry use was abandoned in 2012 and the use of the new shed was a re-establishment of a use that had been abandoned

The court then went on to consider whether the intended use constituted a re-establishment of an abandoned home industry use. By reference to *Leeming v City of Port Adelaide [No. 2]* (1987) 62 LGRA 296, the court observed that one must have regard to what is taking place on the land to determine whether an existing use continues or has been abandoned and the intention and conducts of the owner or occupier of the land were relevant considerations.

Having regard to Mr Carrigan's 2012 development application, the court was of the view that Mr Carrigan had no intention to maintain the home industry use. Further, the court observed that Mr Carrigan had not offered any explanation why the old shed was demolished had it been Mr Carrigan's intention to maintain the home industry use.

In the court's view, the home industry use was abandoned in 2012 and did not accept Mr Carrigan's proposition that the home industry use had continued other than the short period between the demolition of the old shed and the construction of the new shed. On this basis, the use of the new shed constituted a material change of use for the purposes of the *Sustainable Planning Act 2009*.

Court found that the use of the new shed constituted a material increase in the scale, but not the intensity, of the use

In determining whether there was a material increase in the intensity or scale of the use of the premises, the court did not consider that there was a material increase in the intensity of use just because of the size of the new shed and the hardstand area, particularly in the context of a rural residential situation.

However, the court found that there was a material increase in the scale of the use in that the footprint of the new shed was three times bigger and 50% higher than the old shed.

Even though the scale of the new shed was excessive, the court was satisfied that the use of the new shed could be properly characterised as being incidental to and necessarily associated with the use of the land for a detached house

Given that the court found that the use of the new shed amounted to a material change of use, it had to determine whether it fell within the definition of a detached house under the planning scheme.

The court considered the meaning of "use" which was defined under the *Sustainable Planning Act 2009* to include "*any use incidental to and necessarily associated with the use of the premises*".

In the context of a large rural residential lot, the court was of the view that the use of the new shed could be properly characterised as being incidental to and necessarily associated with the use of the land for a detached house whilst noting that the scale of the new shed was excessive and was more than that contemplated under the planning scheme.

The court therefore concluded that the use of the new shed fell within the definition of a detached house for the purposes of the planning scheme.

Council or court - who was the responsible entity which gave the original approval?

Shaun Pryor | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Forde v Toowoomba Regional Council* [2016] QPEC 5 heard before Searles DCJ

March 2016

In brief

The case of *Forde v Toowoomba Regional Council* [2016] QPEC 5 concerned a permissible change application made by John Forde in the Planning and Environment Court with respect to the development permit given to him. The court was requested to determine two preliminary matters namely, whether Mr Forde's permissible change application should have been made to the Toowoomba Regional Council rather than the court and whether the development permit had lapsed on the basis that the court's previous order did not effectively extend the relevant period of the development permit.

The court found that the council was the responsible entity to which Mr Forde's application should have been made rather than the court, as the development permit was originally given by the council's predecessor, the Crows Nest Shire Council.

The court also found the court's previous order extending the relevant period of the development permit was valid.

Court found that Mr Forde's permissible change application should have been lodged with the council, not the court, as the original development permit was given by the council

Mr Forde contended that the court was the responsible entity because the court's previous order extending the relevant period of the development permit was the subject of Mr Forde's application, rather than the initial development permit given by the council's predecessor.

In reliance of *Orchard (Oxenford) Developments Pty Ltd v Gold Coast City Council* [2015] QPELR 462, Mr Forde argued that a development approval was the approval as amended from time to time, for the purpose of section 369 (Request to change development approval) of the *Sustainable Planning Act 2009*, not the approval in its original form.

The court was of the view that the Orchard Developments case provided little support to Mr Forde's argument as it was concerned with which version of the development approval should form the basis of comparison with the permissible change application rather than determining the responsible entity to which the application should be made.

The court by reference to *Aqua Blue (Noosa) Pty Ltd v Noosa Shire Council* [2003] QPELR 82, observed that the original development approval would be the relevant approval for the purposes of a permissible change application and that the application must therefore be made to the responsible entity who gave the original approval.

In this instance, as the original development permit was given by the council's predecessor, the court held that Mr Forde's application should have been made to the council, rather than the court. The court therefore dismissed Mr Forde's application.

Court found that the previous court order extending the development permit was valid unless and until it was set aside and that it was too late now for the council to assert that the application made to the court should have been made to the council

The court observed that the council took no objection to the court's previous order extending the relevant period of the development permit when it was made.

The court considered that it was too late for the council to now assert that Mr Forde should have made the application the subject of the previous court order to the council not the court in circumstances where Mr Forde would have been in a position to have the issue determined had it been raised then and, if necessary, seek an order under section 440 (How court may deal with matters involving noncompliance) of the *Sustainable Planning Act 2009* to regularise any irregularity.

The court referred to *Attorney-General v Kowalski* [2014] SASC 1, where the court said … "*in more recent times, it has been established that, unless a plain intention to the contrary by the legislation is manifested, a judicial order of an inferior court or tribunal exercising judicial power is valid unless and until set aside even if it is contended that it acted beyond jurisdiction*".

Accordingly, the court considered that the previous court order extending the relevant period of the development permit was valid. The court nonetheless declared that if required, under section 440 (How court may deal with matters involving noncompliance) of the *Sustainable Planning Act 2009*, "*any irregularity inherent in the application heard by His Honour Judge Jones be regularised to the intent that DA597 has not yet lapsed and will remain extant until 28 November 2016 unless further changed*".

Two bedroom, or not two bedroom? Court of Appeal overturned the decision of the Planning and Environment Court on the relevance of development application documents in interpreting a development approval

Luke Grayson | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd* [2016] QCA 19 heard before Margaret McMurdo P, Morrison JA and Atkinson J

March 2016

In brief

The case of *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd* [2016] QCA 19 concerned an appeal to the Queensland Court of Appeal from the decision of the Planning and Environment Court in *Walter Elliott Holdings Pty Ltd v Fraser Coast Regional Council* [2015] QPEC 8 in which the primary judge determined to set aside the infrastructure charges notice issued by the Fraser Coast Regional Council for 3 bedroom relocatable homes on the basis that Walter Elliott's development was only for 2 bedroom relocatable homes.

In allowing the appeal by the council, the majority of the court concluded as follows:

- That the development approval was for "home sites" and not for 2 bedroom dwellings or 3 bedroom dwellings.
- That once the council approved the development application it was required to give an infrastructure charges notice.
- That the only avenue for Walter Elliott to appeal the infrastructure charges notice was by way of an appeal under section 478 of the *Sustainable Planning Act 2009*.
- That the making of an application for declaratory relief under section 456 by Walter Elliott rather than an appeal under section 478, "*appeared to be an inappropriate attempt to circumvent the limited nature of the statutory appeal process*".
- That as the proposed development was for the exclusive use of people who are over 50 years of age, the development may contravene sections 7(f), 76 and 77 of the *Anti-Discrimination Act 1991*.

This judgment, with respect to the majority of the court, raises a number of potential issues, in particular the following:

- That it is now unclear to what extent a development approval is limited by a development application.
- That it is now unclear whether a development approval for aged persons accommodation can be validly given.

The development approval did not expressly or by necessary implication incorporate the example house designs or the planning report which would prescribe the development as being for 2 bedroom or 3 bedroom dwellings

The majority of the court identified the following two legal principles which would limit the development approved by a development approval:

1. A development approval should be construed only by reference to the approval itself together with any documents incorporated, expressly or by necessary implication, into the development approval.
2. A development application marks out the boundaries of the development approval being sought and the scope of a development approval cannot be wider than the application to which it relates.

In interpreting the application of these principles to this case the majority noted that Walter Elliott had identified in its planning report that a maximum of two people were to reside in each dwelling and plans demonstrating example house designs included two bedrooms and a multi-purpose room or a study.

However, the development approval was silent on the number of bedrooms being approved and the example house designs were not approved plans. It appears that the majority may also have been influenced by a request by Walter Elliott that the council not include the example house designs as approved plans.

The majority determined that nothing in the development approval or the conditions of approval, either expressly or by necessary implication, incorporated either the example house designs or the planning report into the development approval and on this basis the approval was for neither 2 bedroom nor 3 bedroom dwellings but for "home sites".

Given that the development approval did not limit the number of bedrooms for land use purposes, in the majority's view, the council was not prohibited from determining that the dwellings had 3 bedrooms for infrastructure charging purposes.

The limited scope of appeals in respect of infrastructure charges notices should not be circumvented by allowing declaratory relief

Walter Elliott commenced declaratory proceedings under section 456 of the *Sustainable Planning Act 2009* to seek declarations that its development application was for 2-bedroom dwellings and that the council had no power to issue an infrastructure charges notice for 3-bedroom dwellings.

Before the initial declaratory proceedings were determined by the Planning and Environment Court, the council approved the development application and issued an infrastructure charges notice for 3-bedroom dwellings. Walter Elliott did not appeal the development approval or the infrastructure charges notice and instead it amended its application for declarations.

The majority determined that once the council approved the development application, it was required to give an infrastructure charges notice for the development approval. If Walter Elliott had an issue with the infrastructure charges notice, a limited right of appeal exists under section 478 of the *Sustainable Planning Act 2009*, which should not be circumvented by declaratory proceedings.

The majority relevantly stated that it "*is clear from the applicable statutory provisions that the legislative intent was to limit any appeals from a local government's determination of an infrastructure charges notice to the grounds specified in s 478(2)*".

In the majority's view in this instance, it was an improper use of the declaratory power and the primary judge had "*impermissibly used the declaratory powers under s 456 to usurp the function of the Council as the planning authority*".

The majority questioned the lawfulness of any development application for aged persons accommodation in Queensland

The majority of the court also queried whether a proposed development for occupation exclusively for those who were over 50 years old was unlawful as contrary to section 7(f) of the *Anti-Discrimination Act 1991*, which prohibits discrimination on the basis of age.

The court considered that whilst the Queensland Civil and Administrative Tribunal has the power to exempt a person from the operation of a specified provision of the *Anti-Discrimination Act 1991*, in considering QCAT decisions regarding applications for such an exemption "*it cannot be assumed that, were the respondent to apply for an exemption under the Anti-Discrimination Act, it would be granted*".

Whilst the majority did not reach a concluded view on whether the implementation of the development approval by Walter Elliott would be unlawful as contrary to the *Anti-Discrimination Act 1991*, this was a factor in its determination to refuse to grant Walter Elliott the declaratory relief sought.

Dissenting judgment concluded that the development application was for 2-bedroom dwellings and that the Anti-Discrimination Act 1991 was not relevant in assessing a development application

In the dissenting judgment, Morrison JA did not agree with the matters concluded by the majority in relation to whether the planning report was 'incorporated' in the development approval and the application of the *Anti-Discrimination Act 1991* to a planning decision and relevantly determined as follows:

- The development approval must be taken to incorporate, by necessary implication, a statement in section 7.2 of the planning report that all future dwellings across the development would consist of 2 bedrooms, in order to resolve an ambiguity in the development approval.
- The development application, properly construed, could not be treated as merely being for "home sites" without reference to the number of bedrooms and was in fact seeking a development approval for 2-bedroom dwellings.

- Declaratory proceedings were not inappropriate to determine whether the council acted beyond power in setting an infrastructure charge based on 3-bedroom dwellings.
- In assessing a development application requiring code assessment an assessment manager must not have regard to anything other than a matter stated in section 313 of the *Sustainable Planning Act 2009*, which would not include a potential subsequent violation of the *Anti-Discrimination Act 1991*.

Refusing to cooperate could lead to an adverse costs order

Shaun Pryor | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Lyons v Olive & Anor* [2015] QPEC 62 heard before Jones DCJ

March 2016

In brief

The case of *Lyons v Olive & Anor* [2015] QPEC 62 concerned two applications in the Planning and Environment Court for costs arising out of a dispute between Andrew Lyons, Mark and Leanne Olive and Building Certification Consultants Pty Ltd over a development approval given by Building Certification approving building works on Mr and Ms Olive's land.

In the initial proceedings, the court found that the development approval was void from the outset. Mr Lyons and Building Certification subsequently sought costs on an indemnity basis against each other.

The court found that Building Certification's actions had caused unreasonable delay such as to warrant an adverse costs order being made against it. Building Certification was ordered to pay Mr Lyons' costs from 5 March 2015.

Mr Lyons contended for a favourable costs order on the basis that he was an innocent bystander and was successful in the proceedings and that Building Certification's conduct was unreasonable

Mr Lyons relied on the following in contending for a favourable costs order:

- He was an innocent bystander who was forced to bring the proceedings as a consequence of the conduct of Mr and Mrs Olive and Building Certification.
- He had enjoyed a significant degree of success in the proceedings.
- Building Certification had incorrectly continued to maintain its position that it was not a proper party to the proceedings and imprudently rejected offers of compromise, as well as insisting on a deed being entered into which required Mr Lyons not to make any complaint to any relevant statutory authority in the future.

Building Certification contended for a favourable costs order on the basis that it was not a proper party to the proceedings and that Mr Lyons had acted unreasonably by insisting on indemnity costs against it

Building Certification's central argument was that it was not a proper party to the proceedings but nonetheless, it had acted reasonably by seeking to work towards a resolution. The court dismissed this argument on the basis that if Building Certification was not notified of the proceedings, then any relief granted by the court would "*inevitably be set aside by virtue of the fact that the certifier had not been given the opportunity to be heard*".

In contending for a favourable costs order, it was submitted by Building Certification that Mr Lyons had acted unreasonably by insisting on indemnity costs against them on 20 January, being the day after Mr Lyons reached an agreement with Mr and Ms Olive in relation to their further participation in this matter.

Court found that Building Certification's conduct was such as to warrant the making of an adverse costs order but that it did not warrant a costs order on an indemnity basis

The court found that Building Certification's conduct in maintaining its position that it was not a proper party to the proceedings and its persistence with the requirement that a deed be provided in circumstances where that requirement was later abandoned had caused the matter to unreasonably drag on.

The court relevantly noted that there had been significant delay since 5 March 2015 after Mr Lyons, through his solicitors, put a proposition to Building Certification that agreement be reached concerning the substantive relief and that the issue of costs be reserved and dealt with at a later time before the court if agreement was not able to be reached.

The court by reference to *Cox & Ors v Brisbane City Council & Anor (No. 2)* [2013] QPEC 78 and *Paroz v Paroz & Ors (No. 2)* [2010] QSC 157 observed that costs would generally be payable on a standard basis unless there was some special or unusual feature which would warrant departure from the general proposition.

The court found that the actions of Building Certification were such as to warrant the making of an adverse costs order. However having regard to the conduct of Mr Lyons through his solicitors, the court was not satisfied that it warranted a costs order on an indemnity basis to be made against Building Certification.

Court awarded compensation for loss of business profits resulting from roadworks

Georgina Taylor | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Land Court in the matter of *Zacsam Pty Ltd v Moreton Bay Regional Council* [2016] QLC 12 heard before WA Isdale

April 2016

In brief

The case of *Zacsam Pty Ltd v Moreton Bay Regional Council* [2016] QLC 12 concerned a claim for compensation made in the Land Court under the *Acquisition of Land Act 1967* for costs attributable to disturbance to a pizza business operated in leased premises in the Castle Hill Shopping Centre in Murrumba Downs, resulting from the resumption of land for roadworks along the frontage of the shopping centre.

The issues in dispute primarily concerned the impact of the roadworks on Zacsam's business, namely the loss of profits, the loss of capital value and rental liability, and the costs associated with the claim for compensation, the interest payable and the costs of the proceeding.

The court assessed the compensation for loss of profits at $137,628.16, but did not find in favour of Zacsam in relation to the aspects of the claim relating to loss of capital value and rental liability.

The court also made orders for interest to be payable to Zacsam from the date its business ceased to operate to the date of payment, and for costs incurred in the making of the claim for compensation.

Court resolved uncertainties relating to loss of profits in favour of Zacsam and ordered that the compensation for loss of profits for Zacsam's business be assessed in the amount of $137,628.16

The land was resumed in November 2008. The associated roadworks began in May 2010 and were finished in July 2011. Zacsam commenced trading for its business in March 2008 and it ceased to operate in January 2012. In February 2012, the landlord took back the leased premises and purchased the business from Zacsam and ran it until the franchise agreement expired in March 2013 and the store closed.

Zacsam claimed $137,628.16 in loss of profits, calculated from the start of the roadworks to the cessation of its business in January 2012. The council accepted that the roadworks would have caused some inconvenience and disruption to the business but contended that the loss of marginal profits was only incurred during the roadworks, calculated at $67,532. The council submitted that there was no reason that the roadworks would cause further decline in business after the roadworks ceased.

In considering the economic evidence, the court found that the financial statements of the business were not reliable after the 2009 financial year. Attention instead was directed to the sales figures during the operation period of the business, and the seasonally adjusted turnover evidence. The sales figures showed an initial spike in transactions after the commencement of the business in 2008, and then showed a decline until an improvement in the 2010 financial year, and then another decline until the end of trading in the 2012 financial year. The court found that the business was doing better before the roadworks than after they were completed.

The court accepted that during the roadworks the lost profits were $67,532, but the court could not accept the council's submission that once the roadworks ceased, the business could no longer suffer from their impact.

Zacsam submitted that the damage was caused by the roadworks interfering with access to the business, and that once people had chosen to go another way, the end of the roadworks would not necessarily result in that potential trade returning. Whilst this was not demonstrated by conclusive evidence, the court, with the support of the council, considered it appropriate to resolve this uncertainty in favour of Zacsam.

The court was satisfied that the roadworks were the cause of the decline in the business from the date the roadworks commenced, up until the cessation of the business. The council assessed losses due to business interruption for this period at $121,998. For the same period, the calculations of Zacsam were $137,628.16. As the figures were close, and it was not possible for the court to conclude from the evidence which figure was correct, the uncertainty was again resolved in the favour of Zacsam.

Court found insufficient evidence to support claim of loss in capital value of business and declined to order compensation for loss in capital value of business

Zacsam claimed $420,000 as the loss in capital value of its business, which was the purchase amount for the business. The council contended that there had been no loss in capital value, due to the business being worthless as it had been run down in value by making losses, resulting in no goodwill value left in the business. The council submitted that the business was too highly geared and insolvent prior to the roadworks.

The valuation of the business supporting Zacsam's claim relied heavily on the business acquisition cost. Zacsam's expert accountant did not produce evidence of comparable sales in order to show comparative value.

Whilst Zacsam's expert accountant acknowledged that the most widely applied methods of valuing a business were the earnings-based and the assets-based approaches, the expert used neither of these methods.

As the court was unable to be satisfied that, at any relevant date, the business had a capital value of $420,000, the valuation of the business relied on by Zacsam was not accepted by the court.

Whilst the court was unable to find in favour of Zacsam for this aspect of the claim, the court emphasised that acceptance of the whole of the business valuation evidence relied on by the council could not be implied.

The court was unable to be satisfied that the approach adopted for determining insolvency was correct, as it was not done in accordance with section 95A of the *Corporations Act 2001*. The court did not consider that the value of the business was necessarily zero at any time. However, the court found that the claim for $420,000 was not supportable on the evidence.

Court could not find causal connection between rental liability and disturbance due to roadworks and declined to order compensation for rental liability

Zacsam claimed $66,547 for rent liability, for rent paid by Zacsam for the period between 17 March 2012 and 16 March 2013 when the landlord owned and ran the business. The council submitted that the amount should instead be nil.

The court was not satisfied that the expense due to the rental liability had a causal connection with the disturbance due to roadworks, as there was no evidence of how the business was conducted when the landlord took over until it closed. The court was therefore not satisfied that any amount was able to be awarded for rental liability.

During the course of the hearing, the parties reached an agreement that the sum of $9,748.20 was the sum for the costs associated with the claim for compensation, which formed part of the court's final orders. The court also ordered interest to be payable on the compensation amount from 22 January 2012 to the date of payment, taking into account an advance payment of compensation made by the council.

Court found that the proposed development was too tall and too big and was in significant conflict with the planning scheme

Kathryn O'Hare | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Norfolk Estates Pty Ltd v Brisbane City Council & Body Corporate for Kirribilli Apartments Community Titles Scheme and Ors* [2016] QPEC 9 heard before Robertson DCJ

April 2016

In brief

The case of *Norfolk Estates Pty Ltd v Brisbane City Council & Body Corporate for Kirribilli Apartments Community Titles Scheme and Ors* [2016] QPEC 9 concerned an appeal in the Planning and Environment Court against the Brisbane City Council's decision to refuse a development application for a material change of use to develop two adjoining lots at New Farm with a 10-storey building, including a rooftop terrace containing 13 dwelling units.

The council refused the development application on the basis that it was in significant conflict with the New Farm and Teneriffe Hill Neighbourhood Plan Code, the Multiple Dwelling Code and the Medium Density Residential Zone Code of the *Brisbane City Plan 2014*, and there were no sufficient grounds to justify an approval despite the conflict.

The court found that the development application was in conflict with the *Brisbane City Plan 2014* at all levels. In the absence of sufficient grounds to justify an approval despite the conflict, the court dismissed the appeal.

Town planning experts accepted that the character of the surrounding locality of the proposed development corresponded with the town planning designation in the Brisbane City Plan 2014 as medium density residential

The court first considered the character of the surrounding locality of the proposed development. The proposed development is located on the southern side of Oxlade Drive.

As agreed by the town planning experts, the character of the southern side of Oxlade Drive and Griffith Street was "*predominantly medium rise, medium density residential area … and contains mostly multiple dwellings although some single dwellings remain.*" As to the character of the northern side of Oxlade Drive and Griffith Street, the town planning experts were of the view that "*opposite the site on the northern side of Oxlande Drive the profile and density is markedly different. It is an area of predominantly low rise medium density residential development containing both detached houses and multiple dwellings as well as … small scale non-residential uses.*"

The existing character of the surrounding locality is comprised of a mixture of high rise buildings, namely Glenfalloch (15 storeys), Platinum (7 storeys) and Kirribilli (11 storeys) and low rise buildings.

On balance, the town planning experts agreed that the character of the surrounding locality corresponded with the town planning designation in the *Brisbane City Plan 2014* as medium density residential (or living).

Court found that the local area would be viewed collectively and it did not have a "higher density, multi-unit feel" and the proposed development would visually bridge the gap between Kirribilli and Edgewater if the top four storeys were removed

Norfolk, through its visual amenity expert, divided the local area into three sub-precincts. The middle sub-precinct where the proposed development was located had "*a higher density, multi-unit feel*", with Kirribilli being a prominent building but making minimal positive contribution to the local character and amenity.

Norfolk's visual amenity expert argued that the proposed development would "*reconcile the 11 storey Kirribilli apartments to the prevailing character*", "*is restorative in its nature bridging between the bulk and scale of the buildings to the east of the site and Kirribilli*" and "*has been carefully framed to visually link with other medium rise development within the area whilst also linking with its taller neighbour*".

The court disagreed with the three sub-precincts division and accepted the council's visual amenity expert's opinion that "*a person passing through the whole of this part of the locality would not assess the character as 3 distinct sub-precincts but rather "collectively as part of a wider visual experience".*"

The court also disagreed that any part of the local area had "*a higher density, multi-unit feel*" when it was viewed collectively. During cross-examination, Norfolk's visual amenity expert's "bridging" and "visual link" arguments were significantly undermined. The court preferred the council's visual amenity expert's proposition that the proposed development would in fact visually bridge the gap between Kirribilli and Edgewater (to the east of the site) and produce "a pleasant graduation" if the top four storeys were removed.

Court observed that reasonable members of the community would expect a development on the subject site of up to 5 storeys or 15 metres in height and found the impact of the proposed development on the views of the Brisbane River of Kirribilli residents to be unacceptable and significant

The court went on and considered the impact the proposed development would have on views of the Brisbane River, in particular those of residents within the eastern unit of Kirribilli.

Both the zone code and the neighbourhood plan relevantly contain provisions relating to protection of view corridors and maintenance of views to and from the river, taking into consideration the height, scale and form of development and community expectations about the number of storeys to be built.

The court observed that a fair and objective reading of the *Brisbane City Plan 2014* would lead Kirribilli residents to an expectation of a development on the subject site of up to five storeys or 15 metres in height. A higher building may be developed in limited circumstances where a community and economic need was demonstrated and it responded to the characteristics of the adjoining building.

Norfolk's visual amenity expert argued that the impact on views of Kirribilli residents from levels seven to 11 was minor, which was again undermined during cross examination.

The court preferred the council's visual amenity expert's evidence and concluded that the impact of the proposed development on the views of the Brisbane River of Kirribilli residents from levels seven to 11 would be "*unacceptable, unwelcome and significant.*"

Due to the inconsistency of the proposed development with the amenity and character of the locality and a failure to demonstrate an economic and community need, the court held that the development application significantly conflicted with the Brisbane City Plan

As to the height, bulk and scale of the proposed development, in the court's view, it would present as a high density high rise building, rather than as medium density, which was not consistent with the amenity and character of the locality or the community expectations.

Further, the proposed development failed to maintain views to and from the Brisbane River to an acceptable level or establish an acceptable relationship to adjoining buildings.

Norfolk sought to demonstrate a community and economic need for the proposed development and rely on the maximisation of infrastructure as a ground to support an approval of the proposed development.

However, the court considered that the extent of conflict of the proposed development with the *Brisbane City Plan 2014*, particularly in relation to height, bulk and scale was so significant that the purported need was not sufficient to justify an approval despite the conflict.

Body corporate's appeal struck out due to lack of a special resolution

William Lacy | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Body Corporate for Quay Terraces Cts v Brisbane City Council* [2016] QPEC 12 heard before Rackemann DCJ

April 2016

In brief

The case of *Body Corporate for Quay Terraces Cts v Brisbane City Council* [2016] QPEC 12 concerned a strike-out application made by HSW Nominees Pty Ltd in the course of an appeal commenced in the Planning and Environment Court by the Body Corporate for Quay Terraces Cts against the Brisbane City Council in respect of the council's decision to approve HSW's development application.

Under the *Body Corporate and Community Management Act 1997* the body corporate could start a proceeding only if the proceeding was authorised by a special resolution. As no special resolution had been obtained, HSW submitted that the appeal should be struck out as it had been commenced without the necessary authorisation.

The court ordered that the appeal be struck out as there were no pressing reasons in the interests of justice warranting an alternate course of action and the determination of an adjudicator under the *Body Corporate and Community Management Act 1997* which purported to tie the court's hands was found to be beyond jurisdiction and have no weight in the circumstances.

Court considered whether the appeal should be struck out or adjourned to allow the body corporate time to hold an extraordinary general meeting and found no pressing reasons to adjourn the proceeding

A proceeding which was brought without the necessary authorisation would generally be dismissed or struck out except where there were pressing reasons in the interests of justice which would warrant an alternate course of action.

HSW's application was heard by the court on 8 March 2016. Relevantly, an extraordinary general meeting was called by the body corporate, which was due to be held on 16 March 2016, seeking to ratify the commencement of the appeal.

The body corporate contended that the appeal should not be struck out but rather adjourned until after the extraordinary general meeting. In support of this contention, the body corporate sought to rely on a number of discretionary considerations which included the proximity of the extraordinary general meeting, the prospects of a resolution being passed at that meeting ratifying the commencement of the proceeding and a lack of significant prejudice to HSW.

In its consideration of whether there were any pressing reasons which would warrant the appeal not being struck out, the court was cognisant of the fact that, if the appeal was struck out but a favourable resolution was subsequently obtained to authorise the proceeding, the body corporate could make an application to the court seeking an extension of time to file a new notice of appeal under section 497 of the *Sustainable Planning Act 2009*. Accordingly, this was not a situation where, in the court's view, striking out the appeal would "shut off any prospect of the matters of concern ever being ventilated by proceedings in this court".

The court therefore found no pressing reasons in the interests of justice which would warrant the adjournment contended for by the body corporate. Further, in the event that a favourable resolution was obtained, the court saw no injustice in putting the body corporate in a position of having to apply for an extension of time to file a new notice of appeal.

The body corporate submitted that the court was bound by a determination of an adjudicator made under the Body Corporate and Community Management Act 1997 and it should proceed with the appeal as if a special resolution had been obtained

The day prior to HSW's application first coming before the court the body corporate lodged an adjudication form under the *Body Corporate and Community Management Act 1997* which resulted in the following determination being made:

> *I hereby order that subject to the decision of the Body Corporate for Quay Terraces in respect of motions 9 and 10 to be considered at the extraordinary general meeting to be held on 16 March 2016, or any adjournment of that meeting, the Body Corporate for Quay Terraces is authorised to commence and pursue proceedings number 369 of 2016 before the Planning and Environment Court as if a special resolution had already been passed at a general meeting authorising the commencement of those proceedings.*

The body corporate submitted that this determination "ties this court's hand" and the court was "bound by the determination to act on the basis that the body corporate was indeed authorised to commence and pursue the proceedings as if the special resolution had, in fact, been obtained".

Court found that the adjudicator's determination which purported to authorise the commencement of the appeal was beyond jurisdiction and should be given no weight in the circumstances

HSW submitted that the adjudicator's determination was beyond jurisdiction and on this basis should be ignored by the court in considering whether to strike out the appeal.

Despite the exclusivity of dispute resolution processes under the *Body Corporate and Community Management Act 1997* the court considered, as a collateral question in determining HSW's application, whether the dispute in the appeal was a dispute to which the *Body Corporate and Community Management Act 1997* applied.

The body corporate submitted that the adjudicator's determination was for "a declaratory order about the operation of the Act" for the purposes of section 227(2) of the *Body Corporate and Community Management Act 1997*.

The court disagreed with the body corporate's submissions and found that the determination made was not a declaration about the operation of the relevant Act. The determination purported to allow the body corporate to commence and pursue the appeal under the *Sustainable Planning Act 2009* as if a special resolution had already been passed when in fact it had not. This was not, in the court's view, a declaratory order about the operation of the *Body Corporate and Community Management Act 1997*.

The court therefore found that the determination of the adjudicator was beyond jurisdiction and should be given no weight. On this basis, and in the absence of pressing reasons for adjourning the proceeding, the appeal was struck out.

Advice for councillors and officers dealing with planning matters

Ian Wright

This article discusses a framework to help a councillor and officer to ensure compliance with all laws that apply to the exercise of the local government's planning powers

May 2016

Background

Operation of the planning system

The successful operation of the planning system relies on councillors and officers of a local government having mutual trust and understanding of each other's roles and responsibilities in the consideration of planning matters which involve the balancing of private proposals with wider public interests.

Councillor and officer roles and responsibilities

A councillor and officer must amongst other matters, ensure that the local government:[1]

- discharges its responsibilities under the *Local Government Act 2009*;
- complies with all laws that apply to the local government; and
- achieves its corporate and community plans.

Object of advice

This advice provides a framework which will help a councillor and officer to ensure that the local government complies with all laws that apply to the exercise of the local government's planning powers in order to best serve the public interest of the local government area.

Planning powers

Local government planning powers

A local government is required by the *Sustainable Planning Act 2009* to exercise the following relevant planning powers:

- *Strategic planning* – the preparation of a local planning instrument.[2]
- *Development assessment* – the assessment of a development application.[3]
- *Enforcement* – the enforcement of a development offence.[4]

A local government's planning powers involve the exercise of the following:

- *Legislative power* – the making of a law such as a local law under the *Local Government Act 2009* or a local planning instrument under the *Sustainable Planning Act 2009*.
- *Executive or administrative power* – the administration of a law such as the assessment of a permit application under a local law or a development application under a planning instrument.

Judicial powers

A local government has no judicial or quasi-judicial powers; which are reserved to courts and tribunals such as the Planning and Environment Court and Building and Development Tribunal to review by way of an appeal or application a local government decision for a planning matter.

Planning powers must comply with all laws

A local government must exercise its planning powers in compliance with the following laws:

- *Ultra vires* – acting within power.

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1 See section 12(3)(a) of the *Local Government Act 2009* for councillors and section 13(2)(b) of the *Local Government Act 2009* for officers.
2 See chapter 3 of the *Sustainable Planning Act 2009*.
3 See chapter 6 of the *Sustainable Planning Act 2009*.
4 See chapter 7 of the *Sustainable Planning Act 2009*.

- *Good faith* – acting in good faith.
- *Due diligence* – acting with reasonable care.

A local government's exercise of its planning powers which does not comply with these laws is null and void, open to legal challenge and cannot be legally enforced.

The compliance with these laws generally does not arise in an appeal as the Planning and Environment Court or Building and Development Tribunal hearing the appeal is required to consider the planning matter afresh and as such the "merits" of the planning matter as opposed to the "lawfulness" of a local government's decision is more relevant to the determination of an appeal.

However compliance with these laws becomes critical where an appeal to the Planning and Environment Court or Building and Development Tribunal is not available such as in the following circumstances:

- strategic planning decisions for which there is no right of appeal;
- a compliance assessment or code assessment development application where there is no right of submission or approval for a submitter;
- impact assessment development application where a right of submission or an appeal by a submitter has not been exercised;
- a right of appeal for a development approval has expired.

Acting within power

A local government must act within its planning powers and not *ultra vires* (Latin: beyond the power).

A local government can do anything that is specifically authorised by the *Local Government Act 2009*, *Sustainable Planning Act 2009* or other legislation.

A local government cannot do something that is prohibited by the *Local Government Act 2009*, *Sustainable Planning Act 2009* and other legislation. For example a local government cannot:

- make a local law that establishes a process that is similar to or duplicates a process in the *Sustainable Planning Act 2009*;[5] or
- make a planning scheme which prohibits development other than in the limited circumstances provided for in the *Sustainable Planning Act 2009*.[6]

Acting in good faith

A local government must act in good faith and not exercise its planning powers in the following manner:

- *Improper purpose* – exercise its powers for an improper purpose.
- *Bias* – exercise its powers in a manner that is biased or prejudiced against a person or group.
- *Personal interest* – exercise its powers for the benefit of a councillor or officer.
- *Preferential interest* – exercise its powers to give partial or preferential treatment to a person or group.
- *Prejudicial interest* – exercise its powers prejudicially in relation to a planning matter without giving it proper consideration.
- *Prejudgement* – exercise its power in accordance with a predetermined view of a matter without giving it adequate consideration.
- *Irrelevant consideration* – exercise its powers based on a matter which is irrelevant or extraneous to the planning matter.
- *Relevant consideration* – exercise its powers without considering all matters relevant to the planning matter.
- *Procedural fairness* – exercise its powers without according a right to be heard to a person.
- *Reasonableness* – exercise its powers in a manner that is so unreasonable that no reasonable local government could have exercised the power in that manner.
- *Merits consideration* – exercise its powers based on the merits of the case and not the automatic application of a policy without consideration of the particular circumstances relevant to the matter.

Acting with due diligence

A local government must act with due diligence and exercise its planning powers with reasonable care consistent with what is expected of a 'reasonable local government' and not an ordinary 'reasonable person'.

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5 See section 37 of the *Local Government Act 2009*.
6 See section 88(2) of the *Sustainable Planning Act 2009*.

The failure of due diligence is highlighted by the example of Wollongong City Council, which was placed into administration following a recommendation by the New South Wales Independent Commission Against Corruption. According to the Commission, a number of councillors (but not all councillors) had failed to pay heed to the following warning made by Justice Owen in the Report of the HIH Royal Commission:

> *I am not so much concerned with the content of a corporate governance model as with the culture of the organisation to which it attaches. For me, the key to good corporate governance lies in substance, not form. It is about the way the directors of a company create and develop a model to fit the circumstances of that company and then test it periodically for its practical effectiveness.*[7]

Roles and responsibilities of an officer

Roles of an officer

An officer must assess a planning matter, provide advice to the local government in respect of their assessment of the planning matter and if exercising delegated authority decide the planning matter, on the basis of their overriding obligation of professional independence which on occasions may be at odds with the views, opinions and decisions of councillors and the local government.

Officer's report

An officer's report assessing a planning matter should have regard to the following:

- The report should be accurate and cover amongst other things the substance of any submission or the views of those consulted.
- The report should include relevant information including a clear exposition of the relevant planning instruments, the site or related history and any other material consideration.
- The report should have a written recommendation of action. Oral reporting should be avoided and minuted when it does occur.
- The report should contain a technical assessment in accordance with the *Sustainable Planning Act 2009* and other relevant legislation which clearly justifies the recommendation.
- The report should, if its recommendation is contrary to the provisions of the planning scheme, clearly state the sufficient grounds which justify the departure.
- The report should, if an officer with delegated authority has been requested to refer a planning matter to the councillors for determination, record the reasons for the referral.

Roles and responsibilities of a councillor

Roles of a councillor

A councillor can be involved at various stages of a planning matter and can play different roles at different times.

A councillor may perform the following roles:

- *Decision maker* – a councillor sitting as a local government or exercising delegated authority from the local government may be charged with making a decision in respect of a planning matter.
- *Community representative* – a councillor as an elected representative may be charged with ensuring that a decision maker is aware of their constituent views.
- *Mediator* – a councillor may play a mediating role looking for common ground between different interests in a planning matter.

Responsibilities of a councillor – acting in the public interest

A councillor must act in the overall public interest of the whole local government area.[8] This is a councillor's *corporate responsibility*.

A councillor must ensure that their corporate responsibility is not overridden by the following:

- A councillor's responsibility as an elected community representative who represents the current and future interests of the residents of the local government area.[9] This is a councillor's *representative responsibility*.
- A councillor's personal interests.

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7 See Independent Commission Against Corruption (2008), Report On Investigation Into Corruption Allegations Affecting Wollongong City Council, Part 1, 4th March.
8 See section 12(3)(a) and (6) of the *Local Government Act 2009*.
9 See sections 4 and 12(1) of the *Local Government Act 2009*.

Identifying the public interest

A councillor when determining whether an action is in the overall public interest of the whole local government area should consider the following legal principles:

- The *public interest* is not the same as an *interest of the public* – it may be different.
- The public interest test will not be satisfied if the action is inconsistent with the following local government principles or provides results which are inconsistent with these local government principles:[10]
  - Transparent and effective processes and decision making in the public interest.
  - Sustainable development and management of assets and infrastructure, and delivery of effective services.
  - Democratic representation, social inclusion and meaningful community engagement.
  - Good governance of, and by, the local government.
  - Ethical and legal behaviour of councillors and local government employees.
- The public interest test is an objective test – what would a reasonable elected councillor who is not influenced by personal considerations decide?

Lobbying of a councillor

A councillor consistent with their representative responsibility, may be lobbied by a person or group which may be affected by a planning matter; but they should respond in a manner that is consistent with their corporate responsibility and otherwise complies with the law.

Planning lobbyists

A councillor who is lobbied in respect of a planning matter should take the following action:

- The councillor should keep a record of an approach including a telephone call which is not of a routine constituency nature, invite the person to write to the local government setting out their view, inform a relevant officer nominated by the local government about the approach and seek advice from the relevant officer.
- The councillor should understand what role (ie decision maker, community representative, mediator) they are playing when participating in different stages of a planning matter and communicate the role they are performing and requirements of the respective role to the person.
- The councillor should provide procedural advice to a member of the public who does not have a professional representative or indicate where such advice is available within the local government.

Avoiding bias and predetermination

- The councillor who is a decision maker should, to avoid disqualification from taking part in the decision on the basis of a perceived bias or predetermination:
  - simply listen to a point of view and not indicate or imply their own view in relation to the planning matter or otherwise declare their voting intention; and
  - if they wish to express an opinion it should be made clear that they only have a predisposition to a certain position at this time but that they will only be in a position to make a final decision after having heard all the relevant evidence and arguments and that they otherwise retain an "open mind" about the planning matter.
- The councillor who is a decision maker should advise the person that the local government will not decide on the merits of the planning matter until all information is available and has been duly considered by the local government.
- The councillor who is a decision maker should advise the person that any verbal or written material provided to the councillor in relation to the planning matter will not be treated in confidence as this will prejudice any open discussion, leaving officers with little or no time to provide proper advice to the councillors.
- The councillor who is a decision maker should ensure that a political or other group meeting is not used to determine how a councillor is to decide the planning matter.
- The councillor who is a decision maker should not communicate with a person during a local government meeting other than through the local government's meeting procedures as this may give the appearance of bias.
- The councillor who is a decision maker should not engage in the negotiation or mediation of a planning matter unless delegated authority to do so by the local government and should only do so in the presence of an officer.

[10] See section 4 of the *Local Government Act 2009*.

- The councillor should report to the relevant officer an offer or receipt of a gift, hospitality or favour either personal or to the local government or community and declare the existence of the offer or receipt if the councillor takes part in a decision making process.
- The councillor should ensure that an applicant and submitter are treated alike in terms of a request to address the councillors.
- The councillor should ensure that a presentation is on the local government premises, open to all councillors and for the purpose of presenting factual information only and not for the discussion of the merits of the planning matter.
- The councillor should ensure that the local government has clear procedures for handling correspondence received after the agenda for a planning matter has been issued and that these are communicated to applicants and submitters.

Lobbying by a councillor

A councillor may wish to express a predetermined position in respect of a planning matter, such as where the councillor acts:

- on behalf of existing or future residents of the local government area consistent with the councillor's representative responsibility;
- as a portfolio councillor responsible for a particular area of the local government's responsibilities such as economic development, social development or environmental matters, consistent with the councillor's corporate responsibility; or
- in a personal capacity as a proponent, applicant or submitter or in support of a friend, relative or other person who is a proponent, applicant or submitter.

A councillor who wishes to express a predetermined position on a planning matter should strongly take the following action:

- The councillor should not organise support or opposition, lobby other councillors or act as an advocate to promote a particular outcome.
- The councillor should not act on behalf of a proponent or applicant pursuing the planning matter with the local government.
- The councillor should not apply pressure to an officer to make a particular recommendation or decision.
- The councillor may seek to make representations to the local government in the same manner that is afforded to a member of the public to make representations to the local government.
- The councillor should not be involved in a decision making process for the planning matter by:
  - not taking part in the planning process;
  - not voting in relation to the planning matter; and
  - withdrawing once any public speaking opportunities have been completed to ensure that councillors or officers are not influenced by their continuing presence.

Decision against an officer's recommendation

A councillor may make a decision against an officer's recommendation where the planning issues are finely balanced and the councillor's planning reasons are clear and convincing.

A councillor who is considering making a decision contrary to an officer's recommendation should take the following action:

- The councillor should encourage the formation of tentative reasons by discussing with a relevant officer beforehand a predisposition (and not a predetermination) to consider making a decision contrary to an officer's recommendation.
- The councillor should ensure that the planning reasons are written down as part of a motion to ensure that a detailed minute of the reasons can be made if the motion is agreed.
- The councillor should seek an adjournment for a period to enable the planning reasons to be discussed by the councillors including affording a relevant officer the opportunity to provide advice in respect of the implications of a contrary decision.
- The councillor should consider deferring the planning matter to another meeting to have the putative reasons tested and discussed, if a relevant officer provides very strong objection to the validity of the planning reasons.

A councillor who makes a decision against the officer's recommendation should be aware that:

- an officer may be unable to defend that decision at an appeal;

- a councillor may have to justify the resulting decision by giving evidence in the event of any legal challenge; and
- the decision may be overturned on appeal with costs awarded against the local government if no good reasons for the decision have been given.[11]

Post-decision representations

A local government decision may be the subject of post-decision representations through the following:

- A request for a negotiated decision notice to the local government.[12]
- An appeal or application for review to the Planning and Environment Court or Building and Development Tribunal.[13]
- A request to the Minister for a call in.[14]
- A complaint to the Ombudsman.[15]

A councillor may comment on a local government decision where consistent with the councillor's representative responsibility and their corporate responsibility to serve the overall public interest of the whole local government area.

A councillor who comments on a local government decision should take the following action:

- The councillor should accept the decision of the majority gracefully even if reluctantly and give effect to it or take action in accordance with the law in an appropriate and acceptable manner to change the decision.
- The councillor should take no action to prejudice the local government's position in relation to any post-decision representation.
- The councillor should not denigrate the decision of the majority in public or malign the position of other councillors or officers.

A councillor who comments on a local government decision should be aware that they may have to give evidence in relation to their comments in the event of any challenge to the local government's decision.

Conclusions

Given the significance of well informed and appropriate judgments by councillors and officers, a local government should consider taking the following action:

- A local government should hold regular seminars on planning matters, the roles and responsibilities of councillors and officers in planning matters and the exercise of a local government's planning powers.
- A local government should focus on embedding in the strategic planning of its local planning instruments its goals and policies for the development of the whole local government area, to avoid any issue of predetermination by a councillor and officer in the subsequent assessment of a development application for a proposed development.
- A local government should give consideration for major planning matters to be subject to higher level engagement such as:
  - a development forum which is arranged for and paid for by a proponent or applicant but convened in accordance with a local government protocol to ensure community engagement rather than merely project promotion; and
  - a planning forum convened by the local government.
- A local government should periodically review a selection of their decisions once a development has been completed in order to assess the quality of its local planning instruments and planning decisions and to improve the quality and consistency of its local planning instruments and planning decisions.
- A local government experiencing high rates of sustained legal appeals or reviews should examine the possible reasons for this, including the continuing relevance of the local planning instruments on which the planning decisions have been based, the quality of the planning assessment and the quality of the decision making.

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11 See section 457 of the *Sustainable Planning Act 2009*.
12 See section 361 of the *Sustainable Planning Act 2009*.
13 See chapter 7 of the *Sustainable Planning Act 2009*.
14 See section 424 of the *Sustainable Planning Act 2009*.
15 See section 20 of the *Ombudsman Act 2001*.

Too big and too tall development conflicts with planning schemes

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *VG Projects Pty Ltd v Brisbane City Council* [2016] QPEC 15 heard before Rackemann DCJ

May 2016

In brief

The case of *VG Projects Pty Ltd v Brisbane City Council* [2016] QPEC 15 concerned an appeal commenced by VG Projects Pty Ltd against the Brisbane City Council's deemed refusal of a development application for a material change of use for the proposed multiple dwellings at Oxlade Drive, New Farm.

Through mediation, traffic, noise and wind impact issues were agreed by the parties as not warranting a refusal of the development application. The remaining issues which the court had to determine related to the height, bulk and scale of the proposed development, its consequential impact on the character and amenity of the locality and whether there were sufficient grounds to justify an approval in the event of conflict.

The court found that the proposed development was in conflict with both the *Brisbane City Plan 2000* and *Brisbane City Plan 2014* and the grounds contended by VG Projects were not sufficient to justify an approval. The appeal was therefore dismissed.

9 storey multiple dwellings development was proposed in locality which contained predominantly low to medium rise residential development but some high rise development

The proposed unit development comprised 9 storeys and a roof deck with a gross floor area of 8905m^2 and a plot ratio of approximately 3.75 times the site area. It comprised of 65 dwelling units with a mix of 2, 3 and 4 bedrooms.

The land the subject of the proposed development was included in the Medium Density Residential Area and the New Farm and Teneriffe Hill Local Plan under the *Brisbane City Plan 2000*. Under the *Brisbane City Plan 2014*, the land was included in the Medium Density Residential Zone and the New Farm Neighbourhood Plan under the *Brisbane City Plan 2014*.

Development within the locality was predominantly low to medium rise residential development but it also had some high rise development.

Just because a proposal of a greater height and gross floor area could still meet performance criteria it does not mean it provides for a transition of the locality to a high rise built environment

In assessing the height, bulk and scale of the proposed development, the court focussed on performance criteria P1 and P2 of the New Farm and Teneriffe Hill Local Plan Code as follows:

- "*P1 New buildings must maintain views to and from the River and other landmarks identified on Map A – New Farm and Teneriffe Hill, while maintaining a visual relationship with other buildings in the vicinity*"
- "*P2 Building size and bulk must be consistent with the medium density nature of the locality and retain an appropriate residential scale and relationship with other precincts in the plan area*".

The proposed development did not meet the acceptable solutions A1.1 and A2.1 to performance criteria P1 and P2. In fact, it was nearly twice the height prescribed in A1.1 and had more than 3 times the plot ratio prescribed in A2.1.

Whilst acknowledging that a proposal of a greater height and gross floor area than that prescribed in the acceptable solutions could still meet P1 and P2, the court did not consider those performance criteria provided for a transition of the locality to a high rise/high density built environment.

Court found the proposed development was in conflict with Brisbane City Plan 2000 in that it was not sympathetic to the existing low rise buildings and was not consistent with the medium density nature of the locality

It was not seriously contended by the council and the submitters that the proposed development was in conflict with the first limb of P1. As to the second limb of P1, the court adopted the approach established in *Calvisi & Ors v Brisbane City Council & Ors* [2009] QPELR 35 that "*visual relationship in P1 should be construed to mean a relationship which is pleasing, sympathetic, supportive, harmonious or complementary*". As to P2, the court noted that "*the "relationship" required in P2 is an appropriate relationship*." Consistent with the approach adopted in *Calvisi* and *BTS Properties (Qld) Pty Ltd v Brisbane City Council & Ors* [2015] QPEC 47, the court further noted that building height would be a relevant factor in considering building size and bulk.

In order to determine whether the proposed development complied with P1 and P2, the court had to assess the other buildings in the area, the medium density nature of the locality and other precincts in the area.

In the court's view, the predominant built form in the area was between 2 to 6 storeys. Even though there were a few taller buildings dispersed in the area, it did not detract from the medium density character of the area. Further, unlike the proposed development, the existing high rise buildings were generally sympathetic to existing low rise buildings by having significant setbacks or a design which achieved a transition in height.

Whilst the proposed development sought to incorporate design features to reduce or mitigate the impression of its size and bulk, the court was not satisfied that they were adequate to render its size and bulk as being acceptable.

The court found that the proposed development was not consistent with the medium density nature of the locality and "*would not maintain a visual relationship that is pleasing, sympathetic, supportive, harmonious or complementary*", particularly given its significant height.

Court found the proposed development was in conflict with Brisbane City Plan 2014 and its greater height and scale was not justified by community and economic need

The court gave weight to the *Brisbane City Plan 2014* in its assessment of the proposed development. However, the court was of the view that the proposed development was not consistent with the height, bulk and scale expectations in the locality contemplated under the relevant provisions of the *Brisbane City Plan 2014*.

Further, it had not been established that the greater height and scale of the proposed development was warranted by reason of community and economic need.

Court found the proposed development would cause undue adverse impact on the amenity and character of the area and there were not sufficient grounds to overcome its conflicts with the planning schemes and consequential impacts

The court also had the benefit of lay witness statements in relation to their concerns on the impact of the proposed development on visual amenity and perception of character of the area which the court considered to be genuine. The court found that the proposed development would have an undue adverse impact particularly given its height and bulk.

A number of grounds were asserted by VG Projects seeking to justify the approval of the proposed development in the event that the court found it to be in conflict with the council's planning schemes. The court considered the asserted grounds were relatively weak and were not sufficient to warrant an approval of the proposed development.

Pre-1911 houses were not reasonably capable of being made structurally sound

Shaun Pryor | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Farrah v Brisbane City Council* [2016] QPEC 19 heard before Jones DCJ

May 2016

In brief

The case of *Farrah v Brisbane City Council* [2016] QPEC 19 concerned an appeal in the Planning and Environment Court commenced by Mr Jeffrey Farrah against the Brisbane City Council's refusal to grant a preliminary approval to carry out building works, particularly its refusal to allow the demolition of two pre-1911 houses.

The council's grounds for refusal included asserted conflicts with a number of desired environmental outcomes and performance criteria and acceptable solutions under the Demolition Code of the *Brisbane City Plan 2000*. It was accepted by both parties that the fundamental issue for determination by the court was "*whether or not the two houses were reasonably capable of being made structurally sound*".

The court accepted that the cost to bring each house to a structurally sound state would be in the order of $96,000 and $136,000 respectively and found that neither house was reasonably capable of being made structurally sound. The appeal was therefore allowed.

Court found that structurally sound would include making the structure waterproof and safe but not necessarily fit for permanent habitation

The court considered the principles in *Gould v Brisbane City Council* [2001] QPELR 77, *Craig Securities (No. 2) Pty Ltd v Brisbane City Council* [2006] QPELR 601 and *Ken Ryan & Associates Pty Ltd v Brisbane City Council & Ors* [2008] QPELR 147 in determining whether the two pre-1911 houses were "*structurally unsound and not capable of being made structurally sound*".

Whilst all three decisions confirmed the test was an objective one, the court noted a difference between the reasoning of Griffin SC DCJ in *Craig Securities* and that of Wilson SC DCJ in *Ken Ryan* on whether a building was required to be restored to a level suitable for safe occupation in order to be structurally sound.

In *Craig Securities*, Griffin SC DCJ considered "*that the relevant tests did not require that the standard of structural soundness meet present day building codes and/or standards*". On the other hand, the court observed that Wilson SC DCJ in *Ken Ryan* appeared to suggest that "*the test required the structure be made habitable*".

Nonetheless, the court accepted the test articulated by Griffin SC DCJ in *Craig Securities* and found that structurally sound would include making the structure waterproof and safe but it would not be necessary for the structure to be fit for permanent habitation.

Court accepted additional works identified by Mr Farrah's engineer were necessary to make both houses structurally sound

The court then went on to consider the expert evidence relied on by both parties.

The parties' engineers agreed on most of the items needed to be repaired for both houses. However the engineer for Mr Farrah identified several additional works in respect of both houses.

As to the additional works for the house at 8 Amersham Street, the court found that the rectification to the rear door was necessary but that the works identified in respect of the window frames on the northern external wall of the house were not necessary to make the house structurally sound and waterproof.

As to the additional works for the house at 10 Amersham Street, the court accepted that the chamfer boards on the northern external wall were required to be replaced, otherwise it would result in an "*unacceptable risk of water damage to the timber framing behind those walls*". However, the court was not satisfied that all the timber sills would need to be replaced to make the house structurally sound.

Court preferred the evidence of the council's expert in determining the cost of making the houses structurally sound but considered there to be a risk of variations to the cost occurring

In determining the costs of making the houses structurally sound, the court considered the evidence of experts for both parties who submitted a cost estimate for making each house structurally sound.

The court found the evidence of the expert for Mr Farrah confusing and also found irregularities in the expert's costings. The court generally preferred the evidence of the council's expert but accepted that there were inherent uncertainties in the process of making the houses structurally sound which could lead to variations to the costings and as such it was appropriate to factor that risk into the evidence.

On that basis, the court found that in order to make the houses structurally sound, a prudent owner would budget for in the range of $86,000 to $96,000 for the house at 8 Amersham Street and $126,000 to $140,000 for the house at 10 Amersham Street.

Court found the valuation evidence offered limited assistance in determining whether the houses were reasonably capable of being made structurally sound but led to the conclusion that a significant amount of money would be required to be spent

The court also considered the evidence of the valuers for both parties who submitted an "as is" valuation of each of the lots and houses in their current state. However, both experts had different starting points and took different approaches in their assessment.

The valuer for Mr Farrah submitted that the making of both houses structurally sound and habitable would result in an added value of $180,000 to the "as is" valuation of both houses. The valuer for the council on the other hand, considered that the making of both houses structurally sound and habitable would result in the net worth of each property being indicative of market value and that the risk of over capitalisation was low.

The court examined the sale price of several other properties in the area and considered that Mr Farrah's valuer had materially underestimated the "as is" value of both houses and therefore gave no weight to his assessment of the "as is" values. In regard to the evidence of the council's valuer, the court found that whilst the valuer's "as is" valuations might be correct based on the three assumptions the valuer proceeded on, those assumptions were not warranted.

The court ultimately concluded that the valuation evidence offered limited assistance in determining whether the houses were reasonably capable of being made structurally sound. However, the evidence did lead to the conclusion that Mr Farrah would be required to spend a significant amount of money.

Court found that neither house was reasonably capable of being made structurally sound given the significant costs involved

In light of the expert evidence, the court concluded that the cost of making the houses structurally sound would involve a significant expenditure and that there was a risk that the expenditure would not be recovered if each of the houses was sold in the open market.

The court also concluded that the houses were far from habitable and that a considerable amount of further expenditure would be required to bring them to a habitable state.

The court found that it would be unreasonable to require a significant expenditure to be incurred in circumstances where there would be two uninhabitable houses which might be left to deteriorate again unless a further significant amount of money was spent to make them habitable.

On this basis, the court found that neither house was reasonably capable of being made structurally sound.

Court found that the requested change to construct an acoustic wall near the boundary of the property constituted a permissible change

Nina Crew | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ferreyra & Ors v Brisbane City Council & Anor* [2016] QPEC 10 heard before Bowskill QC DCJ

May 2016

In brief

The case of *Ferreyra & Ors v Brisbane City Council & Anor* [2016] QPEC 10 concerned an application in the Planning and Environment Court by Mr Arturo Frerreya, Ms Stella Ferreyra, Mr Ben Anderson, Mr Glenn Sim, Ms Samantha Jensen, Ms Bridget Barker, Mr Marco Faraone, Mr Jonathan Cook and Ms Christine Jensen, the owners of the units adjacent to the subject land, for declaratory relief in relation to the Brisbane City Council's decision to approve Brian E Fitzgibbons Family Trust's request to change an existing approval.

The unit owners' primary concern related to the acoustic wall which resulted in a loss of natural light, ventilation and visual amenity to their units. The unit owners argued that the council's decision was invalid on the basis that the council failed to take into account relevant considerations and it was unreasonable.

The court found that the council's decision was valid and dismissed the application.

Council approved the permissible change request to construct an acoustic wall

In April 2011 the council had issued the original development approval for alterations and extensions, including the introduction of a new outdoor bar area, to a hotel in Fortitude Valley known as the 'Fringe Bar'.

In March 2014, the hotel owner made a request to the council for a change to the original development approval under section 369 of the *Sustainable Planning Act 2009*. The change included construction of an acoustic wall near the boundary shared by the units.

The council's delegate was satisfied that the change sought by the hotel owner was a permissible change and approved the permissible change request in July 2014. The acoustic wall was subsequently constructed.

Unit owners argued that the council's decision was invalid in that it failed to take into account relevant considerations and was unreasonable

The unit owners argued that in approving the permissible change request:

- the council's delegate failed to take into account relevant considerations, in particular, the potential amenity impacts associated with the loss of natural light and visual amenity;
- the decision of the council's delegate was unreasonable in that it was not formed reasonably on the material before the council and it was so unreasonable that no reasonable local government could have arrived at it.

Court found that the council did not fail to take into account relevant considerations in approving the permissible change request

As to the first argument, the court considered the ministerial guideline used to determine whether a change to a development approval would result in a 'substantially different development'. The court found that the guideline should not be considered to be binding on the council in mandating the matters to be taken into account. Furthermore, it was observed by the court that:

> *the discretion so conferred on a responsible entity is a broad one and, even in a case where the introduction of new impacts is considered, by the decision-maker, to be relevant, the comparative importance of, or weight to be accorded to, any particular impact, is plainly one for the decision-*

> *maker; not amenable to review by the court, in an application such as this (as compared with an appeal on the merits)*.

In any case, the court found that the material before it was able to demonstrate that the potential impact of the acoustic wall on the general visual amenity was considered by the council's delegate and observed that the "*ameliorating effect of the wall on other impacts (including noise, light, privacy and security) was regarded as outweighing any such impacts*" on the units. In the circumstances, the court did not accept the first argument.

Court found the council's opinion that the change would not be likely to cause a person to make a properly made submission was legally reasonable

As to the second argument, by reference to *Minister for Immigration and Border Protection v Stretton* [2016] FCACF 11, the court noted that 'legal reasonableness' would fall within an area of decisional freedom on the council and that the "*width and boundaries of that freedom are framed by the nature and character of the decision, the terms of the relevant statute operating in the factual and legal context of the decision, and the attendant principles and values of the common law, in particular, of reasonableness*".

The court went on to note that:

> *In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification… if the decision is within the "area of decisional freedom" of the decision-maker… it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently.*

In the context of whether the proposed change would cause a person to make a properly made submission objecting to the proposed development, the court found that the approval of the permissible change request fit within the scope of the decisional freedom of the council having regard to the following matters:

- the original approval for alterations and extension to the Fringe Bar would have had significant acoustic impacts on the unit owners;
- the construction of the proposed acoustic wall would improve the noise, security, lighting and privacy issues which were raised by the one submission objecting to the original approval;
- there was a reasonable development expectation for the Fringe Bar to be built to the boundary of the land;
- the unit building itself had been built to the boundary which posed issues about the access to light and air from the adjoining land;
- the proposed acoustic wall was set back 1.2 metres from the boundary;
- "*reasonable minds might differ*" on whether the proposed change would give a rise to a submission as evidenced by the town planning expert's evidence.

The court was therefore not satisfied "*that no reasonable decision-maker could have reached the conclusion that the change would not be likely to cause an (objective and rational person) to make a (reasonable) properly made submission, objecting to the proposed change*".

Does a street have traditional character, it's more than just a numbers game

Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Guiney v Brisbane City Council* [2016] QPEC 26 heard before Rackemann DCJ

June 2016

In brief

The case of *Guiney v Brisbane City Council* [2016] QPEC 26 concerned an appeal by Margaret Guiney commenced in the Planning and Environment Court against the decision of the Brisbane City Council to refuse a development application for a preliminary approval to carry out building work being work for the demolition of a pre-1947 dwelling located within the Traditional Building Character Overlay of the *Brisbane City Plan 2014*.

The determinative issue for the appeal was whether the proposed demolition conflicted with the Traditional Building Character (demolition) Overlay code. The court found that the proposed demolition conflicted with the code as the house the subject of the proposed demolition was located in a street with traditional character and the house contributed positively to that character.

The court considered whether the proposed demolition conflicted with certain outcomes of the Traditional Building Character (demolition) Overlay code

In considering whether the proposed demolition conflicted with the *Brisbane City Plan 2014* the court focused on the following outcomes of the Traditional Building Character (demolition) Overlay code:

- PO5(c) which provides "*Development involves a building which… does not contribute positively to the visual character of the street*";
- AO5(d) which provides "*Development involves a building which … is in a street that has no traditional character*".

The appeal appeared to proceed on the basis that if either of these outcomes could be satisfied the proposed demolition would not be in conflict with the *Brisbane City Plan 2014*.

Ms Guiney contended that the house did not contribute positively to the visual character of Williams Avenue or that the street had no traditional character

The house the subject of the proposed demolition was located in Williams Avenue, Hendra and was a tin and timber house which the court observed was "*… a fine example of traditional building character*" (at [8]).

Williams Avenue was primarily comprised of dwellings with a mix of pre-1947 and post-1946 buildings. The street contained more post-1946 than pre-1947 buildings and this formed the basis for Ms Guiney's contention that the street was one with a modern character and therefore, despite the traditional character of the house, it did not contribute positively to the visual character of Williams Avenue.

To support this contention it was argued by Ms Guiney that a street could have only one character, the character of a street would be determined by reference to what predominated in the street and, because of the predominance of post-1946 houses, Williams Avenue was a street of modern character only.

The court considered how the character of Williams Avenue was to be determined

In asserting that a street may have only one character Ms Guiney sought to rely on *Leach v Brisbane City Council* [2011] QPELR 609.

However the court was not persuaded that this decision was an authority for the proposition that a street may only have one character. Instead the court preferred the reasoning in *Lucas v Brisbane City Council* [2015] QPELR 671 where the court in that instance relevantly stated:

> *It is only if one can characterise the visual character has a significantly predominant one and, thereby, exclude the fact that there is any realistic co-existing character at all which has any significance to do with a pre-1946 character that one could conclude that it (the house) did not contribute positively to that.*

The court also relevantly observed as follows in respect of applying AO5(d) and PO5(c) in the context of the proposed demolition:

- The fact that the subject house formed part of a group of traditional character houses did not necessarily dictate that demolition must be assessed to be in conflict with the assessment criteria rather the demolition of the house must be considered in the context of the relevant street (at [29]).
- A numerical predominance of post-1946 buildings, while being a relevant factor, would not inevitably justify a finding that a street had no traditional character or that a building of traditional character did not contribute positively to the visual character of the street (at [32]-[33]).
- Another factor, other than numerical predominance, which may be relevant to the assessment of the character of the street was the visual prominence of the pre-1947 buildings (at [32]).
- No weight was to be given to the fact that some of the other pre-1947 buildings in the street were "*not in good conditions and their 'potential longevity' is questionable*" as there was not sufficient evidence to establish whether these buildings were susceptible to demolition (at [36]).
- What would be required was an assessment of the present visual character of the street and not the street's potential character in the future (at [38]).

The court found that Williams Avenue had retained a traditional character and that the house contributed positively to the visual character of the street

Having considered the evidence of the expert witnesses the court relevantly found as follows:

> *The numerical predominance of post-1946 buildings in the street is relevant, gives the street an element of non-traditional character and provides an arguable case to permit demolition. On balance however, on the evidence, I am satisfied that this is not a case of a street properly characterised as simply being of a modern character with a few remnant pre-1947 character buildings which have no meaningful influence on the character of the street as a whole. Rather, it is a case of a relatively short street of mixed character in which notwithstanding the numerical predominance of more modern buildings (of different styles),the street, assessed as a whole, nevertheless retains (and retains as a distinguishing feature) traditional character to a significant degree by reason, in particular, of the influence of the traditional character buildings within it, including by reference to their attributes, location, consistency of character, relationship with each other and visual exposure to the street. In that context, not only is traditional character of significance in the street but the subject dwelling, being a fine and readily visible example of traditional building character, contributes positively to the visual character of the street* (at [43]).

On this basis the court found that the proposed demolition did not meet AO5(d) and PO5(c) and therefore the proposed demolition conflicted with the *Brisbane City Plan 2014*.

As Ms Guiney had not advanced grounds to justify the approval of the proposed demolition despite the conflict, the court dismissed the appeal.

No presumption that costs should follow the event

Ronald Yuen | Shaun Pryor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Farrah v Brisbane City Council (No. 2)* [2016] QPEC 23 heard before Jones DCJ

June 2016

In brief

The case of *Farrah v Brisbane City Council (No. 2)* [2016] QPEC 23 concerned an application made by Jeffrey Farrah in the Planning and Environment Court for costs arising out of an appeal by Mr Farrah against the Brisbane City Council's refusal of an application to demolish two pre-1911 houses.

In the substantive appeal, the court found that due to the likely cost involved in bringing the houses to a structurally sound condition, neither house was reasonably capable of being made structurally sound and allowed the appeal. Mr Farrah subsequently made an application for costs against the council.

The court considered the issue on whether to award costs to be a balancing exercise between the public interest and the success of Mr Farrah in the appeal. The court found that while these aspects were finely balanced, the public interest aspect of the case warranted the making of no orders as to costs.

Mr Farrah made an application for costs on the basis of his success and interest in the appeal and his reasonable conduct in prosecuting the appeal

Mr Farrah contended for a costs order on the following basis:

- He was successful in the substantive appeal. In particular, he was successful on the only substantive issue in the appeal and that no other substantive reasons existed justifying the decision not to award costs.
- He was not pursuing a commercial interest and the appeal was brought to avoid having to waste money fixing up the houses or having to sell the properties for less than their true value.
- His conduct in the prosecution of the appeal was reasonable and the litigation had been conducted in an efficient and cost effective way. In fact, the council had acted unreasonably by resisting his request for a mediation in circumstances where there would be a "*reasonable expectation of some utility*".
- He had incurred costs in prosecuting the appeal.

The council argued to the contrary that the application for costs be dismissed

The council submitted that the application be dismissed for the following reasons:

- Most of the council's expert evidence was preferred to that of Mr Farrah.
- The issue of the costs involved in bringing the houses to a habitable state was introduced by Mr Farrah, despite it being clear that the real issue was the cost of making the houses structurally sound.
- It was in the public interest to resist the appeal as the "habitable point" had a potential to impact on the future operation of council's planning instruments relating to protection of traditional building character.
- Mr Farrah's case in the substantive appeal was different from his pleaded case.
- The council had not acted unreasonably in the conduct of the appeal.

Court found the issue on whether to award costs to be a balancing exercise between the public interest and the success of Mr Farrah in the appeal and found that the public interest aspect of the case warranted no orders as to costs

In considering whether to award costs under section 457 (Costs) of the *Sustainable Planning Act 2009*, the court observed the following:

> *It is now well settled that the discretion provided for pursuant to s 457 is a broad one to be exercised judicially but without any presumption that costs ought follow the event or otherwise on the basis that there is some qualified protection against an adverse costs order. In exercising its jurisdiction under s 457 of the SPA the Court has to do so in a way that ensures, as far as can be, that while costs orders are made in appropriate cases it does not create a perceived established attitude as to costs that might act as a disincentive to citizens (individual and corporate) and relevant statutory authorities who either have meritorious cases to litigate or reasonable administrative decisions to defend.*

In relation to the council's refusal to participate in a mediation, the court found that it was not unreasonable since there was little prospect of reaching any compromise and it was unlikely that the mediation would result in any material narrowing of the issues.

The court considered the council's involvement in the appeal which arose out of its concern to preserve residential buildings constructed prior to 1911 involved a matter of genuine public interest. The council was therefore not concerned with achieving or maintaining any commercial advantage over Mr Farrah.

The court accepted that achieving or preserving the public interest might result in "*significant limitations on the ability of a property owner to achieve his highest and best use*" and that the costs of litigation would not be insignificant. However, in the court's opinion, Mr Farrah had secured a commercial advantage from the appeal even if that was not the intended purpose.

It was observed by the court that both parties conducted their respective cases in an efficient and cost-effective manner and it would be wrong to criticise the council for introducing valuation evidence in circumstances where the evidence was brief and provided some assistance in determining the final outcome.

As to the submission that Mr Farrah departed from the "pleaded" case by introducing the "habitable point", the court did not believe it materially affected the conduct of the proceeding and found it to be not an irrelevant consideration.

The court ultimately found the issue on whether to awards costs to be a balancing exercise between the public interest and the success of Mr Farrah in the appeal. The court found that while these aspects were finely balanced, the public interest aspect of the case was a particularly significant consideration which warranted the making of no orders as to costs.

Court found overwhelming need for a service station and caretaker's residence in Jimboomba

Ben Caldwell | Ronald Yuen | Elton Morais

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Peet Flagstone City Pty Ltd v Logan City Council and Anor* [2016] QPEC 24 heard before Rackemann DCJ

June 2016

In brief

The case of *Peet Flagstone City Pty Ltd v Logan City Council and Anor* [2016] QPEC 24 concerned an appeal in the Planning and Environment Court commenced by Peet Flagstone City Pty Ltd against the decision of the Logan City Council to approve a development application made by Bluestone Matthews Pty Ltd for a 24 hour service station and caretaker's residence on land located at the corner of a busy intersection of Teviot Road and Cusack Lane, Jimboomba, and which is in close proximity to the Flagstone Priority Development Area.

The court was required to consider the nature and extent of conflict between the proposed development and the *South East Queensland Regional Plan 2009-2031*, the *Beaudesert Shire Planning Scheme 2007* and the *Logan Planning Scheme 2015*, and determine whether there were sufficient grounds to warrant approval of the proposed development despite the conflict.

The court found that the proposed development was in significant conflict with the council's planning schemes. However, there was overwhelming economic, public and community need which warranted an approval of the proposed development.

The court found that the proposed development was not in conflict with the SEQ Regional Plan even though it was an urban activity outside the urban footprint

The land is contained in the Rural Landscape and Regional Production Area, but outside the urban footprint under the SEQ Regional Plan.

The intent of the Rural Landscape and Regional Production Area was to protect land from inappropriate development, particularly urban or rural residential development. Peet contended that the proposed development was in conflict with the Rural Landscape and Regional Production Area, as the proposed development constituted urban development and would impact on the nearby activity centres.

The court first found that the SEQ Regional Plan did envisage service stations being located outside the urban footprint and within areas such as the Rural Landscape and Regional Production Area. This was supported by the fact that service stations of a particular size did not require referral agency assessment in the Rural Landscape and Regional Production Area under the regulatory provisions and there were no identifiable conflicts with the provisions in the SEQ Regional Plan. The court also found that the proposed development did not have an adverse effect on any centre or the character of the Rural Landscape and Regional Production Area.

The court found that the service station component of the proposed development was inconsistent development under the council's planning schemes

The land is contained in the Rural Residential Precinct of the Mount Lindesay Corridor Zone under the Beaudesert Shire Planning Scheme. Under this scheme, the service station component of the proposed development was not identified as consistent development within the Mount Lindesay Corridor Zone and as such it was inconsistent development.

Similarly, the land is contained in the Park Living Precinct of the Rural Residential Zone of the Logan Planning Scheme. The concept of "inconsistent development" was not used under that scheme and instead it identified preferred land uses in the overall outcomes of each precinct of a zone which were required to be met in order to meet the purpose of the zone. The service station component of the proposed development was not a use identified in the overall outcomes of the Park Living Precinct and therefore the purpose of the Rural Residential Zone was not met. As such the proposed development was in conflict with the Logan Planning Scheme.

The town planning expert witnesses called by the council and Bluestone contended that the level of conflict was substantive rather than merely technical. Whereas, the town planning expert witness called by Peet contended that that the level of conflict was significant.

The court however, found that under both of the council's planning schemes the 'inconsistent use' point was relevant and the level of conflict was significant.

The court found that there would be no impact on the structure or network of planned centres despite finding that the proposed development was 'out of centre' development under the council's planning schemes

Peet contended that the proposed development would impact on the planned structure of urban centres and compromise the network of planned centres, particularly in the Flagstone Priority Development Area.

The town planning expert witnesses called by the council and Bluestone contended that service stations were location-flexible land use types and accordingly, there should be flexibility in the sitting of service stations.

Whilst the court found that the proposed development was out of centre development, there would be no impact on the structure or network of planned centres. This finding was supported by the fact that the proposed development was of an appropriate scale for its purpose, the proposed development was a use of a kind which did not have a specific locational need, there was both economic and community need for the proposed development and the existing opportunities within the Flagstone Priority Development Area were not likely to proceed in the short term.

The court found that the proposed development would not impact on the character of the locality

Peet contended that the proposed development was in conflict with the provisions of the council's planning schemes in relation to character and identity.

The court however resolved this issue expeditiously as Peet's town planning expert witness in a joint report stated that the building design and layout of the facility on the land was not a matter which would determine whether the proposed development would be ultimately approved or refused.

The court found that proposed development would not significantly impact on the character of the locality as the proposed development was located on the corner of a busy intersection of 2 significant traffic routes and the building design and layout gave ample separation from adjacent rural residential development.

The court found that there were sufficient grounds to overcome the conflict

Peet contended that there was no need for the proposed development as there was an approval for a service station at the nearby Flagstone Village and service stations had been earmarked to be accommodated in the Flagstone Priority Development Area specifically a Coles express.

Having regard to the evidence of the parties' need experts and a representative of Peet, the court had little confidence that the service station at Flagstone Village would proceed within the life of the approval. In the court's view, there was no prospect of a Coles Express service station operating at any time prior to 2018 in the Flagstone Priority Development Area.

The court found that the proposed development was suitably located and of an appropriate size to cater for the need and there was an overwhelming economic, public and community need for a service station in the locality.

Court found insufficient grounds to approve partial demolition of a pre-1911 building despite conflicts with the planning scheme

Georgina Taylor | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Synergy Property Partners No. 2 Pty Ltd v Brisbane City Council* [2016] QPEC 21 heard before Everson DCJ

July 2016

In brief

The case of *Synergy Property Partners No. 2 Pty Ltd v Brisbane City Council* [2016] QPEC 21 concerned an appeal in the Planning and Environment Court by applicant, Synergy, against the decision of the council to refuse a development application for a preliminary approval to carry out building work being the partial demolition of a pre-1911 building and for a development permit for a material change of use of premises for a shop, office and food and drink outlet, being a coffee kiosk, at Doggett Street, Teneriffe.

The issues in dispute in the appeal primarily related to conflicts with the *Brisbane City Plan 2014* as a consequence of both the proposed land uses and the form of the proposed development, focusing on issues of need and character.

The court dismissed the appeal on the basis that the proposed development was in conflict with the *Brisbane City Plan 2014* and there was an absence of sufficient grounds to justify an approval despite the conflict.

Court found the proposed development was in a major conflict with the Low-medium density residential zone code as the proposed non-residential uses fell outside the scope of the development contemplated in that zone

The site is located in the Low-medium density residential zone and contains a pre-1911 building, which is one of six contiguous traditional character buildings. The purpose of the zone code relevantly stated that it was to "*provide for a mix of dwelling types supported by compatible small-scale non-residential uses that are positioned along identified active frontages or individually located.*"

The proposed development fell outside the definition of 'small-scale non-residential use', which relevantly included a shop and an office, but did not include a food and drink outlet.

In relation to the proposed shop and office uses, the overall outcomes for the zone code relevantly provided that development for small-scale non-residential uses, where not within an active frontage area, was to have a gross floor area of less than 250m^2, serve local residents' day-to-day needs and not undermine the viability of a nearby centre.

Both parties called experts in retail economics, who agreed that the proposed development would not undermine the viability of nearby centres due to its small scale. However, the court found that there was no evidence that the shop and office would cater for local residents or serve their day-to-day needs.

The proposed coffee kiosk was not contemplated in the Low-medium density residential zone. The council's economics expert gave evidence, which was accepted by the court, that there were already 13 coffee shops within 500m of the site and that any demand for the proposed use as a result of population growth could be accommodated on appropriately zoned land in Mixed use zones.

The court, having regard to the nature of the proposed uses, found that there was a major conflict with the Low-medium density residential zone code as the proposed uses fell outside the scope of non-residential uses contemplated for the zone.

Court found the proposed development was in significant conflict with the Low-medium density residential zone code, the small-scale non-residential uses code and the centre or mixed use code due to the commercial nature of the proposed development and its impact on traditional character of the building

The council submitted that the commercial character of the proposed development and the failure to provide an appropriate transition to the adjoining character house resulted in conflict with various provisions of the *Brisbane City Plan 2014*, including the Low-medium density residential zone code, the small-scale non-residential uses code and the centre or mixed use code.

The applicable codes relevantly required development to be "*of a form and scale that reinforces a distinctive subtropical character of low to low-medium rise buildings*"; to respond "*to the surrounding character and architecture*"; and to complement "*the prevailing scale, built form, setting and streetscape character of a surrounding zone in the residential zones category*".

In relation to the issues of character and transition, both parties called architectural experts with considerable experience in heritage buildings. The council's architectural expert gave evidence that the proposed development presented as essentially commercial in character, which was confirmed by Synergy's architectural expert under cross-examination. The council's architectural expert also gave evidence that the proposed development was not sympathetic to the traditional character of the building which was accepted by the court.

In relation to the issue of transition to the adjoining character house, the council's architectural expert and town planning expert conceded that the height and screening of the proposed development would assist with providing a sensitive transition. However, the court accepted the council's architectural expert's evidence that the presence of a coffee kiosk at the boundary adjoining the neighbouring character house did not provide a sensitive transition.

The proposed development was found to be in significant conflict with the character provisions of the Low-medium density residential zone code, the small-scale non-residential uses code and the centre or mixed use code, particularly where the house was one of six contiguous traditional character buildings. The court also found that the proposed development was not appropriate for its location.

Court found the proposed development was in conflict with the Fortitude Valley neighbourhood plan code as the proposed development detracted from the cohesive traditional timber and tin character streetscape

The applicant submitted that the proposed development was not in conflict with the Fortitude Valley neighbourhood plan code, and that any inconsistencies with other codes were of no consequence because the neighbourhood plan code would prevail over other codes.

The dispute focused on whether the proposed development was in conflict with performance outcome PO1 of the neighbourhood plan code, which required that development "*contributes to a cohesive streetscape and built form character*". The applicant's architectural expert took a broad view of the streetscape and gave evidence that the proposed development "*will integrate residential and commercial characteristics which will visually relate to both the character of the adjoining detached houses and the predominantly commercial built form character of the street*".

The council's architectural expert took a narrow view of the streetscape and gave evidence that the house "*currently forms part of a very cohesive streetscape of five 'timber and tin' character houses*" and that the proposed development detracted from the "*cohesive traditional timber and tin character streetscape*" due to both its commercial character and the coffee kiosk.

The court preferred the council's architectural expert evidence and found that the proposed development was in conflict with PO1 of the neighbourhood plan code. The court further found that there was no inconsistency between the neighbourhood plan code and the other relevant codes with which the proposed development was in conflict and that these codes could all be read harmoniously. In any event, the court found that the strategic framework prevailed over all of the codes considered, to the extent of any inconsistency, and it clearly contemplated development for retail and commercial uses in accordance with the zoning pattern.

Court found the maintenance and improvement of a pre-1911 building to be insufficient grounds to justify approval of the proposed development despite the conflicts

The only ground raised by the applicant as being sufficient to justify approval of the proposed development despite the conflicts was that it was a matter of public interest that pre-1911 buildings were maintained and improved. The court did not find this to be a sufficient ground to justify approval of the proposed development despite the conflicts noting that the reuse of the house could have been achieved without a commercial use.

Costs had to be incurred in any event – each party is to bear its own costs

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Allen & Anor v Cairns Regional Council & Anor (No. 3)* [2016] QPEC 25 heard before Andrews SC DCJ

July 2016

In brief

The case of *Allen & Anor v Cairns Regional Council & Anor (No. 3)* [2016] QPEC 25 concerned an application made in the Planning and Environment Court for costs by Barry Gordon Allen, Edgewill Pty Ltd and Cairns Regional Council against Rosanne and Darryl Barnes arising from a declaratory proceeding commenced by Mr Allen and Edgewill in respect of the lawfulness of the existing use of the nursery.

In the declaratory proceeding, Mr Allen and Edgewill successfully obtained the declaration. However, the court determined not to make a costs order following its consideration of a Calderbank offer which was rejected by Mr and Ms Barnes and the matters identified in section 457 of the *Sustainable Planning Act 2009*.

Whilst Mr Allen, Edgewill and the council were successful in the proceeding, the court found that the success was contributed to by the role of Mr and Ms Barnes as respondents

The court noted that Mr Allen, Edgewill and the council had complete success in the proceeding. However, in the court's view, had Mr and Ms Barnes not been parties to the proceeding, the oral evidence of Mr Allen would not have been led which contributed to the success in the proceeding.

Mr Allen, Edgewill and the council would have incurred substantial legal cost, with or without Mr and Ms Barnes as respondents

The court found that Mr and Ms Barnes had no commercial interest in the proceeding whilst Mr Allen and Edgewill had a commercial incentive to obtain the declarations.

Even if Mr and Ms Barnes did not oppose the declarations sought, the declarations could not have been made by way of a consent order and Mr Allen and Edgewill would have had to satisfy the court that the declarations were necessary and appropriate and that there were factual and legal bases to make such declarations.

Consequently, Mr Allen and Edgewill would have incurred substantial legal costs with or without having Mr and Ms Barnes as respondents in order to protect their commercial interests.

As to the council, it had a duty to ensure that Mr Allen and Edgewill adequately addressed all necessary factual and legal issues when applying for declarations. As a result, the council would also have incurred substantial legal costs with or without Mr and Ms Barnes as respondents.

Just because the solicitors for Mr and Ms Barnes were assured in relation to the prospects of success of the proceeding, it did not mean that Mr and Ms Barnes had acted unreasonably or participated in the proceeding for an improper purpose or without reasonable prospects of success

Mr Allen, Edgewill and the council argued that Mr and Ms Barnes had acted unreasonably leading up to the proceeding or had participated in the proceeding for an improper purpose or without reasonable prospects.

The court did not accept the submission made by Mr Allen and Edgewill. In the court's view, the commencement of the declaratory proceeding was not because of the refusal of Mr and Ms Barnes to concede that there was an existing lawful use of the nursery or to resolve the Planning and Environment Court appeal against the council's approval of Edgewill's development application for the nursery.

Rather, it was in the interest of Mr Allen and Edgewill to circumvent Mr and Ms Barnes' appeal by applying for a declaratory relief with the support of the council.

The court found that Mr and Ms Barnes did not participate in the proceeding for an improper purpose. The court also found that Mr and Ms Barnes' case was not without reasonable prospects of success. The assurances of the solicitors for Mr Allen and Edgewill and the council about their genuine view of the prospects of success of the proceeding were no more than untested advice of Mr Allen about various historical factual matters.

Court found Mr and Ms Barnes had not acted unreasonably and Mr Allen and Edgewill's case was not so compelling which would warrant Mr and Ms Barnes not proceeding with the matter

The council submitted that Mr and Ms Barnes' arguments on the characterisation of the use depended on a strained interpretation of the planning scheme which was directly against the established authority with which the court disagreed.

Mr and Ms Barnes advanced their arguments in reliance of an opinion of an experienced agricultural scientist who did not have the benefits of the oral evidence about the factual matters given during the hearing. In the court's view these matters only became obvious when the oral evidence was given which were not so obvious from the affidavit material or expert reports.

In the circumstances the court found that Mr and Ms Barnes' agricultural expert's opinion was based on a different factual hypothesis and was plausible.

As to Mr and Ms Barnes' refusal to accept a settlement proposal, the court observed that there was no suggestion that they ignored legal advice to resolve the matter and the facts of this case were distinguishable to those of *Hydrox Nominees Pty Ltd v Noosa Shire Council (No. 2)* [2014] QPEC 60. Furthermore, the court found that Mr Allen and Edgewill's case was not strong enough to warrant Mr and Ms Barnes not proceeding with the matter.

Mr and Ms Barnes had a genuine concern on the chemical spray drift and any resolution of this issue would be a matter of public interest

As to whether the proceeding involved a matter of public interest the court found that the proceeding was not concerned with impacts on Mr and Ms Barnes or amenity.

However Mr and Ms Barnes had a genuine concern on the chemical spray drift from the nursery and this issue was raised in the declaratory proceeding whilst it was more relevant in the Planning and Environment Court appeal.

In the court's view any resolution of this issue in the declaratory proceeding and the appeal would amount to a matter of public interest and it was not unreasonable for Mr and Ms Barnes to maintain their concerns.

Even if Mr and Ms Barnes accepted the Calderbank offer and withdrew, Mr Allen, Edgewill and the council would have been required to proceed the matter to a hearing in order to obtain the declarations

The court also considered the Calderbank offer made by the council to Mr and Ms Barnes which was made to the effect that indemnity costs would not be sought if the parties agreed to the declarations being made by consent.

It was observed by the court that the declarations sought could not be made by consent and the court would be required to be satisfied that there was sufficient evidence to make the declarations.

On this basis, even though Mr and Ms Barnes had withdrawn from the proceeding, Mr Allen, Edgewill, and the council would still be required to provide evidence to satisfy the court in making the declarations. Mr Allen, Edgewill and the council would therefore be required to proceed the matter to a hearing in order to obtain the declarations and costs would have been incurred in any event.

In the circumstances the court did not consider it was unreasonable for Mr and Ms Barnes to not accept the council's Calderbank offer.

COLIN BIGGERS & PAISLEY LAWYERS

Land Court has sole discretion to determine whether to award costs

Nina Crew | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Land Court in the matter of *Mahoney & Ors v Chief Executive, Department of Transport and Main Roads (No. 5)* [2016] QLC 36 heard before WA Isdale

July 2016

In brief

The case of *Mahoney & Ors v Chief Executive, Department of Transport and Main Roads (No. 5)* [2016] QLC 36 concerned applications for costs made by the Chief Executive, Department of Transport and Main Roads in the Land Court against John Mahoney, Kathryn Mahoney and the estate of Austin Mahoney in relation to two hearings which took place in 2012 and 2015 for the compulsory acquisition of the former landowners' land.

The court considered the legislative framework within which the court may order costs under section 34 of the *Land Court Act 2000* and section 27 of the *Acquisition of Land Act 1967*. It was determined that the provisions of the *Acquisition of Land Act 1967* prevailed over the provisions for costs in the *Land Court Act 2000*.

The court awarded costs to the department for the 2015 hearing only as it found that the former landowners' conduct which delayed the resolution of the matter was unreasonable.

Court found that the award of costs was in its discretion and was to be exercised judicially on the basis of reasons that were justifiable

In considering the application made by the department, the court observed that it "*should not be bound by any presumptive rule or principle in exercising its discretion but must consider all of the facts and circumstances of the case*".

Section 27(1) of the *Acquisition of Land Act 1967* conferred the court with a discretion to award costs within the bounds of section 27(2) of the Act. The court was required to exercise its discretion judicially on the basis of reasons that were not arbitrary and could be justified.

The court relevantly considered the decision in *Mio Art Pty Ltd & Ors v Brisbane City Council* [2010] QLC 86 which outlined the following matters that were relevant to the exercise of the discretion by the court:

- There had to be a strong justification for awarding costs against a claimant where the effect of the costs order would "*erode the benefit of the just compensation recovered as a consequence of the Court's determination*".
- The quantum of the claims as compared with the amount of the court's determination for compensation and whether the claimant had acted unreasonably and unnecessarily to force the authority into litigation or "*pursued a vexatious, dishonest or grossly exaggerated claim*".

Department sought costs of and incidental to the 2012 and 2015 hearings as the department achieved total success and the former landowners did not achieve an outcome which was any better than the department's settlement offer

In 2012, the department successfully appealed to the Land Appeal Court the original decision made by the Land Court in relation to whether the "*San Sebastian principle*" applied. The former landowners were refused leave to appeal in the Court of Appeal.

In December 2012, the department made an offer to the former landowners to settle the matter for the sum of $345,000. The former landowners did not accept the settlement offer and disputed the value of the compensation.

Following a number of attempts to resolve the matter, the department had to bring an application to the Land Court in 2015 in order to progress the litigation. The former landowners responded with their own application to the Land Court disputing the amount of the compensation.

Both applications were heard by the court in December 2015. The department was successful at the hearing and sought its costs of and incidental to the 2012 hearing incurred after August 2012 and also its costs of and incidental to its application in 2015 on the basis that the department was successful and the outcome achieved by the former landowners was no better than the December 2012 offer.

Court found that an award of costs for the 2012 hearing would deprive the former landowners the full benefit of the compensation

The department submitted that the general rule in relation to costs following the event should be applied as the 2012 hearing involved a determination of a legal question rather than a conventional hearing of competing valuations which was more akin to a civil trial. The department further submitted that the former landowners' case was weak to further support its submission.

The former landowners refuted the claim and submitted that their case was not weak. The former landowners further submitted that a lengthy investigation was undertaken and there was difficulty to obtain information. It was emphasised by the former landowners that considerable efforts were made to deal with the dispute outside of the court process.

The court accepted that the legal question was raised in an attempt to limit the proceedings as opposed to any vexatious purpose. The parties had acted genuinely and were not purposely unreasonable to force the other into litigation. In this instance, the court considered it inappropriate to treat the dispute as if it was a civil case.

The court did not make an order as to costs in relation to the 2012 hearing as in "*making the order sought would deprive the applicants of the full benefit of the compensation which has been determined to be just and reasonable*".

Court awarded costs to the department in relation to the 2015 hearing as it found that the unreasonable conduct of the former landowners was enough to erode the benefit of the compensation

The department submitted that the former landowners' dispute on the compensation amount was unreasonable and had forced it into litigation.

The basis of the former landowners' rebuttal of the department's claim was that they were seeking to have the matter resolved out of court and were focussing on obtaining a fair compensation. The former landowners did not consider that their conduct was capable of forcing the department to pursue its application in 2015.

The court found that the 2015 hearing was distinct from the 2012 hearing. It was necessary for the department to bring on an application to resolve the matter because the former landowners were delaying a resolution based on an understanding which was "*without merit and could properly be characterised as unreasonable*".

The court held that the department had conducted its application in a proper and efficient manner and found that "*the unreasonableness of the applicants' conduct in the 2015 applications is sufficient to weigh decisively against the erosion of the compensation awarded*". The former landowners were ordered to pay the department's costs of and incidental to the applications heard in 2015.

COLIN BIGGERS & PAISLEY LAWYERS

Queensland infrastructure planning and charging framework – past, current and future

Ian Wright | Ronald Yuen | Shaun Pryor

This article discusses the key elements of Queensland's capped infrastructure planning and charging framework in the previous, current and future regimes

August 2016

Introduction

Infrastructure planning and charging framework

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

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

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

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

On 25 May 2016, the *Planning Act 2016* (**Planning Act**) was assented to but has yet to commence. It adopts the current capped framework for local governments subject to a limited number of changes (**future capped framework**).

Themes of the paper

This paper has four themes:

- First, it considers the key elements of the current capped framework as compared with the previous capped framework.
- Second, it considers the key changes of the future capped framework arising from the Planning Act.
- Third, it considers some suggested improvements to the current capped framework which are not addressed in the future capped framework under the Planning Act.
- Finally, it offers some conclusions about the impact of the previous, current and future capped frameworks.

Legal and practical implications of the current capped framework

Key elements of the current capped framework

The current capped framework comprises the following key elements:

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

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

Infrastructure scope

The current capped framework, similar to the previous capped framework, is based on a definition of development infrastructure and includes water cycle management infrastructure, transport infrastructure, public parks infrastructure and land for specified local community facilities.[16]

However, unlike the previous capped framework, development infrastructure no longer includes the local function of State-controlled roads in relation to the transport infrastructure component of development infrastructure.[17]

Identification of trunk and non-trunk infrastructure

The current capped framework, similar to the previous capped framework, empowers a local government to identify development infrastructure as trunk infrastructure in a local government infrastructure plan (called an **LGIP**). Development infrastructure that is not identified as trunk infrastructure in the LGIP (**LGIP unidentified infrastructure**) will generally be non-trunk infrastructure.[18]

However, unlike the previous capped framework, the LGIP unidentified infrastructure can also be made trunk infrastructure in the following circumstances:

- *Necessary infrastructure condition* – The LGIP unidentified infrastructure is required by way of a necessary infrastructure condition, where the LGIP unidentified infrastructure services development consistent with the assumptions about the type, scale, location or timing of future development stated in the LGIP.[19]
- *Conversion application* – The LGIP unidentified infrastructure which is the subject of a condition for non-trunk infrastructure becomes trunk infrastructure by the approval of a conversion application.

Infrastructure planning instrument

The current capped framework requires a local government to include an LGIP in its planning scheme if it intends to levy charges for or impose conditions requiring the provision of trunk infrastructure under Chapter 8 of the SPA.[20] An LGIP under the current capped framework is similar to a priority infrastructure plan (**PIP**) under the previous capped framework.

The current capped framework provides a number of mechanisms for transitioning the various existing infrastructure planning instruments of local governments to the current capped framework. Until 1 July 2016 or a later date decided by the Minister (being before 1 July 2018)[21] (the **cut-off date**), the following applies for local governments which have not included an LGIP in their planning scheme:

- *Local government with a PIP* – For a local government that had a PIP under the previous capped framework, the PIP becomes an LGIP.[22]
- *Local government without a PIP* – For a local government that did not prepare a PIP under the previous capped framework, the local government may make a modified charges resolution which identifies trunk infrastructure and states the required standards of service and establishment costs.[23]

Local governments which have not included an LGIP in their planning scheme before the cut-off date:[24]

- *No infrastructure charges* – Cannot levy an infrastructure charge.
- *Limited conditioning power* – Can only impose a condition about non-trunk infrastructure.

State infrastructure charging instrument

The current capped framework, similar to the previous capped framework, empowers the Minister to prepare a State planning regulatory provision (called a **SPRP (adopted charges)**).[25]

The *State Planning Regulatory Provision (adopted charges)* dated July 2012 made under the previous capped framework is deemed to be the SPRP (adopted charges) under the current capped framework and it remains the current SPRP (adopted charges).[26]

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16 See section 627 of SPA and Schedule of SEQ Water Act.
17 See Schedule 3 of the *Sustainable Planning Act 2009* (28 May 2014 reprint) (**28 May SPA**).
18 See section 627 of SPA and Schedule of SEQ Water Act.
19 See section 647 of SPA and section 99BRCR of SEQ Water Act.
20 See section 628A of SPA.
21 See section 997 of SPA.
22 See sections 982 of SPA.
23 See sections 979 and 996 of SPA.
24 See section 628A of SPA.
25 See section 629(1) of SPA; cf. section 648B of 28 May SPA.
26 See section 983(1) of SPA.

On 29 July 2016, the Adopted Infrastructure Charges Schedule 2016 replaced Schedule 1 of the current SPRP (adopted charges) thereby increasing the amount of the maximum adopted charges for development.[27]

Local infrastructure charging instrument

The current capped framework, similar to an adopted infrastructure charges resolution under the previous capped framework, empowers a local government to adopt a resolution (called a **charges resolution**).[28]

In addition to the matters prescribed under the previous capped framework, a charges resolution must provide for the following:

- *Charges breakup* – A charges breakup for all adopted charges between the local government and distributor-retailer.[29]
- *Offset and refund calculation methodology* – A methodology for working out the cost of infrastructure for an offset and refund.[30] The methodology must be consistent with the parameters provided for under the SPRP (adopted charges) or the *Statutory guideline 03/14 Local government infrastructure plans* (**LGIP guideline**).[31]
- *Conversion criteria* – Criteria for deciding a conversion application, which must be consistent with the parameters provided for under the LGIP guideline.[32]

A charges resolution, similar to an adopted infrastructure charges resolution, may provide for automatic increases in a levied charge from the date it is levied to the date it is paid, which cannot be greater than the maximum adopted charge or the increase by the 3 yearly PPI index average.[33] It is relevant to note that under the previous capped framework the increase could not be greater than the maximum adopted charge or the increase by the consumer price index.[34]

Infrastructure charge

The current capped framework empowers a local government to give an applicant an infrastructure charges notice (called an **ICN**)[35] which levies a charge by applying the adopted charge (called a **levied charge**)[36] under a charges resolution in the following circumstances:[37]

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

Under the previous capped framework, an adopted infrastructure charge was levied by way of an adopted infrastructure charges notice.[38]

Infrastructure charges notice

The requirements for an ICN and an adopted infrastructure charges notice are substantially similar.[39] However, an ICN must also state the following:

- *Details of the calculation of the levied charge* – How the amount of the levied charge has been worked out.[40]
- *Details of an offset or refund* – Whether an offset or refund applies and if so, the information about the offset or refund including the timing of the refund.[41] However, this requirement may be waived by the recipient of the ICN.[42]

  This provides greater certainty to a development proponent about its financial liability for the provision of infrastructure for development without the need for an infrastructure agreement. However, a local government is required to determine its liability for an offset or refund and its amount at the decision stage of the IDAS process; whilst under the previous capped framework this liability would have been determined by the negotiation of an infrastructure agreement.

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27 See sections 629(2) and (3) of SPA; Queensland Government Gazette No. 75, Friday 29 July 2016; Adopted Infrastructure Charges Schedule 2016.
28 See section 630(1) of SPA and section 99BRCF(1) of SEQ Water Act; cf sections 648D(1) and 755KA(1) of 28 May SPA.
29 See section 632(4) of SPA.
30 See section 633(1) of SPA and section 99BRCH(1) of SEQ Water Act.
31 See section 633(2) of SPA and section 99BRCH(2) of SEQ Water Act.
32 See section 633A of SPA and section 99BRCHA of SEQ Water Act.
33 See sections 631(3) to (6) of SPA and sections 99BRCG(3) to (6) of SEQ Water Act..
34 See sections 648D (9) and (10) and 755KA(2), (3) and (4) of 28 May SPA.
35 See sections 635(1) and (2) of SPA and sections 99BRCI(1) and (2) of SEQ Water Act.
36 See sections 627 and 635(6) of SPA and Schedule and section 99BRCI(6) of SEQ Water Act.
37 See section 635(1) of SPA and section 99BRCI(1) of SEQ Water Act.
38 See sections 648F and 755KB(3) of 28 May SPA.
39 See section 637 of SPA and section 99BRCK of SEQ Water Act; cf. sections 648F and 755KB(3) of 28 May SPA.
40 See section 637(1)(b) of SPA and section 99BRCK(1)(b) of SEQ Water Act.
41 See section 637(1)(f) of SPA and section 99BRCK(1)(f) of SEQ Water Act.
42 See section 637(1A) of SPA and section 99BRCK(1A) of SEQ Water Act.

- *Establishment cost* – In order to identify the details of an offset or refund it will be necessary to work out the cost of the trunk infrastructure. This will likely require reference to the establishment cost of infrastructure in the schedule of works in the plans for trunk infrastructure in the LGIP; although the process for determining the establishment cost in these circumstances is by no means clear.

  It is relevant to note the following features of the definition of establishment cost under the current capped framework[43] are different from the definition under the previous capped framework[44]:

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

  Based on the definition of establishment cost under the current capped framework, the cost of infrastructure stated in an LGIP may not be the establishment cost of infrastructure for the purpose of determining an offset or refund under the current capped framework.

- *Information notice* – The decision, the reasons for the decision and details of the appeal rights.[45]

Similar to the previous capped framework, the recipient of an ICN may enter into an agreement with the local government about the payment of the levied charge or providing infrastructure instead of paying the levied charge.[46] However, the power of a local government to give a land contribution notice in lieu of, or in addition to the payment of infrastructure charges under the previous capped framework has been removed from the current capped framework.[47]

Levied charge

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

- *Additional demand* – A levied charge may only be for additional demand placed upon the trunk infrastructure which will be generated by the development.[48] A levied charge must therefore exclude demand on the trunk infrastructure from an existing lawful use, a previous lawful use or other lawful development that may be carried out without a further development permit.[49]

  Under the previous capped framework, an adopted infrastructure charges resolution may provide a discount to an adopted infrastructure charge taking into account the existing usage of trunk infrastructure by the premises on which the development is carried out.[50] Other than that, the previous capped framework did not contain any requirements for local governments to take into account a previous lawful use or other lawful development in working out the charges levied for development.

  It is noted that the "other lawful development that may be carried out without a further development permit" includes the following development:

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

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

- *Levied charge attaches to the land* – A levied charge is payable by the applicant including any person in whom the benefit of the application vests,[51] such as an owner of the subject premises to which a development approval applies.

  Furthermore a levied charge attaches to the land such that it can be recovered from owners and their successors in title.[52]

43 See section 627 of SPA and section 99BRCC of SEQ Water Act.
44 See Schedule 3 of 28 May SPA.
45 See sections 637(2) and 627 of SPA and section 99BRCK(2) and Schedule of SEQ Water Act.
46 See section 639 of SPA and section 99BRCM of SEQ Water Act.
47 See sections 648K(3) and (4) and 755MA(4) and (5) of 28 May SPA.
48 See section 636(1) of SPA and section 99BRCJ(1) of SEQ Water Act.
49 See section 636(2), (3), (3A) and (4) of SPA and section 99BRCJ(2), (3), (3A) and (4) of SEQ Water Act.
50 See section 648D(1)(d) of 28 May SPA.
51 See sections 635(6)(b) and 628(1)(a) of SPA and section 99BRCI(6)(b) of SEQ Water Act.
52 See sections 635(6)(b) and (c) of SPA and sections 99BRCI(6)(b) and (c) of SEQ Water Act; cf. *Montrose Creek Pty Ltd & Manningtree (Qld) Pty Ltd v Brisbane City Council* (2013) QPELR 47.

Infrastructure charge versus development charge

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

- *Infrastructure charge is not a development charge* – A levied charge is an infrastructure charge which has the primary goal of recovering the cost of trunk infrastructure to be provided by a local government to service development.[53]

  A levied charge is different to a development charge which is a charge designed to internalise the marginal external costs that are imposed by development and which has the primary goal of influencing the location and nature of development.[54]

- *Average cost approach not marginal cost approach* – The maximum adopted charges in the SPRP (adopted charges) are calculated by reference to an average cost State-wide approach; whilst the adopted charges in a charges resolution upon which a levied charge in an ICN is based are calculated by reference to an average cost municipality-wide approach which is limited to the maximum amount prescribed by the State.[55]

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

Development charge

The current capped framework, similar to the previous capped framework, empowers a local government to impose a condition on a development approval requiring the payment of additional trunk infrastructure costs for development (called an **additional payment condition**) if it meets the following criteria:[56]

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

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

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

Conditions for trunk and non-trunk infrastructure

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

- *Head of power* – The condition must expressly identify one of the following heads of power for the imposition of the condition:[57]
  - *Necessary infrastructure condition* – A condition can be imposed requiring the provision of trunk infrastructure if the trunk infrastructure is necessary to service the subject premises and has not been provided or has been provided but is inadequate.[58] There are two types of necessary infrastructure conditions:
    - *LGIP identified infrastructure* – A condition requiring at a stated time, LGIP identified infrastructure or different trunk infrastructure delivering the same desired standard of service, if the LGIP identifies adequate trunk infrastructure to service the subject premises.[59]

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53 Productivity Commission (2011) Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment, Research Report, Volume 1, April 2011, page 198.
54 Productivity Commission (2011) Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment, Research Report, Volume 1, April 2011, page 198.
55 Clinch JP and O'Neill E Designing Development Planning Charges: Settlement Patterns, Cost Recovery and Public Facilities, Urban Studies, 15 March 2010, page 2152.
56 See section 650(1) of SPA and section 99BRCU(1) of SEQ Water Act.
57 See section 335(1)(e)(iii) of SPA and section 99BRAI(2)(e) of SEQ Water Act..
58 See sections 645, 646 and 647 of SPA and sections 99BRCP, 99BRCQ and 99BRCR of SEQ Water Act.
59 See section 646 of SPA and section 99BRCQ of SEQ Water Act.

- *LGIP unidentified infrastructure* – A condition requiring development infrastructure necessary to service the premises at a stated time, if the LGIP does not identify adequate trunk infrastructure to service the subject premises and the development infrastructure services development consistent with the assumptions stated in the LGIP about the type, scale, location or timing of future development.[60]

- *Non-trunk infrastructure condition* – A condition can be imposed requiring the provision of non-trunk infrastructure for the following limited purposes:[61]
  - *Internal network* – A network or part of a network internal to the premises.
  - *Connection to external network* – The connection of the premises to an external infrastructure network.
  - *Safety or efficiency of network* – The protection or maintenance of the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.

- *Relevant and reasonable requirement* – The condition must also satisfy the relevant and reasonable requirement of the SPA.[62] In the case of a necessary infrastructure condition, the relevant and reasonable requirement is deemed to be met if the following are satisfied:[63]
  - *Necessary to service subject premises* – The infrastructure is necessary to service the subject premises.
  - *Efficient and cost effective solution* – The infrastructure is the most efficient and cost effective solution for servicing other premises in the general area of the subject premises.
  - *Infrastructure on the subject premises* – The infrastructure, if provided on the subject premises, is not an unreasonable imposition on the development or the use of the subject premises as a consequence of the development.

This is significantly different from the previous capped framework where a necessary infrastructure condition could only be imposed if the trunk infrastructure is identified in the PIP or an adopted infrastructure charges resolution of the local government.[64]

Furthermore, the necessary infrastructure condition for LGIP unidentified infrastructure enables a development proponent to seek an offset or refund for the LGIP unidentified infrastructure by the following:

- first, requesting the imposition of a necessary infrastructure condition on the basis that the design of the infrastructure meets the relevant conversion criteria including the desired standards of service;
- second, if a necessary infrastructure condition is not imposed, making a conversion application to convert the infrastructure to trunk infrastructure.

Conversion applications for non-trunk infrastructure conditions

Conversion application criteria

The current capped framework, unlike the previous capped framework, empowers an applicant for the development approval to make a conversion application to the local government to convert non-trunk infrastructure imposed in a non-trunk infrastructure condition to trunk infrastructure, if the construction of the non-trunk infrastructure has not commenced.[65]

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

- *Non-trunk infrastructure condition* – The non-trunk infrastructure condition no longer has effect.[66]
- *Necessary infrastructure condition* – The local government may amend the development approval by imposing a necessary infrastructure condition for the trunk infrastructure.[67]
- *ICN* – If a necessary infrastructure condition is imposed, the local government must give an ICN or amend an existing ICN to state whether an offset or refund applies and if so, the details of the offset or refund.[68]

The conversion application process raises the following issues:

- *Development approval* – The conversion application can only be lodged after a development approval takes effect. It cannot be commenced whilst an appeal is on foot for the development approval; presumably on the basis that any issue in respect of the status of the infrastructure will be resolved as part of the appeal.
- *Time limitation* – There is no time limit for the making of a conversion application other than before the commencement of the construction. This gives rise to uncertainty to a local government about when development infrastructure may become trunk infrastructure and consequently its liability to an offset or refund

60 See section 647 of SPA and section 99BRCR of SEQ Water Act.
61 See section 665 of SPA and section 99BRDJ of SEQ Water Act.
62 See sections 345 of SPA and section 99BRAJ of SEQ Water Act.
63 See section 648 of SPA and section 99BRCS of SEQ Water Act.
64 See section 649 of the 28 May SPA.
65 See sections 658 and 659 of SPA and sections 99BRDD and 99BRDE of SEQ Water Act.
66 See section 662(2) of SPA and section 99BRDH(2) of SEQ Water Act.
67 See section 662(3) of SPA and section 99BRDH(3) of SEQ Water Act.
68 See section 662(4) of SPA and section 99BRDH(4) of SEQ Water Act.

which would have a financial implication on the local government. However, this issue has been addressed in the Planning Act, which is further discussed in section 3 below.

- *Conversion* – It enables a development proponent to design development infrastructure servicing the proposed development such that it meets the relevant conversion criteria.

Conversion application assessment criteria

A conversion application is to be assessed against the criteria included in a charges resolution[69] which must be consistent with the parameters provided for under the LGIP guideline (**Adopted Conversion Criteria**).[70]

The Adopted Conversion Criteria must be consistent with the following:[71]

- *Planning rationale* – The context, planning and infrastructure standards for the relevant area. The context, planning and infrastructure standards are those stated in the applicable LGIP and planning scheme. The *relevant area* is the area of the *local authority* and not the priority infrastructure area,[72] being the local government area for the relevant local government and the geographic area for the relevant distributor-retailer.
- *Default conversion criteria rationale* – The principles underlying the default conversion criteria.

The LGIP guideline does not identify the underlying principles of the following default conversion criteria; leaving their determination to local authorities and development proponents until they are determined by the Planning and Environment Court:[73]

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

Offsets and refunds for trunk infrastructure and development charge

The current capped framework, unlike the previous capped framework, provides a more defined framework for an offset or refund for trunk infrastructure and a development charge.

Necessary infrastructure condition

The current capped framework requires a local government, which has imposed a necessary infrastructure condition requiring the provision of trunk infrastructure, where trunk infrastructure services or is planned to service premises other than the subject premises, to take the following actions:

- *Offset* – Offset the cost of the infrastructure against the levied charge, if the cost of the trunk infrastructure is equal to or less than the levied charge.[74]
- *Refund* – Refund to the applicant an amount equal to the difference between the establishment cost of the trunk infrastructure and the levied charge, if the cost of the trunk infrastructure exceeds the levied charge.[75]
- *Identification of an offset and refund* – Identify in an ICN whether an offset or refund applies and if so the details of the offset or refund.[76]
- *Recalculation of the establishment cost for trunk infrastructure* – Where requested by an applicant, recalculate the establishment cost of the trunk infrastructure using the methodology in the charges resolution and amend the ICN accordingly.[77]

Additional payment condition

The current capped framework also requires a local government which has imposed an additional payment condition to refund to the payer the following:

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69 See section 633A(1) of SPA and section 99BRCHA(1) of SEQ Water Act.
70 See section 633A(2) of SPA and section 99BRCHA(2) of SEQ Water Act.
71 See section 4.2.1 of the LGIP guideline.
72 See section 4.2 of the LGIP guideline.
73 See section 4.2.2 of the LGIP guideline.
74 See sections 649(1) and (2) of SPA and sections 99BRCT(1) and (2) of SEQ Water Act.
75 See section 649(1) and (3) of SPA and sections 99BRCT(1) and (3) of the SEQ Water Act.
76 See section 637(1)(f) of SPA and section 99BRCK(1)(f) of the SEQ Water Act.
77 See section 657 of SPA and section 99BRDC of the SEQ Water Act.

- *Development in PIA* – The proportion of the establishment cost of the infrastructure that may be apportioned reasonably to other users of the infrastructure and has been, is or is to be, the subject of a levied charge by the local government.[78]
- *Cessation of development approval* – Any part of the payment the local government has not spent or contracted to spend on designing and constructing the infrastructure, if:
  - the development approval no longer has effect;
  - a payment has been made; and
  - construction of the infrastructure has not substantially started before the development approval no longer has effect.[79]

State infrastructure provider powers

State-related condition

The current capped framework empowers a State infrastructure provider to impose a condition on a development approval (called a **State-related condition**) for infrastructure or works to protect or maintain the safety or efficiency of infrastructure associated with State-controlled transport infrastructure, public passenger transport infrastructure, railways, ports and airports only.[80]

It is relevant to note that a State infrastructure provider's power to impose a State-related condition is less prescriptive than that under the previous capped framework.

Local government reimbursement

Like the previous capped framework, a local government may be required to reimburse to a State infrastructure provider which has imposed a State-related condition, levied charges for local government infrastructure which has been replaced by the State infrastructure the subject of the State-related condition.[81]

Infrastructure agreements

The current capped framework provides for arrangements for infrastructure agreements, which are materially the same as the previous capped framework but for the following:

- *Public sector entity* – A distributor-retailer is declared not to be a public sector entity[82] and as such, a distributor-retailer cannot enter into an infrastructure agreement under the SPA other than where a local government or other public sector entity is a party.[83]
- *Obligation to negotiate in good faith* – A local government, other public sector entities, applicants and other entities have an obligation, where an infrastructure agreement is proposed, to negotiate the infrastructure agreement in good faith.[84]

Planning Act 2016

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

Some of the key changes are as follows:

- *State Planning Regulatory Provision (adopted charges)* – The matters provided for in a SPRP (adopted charges) have been incorporated into Part 6 (Infrastructure) and Schedule 26 (Maximum for adopted charges) of the Draft Planning Regulation in recognition of the removal of state planning regulatory provisions.
- *Definitions* – The definition of the PIA has been amended with the term "*non-rural purposes*" replaced with the following:[85]
  - Residential purposes, other than rural residential purposes;
  - Industrial, retail or commercial purposes;
  - Community or government purposes related to a purpose stated above.
- *Terminology* – Key changes in terminology include the following:[86]
  - Additional demand is now referred to as extra demand.
  - Additional payment condition is now referred to as an extra payment condition.

78 See section 654 of SPA and section 99BRCY of SEQ Water Act.
79 See section 655(1) and (2) of SPA and section 99BRCZ(1) and (2) of SEQ Water Act.
80 See section 666 of SPA.
81 See section 669 of SPA.
82 See section 627 of SPA.
83 See section 677 of SPA and section 99BRDP of SEQ Water Act.
84 See section 671 of SPA and section 99BRDL of SEQ Water Act.
85 See Schedule 2 of the Planning Act; cf. section 627 of SPA.
86 See Chapter 4 of the Planning Act; cf. Chapter 8 of SPA.

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

- *Maximum adopted charge* – The maximum adopted charge prescribed in a regulation automatically increases each year by the sum of the 3-yearly moving average quarterly percentage increase in the PPI for each financial quarter since the prescribed amount was last prescribed or amended.[87]
- *Head of power for necessary infrastructure condition for LGIP identified infrastructure* – Unlike the current capped framework which requires both LGIP identified and LGIP unidentified infrastructure to be "*necessary to service*" the subject premises, under the future capped framework LGIP identified infrastructure may be required "*whether or not the infrastructure is necessary to service the subject premises*" if "*the trunk infrastructure is or will be located on the premises*"[88].
- *Relevant and reasonable requirement* – Unlike the current capped framework under which the infrastructure the subject of a necessary infrastructure condition is required to be "*necessary to service the subject premises*", this requirement has been removed from the future capped framework.[89]
- *Conversion application* – A conversion application is now required to be made within 1 year after the development approval starts to have effect.[90]

Improvements to the current capped framework

The previous, current and future capped frameworks, whilst providing certainty to development proponents, have had significant public policy implications in terms of a lack of integration, inequity and economic inefficiency and should be the subject of a significant policy review process to address these matters whilst maintaining certainty for development proponents.[91]

However in the absence of a more fundamental review of the capped framework, the following suggestions are made to improve the operation of the capped framework:

- *Infrastructure charges as a tax or user charge* – The previous, current and future capped frameworks have been characterised by some commentators as establishing a tax regime as opposed to a user charges regime. In our opinion, an infrastructure charge is not a tax but rather a user charge to which a cap has been applied since 2011. The current uncertainty could be resolved by a legislative or policy amendment to the effect that the capped framework is not a tax regime and is otherwise subject to an apportionment principle such that the infrastructure charge is to bear some relationship to the usage of the trunk infrastructure to which the infrastructure charge relates.

  In this context it is relevant to note that an infrastructure charge which is levied on development can be judicially reviewed where a local government's decision is so unreasonable that no reasonable local government could have levied the infrastructure charge.[92] This may occur in particular circumstances, for instance where the infrastructure charge is for planned infrastructure which does not benefit the development (such as unserviced premises) or the infrastructure charge has no relationship to the development's projected usage of the planned infrastructure (such as where some rural local governments have applied infrastructure charges for intensive industries such as poultry farms to effectively prevent their development).
- *Additional demand* – In order to minimise the administrative burden for local governments, the provisions under section 636(2)(c) of the SPA relating to "*other development*" could be amended to exclude the demand generated by exempt or self-assessable development for the purpose of levying levied charges.
- *Establishment cost* – The references to the cost of the infrastructure in sections 633 and 649 of the SPA should be amended to the establishment cost of the infrastructure given the following:
  - the offset or refund is determined by reference to the establishment cost of the infrastructure when the details of the offset or refund are included in an ICN;
  - where requested by an applicant, the establishment cost is to be recalculated by the local government using the methodology stated in the charges resolution.

87 See section 112 of the Planning Act; cf. sections 629(2), (3) and (5) of SPA.
88 See section 645(1) of SPA; cf section 127 of the Planning Act.
89 See section 648(1) of SPA; cf section 128(4) of the Planning Act.
90 See section 139 of the Planning Act; cf. section 659 of SPA and section 99BRDE of SEQ Water Act.
91 See Ian Wright The Importance of the Planning and Funding of Development Infrastructure to Queensland's Economic Model, Legal Knowledge Matters July 2014 to June 2015, Colin Biggers & Paisley.
92 See section 478 of SPA and section 99BRBO of SEQ Water Act.

- *Adopted Conversion criteria* – The LGIP guideline should identify the underlying principles of the default conversion criteria in respect of which the conversion criteria included in a charges resolution must be consistent. This will avoid local authorities and development proponents having to discern these principles until they are determined by the Planning and Environment Court.
- *Definition of establishment cost* – The definition of establishment cost should be amended to reference the schedules of works in an LGIP given that it is likely to be the only information available to a local government when an ICN is being prepared.

Conclusions

Key elements of the capped infrastructure planning and charging framework

A summary of the key elements of the infrastructure planning and charging framework between the previous capped framework, current capped framework and the future capped framework is provided in Table 1.

The current capped framework and future capped framework are materially similar to the previous capped framework other than for the following:

- *Additional demand* – A levied charge must exclude demand generated from an existing lawful use, a previous lawful use or other development which may be lawfully carried out without a development permit.
- *LGIP unidentified infrastructure* – A necessary infrastructure condition may be imposed requiring development infrastructure which is not identified in an LGIP in specified circumstances. Development infrastructure the subject of the necessary infrastructure condition is trunk infrastructure and the provision of the infrastructure may give rise to an entitlement to an offset or refund.
- *Conversion of non-trunk infrastructure* – Non-trunk infrastructure may be converted to trunk infrastructure. If converted, the non-trunk infrastructure becomes trunk infrastructure and the provision of the infrastructure may give rise to an entitlement to an offset or refund.
- *Identified offsets and refunds* – A local government must identify an offset and refund in an ICN unless this requirement is waived by the recipient of the ICN.
- *Recalculation of the establishment cost of infrastructure* – A local government when requested by an applicant, must recalculate the establishment cost of trunk infrastructure in accordance with the methodology in its charges resolution.

Effects of the capped infrastructure planning and charging framework

The current capped framework and future capped framework provides certainty for development proponents, reduces the cost of the administration of an offset and refund for development proponents and on balance is less costly to administer than the previous capped framework.

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

- *Administrative costs* – The cost of the determination of ICNs, recalculation requests, conversion applications and appeals; albeit these costs can be recovered to some extent by a local government through a review of its cost-recovery fee schedule.
- *Reduced levied charges* – The cost of the reduction of levied charges from higher offset and refund values; has been estimated by the LGAQ as being in the vicinity of $480 million annually.[93]
- *Inefficient settlement patterns* – Capped charges do not provide a price signal as to location with the effect that inefficient settlement patterns are encouraged at unquantified costs of likely social inequity and economic inefficiency.

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

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

Table 1 Table of summary of key elements of infrastructure planning and charging frameworks

Items	Previous capped framework (before 4 July 2014)	Current capped framework (after 4 July 2014)	Future capped framework (under Planning Act)
Development infrastructure			
Trunk infrastructure	Includes infrastructure identified in the PIP or the adopted infrastructure charges resolution or infrastructure other than infrastructure for which a condition has been imposed under section 626A of 28 May SPA	Includes infrastructure identified in the LGIP, infrastructure that becomes trunk infrastructure because of a conversion application and infrastructure required to be provided under a condition under section 647(2) of SPA	Includes infrastructure identified in the LGIP, infrastructure that becomes trunk infrastructure because of a conversion application and infrastructure required to be provided under a condition under section 127(3) of Planning Act
Non-trunk infrastructure	Development infrastructure which is not trunk infrastructure	Development infrastructure which is not trunk infrastructure	Development infrastructure which is not trunk infrastructure
Infrastructure planning and charging instrument			
Infrastructure planning instrument	PIP	LGIP	LGIP
State charging instrument	SPRP (adopted charges) dated July 2012	SPRP (adopted charges) dated July 2012 or a replacement SPRP (adopted charges)	Planning Regulation Part 6 and Schedule 26
Local charging instrument	Adopted infrastructure charges resolution	Charges resolution	Charges resolution
Infrastructure charges and charges notice			
Infrastructure charges	Adopted infrastructure charges	Levied charges (for additional demand only)	Levied charges (for additional demand only)
Charges notice	Adopted infrastructure charges notice	Infrastructure charges notice	Infrastructure charges notice
Conditioning powers			
Trunk infrastructure if identified in PIP or LGIP	✓	✓	✓
Different trunk infrastructure if identified in PIP or LGIP	✓	✓	✓
Development infrastructure not identified in PIP or LGIP but which is necessary to service the premises and services development consistent with the assumptions stated in LGIP	–	✓	✓
Non-trunk infrastructure	✓	✓	✓

Items	Previous capped framework (before 4 July 2014)	Current capped framework (after 4 July 2014)	Future capped framework (under Planning Act)
Additional trunk infrastructure costs if completely or partly outside the PIA	✓	✓	✓
Additional trunk infrastructure costs if generated infrastructure demand is inconsistent with planning assumptions stated in PIP or LGIP	✓	✓(1)	✓(1)
Additional trunk infrastructure costs if development will require new trunk infrastructure earlier than when identified in LGIP	✓	✓	✓
Offset or refund, establishment cost and conversion			
Offset against infrastructure charges	✓	✓	✓
Refund	✓(2)	✓	✓
Establishment cost recalculation	–	✓	✓
Conversion application	–	✓	✓(3)

1 Applies if generated infrastructure demand is more than the assumptions about the type or scale of future development stated in LGIP.

2 The refund is required to be on terms agreed with the infrastructure provider.

3 Conversion application must be made within 1 year after the development approval starts to have effect but before construction of the non-trunk infrastructure starts.

Appeals of land valuation decisions are only concerned with the appropriate valuation of the subject site and cannot call into question all valuations within the site's area

Shaun Pryor | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Land Court in the matter of *O'Connor v Valuer-General* [2016] QLC 44 heard before WL Cochrane

August 2016

In brief

The case of *O'Connor v Valuer-General* [2016] QLC 44 concerned an appeal commenced in the Land Court of Queensland by Daniel James O'Connor and Despina Maria O'Connor against the valuation by the Valuer-General of their property situated at 24 Rowallan Close at Westlake.

Mr and Mrs O'Connor contended that the valuation of $520,000 for their property was excessive and that based on comparable sales, $450,000 was a more appropriate value. Their case was premised on restoring consistency and integrity for site values of residential properties in the Westlake area and in particular of their property.

The court found that it did not have the statutory power to revalue the whole of the Westlake area and could only assess the correct valuation of the subject land. The court ultimately accepted the evidence of the Valuer-General's valuer and decided not to change the original valuation, dismissing the appeal.

Mr and Mrs O'Connor contended that the site value for their property was excessive

Mr and Mrs O'Connor appealed the decision of the Valuer-General on the following grounds:

- The excessive site value for the subject property and all other residential land in Westlake.
- The failure to recognise the reflected factors from 2013 to 2014 of properly analysed vacant land sales in Westlake
- The lack of evidence to support the wide variance in percentage increases applied to residential lands across the Centenary suburbs being a 15% to 40% increase in Westlake and 5% to 10% increases in other adjoining suburbs.

Court reinforced the importance of sales evidence of comparable land in determining the appropriate value of land but noted the change in the evidentiary onus

Despite the change in the valuation process brought about by the *Land Valuation Act 2010*, the court reinforced the established importance of comparable sales evidence in determining the appropriate value of land as observed in *Steers v Valuer-General* [2012] QLC 65. By reference to the decision of *Lawson v Valuer-General* [2012] QLC 27, the court confirmed that the principles for determination of the market value established by the High Court in *Spencer v The Commonwealth* (1907) 5 CLR 418 remain relevant.

With respect to the changes to the valuation process introduced by the *Land Valuation Act 2010*, the court noted that the presumption of correctness in favour of the valuation has been removed and that Mr and Mrs O'Connor are limited to the matters stated in the notice of appeal and carry the onus of proving those grounds.

Court found that it does not have a statutory power to order a revaluation of the Westlake area

Mr and Mrs O'Connor's case as identified in the grounds of appeal was premised on restoring the consistency and integrity of site values for residential properties in the Westlake area. The court noted however that "*the nomination of a matter as a ground of appeal does not automatically make it a valid or useful ground*".

The court found difficulty in Mr O'Connor's thesis in circumstances where it did not have the statutory power to order the Valuer-General to revalue the whole of Westlake.

The court referred to the decision of *Farr v Valuer-General* [2012] QLC 64, where His Honour Mr Isdale cited several decisions which make it clear that the question before the court is the correct valuation of the subject land, not the correct valuation of an area. The court further referred to the decision of *Ladewig v Department of Natural Resources, Mines and Water* [2007] QLC 47 for the principle that the court should not purport to conclude a view as to the value of any individual property to which an appeal has not been initiated.

The court found that its focus in this case is on the value of the subject land only which is to be assessed by reference to sales at a relevant time of comparable land or of land which gives guidance as to the value of the subject land.

Mr O'Connor acted as both the advocate for himself and his wife and also as his own "expert" valuer

Mr O'Connor represented himself and his wife in the appeal. The court noted that despite Mr O'Connor's lack of legal qualifications, this did not preclude him from running his own case. However, Mr O'Connor, being a registered valuer in the employ of the Valuer-General, also sought to represent himself and his wife as an "expert" valuer in the appeal.

The court cited the decision of *Donald Neil Meiers and Florence Myrtle Meiers v Valuer-General* [2012] QLC 19, which in a similar set of circumstances referred to the case of *P and R Cupo v Department of Natural Resources and Water* [2009] QLC 33. In *Cupo*, His Honour Member Jones observed that "*an advocate's role is to persuade the Court to adopt his clients' case and reject the case for the opposition. On the other hand the role of an expert witness is to assist the Court by giving honest and objective evidence*".

The decision of *Cupo* went on to refer to *Pratt v Department of Natural Resources and Water* [2008] QLC 63 where the President said:

> *an interest or perceived interest in the outcome of litigation does not constitute a justification for the exclusion of expert evidence. It is simply a matter which goes to the weight of that evidence. Therefore even though Mr Whip's evidence was tainted, it was admitted. However, any argumentative or adversarial statements were excluded from consideration. Furthermore, where there was a conflict between Mr Whip's evidence and that of the Department's valuer, little or no weight was attributed to Mr Whip's evidence unless it was corroborated from another source, or unless the Department's valuer was demonstrably wrong.*

The court adopted the approach from *Pratt* and found that whilst Mr Connor's evidence was admissible, it was inevitably tainted due to his advocatory role and was unable to give his evidence the same weight as that of the valuer for the Valuer-General.

Court considered the evidence of both experts of comparable sales but ultimately decided not to change the valuation

Mr O'Connor and the valuer for the Valuer-General both agreed on three relevant bona fide sales of vacant land in the suburb of Westlake. Mr Connor's approach was based on a direct comparison of vacant or lightly improved land sales in comparable locations with adjustments made for points of difference.

The first relevant site was sold in July 2013 for $575,000 and was identified by Mr O'Connor as being superior in size, outlook, elevation and ambience. The valuer for the Valuer-General, however identified that whilst the property is larger, more elevated and enjoys filtered views of the Brisbane River, it is subject to heavier traffic than the subject land, is identified in the BCC Flood Wise Report and lacks the appeal of a quiet cul-de-sac.

The second relevant site was sold in July 2014 for $608,888. Mr O'Connor identified the site as being vastly superior with a significantly larger area and "*panoramic Brisbane River vista like views*". The valuer for the Valuer-General, whilst acknowledging that the property was superior to the subject land due to its size, views and the shared boundary with the parkland, emphasised that the land is wholly within the BCC River Flood Planning Overlays and was entirely covered by water in the January 2011 flood event.

The third relevant site was sold in February 2014 for $480,000. In 2013, the site was valued at $415,000. Both Mr O'Connor and the valuer for the Valuer-General agreed that this site value was too low and that a more appropriate value is $430,000 and $450,000 respectively. However, a recent valuation of October 2015 identifies the site as being $450,000. The valuer for the Valuer-General identified that the site lacks the appeal of a quiet cul-de-sac and is surrounded by smaller lot houses of a less impressive standard than those surrounding the subject land.

In making its decision, the court noted a number of decisions which observed the imprecise and uncertain nature of valuations. The court ultimately preferred the evidence and conclusions of the valuer for the Valuer-General and decided not to change the valuation of Mr and Mrs O'Connor's property.

COLIN BIGGERS & PAISLEY LAWYERS

Multiple dwellings, maximum allowable gross floor area and transferable development rights in the City Centre neighbourhood plan

William Lacy | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *University of Queensland v Brisbane City Council & CBUS Property Brisbane Pty Ltd* [2016] QPEC 35 heard before Everson DCJ

August 2016

In brief

The case of *University of Queensland v Brisbane City Council & CBUS Property Brisbane Pty Ltd* [2016] QPEC 35 concerned an originating application made by the University of Queensland seeking declarations and consequential relief in the Planning and Environment Court in respect of two decisions of Mr Leeds, a delegate of the Brisbane City Council. The first decision was to approve a development application made by CBUS Property Brisbane for a development permit for a material change of use for multiple dwellings (264 units) and centre activities (retail and food and drink outlet) on a site located at 443 Queen Street, Brisbane and the second decision was an associated but separate decision to approve the transfer of transferable site area requested by CBUS.

The university identified six grounds for challenging the validity of the delegate's decisions being that the development was wrongly treated as requiring code assessment, that the delegate had no power to make the second decision under the relevant delegation, that both the development application and the transfer request were not properly assessed and that both of the delegate's decisions were unreasonable.

The court, after considering the relevant provisions of the *Brisbane City Plan 2014* and the actions of the delegate, found that the proposed development was correctly subject to code assessment, dismissed each of the other grounds raised by the university and ultimately dismissed the originating application.

Court considered whether development application was wrongly treated as requiring code assessment

When the development application was originally submitted to the council, the delegate reviewed the gross floor area (GFA) calculations submitted with the application and formed the view that the proposed development would require impact assessment. On this basis, the delegate issued a notice stating that the development application was not properly made as it did not identify the level of assessment as impact assessment.

In response to this notice, the development application was changed to nominate 300m^2 of transferable site area (TSA) to be transferred to the site of the proposed development. Transferable site area is a form of transferable development right under the *City Centre neighbourhood plan code* of the *Brisbane City Plan 2014* that may, subject to certain requirements and the council's approval, be transferred from specific heritage place sites to another site for the purpose of calculating the extent of development that may be carried out on the other site.

The delegate was "*of the opinion that the inclusion of the TSA was such that the development application was then code assessable*" (at [7]). However, the university submitted that the proposed development should have been subject to impact assessment. In this context, the court was required to determine whether (at [10]):

- the GFA of the proposed development above the maximum podium height was greater than the maximum allowable GFA specified in the relevant neighbourhood plan of the *Brisbane City Plan 2014*; and
- the use, being Multiple dwelling, was located in a portion of the building below maximum podium height.

If either of these questions was answered in the affirmative the proposed development would have required impact assessment.

Court found that the proposed development complied with relevant GFA limits

There were two areas of contention surrounding the calculation of the GFA each of which would have a significant impact on the quantum of the maximum allowable GFA above the maximum podium height. Subject to the court's findings on these contentions and the allocation of the transferable site area, the maximum allowable GFA above the maximum podium height could be as low as 20,407m^2 or as high as 44,995m^2.

The first area of contention was whether the area of the lowest level of car parking, Carpark Level 1, was to be included in calculating the maximum allowable GFA. Due to the slope of the site, only 150m^2 of the 1,629m^2 of Carpark Level 1 was above the maximum podium height, being the height relevant to determining this level's inclusion in the GFA calculation, and consequentially the university sought to rely on a volumetric calculation of the GFA of this level in calculating the maximum allowable GFA.

Considering the relevant provisions of the *Brisbane City Plan 2014* the court found (at [19]):

> *The approach of the applicant [the university], that the extent of Carpark Level 1 above maximum podium height should be calculated volumetrically, does not accord with the wording of the relevant provisions quoted above. The wording is clear that only the horizontal plane is relevant.*

The second area of contention concerned the figure for "city site cover" which was 0.55074866 and used in calculating the maximum allowable GFA. The "development ratio", another figure used in the calculation of the of the maximum allowable GFA, was to be determined differently depending on whether the city site cover was between "0.45 and 0.55" or "0.56 or more". Despite the university's submission that the city site cover should be rounded to 0.56 as there was a gap in the relevant provisions, in that they did not provide for circumstances where the city site cover was between 0.55 and 0.56, the court found that the city site cover expressed to two decimal places fell within the 0.45 to 0.55 range.

The court's findings on these two points meant that from the perspective of GFA both the original development application, which did not include the transfer of transferable site area and the changed development application were in fact code assessable.

Court found that the multiple dwelling use was not located below the maximum podium height

Carpark Level 1 was below the maximum podium height and, by virtue of the tables of assessment, if these car parks were part of the multiple dwelling use, the proposed development would require impact assessment.

Under schedule 3 of the *Sustainable Planning Act 2009* the definition of use "*includes any use incidental to and necessarily associated with the use of the premises*". The development application and decision notice made it clear that the car parks were intended for the exclusive use of the residents of the multiple dwelling and not the retail component of the proposed development.

To give effect to the provisions of the City Centre neighbourhood plan, the court found it was necessary to exclude car parking from the multiple dwelling use. On this basis, the court found that "*City Plan 2014 read as a whole demonstrates that car parking is not considered to be part of a Multiple dwelling use in the CCNP [City Centre neighbourhood plan] area.*" However, the court noted that a different conclusion could be reached in a different context, such as under a different planning scheme.

Consequentially the development application was not wrongly treated as requiring code assessment.

Court found that transfer request and development application were properly assessed, that the delegate had power to determine the transfer request and that the decisions were not unreasonable

In respect of the remaining grounds raised by the university, the court found that:

- the delegate had the power to assess and determine the transfer request (at [32]);
- the delegate had properly assessed the transfer request and the development application (at [36] and [51]);
- the delegate's decisions were not unreasonable in the Wednesbury sense (at [40] and [52]).

Consequentially, the university did not establish an error that would enable the court to set aside the decision on the proposed development.

Court dismissed preliminary legal issues of lack of owner's consent and futility raised by a commercial competitor

Elton Morais | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MTAA Superannuation Fund (Flagstone Creek and Spring Mountain Park) Property Pty Limited v Logan City Council & Hope Island Consortium Pty Ltd* [2016] QPEC 34 heard before Everson DCJ

August 2016

In brief

The case of *MTAA Superannuation Fund (Flagstone Creek and Spring Mountain Park) Property Pty Limited v Logan City Council & Hope Island Consortium Pty Ltd* [2016] QPEC 34 concerned an appeal in the Planning and Environment Court by MTAA Superannuation Fund against the decision of the council to approve a development application for a material change of use – shopping centre (expansion) over land at Bushman Drive, Jimboomba, which was relevantly partly freehold land and land owned by a body corporate.

MTAA Superannuation Fund made an application to the court requesting that it determine the following preliminary legal issues prior to the merits hearing progressing to a hearing and determination by the court:

- whether the development application failed to include the consent of the owners of the land;
- whether the development application properly identified all aspects of the proposed development;
- whether the assessment of the development application was futile.

The preliminary legal issues raised by MTAA Superannuation Fund involved matters of planning and property law.

The court found that the consent of the owners of the land was properly provided by Hope Island Consortium

MTAA Superannuation Fund contended the following:

- Hope Island Consortium did not obtain the consent of the body corporate to the making of the development application, as:
  - such consent would be required to be given by way of a resolution of the members of the body corporate without dissent, as the decision to consent to the making of the development application was a restricted issue under section 100(2) of the *Body Corporate and Community Management Act 1997* (**BCCMA**) and 18(1) of the *Body Corporate and Community Management (Commercial Module) Regulation 2008* as it would change the rights, privileges or obligations of the owners of the lots included in the community titles scheme; and
  - MTAA Superannuation Fund was a member of the body corporate and did not provide its consent (first issue).
- The proposed consent of the body corporate was the only consent to the making of the development application over the body corporate land and not the adjoining land (second issue).

In relation to the first issue, Hope Island Consortium contended that the decision of the body corporate to consent to the making of the development application was not a decision on a restricted issue. In this regard, Hope Island Consortium sought to rely on the case of *Rakaia Pty Ltd v Body Corporate for "Inn Cairns" Community Tittles Scheme 16010* [2012] QCA 306, in which the Court of Appeal was required to determine whether or not a resolution of the committee to approve a lot owner to make a development application to the Cairns Regional Council to convert its lot and car park (which was located on common property) from holiday accommodation to a multiple dwelling unit was a decision on a restricted issue. The court held that the meaning "decision to change" should be given an ordinary meaning and accordingly held that the resolution passed by the body corporate did not effectuate a change to anything. Rather, the decision was only to consent to the making of the development application.

The court relied on the case of *Rakaia* in determining that the consent of the body corporate was not a decision on a restricted issue.

In relation to the second issue, the court noted that a broad approach is to be taken in considering the obligation to provide the consent of the owner of land. In this regard, the court noted that section 263(1) of the *Sustainable Planning Act 2009* provided that the consent of the owner of the land the subject of the application was required for its making and there was no requirement that the consent of the owner of the land must make reference to land other than land the owner owned.

The court was subsequently satisfied that the body corporate was not obliged to refer to the adjoining land in the consent it gave and the consent was sufficient and lawful.

The court found that the development application did properly identify all aspects of the development

MTAA Superannuation Fund contended that the development application was deficient as Hope Island Consortium did not identify or seek an approval for a development application for reconfiguring a lot.

Over the course of the hearing, MTAA Superannuation could not point to any particular impediment to the assessment of the development application in the absence of a development application for a reconfiguration of a lot. Accordingly, the court considered that MTAA Superannuation Fund had abandoned this point and in the event that it did not, the court was of the view that there was no merit in this point.

The court found that the assessment of the development application was not futile

MTAA Superannuation Fund contended that the assessment of the development application was futile as:

- in order for an approval of the development application to be implemented, it would require the passing of a resolution of the members of the body corporate without dissent;
- MTAA Superannuation Fund was a member of the body corporate and would not provide its consent.

Hope Island Consortium contended that despite MTAA Superannuation Fund not providing its consent, the assessment of the development application was not futile as Hope Island Consortium was able to refer the matter to an adjudicator under the BCCMA and following that the court, both of whom have broad powers to resolve such a dispute.

The court found comfort in the case of *Albrecht v Ainsworth & Ors* [2015] QCA 220 which dealt with a similar issue and was consequently not persuaded by MTAA Superannuation Fund and found that the assessment of the development application was not futile.

Court found incorrect determination of assessment level rendered development approval invalid and of no effect

Russell Buckley | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Body Corporate for Surfers International Community Titles Scheme 12247 & Anor v Gold Coast City Council & Anor* [2016] QPEC 29 heard before Searles DCJ

August 2016

In brief

The case of *Body Corporate for Surfers International Community Titles Scheme 12247 & Anor v Gold Coast City Council & Anor* [2016] QPEC 29 concerned a development approval for a material change of use for 639 apartments, café, shop, restaurant and tourist shop at 3 Trickett Street, Surfers Paradise. The body corporate of the adjoining property and its Chairman Mr Tony Roberts applied to the Planning and Environment Court to have the council's decision set aside on the basis that it was invalid and of no effect.

The court found that in accordance with the Surfers Paradise Local Area Plan, the council's jurisdiction to determine the application through code assessment hinged on whether the building's podium contained apartments. If an apartment were found to be located within the podium under the Local Area Plan, the development application was required to be subject to impact assessment.

The court found that the building's podium comprised four levels and that the correct application of the *Gold Coast Planning Scheme 2003* was that recreational facilities contained in the podium's fourth level were included in the defined use of apartment.

The court held that council's decision to subject the application to code assessment amounted to a mistaken jurisdictional fact. As a consequence, the council had fallen into jurisdictional error. The court found that the council's jurisdiction to treat the application as code assessable was never enlivened. On this basis, the court declared council's decision a nullity and ordered that it be set aside.

To determine the correct level of assessment the court firstly defined what a podium is and concluded that the development accommodated four levels

The council submitted that as the term podium was not defined under the *Gold Coast Planning Scheme 2003* its meaning should be determined by the court. The court considered the meaning and nature of the term generally with reference to the following definitions set out within the Macquarie and Oxford English Dictionaries:

- A continuous projecting base of a building forming a front of the basement of the foundation behind it
- A low continuous structure serving a base or terrace wall
- A projecting lower structure around the base of a tower block

To complicate matters, the court highlighted that the development application contained contradictory descriptions of the podium's size. The town planning report described a three-storey podium, while architectural plans and responses to the council's codes stated the development incorporated a four-storey podium. In an attempt to resolve the issue, the court heard expert evidence from both parties.

Experts for the body corporate considered the podium to comprise four levels on the basis that the levels in question had a far greater site coverage and bulk than the building's tower component. Experts for council and the developer Forise Investments argued that recreational uses on level four were not a continuation of the podium but rather private ancillary facilities exclusively dedicated to the apartments.

The court noted that the expert evidence provided was divergent and of little use. After reviewing wording contained in the application's architectural plans, the court was satisfied that the building's podium accommodated four storeys. The court noted that such an interpretation was consistent with definitions of a podium under both the Macquarie and Oxford English Dictionaries.

Despite level four being limited to recreational facilities, including a spa, sauna and pool, the court was satisfied that such uses fell within the definition of apartment under the Gold Coast Planning Scheme 2003

The council and the developer argued that uses within level four were inconsistent with the definition of apartment under the planning scheme. The body corporate relied on *Walker v Noosa Shire Council* [1985] 1 Qd R 387 to argue that level four could not be considered independently if it had no severable purpose other than servicing the apartments above.

The court relevantly considered the decision in *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157, which concluded that where part of a premises was used for a purpose which was subordinate to the purpose of another part, it was appropriate to disregard the former and adopt the dominant use to cover both.

Ultimately, the court agreed with the body corporate's interpretation. The court determined that as the recreational uses were incidental and necessarily associated with the development's apartments, they fell under the same use definition. To support this conclusion, the court noted that level four was not publicly accessible and lacked any nexus to the lower three non-residential levels of the podium.

Court found council's erroneous interpretation of level four's composition and use constituted a jurisdictional error that rendered the development approval invalid

The court having determined that level four formed part of the development's podium and should have been categorised under the apartment use, then found that the development application should have been subjected to impact assessment rather than code assessment.

The court cited the decision in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 to highlight that in its view a jurisdictional fact was one that was essential to the decision maker's power to decide the matter. The court found that failing to adopt the correct level of assessment amounted to a mistaken jurisdictional fact. As a consequence, the council's jurisdiction to determine the application was never enlivened and the development approval was therefore declared a nullity.

Court found it inappropriate to waive council's non-compliance on the basis that the development's economic benefits failed to override the public's interest in community involvement

The council requested that the court exercise its discretion under section 440 of the *Sustainable Planning Act 2009* to waive any non-compliance. It was put to the court that in accordance with the decision in *Maryborough Investments Pty Ltd v Fraser Coast Regional Council* [2010] QPEC 113, the court's discretion to do so was broad and untrammelled.

The court noted that section 294 of the *Sustainable Planning Act 2009* established that the purpose of public notification is to ensure individuals have the opportunity to make submissions and secure their future appeal rights. The court held that council's failure to subject the development to impact assessment was no mere technicality as it locked out interested submitters going to the heart of section 294.

In the circumstances, the court found that the public's interest in supporting opportunities for community involvement in the decision making outweighed any economic benefits presented by the development. Accordingly, the court therefore elected not to waive council's indiscretion.

Court excused non-compliance with public notification requirements of a development application

Georgina Taylor | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Telstra Corporation Ltd v Brisbane City Council & Ors* [2016] QPEC 37 heard before Bowskill QC DCJ

September 2016

In brief

The case of *Telstra Corporation Ltd v Brisbane City Council & Ors* [2016] QPEC 37 concerned an application in pending proceedings in the Planning and Environment Court. The applicant sought orders that Telstra's development application for a development permit for a material change of use for a telecommunications facility at Paddington "was not publicly notified in a manner so as to comply with the *Sustainable Planning Act 2009*."

Telstra had appealed to the court against the Brisbane City Council's decision to refuse the development application, which had proposed the demolition of an existing telecommunications monopole at 4 Hayward Street and a new, taller monopole being developed at 297A Given Terrace. The application in pending proceedings was supported by two other parties.

The court found that there had been non-compliance with the public notification requirements of the SPA, in relation to the description of the relevant land in the approved forms, but excused the non-compliance and ordered that the appeal proceed.

Court found placing public notices on different street frontages on different days not inconsistent with the public notification requirements of the SPA

Under section 297(1) of the SPA, the applicant for a development application would be required to give public notification as follows:

- publish a notice at least once in a newspaper circulating generally in the locality of the land;
- place a notice on the land in the way prescribed under a regulation; and
- give a notice to the owners of all land adjoining the land the subject of the development application.

The applicant raised an issue that the public notices placed on the Hayward Street and Given Terrace frontages were erected on different days and that this conflicted with other evidence in the proceedings that stated they had been erected on the same day.

After considering the evidence, the court found that the two public notices had been placed on different but consecutive days. However, the court found that this did not result in public notification being inconsistent with section 299(3) of the SPA, which relevantly required that all of the public notification actions be completed within 5 business days of the first action. The court also found that there had been no resulting curtailment of the 15 business day notice period required under section 298(1) of the SPA, which commenced the day after the last public notice had been placed on the Given Terrace frontage.

The applicant also raised a complaint that the notices sent to residents under section 297(1)(c) of the SPA were posted during the school and university holiday period during which "it is reasonable that many residents were absent from their homes". The court found no basis for non-compliance with the notification requirements under the SPA, as the only limitation placed on the notification period under the SPA was that the notification period must not include any business day from 20 December in one year to 5 January in the following year. The notification period in this case ran from 18 June to 9 July 2015.

Court found public notices clearly invited people to "have your say" and make written submissions

The applicant further argued that there were errors in the public notices as the descriptions of the heights of both the existing and proposed towers were inaccurate. The notice described the existing tower was 15 metres high, but the information supporting the development application showed the tower was 16.7 metres high, and other

drawings indicated the tower was either 14.6 metres or 14.1 metres high. The notice showed the proposed monopole to be 21 metres high, whereas it was proposed to be 21.3 metres high.

The court observed that what would be required to be included in the notice was a short hand description of the proposed development. The court found that it was plain from the notice that there was an increase in height proposed, and there had not been any non-compliance with the public notification requirements.

A further argument was put forward by the applicant and other party that the inclusion of only one street address would suggest to people that only an increase in height of the existing monopole was proposed, in relation to which they would have no right of comment. The court did not accept this argument as the notices clearly invited people to "have your say" and make written submissions. The court also observed that was it not the job of the public notices to detail the proposed development.

Court found non-compliance with the requirements of the SPA in relation to the description of the land in the approved forms for public notification

The applicant argued that the public notices only included 297A Given Terrace as the street address for the proposal, and not 4 Hayward Street which gave rise to a non-compliance with the public notification requirements under the SPA.

The court considered section 299(1) of the SPA, which relevantly provided that the notices under section 297(1) must be in the approved form. The approved form, made under section 760(1)(c) of the SPA, was in appendix 2 of the Guide on public notification of certain development applications. The approved form made provision for the identification of the land the subject of the proposed development by reference to the street address and the real property description.

The court also considered section 48A(2)(b) of the *Acts Interpretation Act 1954*, which relevantly provided that, if an approved form required specified information to be included in the form, the form would not be properly completed unless the requirement was complied with. The court found that section 48A(2)(b) applied to approved forms for the purposes of section 297 of the SPA, as the forms required specified information, including the street address and real property description of the relevant land. Accordingly, the court found there had been non-compliance with the requirements of the SPA in relation to the description of the relevant land in the approved forms.

Court excused non-compliance with the public notification requirements of the SPA

The court went on to consider the effect of the non-compliance and whether it was appropriate to exercise its powers under section 440 of the SPA and excuse the non-compliance. In doing so, the court had regard to the purpose of public notification, which was to:

> *alert members of the public with an interest in the land, or the general area, to the overall nature of the proposed development, the land affected, how to inform themselves about the detail of what is proposed, and the time in which they can make a submission if they wish to.*

Telstra gave evidence that the reason that only 297A Given Terrace was included on the public notices was that the council's property details database, known as PD Online, did not recognise 4 Hayward Street as an address prior to the notification stage, and that both of the relevant lots were described in the database as 297A Given Terrace. There was a further problem with PD Online, which apparently would not recognise 297A Given Terrace.

The applicants argued that people would be expected to use the street address to find out about the proposal. Telstra and the council both responded by arguing that, despite the "database glitch" people could access the relevant information using the application number or the real property description. One of the applicants responded that people would have to go past the signs to see this information.

The court found that it was appropriate to excuse the non-compliance under section 440 of the SPA for the following reasons:

- the notices included sufficient information to identify the land affected by the proposed development to enable an interested person to access further detailed information;
- it was reasonable to expect a person to read and take note of the information on a public notice;
- the omission of 4 Hayward Street in the notice was not done deliberately;
- a person who was sufficiently interested in the proposed development would look up PD Online, and where the person failed to get the relevant information, could reasonably be expected to make further efforts to get the relevant information, such as contacting Telstra or the council;
- notwithstanding the issues with PD Online, there were 427 properly made submissions, about 62 co-respondents and no evidence of anyone being denied an opportunity to make a submission.

The court made an order, under section 440 of the SPA that the appeal proceed, notwithstanding any non-compliance with the requirements for public notification.

The significance of the demolition of a pre-1946 dwelling is dependent on the extent of the loss of traditional character

Nina Crew | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Kanesamoorthy & Anor v Brisbane City Council* [2016] QPEC 42 heard before Searles DCJ

September 2016

In brief

The case of *Kanesamoorthy & Anor v Brisbane City Council* [2016] QPEC 42 concerned an appeal commenced in the Planning and Environment court by Dushyandan Kanesamoorthy and Harjasleen Singh against the Brisbane City Council's decision to refuse a development application for a preliminary approval to carry out building work for the demolition of a pre-1946 house located at 80 Kent Street, Hamilton.

The council refused the development application on the basis that the proposed demolition of the dwelling was in conflict with the provisions of the Traditional building character (demolition) overlay code.

The court, after considering the relevant provisions of the demolition overlay code, found that the proposed demolition did not "*satisfy Acceptable Outcome AO5(d), Acceptable Outcome AO5(c) or Performance Outcome PO5(c). It follows that the dwelling should be protected as envisaged by Overall Outcomes 2(a) and 2(d) of the Purpose of the Code*" and dismissed the appeal.

The applicants submitted that the proposed demolition should not have been refused by the council

The applicants appealed the council's decision to refuse the development application on the following grounds:

- The traditional character of Kent Street was highly eroded and therefore the proposed demolition of the dwelling would not result in a significant loss of traditional character.
- Given the number of modern multi-unit dwellings mixed in with pre-1946 dwellings, Kent Street lacked traditional character.
- The visual character of Kent Street was influenced by the number of modern multi-unit dwellings rather than the pre-1946 dwellings and the dwelling itself was not important to the post-1946 character of Kent Street.

The demolition overlay code imposed alternatives rather than cumulative requirements in considering whether the proposed demolition of a dwelling was in conflict with the code

The council and the applicants agreed that OO2(a), OO2(d), PO5(c), AO5(c) and AO5(d) of the demolition overlay code required consideration.

The court noted that under the *Brisbane City Plan 2014*, if the proposed demolition complied with any of the Performance Outcomes or Acceptable Outcomes then the proposed development would be said to comply with the purpose and overall outcomes of the demolition overlay code.

Court found that Kent Street was of a mixed character and could not be said to be a street that had no traditional character

The heritage expert of the applicants expressed the opinion that Kent Street did not have a traditional building character, but rather a modern character based on a numerical analysis of the number of post-1946 dwellings to pre-1946 dwellings. On the other hand, the heritage expert for the council regarded that Kent Street was mixed with both traditional and non-traditional characteristics. In council's heritage expert's view, Kent Street could not be described as not being of traditional character.

The court determined that the lots located on Kent Street, whilst outside of the Traditional building character (demolition) overlay, contributed to the traditional character of the street and should be included in the numerical analysis. This provided a more balanced distribution between traditional and modern dwellings and the court found that Kent Street fell into the rare 'mixed character' street type.

The applicants raised concerns on whether Kent Street could be divided into segments, with each area exhibiting different characteristics. In *Leach v Brisbane City Council* [2011] QPELR 609 the court determined that the entire street must be identified as one particular type of character. The court found that a mixed character of both traditional and non-traditional dwellings still applied as a single character to the street and the proposed demolition did not satisfy AO5(d) of the demolition overlay code.

Despite the alterations to the dwelling the court found that the proposed demolition would result in a significant meaningful loss of traditional character

The applicants submitted that the quantum of loss to the traditional character was not significant given that parts of the dwelling had been visibly altered and the dwelling sat "*within the lower acceptable range of the Codes meaning of traditional character*".

However, the applicants' heritage expert agreed that despite the unsympathetic alterations the dwelling still exhibited a traditional building character and accepted that the dwelling retained the traditional character features identified by the council's heritage expert.

In *Unterweger v Brisbane City Council* [2012] QPLER 375, the court considered that whether alterations to a dwelling would deprive a building of its traditional character was a question of fact and degree. It was noted in Unterweger that it was "*not necessary that the street or dwelling to be pristine, remarkable, unique or have architectural merit for demolition to be refused*".

The court found that despite the alterations, the dwelling still exhibited significant traditional building characteristics and for the purposes of AO5(c), the proposed demolition would "*result in a significant and meaningful loss of traditional building character*".

Court found that the traditional character of the dwelling provided a positive visual contribution to Kent Street and PO5(c) was not satisfied

In its consideration of PO5(c), the court by reference to *Marriot v Brisbane City Council* [2015] QPEC 45 noted that the term 'positively' was intended to mean a contribution which was favourable and added to the visual character of the street as opposed to being neutral or detracting from it.

While the applicants' heritage expert expressed the view that an average person walking down Kent Street would not gain much satisfaction from the dwelling's traditional visual contribution to the post-1946 characteristics, the council's heritage expert gave evidence that the dwelling's "*Interwar style traditional character*" was a highly recognisable traditional form of Kent Street.

The court accepted the evidence of the council's heritage expert and considered that the presence of the dwelling was a positive contribution to the traditional building characteristics of Kent Street which still displayed the characteristics established pre-1946. The court therefore determined that the proposed demolition of the dwelling did not satisfy PO5(c).

Court found that whilst there was a clear and demonstrable need for the proposed mosque, it was too big for the site and therefore insufficient on balance to justify approval

Kathryn O'Hare | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Salsabil Charitable Organisation Pty Ltd v Gold Coast City Council & Anors* [2016] QPEC 17 heard before Everson DCJ

September 2016

In brief

The case of *Salsabil Charitable Organisation Pty Ltd v Gold Coast City Council & Anors* [2016] QPEC 17 concerned an appeal in the Planning and Environment Court commenced by Salsabil Charitable Organisation Pty Ltd against the Gold Coast City Council's decision to refuse a development application for material change of use for a Place of Worship, specifically, a mosque on land situated at Currumbin Waters.

Although there was a clear community need for the proposed development, the council refused the development application on the basis that it was in conflict with specific planning scheme provisions designed to protect the amenity of the surrounding industrial estate and adjoining residential estate from off-site car parking and overflow parking during peak worship hours.

The court found that the development application was in conflict with both the *Gold Coast Planning Scheme 2003* and the *City Plan 2016* and in the absence of sufficient grounds to justify an approval despite the conflict, the court dismissed the appeal.

Due to the extent of the likely increase in the Islamic population, court found that there was a clear community need for the proposed mosque

Salsabil, through its planning need expert, submitted that although a mosque at Worongary had been approved, it was only going to contribute a minor role in catering for the future growth of the Islamic population in terms of their need for another mosque. Accordingly, with the nearest mosque being 36.6 km of driving distance away from the subject site and a predicted annual growth of 8.8% in the Islamic population, the establishment of the proposed mosque would meet a clear community need.

Through their social planner, the council disagreed, submitting that this need did not appear to be evident in the southern part of the Gold Coast area. However, each of the town planners acknowledged that there was a community need for the proposed mosque which led the court to accept the evidence of Salsabil's planning need expert that there was a clear community need for the proposed mosque.

Court found the proposed mosque would create a massive demand for off-site car parking and the overflow parking would have a detrimental impact on the surrounding amenity

The court then considered the issue of traffic and availability of parking. In the first joint report, the traffic expert for Salsabil concluded that there were alternative options available which, if implemented, would manage the parking demands without creating an adverse impact on the surrounding area.

The traffic expert for the council disagreed with this conclusion and considered that the alternative options would have limited utility. The court preferred the evidence of the council's traffic expert and rejected the alternative options.

In the second joint report, the experts reached an agreement in relation to the use of public transport and the demand for parking. However, this was overshadowed by Salsabil's traffic expert conducting their own surveys after the second joint expert report process had concluded.

The court accepted the council's expert's criticism of these surveys as well as the limited statistical relevance they represented.

In addition to this, there was the consideration of a potential future development application which would result in the creation of between 40 and 47 extra parking spaces nearby. The court preferred the evidence of the council's traffic expert which specified that only 40 extra car parks would be provided for and nonetheless found that the overflow parking issue would remain having a detrimental impact on the surrounding amenity.

Court considered the impacts of the proposed mosque based on the peak operation levels of the proposed use

In considering the parking demands of the proposed mosque, the court considered it appropriate to evaluate the impact on traffic and parking based on the peak operation of the proposed use, that was, Friday worship times with a maximum occupancy of 650 people as provided by Salsabil.

Accordingly, the court preferred the evidence of the council's traffic expert that with 650 worshippers during Friday prayers, the proposed mosque would require 201 on-street parking space, which included consideration of the 40 car parks provided for under the potential future development application if approved by the council.

In addition to this, the town planning experts for the council and the submitters considered the appropriateness of the proposed mosque and its "*use related to its scale and consequential impacts*". The experts concluded that due to the adverse impacts, the proposed mosque was not an appropriate use for the location and that the need should be met elsewhere.

Although the proposed use was contemplated for the site, the predicted impacts of the proposed mosque were just too great

The court then considered the nature and extent of the conflicts with the *Gold Coast Planning Scheme 2003* and whether there were sufficient grounds to justify an approval despite the conflict.

Although a Place of Worship was a use contemplated for the site, it was subject to impact assessment under the *Gold Coast Planning Scheme 2003* which had a broad strategy of promoting business activity whilst protecting amenity.

Salsabil submitted that the peak demand during Friday prayers would not impact the surrounding industrial area and neighbouring businesses as well as not creating any unacceptable noise or hard amenity impacts. However, the council argued the contrary which was accepted by the court.

There was a clear and demonstrable planning and community need for the proposed mosque, however the court found that the proposed use was simply inappropriate for the site

The court believed that "*significant weight*" should be given to the *City Plan 2016* as it represented the latest planning intent of the council. In considering the conflicts, it was observed that the need to protect amenity in the *City Plan 2016* was similar, if not greater, to that contained in the *Gold Coast Planning Scheme 2003*. As such the court determined that the conflicts concerning the off-site parking demand were even greater under the *City Plan 2016*.

The amenity impacts of the off-site parking arising from the proposed mosque were contrary to the reasonable expectations of nearby residents and surrounding businesses under both planning schemes.

Accordingly, the court found that although there was a strong planning and community need for the proposed mosque, the impact of the extent of the off-site parking demand would result in "*significant impacts on the amenity of both the industrial estate and the adjoining residential area*". Therefore, the court concluded that the planning need for the proposed mosque was insufficient on balance to justify an approval of the proposed mosque despite these conflicts.

Queensland infrastructure planning and charging framework

Ian Wright | Ronald Yuen | Shaun Pryor

This article discusses the key elements of Queensland's capped infrastructure planning and charging framework

September 2016

Introduction

Infrastructure planning and charging framework

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

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

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

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

On 25 May 2016, the *Planning Act 2016* (**Planning Act**) was assented to but has yet to commence. It adopts the current capped framework for local governments subject to a limited number of changes (**future capped framework**).

Themes of the paper

This paper has three themes:

- First, it considers a number of key elements of the current capped framework.
- Second, it considers the key changes of the future capped framework arising from the Planning Act.
- Finally, it offers some conclusions about the impact of the capped infrastructure planning and charging frameworks.

Legal and practical implications of the current capped framework

Key elements of the current capped framework

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

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

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

- Offsets and refunds for trunk infrastructure and development charge

- State infrastructure provider powers
- Infrastructure agreements.

Infrastructure scope

The current capped framework is based on a definition of development infrastructure and includes water cycle management infrastructure, transport infrastructure, public parks infrastructure and land for specified local community facilities.[94]

Unlike the previous capped framework, development infrastructure no longer includes the local function of State-controlled roads in relation to the transport infrastructure component of development infrastructure.[95]

Identification of trunk and non-trunk infrastructure

The current capped framework empowers a local government to identify development infrastructure as trunk infrastructure in a local government infrastructure plan (called an **LGIP**). Development infrastructure that is not identified as trunk infrastructure in the LGIP (**LGIP unidentified infrastructure**) will generally be non-trunk infrastructure.[96]

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

- *Necessary infrastructure condition* – The LGIP unidentified infrastructure is required by way of a necessary infrastructure condition, where the LGIP unidentified infrastructure services development consistent with the assumptions about the type, scale, location or timing of future development stated in the LGIP.[97]
- *Conversion application* – The LGIP unidentified infrastructure which is the subject of a condition for non-trunk infrastructure becomes trunk infrastructure by the approval of a conversion application.

Infrastructure planning instrument

The current capped framework requires a local government to include an LGIP in its planning scheme if it intends to levy charges for or impose conditions requiring the provision of trunk infrastructure under Chapter 8 of the SPA.[98] An LGIP under the current capped framework is similar to a priority infrastructure plan (**PIP**) under the previous capped framework.

The current capped framework provides a number of mechanisms for transitioning the various existing infrastructure planning instruments of local governments to the current capped framework. Until 1 July 2016 or a later date decided by the Minister (being before 1 July 2018)[99] (the **cut-off date**), the following applies for local governments which have not included an LGIP in their planning scheme:

- *Local government with a PIP* – For a local government that had a PIP under the previous capped framework, the PIP becomes an LGIP.[100]
- *Local government without a PIP* – For a local government that did not prepare a PIP under the previous capped framework, the local government may make a modified charges resolution which identifies trunk infrastructure and states the required standards of service and establishment costs.[101]

Local governments which have not included an LGIP in their planning scheme before the cut-off date:[102]

- *No infrastructure charges* – Can not levy an infrastructure charge.
- *Limited conditioning power* – Can only impose a condition about non-trunk infrastructure.

State infrastructure charging instrument

The current capped framework empowers the Minister to prepare a State planning regulatory provision (called a **SPRP (adopted charges)**).[103]

The *State Planning Regulatory Provision (adopted charges)* dated July 2012 made under the previous capped framework is deemed to be the SPRP (adopted charges) under the current capped framework and it remains the current SPRP (adopted charges).[104]

On 29 July 2016, the Adopted Infrastructure Charges Schedule 2016 replaced Schedule 1 of the current SPRP (adopted charges) thereby increasing the amount of the maximum adopted charges for development.[105]

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94 See section 627 of SPA and Schedule of SEQ Water Act.
95 See Schedule 3 of the *Sustainable Planning Act 2009* (28 May 2014 reprint) (**28 May SPA**).
96 See section 627 of SPA and Schedule of SEQ Water Act.
97 See section 647 of SPA and section 99BRCR of SEQ Water Act.
98 See section 628A of SPA.
99 See section 997 of SPA.
100 See sections 982 of SPA.
101 See sections 979 and 996 of SPA.
102 See section 628A of SPA.
103 See section 629(1) of SPA; cf. section 648B of 28 May SPA.
104 See section 983(1) of SPA.

Local infrastructure charging instrument

The current capped framework, similar to an adopted infrastructure charges resolution under the previous capped framework, empowers a local government to adopt a resolution (called a **charges resolution**).[106]

A charges resolution is required to provide for the following:

- *Adopted charge* – The day when an adopted charge under the resolution is to take effect.[107]
- *Charges breakup* – A charges breakup for all adopted charges between the local government and distributor-retailer.[108]
- *Offset and refund calculation methodology* – A methodology for working out the cost of infrastructure for an offset and refund.[109] The methodology must be consistent with the parameters provided for under the SPRP (adopted charges) or the *Statutory guideline 03/14 Local government infrastructure plans* (**LGIP guideline**).[110]
- *Conversion criteria* – Criteria for deciding a conversion application, which must be consistent with the parameters provided for under the LGIP guideline.[111]

A charges resolution, similar to an adopted infrastructure charges resolution, may provide for automatic increases in a levied charge from the date it is levied to the date it is paid, which cannot be greater than the maximum adopted charge or the increase by the 3 yearly PPI index average.[112] It is relevant to note that under the previous capped framework the increase could not be greater than the maximum adopted charge or the increase by the consumer price index.[113]

Infrastructure charge

The current capped framework empowers a local government to give an applicant an infrastructure charges notice (called an **ICN**) [114] which levies a charge by applying the adopted charge (called a **levied charge**)[115] under a charges resolution in the following circumstances:[116]

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

Infrastructure charges notice

Under the current capped framework, an ICN is required to state the following:[117]

- *Amount* – The current amount of the levied charge.
- *Details of the calculation of the levied charge* – How the amount of the levied charge has been worked out.
- *Land* – The land to which the levied charge relates.
- *Timing* – When the levied charge will be payable.
- *Automatic increase provision* – Whether the levied charge is subject to automatic increases and how the increases are worked out.
- *Details of an offset or refund* – Whether an offset or refund applies and if so, the information about the offset or refund including the timing of the refund. However, this requirement may be waived by the recipient of the ICN.[118]

  This provides greater certainty to a development proponent about its financial liability for the provision of infrastructure for development without the need for an infrastructure agreement. However, a local government is required to determine its liability for an offset or refund and its amount at the decision stage of the IDAS process; whilst under the previous capped framework this liability would have been determined by the negotiation of an infrastructure agreement.

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105 See sections 629(2) and (3) of SPA; Queensland Government Gazette No. 75, Friday 29 July 2016; Adopted Infrastructure Charges Schedule 2016.
106 See section 630(1) of SPA and section 99BRCF(1) of SEQ Water Act; cf sections 648D(1) and 755KA(1) of 28 May SPA.
107 See section 630(3) of SPA and section 99BRCF(3) of SEQ Water Act.
108 See section 632(4) of SPA.
109 See section 633(1) of SPA and section 99BRCH(1) of SEQ Water Act.
110 See section 633(2) of SPA and section 99BRCH(2) of SEQ Water Act.
111 See section 633A of SPA and section 99BRCHA of SEQ Water Act.
112 See sections 631(3) to (6) of SPA and sections 99BRCG(3) to (6) of SEQ Water Act.
113 See sections 648D(9) and (10) and 755KA(2), (3) and (4) of 28 May SPA.
114 See sections 635(1) and (2) of SPA and sections 99BRCI(1) and (2) of SEQ Water Act.
115 See sections 627 and 635(6) of SPA and Schedule and section 99BRCI(6) of SEQ Water Act.
116 See section 635(1) of SPA and section 99BRCI(1) of SEQ Water Act.
117 See section 637 of SPA and section 99BRCK of SEQ Water Act.
118 See section 627 of SPA and section 99BRCC of SEQ Water Act.

- *Establishment cost* – In order to identify the details of an offset or refund it will be necessary to work out the cost of the trunk infrastructure. This will likely require reference to the establishment cost of infrastructure in the schedule of works in the plans for trunk infrastructure in the LGIP; although the process for determining the establishment cost in these circumstances is by no means clear.

  It is relevant to note the following features of the definition of establishment cost under the current capped framework[119] are different from the definition under the previous capped framework[120]:

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

  Based on the definition of establishment cost under the current capped framework, the cost of infrastructure stated in an LGIP may not be the establishment cost of infrastructure for the purpose of determining an offset or refund under the current capped framework.

- *Information notice* – The decision, the reasons for the decision and details of the appeal rights.[121]

Similar to the previous capped framework, the recipient of an ICN may enter into an agreement with the local government about the payment of the levied charge or providing infrastructure instead of paying the levied charge.[122] However, the power of a local government to give a land contribution notice in lieu of, or in addition to the payment of infrastructure charges under the previous capped framework has been removed from the current capped framework.[123]

Levied charge

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

- *Additional demand* – A levied charge may only be for additional demand placed upon the trunk infrastructure which will be generated by the development.[124] A levied charge must therefore exclude demand on the trunk infrastructure from an existing lawful use, a previous lawful use or other lawful development that may be carried out without a further development permit.[125]

  Under the previous capped framework, an adopted infrastructure charges resolution may provide a discount to an adopted infrastructure charge taking into account the existing usage of trunk infrastructure by the premises on which the development is carried out.[126] Other than that, the previous capped framework did not contain any requirements for local governments to take into account a previous lawful use or other lawful development in working out the charges levied for development.

  It is noted that the "*other lawful development that may be carried out without a further development permit*" includes the following development:

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

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

- *Levied charge attaches to the land* – A levied charge is payable by the applicant including any person in whom the benefit of the application vests,[127] such as an owner of the subject premises to which a development approval applies.

  Furthermore a levied charge attaches to the land such that it can be recovered from owners and their successors in title.[128]

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119 See section 627 of SPA and section 99BRCC of SEQ Water Act.
120 See Schedule 3 of 28 May SPA.
121 See sections 637(2) and 627 of SPA and section 99BRCK(2) and Schedule of SEQ Water Act.
122 See section 639 of SPA and section 99BRCM of SEQ Water Act.
123 See sections 648K(3) and (4) and 755MA(4) and (5) of 28 May SPA.
124 See section 636(1) of SPA and section 99BRCJ(1) of SEQ Water Act.
125 See section 636(2), (3), (3A) and (4) of SPA and section 99BRCJ(2), (3), (3A) and (4) of SEQ Water Act.
126 See section 648D(1)(d) of 28 May SPA.
127 See sections 635(6)(b) and 628(1)(a) of SPA and section 99BRCI(6)(b) of SEQ Water Act.
128 See sections 635(6)(b) and (c) of SPA and sections 99BRCI(6)(b) and (c) of SEQ Water Act; cf. *Montrose Creek Pty Ltd & Manningtree (Qld) Pty Ltd v Brisbane City Council* (2013) QPELR 47.

Infrastructure charge versus development charge

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

- *Infrastructure charge is not a development charge* – A levied charge is an infrastructure charge which has the primary goal of recovering the cost of trunk infrastructure to be provided by a local government to service development.[129]

  A levied charge is different to a development charge which is a charge designed to internalise the marginal external costs that are imposed by development and which has the primary goal of influencing the location and nature of development.[130]

- *Average cost approach not marginal cost approach* – The maximum adopted charges in the SPRP (adopted charges) are calculated by reference to an average cost State-wide approach; whilst the adopted charges in a charges resolution upon which a levied charge in an ICN is based are calculated by reference to an average cost municipality-wide approach which is limited to the maximum amount prescribed by the State.[131]

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

Development charge

The current capped framework empowers a local government to impose a condition on a development approval requiring the payment of additional trunk infrastructure costs for development (called an **additional payment condition**) if it meets the following criteria:[132]

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

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

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

Additional payment condition

An additional payment condition is required to state all of the following:[133]

- *Reasons* – Why it was imposed.
- *Amount* – The amount of the payment to be made under the condition.
- *Details of trunk infrastructure* – Details of the trunk infrastructure for which the payment is required.
- *Timing* – When the amount becomes payable.
- *Provision of trunk infrastructure* – That the applicant may, instead of making the payment, elect to provide part or all of the trunk infrastructure.
- *Additional requirements* – If the applicant elects to provide part or all of the trunk infrastructure, the additional payment condition is also required to state the requirements for providing the trunk infrastructure and when it must be provided.[134]

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129 Productivity Commission (2011) Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment, Research Report, Volume 1, April 2011, page 198.
130 Productivity Commission (2011) Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment, Research Report, Volume 1, April 2011, page 198.
131 Clinch JP and O'Neill E Designing Development Planning Charges: Settlement Patterns, Cost Recovery and Public Facilities, Urban Studies, 15 March 2010, page 2152.
132 See section 650(1) of SPA and section 99BRCU(1) of SEQ Water Act.
133 See section 651 of SPA and section 99BRCV of SEQ Water Act.
134 See section 651(1)(f) of SPA and section 99BRCV(1)(f) of SEQ Water Act.

If an additional payment condition is for development completely inside the PIA, it may only require a payment of the following:[135]

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

If an additional payment condition is for development completely or partly outside the PIA, it may only require a payment of the following:[136]

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

Conditions for trunk and non-trunk infrastructure

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

- *Head of power* – The condition must expressly identify one of the following heads of power for the imposition of the condition:[137]
  - *Necessary infrastructure condition* – A condition can be imposed requiring the provision of trunk infrastructure if the trunk infrastructure is necessary to service the subject premises and has not been provided or has been provided but is inadequate.[138] There are two types of necessary infrastructure conditions:
    - *LGIP identified infrastructure* – A condition requiring at a stated time, LGIP identified infrastructure or different trunk infrastructure delivering the same desired standard of service, if the LGIP identifies adequate trunk infrastructure to service the subject premises.[139]
    - *LGIP unidentified infrastructure* – A condition requiring development infrastructure necessary to service the premises at a stated time, if the LGIP does not identify adequate trunk infrastructure to service the subject premises and the development infrastructure services development consistent with the assumptions stated in the LGIP about the type, scale, location or timing of future development.[140]
  - *Non-trunk infrastructure condition* – A condition can be imposed requiring the provision of non-trunk infrastructure for the following limited purposes:[141]
    - *Internal network* – A network or part of a network internal to the premises.
    - *Connection to external network* – The connection of the premises to an external infrastructure network.
    - *Safety or efficiency of network* – The protection or maintenance of the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.
    - *Relevant and reasonable requirement* – The condition must also satisfy the relevant and reasonable requirement of the SPA.[142]

This is significantly different from the previous capped framework where a necessary infrastructure condition could only be imposed if the trunk infrastructure is identified in the PIP or an adopted infrastructure charges resolution of the local government.[143]

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135 See section 652 of SPA and section 99BRCW of SEQ Water Act.
136 See section 653 of SPA and section 99BRCX of SEQ Water Act.
137 See section 335(1)(e)(iii) of SPA and section 99BRAI(2)(e) of SEQ Water Act..
138 See sections 645, 646 and 647 of SPA and sections 99BRCP, 99BRCQ and 99BRCR of SEQ Water Act.
139 See section 646 of SPA and section 99BRCQ of SEQ Water Act.
140 See section 647 of SPA and section 99BRCR of SEQ Water Act.
141 See section 665 of SPA and section 99BRDJ of SEQ Water Act.
142 See sections 345 of SPA and section 99BRAJ of SEQ Water Act.
143 See section 649 of the 28 May SPA.

Relevant and reasonable test for a trunk infrastructure condition

In the case of a necessary infrastructure condition, the relevant and reasonable requirement is deemed to be met if the following are satisfied:[144]

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

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

  - The proposed development is serviced by the infrastructure.
  - The proposed development generates additional demand on the infrastructure network.
  - The proposed development has an adverse impact on the safety or efficiency of the infrastructure network.
  - The infrastructure is required as a result of the proposed development.
  - The infrastructure is not required merely on the desirability of having the infrastructure or to meet the local government's desires for the future of the general area in which the subject premises is independent of the development of the subject premises.

- *Efficient and cost effective solution* – The infrastructure is the most efficient and cost effective solution for servicing other premises in the general area of the subject premises.

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

  - The construction of the work is not carried out on a piecemeal basis.
  - Full construction that is necessary to service other premises in the general area of the subject premises is carried out in full, rather than in part as development of other premises progresses.

- *Infrastructure on the subject premises* – The infrastructure, if provided on the subject premises, is not an unreasonable imposition on the development or the use of the subject premises as a consequence of the development.

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

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

Relevant and reasonable test for a non-trunk infrastructure condition

A non-trunk infrastructure condition is required to satisfy the following requirements:[145]

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

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

  - Maintain proper standards.
  - In some other legitimate sense such as where it is imposed in the interests of rational development of the general area in which the premises is situated.

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

144 See section 648 of SPA and section 99BRCS of SEQ Water Act.
145 See section 345 of SPA and section 99BRAJ of SEQ Water Act.

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

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

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

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

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

Conversion applications for non-trunk infrastructure conditions

Conversion application criteria

The current capped framework empowers an applicant for the development approval to make a conversion application to the local government to convert non-trunk infrastructure imposed in a non-trunk infrastructure condition to trunk infrastructure, if the construction of the non-trunk infrastructure has not commenced.[146]

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

- *Non-trunk infrastructure condition* – The non-trunk infrastructure condition no longer has effect.[147]
- *Necessary infrastructure condition* – The local government may amend the development approval by imposing a necessary infrastructure condition for the trunk infrastructure.[148]
- *ICN* – If a necessary infrastructure condition is imposed, the local government must give an ICN or amend an existing ICN to state whether an offset or refund applies and if so, the details of the offset or refund.[149]

The conversion application process raises the following issues:

- *Development approval* – The conversion application can only be lodged after a development approval takes effect. It cannot be commenced whilst an appeal is on foot for the development approval; presumably on the basis that any issue in respect of the status of the infrastructure will be resolved as part of the appeal.
- *Time limitation* – There is no time limit for the making of a conversion application other than before the commencement of the construction. This gives rise to uncertainty to a local government about when development infrastructure may become trunk infrastructure and consequently its liability to an offset or refund which would have a financial implication on the local government. However, this issue has been addressed in the Planning Act, which is further discussed in section 3 below.
- *Conversion* – It enables a development proponent to design development infrastructure servicing the proposed development such that it meets the relevant conversion criteria.

Conversion application assessment criteria

A conversion application is to be assessed against the criteria included in a charges resolution[150] which must be consistent with the parameters provided for under the LGIP guideline (**Adopted Conversion Criteria**).[151]

The Adopted Conversion Criteria must be consistent with the following:[152]

- *Planning rationale* – The context, planning and infrastructure standards for the relevant area. The context, planning and infrastructure standards are those stated in the applicable LGIP and planning scheme. The

146 See sections 658 and 659 of SPA and sections 99BRDD and 99BRDE of SEQ Water Act.
147 See section 662(2) of SPA and section 99BRDH(2) of SEQ Water Act.
148 See section 662(3) of SPA and section 99BRDH(3) of SEQ Water Act.
149 See section 662(4) of SPA and section 99BRDH(4) of SEQ Water Act.
150 See section 633A(1) of SPA and section 99BRCHA(1) of SEQ Water Act.
151 See section 633A(2) of SPA and section 99BRCHA(2) of SEQ Water Act.
152 See section 4.2.1 of the LGIP guideline.

relevant area is the area of the *local authority* and not the priority infrastructure area,[153] being the local government area for the relevant local government and the geographic area for the relevant distributor-retailer.

- *Default conversion criteria rationale* – The principles underlying the default conversion criteria.

The LGIP guideline does not identify the underlying principles of the following default conversion criteria; leaving their determination to local authorities and development proponents until they are determined by the Planning and Environment Court:[154]

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

Planning Act 2016

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

Some of the key changes are as follows:

- *State Planning Regulatory Provision (adopted charges)* – The matters provided for in a SPRP (adopted charges) have been incorporated into Part 6 (Infrastructure) and Schedule 26 (Maximum for adopted charges) of the Draft Planning Regulation in recognition of the removal of state planning regulatory provisions.
- *Definitions* – The definition of the PIA has been amended with the term "*non-rural purposes*" replaced with the following:[155]
  - Residential purposes, other than rural residential purposes;
  - Industrial, retail or commercial purposes;
  - Community or government purposes related to a purpose stated above.
- *Terminology* – Key changes in terminology include the following:[156]
  - Additional demand is now referred to as extra demand.
  - Additional payment condition is now referred to as an extra payment condition.
  - Additional trunk infrastructure cost is now referred to as an extra trunk infrastructure cost.
  - Submissions in the context of seeking a new infrastructure charges notice during the relevant appeal period, are now referred to as representations.
  - Obligations in the context of an infrastructure agreement, are now referred to as responsibilities; the reason for which is not readily apparent given that the concepts of "*rights, interests and obligations*" are terms readily recognised by contract law.
- *Maximum adopted charge* – The maximum adopted charge prescribed in a regulation automatically increases each year by the sum of the 3-yearly moving average quarterly percentage increase in the PPI for each financial quarter since the prescribed amount was last prescribed or amended.[157]
- *Head of power for necessary infrastructure condition for LGIP identified infrastructure* – Unlike the current capped framework which requires both LGIP identified and LGIP unidentified infrastructure to be "*necessary to service*" the subject premises, under the future capped framework LGIP identified infrastructure may be required "*whether or not the infrastructure is necessary to service the subject premises*" if "*the trunk infrastructure is or will be located on the premises*"[158].

153 See section 4.2 of the LGIP guideline.
154 See section 4.2.2 of the LGIP guideline.
155 See Schedule 2 of the Planning Act; cf. section 627 of SPA.
156 See Chapter 4 of the Planning Act; cf. Chapter 8 of SPA.
157 See section 112 of the Planning Act; cf. sections 629(2), (3) and (5) of SPA.
158 See section 645(1) of SPA; cf section 127 of the Planning Act.

- *Relevant and reasonable requirement* – Unlike the current capped framework under which the infrastructure the subject of a necessary infrastructure condition is required to be "*necessary to service the subject premises*", this requirement has been removed from the future capped framework.[159]
- *Conversion application* – A conversion application is now required to be made within 1 year after the development approval starts to have effect.[160]

Conclusions

The current capped framework and future capped framework provides certainty for development proponents, reduces the cost of the administration of an offset and refund for development proponents and on balance is less costly to administer than the previous capped framework.

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

- *Administrative costs* – The cost of the determination of ICNs, recalculation requests, conversion applications and appeals; albeit these costs can be recovered to some extent by a local government through a review of its cost-recovery fee schedule.
- *Reduced levied charges* – The cost of the reduction of levied charges from higher offset and refund values; has been estimated by the LGAQ as being in the vicinity of $480 million annually.[161]
- *Inefficient settlement patterns* – Capped charges do not provide a price signal as to location with the effect that inefficient settlement patterns are encouraged at unquantified costs of likely social inequity and economic inefficiency.

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

159 See section 648(1) of SPA; cf section 128(4) of the Planning Act.
160 See section 139 of the Planning Act; cf. section 659 of SPA and section 99BRDE of SEQ Water Act.
161 Local Government Association of Queensland Ltd (2013) *Discussion Paper: Infrastructure planning and charging framework review*, Submission, August 2013, page 10.

Modification of development consent invalid due to jurisdictional error

Todd Neal | Emma Whitney | Cecilia Pascale

This article discusses the decision of the Land and Environment Court in the matter of *Fenwick v Woodside Properties Pty Ltd* [2016] NSWLEC 104 heard before Pepper J

September 2016

In brief – Following modification procedure will ensure proper jurisdiction is enlivened

The Land and Environment Court's recent decision in the case of *Fenwick v Woodside Properties Pty Ltd* [2016] NSWLEC 104 demonstrates the critical importance of the requirement to publicly notify applications for consent, in particular section 96(2) modification applications (under the *Environmental Planning and Assessment Act 1979*); and the court's approach to time limits for allowing judicial review proceedings.

Jurisdictional error in earlier modifications renders later modifications invalid

In this case, a developer sought to make three successive section 96(2) modifications to a condition of development consent authorising a subdivision of land for residential purposes. The condition imposed a requirement for a restriction on the form and scale of dwellings to be constructed on the land. The court found that the first two modifications sought had fallen into jurisdictional error because they were not publicly notified in accordance with clause 119(2) of the *Environmental Planning and Assessment Regulation 2000* (in this case, the modifications were required to have been notified or advertised for a period not exceeding 14 days).

The court determined that because the earlier modifications to the development consent contained a jurisdictional error (ie they failed to publicly notify the applications), later modifications to the earlier consent could also be invalidated. This was because, in approving the modification, the consent authority took into account an irrelevant consideration, namely the earlier modified development consent.

Time limit extension allowed by Land and Environment Court

The court also accepted the application to extend the time to commence proceedings. Ordinarily, the time limit is three months from the date of the decision. The factors relevant to the court's exercise of discretion in allowing the extension included:

- the particular interest of the applicant, Ms Christine Fenwick, challenging the decision, in this case a local resident living on land adjacent to the development;
- the time at which Ms Fenwick became, or should have with reasonable diligence become aware of the decision (which was not until the modification works had commenced on the site);
- the respondents' lack of opposition to the application being made.

Applicants and consent authorities should adhere to proper procedure in assessment of section 96 modifications

It is important to note that in this case, the court specifically pointed out (at [21]) that the Planning Assessment Report for the final modification "made it abundantly clear… that it was, in several material respects, premised on [the earlier modifications of the development consent]." Achieving the threshold for establishing the existence of irrelevant considerations may not be as easily demonstrated in cases where a later modification does not so explicitly rely upon earlier jurisdictional errors.

This case serves as a timely reminder for applicants and consent authorities to ensure that the proper legislative procedure in the assessment of section 96 modifications is followed so that jurisdiction is properly enlivened. Doing so can avoid significant cost and time implications.

Court awarded costs in favour of council to compensate council for costs incurred by it in the proceedings

Nina Crew | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gray v Gympie Regional Council* [2016] QPEC 49 heard before Bowskill QC DCJ

October 2016

In brief

The case of *Gray v Gympie Regional Council* [2016] QPEC 49 concerned an application under section 457 of the *Sustainable Planning Act 2009* made in the Planning and Environment Court by the Gympie Regional Council against Deirdre Gray seeking an order that Ms Gray pay the council's costs of the proceeding.

The court determined that it was appropriate to order costs in favour of the council from 24 June 2016 to compensate the council for wasted costs and expenses incurred by the council to comply with the court's directions, including engagement of experts.

Council refused a development application to convert an existing dwelling house into a hardware and trade supplies store which led to a filing of the notice of appeal

In 2015, Ms Gray made a development application to the council for approval for development which comprised of a material change of use to convert an existing dwelling house, within a residential living zone, into a "hardware and trade supplies store". The council refused the development application on 16 September 2016 on the basis that the proposed development was in conflict with the residential living zone and the strategic framework of the planning scheme.

On 14 October 2015, Ms Gray appealed the council's decision by way of a notice of appeal based on the view formed by Ms Gray's town planner, acting as her agent, that she had reasonable prospects of success.

Ms Gray's failure to notify the council of her intention to withdraw the appeal earlier led to the council taking steps and incurring costs to defend its position, despite Ms Gray being advised of the low prospects of success

Ms Gray was invited to withdraw her appeal by the council in February 2016 on the basis that the appeal had little prospects of succeeding or the parties should engage in early mediation before substantive steps were taken. Ms Gray's agent refuted the council's position as to prospects but agreed that the dispute was largely about the sufficiency of grounds to support the development application despite conflicts with the planning scheme. On 27 April 2016, the parties took part in a mediation conference, however, it did not resolve the matter.

In May 2016, directions for the conduct of the appeal proposed by Ms Gray were made by the court. The council took steps in the proceedings to comply with the directions on 24 June 2016 and engaged and nominated a town planning expert, traffic expert and need expert for the appeal. Ms Gray, on the other hand, only engaged and nominated a town planning expert for the appeal.

On 6 July 2016, Ms Gray received advice from her lawyer as to her prospects of success in the appeal which was less than 50%. Notwithstanding that, Ms Gray continued with the appeal and did not inform the council of her intention to discontinue the appeal.

The council continued to take steps to resolve the appeal which included the council's town planning expert arranging to meet with Ms Gray's town planning expert on the 26 July 2016. However, this meeting was cancelled by Ms Gray's town planning expert at the last minute on the basis that the appeal may be withdrawn shortly.

The council's experts continued to work up until 27 July 2016 when the council advised them to stop upon receiving a letter advising of Ms Gray's intention to discontinue the appeal. The council up until that date had incurred costs in the form of fees payable to the council's need expert in the amount of $3,452 and the council's town planning expert in the amount of $5,791.50.

Council made an application for costs against Ms Gray after she filed and served a notice of discontinuance

The council submitted that Ms Gray should pay its costs of the proceedings on the basis that:

- the council was successful in the appeal because the original decision was not overturned;
- Ms Gray had a commercial interest in seeking to obtain an approval for a commercial use in a residential area;
- Ms Gray did not have reasonable prospects of success given the conflicts with the planning scheme and did not nominate experts to address all of the issues in dispute;
- the council defended the appeal to protect the public's interest in orderly development;
- Ms Gray acted unreasonably, by obtaining directions order and not complying with them, knowing that the council was incurring costs, and failing to discontinue the appeal or advise the council of the intention to withdraw the appeal within a reasonable time; and
- Ms Gray failed to comply with the directions orders and the implied undertaking in rule 4(3) of the *Planning and Environment Court Rules 2010*.

Court determined that it was appropriate for the council to recover part of its costs of the proceedings

The court noted that its power to make an order for costs under section 457(1) of the *Sustainable Planning Act 2009* was a broad one to be exercised judicially. However, there should be no presumption that costs ought to follow the event.

It was the court's view that it was appropriate for the council to recover part of its costs of the proceedings on the basis that the council should be compensated for wasted costs and expenses it had incurred in complying with the directions and the engagement of experts.

The court determined that Ms Gray "effectively surrendered" to the council and it was not a case where there was "*some supervening event or settlement [that] so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs*". The court noted that nothing in the council's conduct in the appeal could be said to disentitle it to recover its costs given that Ms Gray took no steps to stop the council from incurring costs when she became aware of her prospects of success on 6 July 2016.

The court reinforced that costs were awarded not to punish Ms Gray, but were compensatory in the sense that it was to indemnify the council against the expenses incurred in the proceedings.

Ms Gray made submissions to the court not to award costs to the council but were not accepted by the court

Ms Gray submitted to the court against the award of costs in favour of the council on a number of basis which included the following:

- The award of costs would be contrary to accepted notions of public policy to award costs against a party who discontinued an appeal in circumstances where it took those steps following advice to do so.
- The advice provided to Ms Gray changed over time and she was entitled to change the approach to reflect the change in advice.

In relation to the first argument, the court by reference to *Manly Wharf Pty Ltd v Manly Council* (1997) 98 LGERA 245 noted "*it is difficult to conceive of a situation where an applicant would incur the costs of fully litigating a matter simply to avoid the costs of discontinuance*" and therefore rejected the argument made by Ms Gray.

In relation to the second argument, the court determined that while Ms Gray was entitled to change her position as advice given to her changed, it did not mean that the council should be expected to bear the costs which it had reasonably incurred for no ultimate benefit. The court therefore ordered Ms Gray to pay the council's costs of the proceedings from 24 June 2016, including its costs of the costs application on a standard basis.

Proposed residential development in floodplain conflicts with planning scheme and lacks sufficient grounds to justify an approval

William Lacy | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Reibel Farms Pty Ltd v Whitsunday Regional Council* [2016] QPEC 44 heard before Durward SC DCJ

October 2016

In brief

The case of *Reibel Farms Pty Ltd v Whitsunday Regional Council* [2016] QPEC 44 concerned an appeal in the Planning and Environment Court commenced by Reibel Farms against the decision of the Whitsunday Regional Council to refuse a development application for a preliminary approval to which section 3.1.6 of the *Integrated Planning Act 1997* applies for residential development.

The site the subject of the appeal was located in Bowen and subject to significant constraints in respect of flooding, which arose from a depression and drainage channel which bisected the land. The court determined that "*there is a potential for a flooding event that makes the proposed development untenable*" and that no proposed mitigation measures before the court would overcome this issue.

The court found that the proposed residential development was in significant conflict with the *Bowen Shire Planning Scheme 2006* and that there were not sufficient grounds to justify an approval of the proposed residential development notwithstanding the conflict.

Court found that there remained flood, safety and evacuation risks on the site despite the floodway upgrade and the proposed residential development was not suitable

The site was comprised of three lots located at 33 Argyle Park Road and Jilletts Road, Bowen. The land was in the Rural Zone and Open Space Zone under the *Bowen Shire Planning Scheme 2006*.

Bells Gully, which bisected the land, was a drainage channel which received flood waters from local sources and from breakouts of Don River further to the west of the site, which was described to be "*a particularly dangerous and unpredictable river during floods*".

Argyle Park Road, which adjoined the eastern part of the site was the primary point of access to the site and also a preferred evacuation route for the site and other beachside residential areas to the east of the site.

At the time of the original hearing in November 2014 the existing floodway crossing on Argyle Park Road was at such a height that it was susceptible to being cut on a regular basis, having immunity to local flooding at only an average recurrence interval of two years. The council ultimately upgraded the road culvert crossing in an attempt to increase its flood immunity for local flooding to an ARI 100 year level.

This upgrade was completed before the court delivered its judgment in the appeal and further evidence was put before the court on the effect of the upgrade. On the basis of evidence given by the hydrology expert for the council, the court was not convinced that the crossing would be trafficable during a 1 in 100 year flood.

The court found that there remained flood, safety and evacuation risks despite the completion of the floodway upgrade and that "*a residential development as proposed on a floodplain such as the land, would potentially increase the burden upon emergency services in a significant flood event, even though there has been an upgrade of the crossing of Bells Gully*".

Court found that the proposed residential development was in substantial conflict with the Bowen Shire Planning Scheme 2006 and the site was not suitable for the proposed residential development given its rural zoning and exposure to flood risks

The potential conflicts with the *Bowen Shire Planning Scheme 2006* arose from the proposed use of the site for urban residential development when the site was in a rural zone and where there was a significant risk of flooding.

Reibel Farms submitted that the conflict with the *Bowen Shire Planning Scheme 2006* was minor. However, the court found that the "*proposed development conflicts with the planning scheme and that the conflicts are not minor but rather are substantial*". The court went on to state as follows:

> *The land is subject to a real risk of flooding which has the potential for placing residents at personal risk to their health and safety, increase the burden on emergency services and may adversely affect land outside the boundaries of the subject land. The construction of residential development on a floodplain such as Bells Gully, which by its very nature has a specific purpose of taking water flow in flood times and, indeed undoubtedly, stormwater to the ocean at the outfall at King's Beach, is one that should be discouraged under the planning scheme. The land is rural land and I note that under the draft planning scheme continues to be rural land. A residential development on the land is incompatible with proper planning principles.*

Court considered whether grounds existed that may justify approval despite the conflict

Reibel Farms raised a number of grounds in seeking to establish sufficient grounds to justify the approval of the proposed residential development despite the conflicts, including that there was a significant need for the proposed residential development.

Having heard evidence from the economic need experts for both parties, the court did not find that there was a demonstrated economic need for the proposed residential development. It was established that the planning scheme provided adequate land for residential purposes and that considering the economic outlook for the area, it was likely that residential demand could be met within areas identified in the planning scheme for a considerable period of time.

Having considered the grounds raised by Reibel Farms, the court found that there were not sufficient grounds to justify an approval of the proposed residential development notwithstanding the identified conflicts. On this basis the appeal was dismissed and the council's decision to refuse the development application was confirmed.

Court found that privacy did not outweigh the level of amenity expected in Spring Hill

Shaun Pryor | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Steendyk v Brisbane City Council & Ors* [2016] QPEC 47 heard before Bowskill QC DCJ

October 2016

In brief

The case of *Steendyk v Brisbane City Council & Ors* [2016] QPEC 47 concerned an application commenced in the Planning and Environment Court by Brian Steendyk against Ellen and Kevin Calder-Potts and the Brisbane City Council seeking the following declarations:

- that the Calder-Potts' request made on 9 October 2014 to change a development approval given in 2010 was not a permissible change within the meaning of section 367 of the *Sustainable Planning Act 2009*;
- that the decision of the council made on 20 November 2014 to approve the permissible change request was of no force and effect;
- that the removal of the privacy screens which were conditioned as part of an approval given by the court in 2002 constituted a development offence under section 580 of the *Sustainable Planning Act 2009*.

The council's decision to approve the permissible change request approved, among other things, the replacement of fixed privacy screens on the north western side of the Calder-Potts' verandah, with a one metre high solid weatherboard wall with folding timber shutter screens above.

Mr Steendyk's primary concern was the impact on the privacy and amenity of his house when the moveable louvres on the western edge of the desk were in the open position. He claimed that occupants of the room could clearly see the rear yard of his house, part of the lower floor and into both bedrooms on the upper floor of his house.

The court did not find that any of the grounds relied upon by Mr Steendyk had been made out and ultimately decided not to grant the declaratory relief sought.

Mr Steendyk contended that the council had no jurisdiction to assess the permissible change request and that the council's decision was affected by jurisdictional error

In support of the declarations sought, Mr Steendyk relied on the following grounds:

- the council did not have jurisdiction to assess the permissible change request because the change was required to be made to the 2002 court approval and only the court had jurisdiction to deal with the request;
- the council's decision was affected by jurisdictional error which included the council's failure to take into account relevant considerations, and its decision was so unreasonable that no reasonable local government could have made it.

Court determined the appropriate process for dealing with a permissible change request

The council and the Calder-Potts submitted that the process for dealing with a permissible change request was two-fold. Firstly, the responsible entity was required to determine whether the change requested was a "permissible change" within the meaning of section 367(1) of the *Sustainable Planning Act 2009*. Secondly, if the change was found to be a "permissible change", the responsible entity was required to assess the request under section 374 of the *Sustainable Planning Act 2009*, and then to decide the request under section 375 of the *Sustainable Planning Act 2009*.

Mr Steendyk contended that the responsible entity was required to have regard to the matters set out in section 374 of the *Sustainable Planning Act 2009* in determining whether a change was a "permissible change", which provided a range of matters the responsible entity would have regard to.

The court considered that whether a proposed change was a "permissible change" would be a factual criterion involving the decision-maker's evaluation and formation of opinion and that it was necessary to satisfy this criterion in order to enliven the power of the responsible entity to exercise a discretion.

The court found that "*there is nothing in the language used, in either s 367 or s 374, or elsewhere in this division, which suggests that, in determining whether the definition in s 367 is met, regard must be had to the matters set out in s 374. Section 374 expressly refers to "assess[ing] the request", within a separate subdivision headed "assessing and deciding request for change". There is no apparent link between that section, and the definition section in s 367*".

Court found that the 2002 court approval could not restrict the carrying out of works approved by a subsequent approval

The 2002 court approval required the owner to "*fix privacy screens up to 1.8 metres above floor level to the sides of all balcony(s)/verandah(s)*". In reliance on section 245 of the *Sustainable Planning Act 2009*, Mr Steendyk submitted that since the 2002 court approval had not been cancelled and there had not been an abandonment of the use of the premises as a house, the approval remained in effect and bound the Calder-Potts as owners of the property.

Mr Steendyk further submitted that section 347(a) of the *Sustainable Planning Act 2009* did not allow a condition of a development approval to "*be inconsistent with a condition of an earlier development approval…still in effect for the development*".

The court accepted that section 245 of the *Sustainable Planning Act 2009* allowed different development approvals for the same land to co-exist. However, the court noted that "*it cannot be correct to say that an approval for development, which has already taken place and been completed, in this case in 2002, continues to bind the owner, and their successors in title, in such a way as to restrict the scope of any subsequent works that may be sought to be carried out to the house*".

With respect to section 347(a) of the *Sustainable Planning Act 2009*, the court found that the 2002 court approval was not an approval "*still in effect for the development*" the subject of the 2010 development approval, because the 2010 development approval was for different "development".

The court ultimately found that the permissible change request was to change the 2010 development approval, not the 2002 court approval, and that the council did have jurisdiction to assess it under section 369 of the *Sustainable Planning Act 2009*.

Court found that the council was not required to have regard to any of the pre-2010 material

Mr Steendyk submitted that the council had failed to take into account relevant considerations by not having regard to the 2002 court approval in reaching its decision.

Mr Steendyk sought to rely on the decision in *Dunlop v Wollahra Municipal Council* (1975) 2 NSWLR 446 for the proposition that the council was to have imputed knowledge of the history of dealings with the land, whether the act was performed by one person, or by several persons.

However, the court did not accept Mr Steendyk's submission and found that it would be "*a strenuous step too far*" to do so. The court considered that the Dunlop decision only confirmed that the decision-maker could be informed by reports and other documents that were before the decision-maker at the time the decision was made and was not restricted to the decision itself.

The court nonetheless found that there was no basis to conclude that the council was required to have regard to any of the pre-2010 material.

Court found that the council's decision was not so unreasonable that no reasonable local government could have made it

Mr Steendyk also contended that the decision of the council to approve the permissible change request in circumstances where it had actual knowledge that Mr Steendyk held firm views as to the importance of fixed privacy screening on the verandah, was so unreasonable that no reasonable local government could have made it.

Given its finding with respect to the pre-2010 material, the court found that there was a lack of evidence to show that the council knew about Mr Steendyk's "firm views" in relation to the fixed screening and that as a result, there was no basis for this argument.

Court found discretionary factors outweighed the relief sought by Mr Steendyk

Whilst the court did not accept Mr Steendyk's arguments, it went on to consider its discretion to grant the relief sought. The court found a number of discretionary factors which weighed strongly against the grant of the relief sought by Mr Steendyk which included:

- the importance of providing privacy did not outweigh the level of amenity that could reasonably be expected in an area such as Spring Hill;
- the works had already been completed by the Calder-Potts and were part of a broader range of works;
- the works had been carried out at considerable expense;
- the works were carried out in good faith and in reliance on the validity of the approval;
- the cost of $23,000 to reverse the works was not inconsiderable;
- the impact on the privacy of Mr Steendyk's land and home was negligible and had caused no concern to the Calder-Potts' closer neighbours;
- it was unreasonable for Mr Steendyk to seek to impose restraints on the Calder-Potts' property, requiring them to have fixed privacy screens of a particular kind on their verandah, in order to preserve privacy for Mr Steendyk;
- a new application for a development approval for the works which had been carried out would have been code assessable under the *Brisbane City Plan 2014* and Mr Steendyk would have had no right to make any submission, or to challenge the merits of any decision.

The court ultimately found that even if it had found some basis on which to invalidate the council's decision to approve the permissible change request, it would have declined to grant the relief sought by Mr Steendyk for discretionary reasons.

National register of foreign ownership of water entitlements

Todd Neal | Cecilia Pascale

This article discusses the Commonwealth Government's proposed changes to the *Register of Foreign Ownership of Agricultural Land Act 2015*

October 2016

In brief – Proposed changes would take effect from 1 July 2017

Foreign persons who hold a "registrable water entitlement" or a "contractual water right" may need to register those interests with the Australian Taxation Office (ATO) from 1 July 2017 if the government's proposed changes to the *Register of Foreign Ownership of Agricultural Land Act 2015* are passed.

Foreign owners of agricultural land will be impacted by proposed changes

Foreign owners of land in Australia need to increasingly monitor the regulatory environment impacting their investments in Australia as it is moving on a range of fronts. One of those fronts relates to resource ownership attached to agricultural land.

In August this year, the Commonwealth government released a draft Bill to amend the *Register of Foreign Ownership of Agricultural Land Act 2015*. The Bill is called the *Foreign Ownership of Agricultural Land Amendment (Water) Bill 2016*, which, if assented to, would amend the Act to establish a national register of foreign ownership of water entitlements.

In short, under the proposed changes, if you are a foreign person who holds, or will hold, a "registrable water entitlement" or a "contractual water right", then from 1 July 2017, you will need to register those interests with the ATO.

Foreign person definition includes individuals not ordinarily resident in Australia and foreign governments

The stated intention behind the amendments is to create a register of interests to enhance transparency to inform future policy. This transparency is intended to inform government and the community about emerging investment trends.

Under the Bill, a foreign person will have to register relevant interests with the ATO from 1 July 2017.

Under section 4 of the *Foreign Acquisitions and Takeovers Act 1975*, a foreign person is defined to be:

- an individual who is not ordinarily resident in Australia;
- a foreign government or foreign government investor;
- a corporation, trustee or general partner of a limited partnership where an individual not ordinarily resident in Australia, foreign corporation or foreign government holds an interest of at least 20%; or
- a corporation, trustee or general partner of a limited partnership in which two or more foreign persons hold an aggregate interest of at least 40%.

If the Bill is assented to, then from 1 December 2017 foreign persons will have to notify the Commissioner within 30 days after a change to their interest.

Registrable water entitlements and contractual water rights

The triggers to the obligation of foreign persons to register their interests are if they hold a "registrable water entitlement" or a "contractual water right".

Registrable water entitlements comprise:

- an irrigation right relating to a water resource in Australia;
- a right under a State or territory law to either hold or take water from a water resource in Australia.

Registrable water entitlements do not include:

- stock and domestic rights;
- riparian rights;
- an annual water allocation.

A "contractual water right" is defined as a contractual right that the person holds (alone or jointly) to another person's "registrable water entitlement" or a right of a kind specified in the rules. This would include rights under a deed, as well as a contract.

Penalties for breaches of registration requirements apply, but exemptions a possibility

Criminal and civil penalties apply for breaches of the registration requirements. These include maximum criminal penalties of $135,500 for individuals and $675,000 for companies, and up to three years' imprisonment and divestment orders.

The substantial penalties for non-compliance would mean that foreign owners (as that phrase is expansively defined) will need to conduct an audit of their agricultural landholdings and their interests in water resources to ensure that the relevant interests are properly registered.

The requirements to register will apply to some corporations, trusts and partnerships comprised of foreign interests, given the definition of foreign person.

It is likely that a final Bill will be considered by Parliament early in 2017. It is also possible that the Bill may be amended through the parliamentary process and there may be exemptions to registration which get passed.

Seek legal advice about registrable water entitlements rights and obligations

Foreign owners or those proposing to enter into a transaction for registrable water entitlements with a foreign owner, should seek legal advice about their rights and obligations.

COLIN BIGGERS & PAISLEY LAWYERS

Wind energy planning framework – cancelling out the white noise

Todd Neal | Cecilia Pascale

This article discusses the NSW Department of Planning and Environment's Wind Energy Planning Framework

October 2016

In brief – NSW government aims for more clarity around wind farm development process

The NSW Department of Planning and Environment is now considering the public submissions it has received on its newly proposed Wind Energy Planning Framework, which will underpin the future strategic policy for wind farm developments in NSW.

Wind energy investment needs to be balanced with community needs

The recent debate over wind farms has led to inertia on the development of wind farms in NSW. In particular, the uncertainty and delay in obtaining approvals or modifications to approvals has impacted on wind farm investment in NSW when compared to other states in Australia. This is despite the 2011 Draft Planning Guidelines for Wind Farms.

The stated intent behind the framework is to balance investment in wind energy with the needs of the community.

Approval regime includes considering capital investment value of State Significant Development wind farm projects

In NSW a tiered approvals regime for renewable energy projects exists to ensure that the level of assessment is appropriately tailored to the scale and type of the project. The framework's Assessment Policy provides the following table as a general overview of wind energy project categories and the assessment pathways:

CIV and output criteria	Environmental planning instrument	Development category	Assessment by	Planning pathway (*EP&A Act*)	Consent authority
CIV less than $5M and output less than 30MW	Infrastructure SEPP	Local Development	Local Council	Part 4	Local Council
CIV $5-30M and output less than 30MW	Infrastructure SEPP Schedule 4A, EP&A Act	Regional Development	Local Council	Part 4	Joint Regional Planning Panel
CIV less than $5M and output 30MW +	Infrastructure SEPP Schedule 3, EP&A Reg	Local Development and Designated Development	Local Council	Part 4	Local Council
CIV $5-30M and output 30MW +	Infrastructure SEPP Schedule 4A, EP&A Act Schedule 3, EP&A Reg	Regional Development and Designated Development	Local Council	Part 4	Joint Regional Planning Panel

CIV and output criteria	Environmental planning instrument	Development category	Assessment by	Planning pathway (*EP&A Act*)	Consent authority
CIV $30 M or more*	SRD SEPP	SSD	Department	Part 4, Division 4.1	Planning Minister / Planning Assessment Commission
CIV $30M or more* and output 30MW +	SRD SEPP Schedule 3, EP&A Reg	SSD (with some "designated development" legal consequences)	Department	Part 4, Division 4.1	Planning Minister / Planning Assessment Commission

Wind Energy Planning Framework Proposed Draft Assessment Policy, NSW Department of Planning and Environment, p.4.

As the above diagram demonstrates, the two key SEPPs are the:

- *State Environmental Planning Policy (State and Regional Development) 2011*.
- *State Environmental Planning Policy (Infrastructure) 2007*.

As a general rule, wind farm developments are assessed as State Significant Developments (SSD) where the proposed farm has:

- a capital investment value (CIV) of $30 million or more; or
- a CIV of $10 million where proposed in an environmentally sensitive area.

However, it is technically possible for a wind farm project to be assessed as local, regional and designated development, which would involve assessment and consent by councils or Joint Regional Planning Panels, depending on the category of development.

The framework deals only with wind farm developments that fall within the definition of SSD under the *Environmental Planning and Assessment Act 1979*. In other words, it will not apply to projects that have lower CIVs than what is mentioned above.

Framework includes technical noise, visual impact and environmental assessments

The framework has been put forward to address delays in the assessment and determination of applications that have been identified for wind farm projects. It includes:

- **An overarching Assessment Policy:** this provides guidance on the planning framework for the assessment of large-scale wind farms and emphasises a front-end approach to community engagement.
- **A technical Noise Assessment Bulletin:** this provides guidance on how to measure and assess environmental noise impacts from wind farms.
- **A technical Visual Impact Assessment Bulletin:** this provides guidance on the principles applied in the siting and visual assessment of wind farms.
- **Standard Secretary's Environmental Assessment Requirements:** these provide a template set of requirements that any wind farm project that is SSD will need to meet.

Consistent with the *Environmental Planning and Assessment Act 1979*, the Assessment Policy contemplates the submission of an environmental impact statement (EIS) by the applicant, and public exhibition of the EIS for a minimum of 30 days. The applicant is then afforded the chance to respond to submissions prior to the application being determined.

Significantly, the framework also removes the requirement for a minimum buffer zone between adjacent sensitive uses. Negotiated agreements with neighbouring parcels are instead considered the preferred mechanism for dealing with impacts. The bulletins also contain mitigation requirements based on the number of turbines and their proximity to a sensitive land use.

Wind Energy Planning Framework's implementation and implications

It is intended that the Department of Planning and Environment will provide an updated framework and possible draft amendments to the planning legislation to give effect to the framework in early to mid-2017.

If finalised, the framework will provide better clarity for proponents and the community about what is required for the development of any SSD wind farm, and when and how they might be approved.

The shift from buffer zones to private market negotiations will require more extensive community engagement and the preparation of agreements addressing the concerns of relevant neighbours.

It was futile to make a decision on the preliminary points because the court would hear and determine the issues in dispute by way of a rehearing

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bond v Chief Executive Department of Environment and Heritage Protection* [2016] QPEC 40 heard before Everson DCJ

November 2016

In brief

The case of *Bond v Chief Executive Department of Environment and Heritage Protection* [2016] QPEC 40 concerned an application in a pending proceeding filed in the Planning and Environment Court by Peter Bond which sought the determination of a preliminary point in an appeal against the decision of the Department of Environment and Heritage Protection to issue an environmental protection order dated 25 May 2016 to Mr Bond.

Mr Bond alleged that the environmental protection order was issued to him unlawfully in that it did not comply with the statutory requirements of an environmental protection order set out in section 360 of the *Environmental Protection Act 1994* and that Mr Bond was denied procedural fairness.

The court found that the department complied with the requirements of an environmental protection order and that Mr Bond was not denied procedural fairness. The application was therefore dismissed.

Court found the department complied with the requirements of an environmental protection order under the Environmental Protection Act 1994

Mr Bond alleged that the environmental protection order issued to him was invalid in that the department failed to determine whether there were special circumstances under section 521(2)(ii) of the *Environmental Protection Act 1994* when stating the appropriate review or appeal details in the environmental protection order.

It was submitted by Mr Bond that the department in its letter dated 22 June 2016, which was sent in response to the application for review of the department's original decision, accepted that there were special circumstances, and on this basis the environmental protection order did not meet the statutory requirements under section 360 of the *Environmental Protection Act 1994* and was invalid.

The court found that there was no evidence to suggest that at the time of issuing the environmental protection order the department considered that special circumstances existed. In fact, the court observed that the nomination of a 10 day period together with the relevant information in the environmental protection order would suggest that the department's view at the time was that no special circumstances existed.

Accordingly, the court found that the department had not failed to acknowledge special circumstances in stating the review or appeal details and therefore the environmental protection order was not invalid.

Court found that it was not mandatory for the department to comply with sections 521(5) or 521(8) of the Environmental Protection Act 1994 by making a review decision and Mr Bond was not denied procedural fairness in the absence of such mandatory requirement

If the department did not comply with section 521(5) or 521(8) of the *Environmental Protection Act 1994*, the department was taken to have made a decision confirming the original decision under section 521(10) of the *Environmental Protection Act 1994*.

Since it was not mandatory for the department to make a review decision, the court found that there was no right to compel the department to make a decision. Accordingly, Mr Bond was not denied procedural fairness as a consequence of a deemed refusal of his application for review of the original decision.

Court found that it would be futile to require the department to review the original decision to give the environmental protection order or to give a new environmental protection order since the court had power to hear and determine the dispute between the parties

The court noted that Mr Bond lodged the notice of appeal within the statutory timeframe and the appeal would not be affected by the department's decision or its conduct prior to the matter coming before the court given that the appeal would be heard by way of a rehearing and the broad jurisdiction of the court.

Further, there was no material before the court which demonstrated that Mr Bond had suffered any prejudice by appealing in circumstances where the department did not make a review decision.

Nonetheless, the court considered the rules of natural justice and, by reference to the High Court decision of *Stead v State Government Insurance Commission* (1986) 161 CLR 141, noted that "*not every departure from the rules of natural justice warrants a remedy if such a remedy would be futile*". In this regard, the court cited the following passage from the High Court decision:

> *Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.*
>
> *For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.*

The court considered that it would be futile to require the department to undertake a review of the original decision to issue the environmental protection order or to issue a new environmental protection order only because Mr Bond was not afforded a review of the original decision, since the court would hear and determine the issues in dispute by way of a rehearing.

Court refused an application to join a permissible change proceeding as all of the relevant issues were placed before the court and inclusion would result in additional costs

Kathryn O'Hare | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Novadeck Pty Ltd v Brisbane City Council* [2016] QPEC 53 heard before Everson DCJ

November 2016

In brief

The case of *Novadeck Pty Ltd v Brisbane City Council* [2016] QPEC 53 concerned an application under rule 69(1)(b)(ii) of the *Uniform Civil Procedure Rules 1999* by Beriley Pty Ltd, an adjoining landowner, seeking to be included in a proceeding in which Novadeck Pty Ltd requested a further permissible change to a development approval for land located at 28 Benhiam Street, Calamvale.

Beriley raised concerns relating to increases in the pad levels for townhouse dwellings located close to the common boundary and changes to the proposed acoustic barriers located on the same boundary. Relevantly, the Brisbane City Council had issued a notice to Novadeck under section 373(1) of the *Sustainable Planning Act 2009* objecting to these further changes.

Claiming that it was necessary to not only consider the changes to the development approval before the Planning and Environment Court but also the "real extent of the change" from the original approval, Beriley asserted that it could not rely upon the council to ensure that its concerns were properly agitated. However, in dismissing the application, the court stated that the further changes were to be assessed solely by comparing them to the most recent approval and that the concerns of Beriley were nonetheless being brought to the attention of the court by the council.

Ultimately, the court was of the view that it was not desirable, just and convenient to include Beriley as a party to the permissible change application in circumstances where all of the relevant issues were placed before the court with Beriley's inclusion only potentially adding to the costs of the parties.

While Beriley had no right to be heard, the council had already taken their concerns into account in assessing the permissible change application

On 8 October 2008, the Planning and Environment Court granted a development permit for a material change of use (multi-unit dwelling) and a preliminary approval for building work (multi-unit dwelling) to Novadeck, which was later changed by a judgment of the court on 7 December 2015.

At the time of the proceeding, Novadeck had constructed 49 two-storey townhouse dwellings on the land whilst Beriley was in the process of constructing 51 residential units on the land located to the south of the subject land.

In its application, Beriley claimed that its presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute concerning Novadeck's application. Beriley sought to agitate concerns relating to increases in the pad levels for townhouse dwellings located close to the common boundary and changes to the proposed acoustic barriers located on the same boundary.

Under section 373(1) of the *Sustainable Planning Act 2009*, the council issued a notice to Novadeck objecting to the changes and the court stated that while Beriley had no right to be heard, the council had nonetheless taken its concerns into account in assessing Novadeck's permissible change application.

Court held that the development approval against which a change was measured was the development approval in place at the time the permissible change application was made and not the original approval

The court considered the interrelationship between the prescriptive planning regime in Queensland and rule 69 of the *Uniform Civil Procedure Rules 1999*. In doing so, the court considered *Leda Holdings Pty Ltd v Caboolture Shire Council* [2007] 1 Qd R 467 and *Coolum Properties Pty Ltd & Bunnings Group Ltd v Maroochy Shire Council & Ors* [2007] QCA 299 in which the Court of Appeal discussed the discretion conferred by rule 69 as intending to "*facilitate the determination of proceedings in accordance with the rules of natural justice*" and should not be approached as if it were intended to "*restrict the availability of the common law right of a person likely to be affected by a decision to be heard in relation to that decision*".

Beriley asserted that it could not rely upon the council to ensure that its concerns were properly agitated in the application, submitting that the magnitude of the changes in the permissible change application being great, contrary to that submitted by Novadeck.

Relying upon the reasoning in *Orchard (Oxenford) Developments Pty Ltd v Gold Coast City Council* [2015] QPELR 462, Beriley submitted that in determining whether the further changes were permissible, it was necessary to not only consider the changes the subject of the application but also the changes from the original approval.

However, the court disagreed and observed that the development approval against which a change was measured in all cases was the development approval in place at the time the permissible change application was made. The original approval was therefore not relevant.

It was uncontentious that Beriley did not have a right to be heard in the determination of Novadeck's permissible change application as its inclusion was not desirable, just and convenient

In concluding that the applicability of the rules of natural justice was subject to the relevant statutory law that applied, the court found it was uncontentious that Beriley did not have a right to be heard in the determination of Novadeck's permissible change application. Further, on the facts, it was held that the concerns of Beriley were nonetheless being brought to the attention of the court by the council.

There was nothing before the court that suggested the court would not be able to undertake the task mandated by the legislative framework in assessing the permissible change application without including Beriley as a party to the proceeding under rule 69 of the *Uniform Civil Procedure Rules 1999*.

Accordingly, the court held that is was not desirable, just and convenient to include Beriley as a party to the proceeding where all the relevant issues were placed before the court and its inclusion would only potentially add to the costs of the parties.

Building and Development Dispute Resolution Committee made an error or mistake in law by approving an application to construct a dwelling house over a sewer

Christy Englezakis | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Council of the City of Gold Coast v Taylor & Anor* [2016] QPEC 54 heard before Robertson DCJ

November 2016

In brief

The case of *Council of the City of Gold Coast v Taylor & Anor* [2016] QPEC 54 concerned an appeal in the Planning and Environment Court against a decision of the Building and Development Dispute Resolution Committee to uphold an appeal from Mr and Mrs Taylor against the refusal of their development application for building work for the construction of a dwelling house.

The building work was proposed to be carried out on a lot traversed by a sewer and departed from the applicable performance requirements of the *Queensland Development Code*. The council, as a concurrence agency, directed the building certifier to refuse Mr and Mrs Taylor's development application on this basis.

The court allowed the appeal and set aside the decision of the committee, finding that the committee had made an error or mistake in law by failing to do the following:

- Consider and make findings about compliance with the applicable performance requirements.
- Give adequate reasons regarding matters of compliance and the discretion the committee thought it may exercise in approving the development application despite non-compliance with the *Queensland Development Code*.

The proposed building work departed from the acceptable solutions to the applicable performance requirements under the Queensland Development Code as it was proposed to be constructed over a sewer

Part MP1.4 - Building over or near relevant infrastructure of the *Queensland Development Code* applies to building work for a building or structure proposed to be carried out on a lot that contained, or was adjacent to a lot that contained, relevant infrastructure, including a sewer operated by or for a sewerage service provider.

The applicable performance requirements under MP1.4 relevantly provide as follows:

- A building or structure is constructed and located so its integrity is unlikely to be affected as a result of maintenance, replacement or failure of the relevant infrastructure.
- When completed, a building or structure allows the relevant service provider the access above the infrastructure required for inspecting, maintaining or replacing the infrastructure.

All parties agreed that the proposed building work departed from the acceptable solutions to these performance requirements as it was proposed to be constructed over a sewer. The council, as the relevant service provider and a concurrence agency for the development application, directed the building certifier to refuse the development application on the basis that it did not comply with the *Queensland Development Code*.

The committee approved the development application on appeal on the basis that the performance requirements of the Queensland Development Code were able to be satisfied

It was the concern of the committee that the council had not sufficiently explored whether the performance requirements of the *Queensland Development Code* were able to be satisfied. The council appeared to have taken the position that the performance requirements had the effect of prohibiting development above sewer lines, whilst on appeal before the court the council no longer maintained such a position.

The committee examined options that could satisfy the performance requirements, applying the *South East Queensland Water Supply and Sewerage Design and Construction Code*, specifically, the criterion that a new sewer constructed in accordance with the code would have an expected life of 100 years. The committee also considered the impact of the council's preferred relocation of the sewer on the design of the proposed dwelling and useability of the subject site.

The committee subsequently approved the development application, imposing a condition requiring the applicant to replace the section of sewer under the proposed building to the satisfaction of the council and in accordance with the *South East Queensland Water Supply and Sewerage Design and Construction Code*.

Court found the committee's reasoning process was flawed in failing to properly consider compliance with the Queensland Development Code

The council argued that the committee had taken into account an irrelevant consideration by referencing the *South East Queensland Water Supply and Sewerage Design and Construction Code*. Under section 313(5) of the *Sustainable Planning Act 2009*, an assessment manager must not assess an application against, or have regard to, anything other than a matter or thing referred to in section 313, including the *South East Queensland Water Supply and Sewerage Design and Construction Code*.

The court considered the council's argument had some merits. However, in any case the court found shortcomings in the committee's reasoning process in respect of compliance or otherwise of the proposal with the relevant performance requirements.

In respect of the committee's reason that a sewer constructed in accordance with the *South East Queensland Water Supply and Sewerage Design and Construction Code* would have an expected life of 100 years, the court found that this, in itself, did not achieve compliance with the relevant performance requirements. The performance requirements related to the construction and location of buildings and access for inspection, maintenance and replacement of infrastructure. If the committee considered construction to this standard would achieve compliance, it should have made a finding to this effect and given adequate reasons for doing so.

The committee's reasoning in regard to the impact of relocating the sewer was also considered deficient as it did not state how this was linked to compliance with the performance requirements or the ultimate decision. The court speculated that the committee might have thought it had a discretion to approve the development application regardless of the conflict with the *Queensland Development Code* and therefore considered the consequences for the Taylor's of moving the sewer to be relevant. The committee's reasons, however, lacked any explanation as to why it considered it had such a discretion and why it sought to exercise it.

The court found the reasons for the decision of the committee did not expressly find that the proposal complied with the relevant performance requirements of the *Queensland Development Code*, nor did they justify that compliance with the condition to replace the sewer would achieve compliance with the *Queensland Development Code*.

Court found the committee made an error or mistake in law and decided to set aside the committee's decision and made a new decision

Under section 479(1)(a) of the *Sustainable Planning Act 2009*, a decision of the committee may be appealed on the ground of an error or mistake in law on the part of the committee. The court found that the committee made an error or mistake in law by failing in its reasons to do the following:

- expressly find that replacing the relevant section of the sewer would achieve compliance with the applicable performance requirements;
- explain how the condition requiring replacement of the relevant section of the sewer linked with any finding about compliance with the applicable performance requirements.

Further, the committee had not considered or made findings about compliance on the basis of the development application before it or the approval the committee purported to give.

The committee also failed to give adequate reasons regarding the following:

- matters of compliance;
- the discretion the committee thought it may exercise in approving the development application despite non-compliance with the *Queensland Development Code*.

The court considered whether it was appropriate to return the matter to the committee to make a further decision according to law. The parties agreed however, that the preferred course was for the court to make a decision.

The court upheld the appeal, set aside the committee's decision and approved the development application subject to a different condition. This gave effect to the council's preference that the sewer be moved so that it did not lie underneath the building and satisfied the relevant performance requirements of the *Queensland Development Code*.

Foreign ownership of water entitlements registration update

Todd Neal | Cecilia Pascale

This article discusses the Federal Government's proposed changes to the *Register of Foreign Ownership of Water or Agricultural Land Act 2015*

December 2016

In brief – Foreign persons must comply with registration compliance burdens

The Federal Government's proposed changes to the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* have been passed which impose immediate and ongoing registration compliance burdens on foreign persons.

New laws affect foreign persons holding registrable water entitlements and contractual water rights

In our October article entitled, *National register of foreign ownership of water entitlements*, we advised that foreign persons who hold a "registrable water entitlement" or a "contractual water right" may need to register those interests with the Australian Taxation Office (ATO) from 1 July 2017 if the Federal Government's proposed changes to the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* are passed.

These changes were passed on 1 December 2016. Under the new legislation, there are:

- immediate compliance burdens; and
- ongoing compliance burdens.

Immediate compliance burdens

From 1 July 2017 to 30 November 2017, "foreign persons" need to register with the ATO their "registrable water entitlement" or a "contractual water right" that they will hold at the end of 30 November 2017.

Ongoing compliance burdens

From 1 December 2017, "foreign persons" need to notify the ATO within 30 days of the end of a financial year if:

- they started or ceased to hold a "registrable water entitlement" or a "contractual water right" during that financial year;
- they became a "foreign person" while holding "a registrable water entitlement" or "contractual water right" during that financial year;
- they ceased to be a "foreign person" while holding "a registrable water entitlement" or "contractual water right" during that financial year;
- they held a "registrable water entitlement" or "contractual water right" where that entitlement or right to the volume of water or the share of a water resource changed.

Penalties for non-compliance under the Taxation Administration Act 1953 (Cth)

Failure to meet the above registration compliance burdens will expose foreign persons to penalties under the *Taxation Administration Act 1953* (Cth). At present, the penalty is 1 unit for each 28 days by which registration is delayed. At present, these units are valued at $180.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and environment: a recap of 2016 and what to expect in 2017

Todd Neal | Cecilia Pascale

This article discusses key changes to environment and planning legislation and processes in 2016 and key items to watch out for in 2017

December 2016

In brief – NSW has experienced rapid and significant planning and environment change

There has never been so much incremental reform impacting development in NSW as there is today. All this at a time of big crane counts, big infrastructure and a need to increase housing supply. We take a look at the key changes in 2016 to bureaucracy, the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), case law and other environment and planning processes.

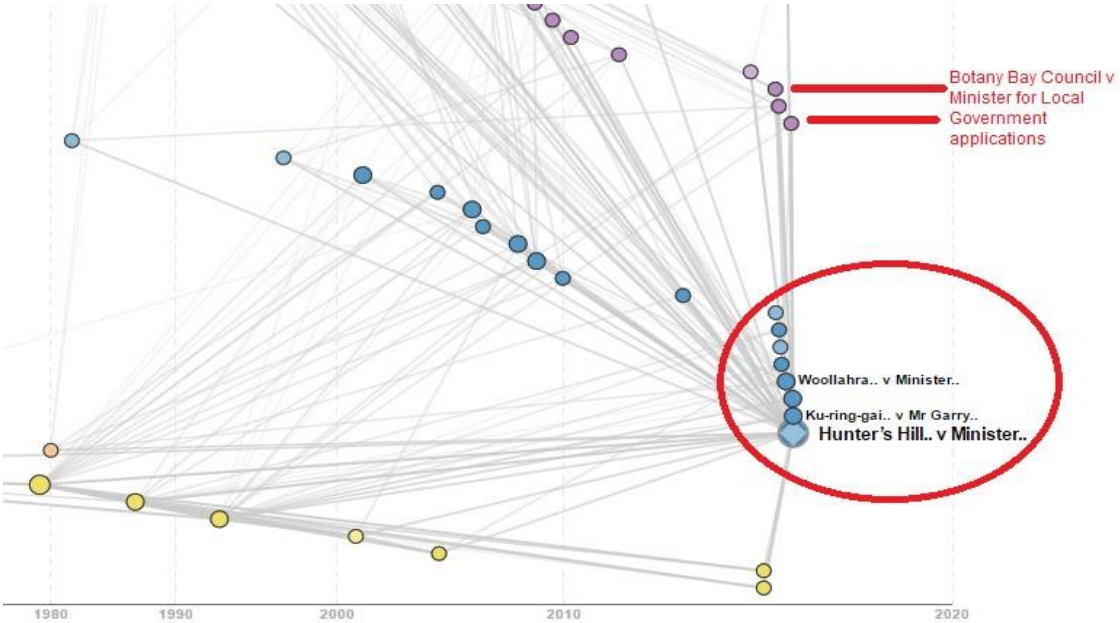
While the NSW coalition mantra of "evolution not revolution" has been recited as the pragmatic underpinning for the latest reform agenda (in pointed contrast to the 2013 wholesale proposed-but-unsuccessful reform of the EP&A Act), the cumulative impact of each reform is beginning to feel more revolutionary than evolutionary. The upshot is that significant change is happening faster than you can say "Have your say", in order to facilitate, among other things, the "new normal"; annual population increases of 30,000 people each year in NSW.

In this context, this article provides a high level summary of some of the key changes during 2016 to:

- bureaucracy;
- the EP&A Act and related policies;
- case law;
- other environment and planning processes.

Bureaucratic changes impacting councils

At the macro level, the amalgamation process for many councils is still being resolved in the courts. As the below Jade Precedent Tracker visually demonstrates, the courts have heard a large cluster of cases challenging the amalgamations:



We mention this because the coalface of planning and environment issues is often at this tier of government. During what appears to be somewhat of a "caretaker" period (the period when councils are under administration and before a new elected council is installed), councils are meant to be complying with the Department's *Circular No 16-18/ 27 June 2016 / A489192 Council decision-making prior to the September 2016 local government elections*. Although it is not a binding policy, we have observed difficulties in its implementation and even soft enforcement. Despite this, the circular is an important policy if NSW truly wants to "make things happen" given the current flux in local government. This is particularly important given the latest Australian Bureau of Statistics data showing a fall in approvals over the last six months. While correlation does not prove causation, the reduction in approvals does coincide with the amalgamation of councils in NSW.

We have also just witnessed (and will continue to see) changes to the *Local Government Act 1993* of both a symbolic and substantive nature, including the replacement of the charter with principles. While some of these reforms are geared at removing red tape, work will inevitably be required to ensure compliance and implementation of the new requirements or options available. Councils will need to adjust to some of the more permissive regulation embodied in the Act.

One of the key environment and planning changes is the absence from the principles of the requirement for councils, councillors and council employees to have regard to the principles of ecological sustainable development (**ESD**) in carrying out their responsibilities and its removal from the principles for local government.

Of course, many of the Acts under which local government works, such as the EP&A Act, still require consideration of ESD principles. Accordingly, the removal of ESD in the *Local Government Act 1993* amendments is likely to have more of a symbolic effect.

The other major change to the bureaucracy dealing with environmental planning issues is to the Department of Planning and the creation of the Greater Sydney Commission (**GSC**) through the *Greater Sydney Commission Act 2015*. The significant change here is the introduction of the GSC which came into effect on 27 January 2016. Many of the Minister's functions have been delegated to the GSC. This is particularly relevant for planning proposals. The GSC has also been tasked with some important planning functions such as the creation of District Plans, discussed in more detail below.

Finally, the enforcement capabilities of the Department of Planning have been ramped up (see its Ministerial media release *Toughest fines in the country come into force*) across the Sydney, Singleton, Wollongong and Queanbeyan offices – doubling the number of compliance officers in the field across NSW to monitor and enforce the conditions placed on developments of state significance.

Changes to the Environmental Planning and Assessment Act and related policies

We recently attended an end of year seminar from Carolyn McNally, Secretary of the Department of Planning, who mentioned that a more comprehensive Planning Bill was on her desk. While we wait for that to eventuate, some of the changes gazetted in 2016 address:

- the introduction of pre-development application consultation between neighbours;
- integration of the new Sydney Planning Panels (which have replaced Joint Regional Planning Panels (**JRPPs**) within Sydney) into the EP&A Act, and setting out the new role of the Panels as consent authorities;
- an end to transitional arrangements for projects approved under Part 3A, including modifications.

Other reforms include:

- A new VPA Practice Note dealing with "value capture", the practices of councils entering VPAs and the appropriateness of using VPAs in certain circumstances. It attempts to strike a balance between legitimate efforts to "capture" development profits and illegitimate "revenue raising", in light of mounting evidence that VPAs were being used by some councils as a "ransom".
- A new pre-Gateway review process allowing reviews (by the Panels) of planning proposals that have stagnated. This is an important change necessary to reduce blockages in the system. We are currently acting on a number of proponent-led planning proposals impacted by a lack of inertia, which ironically seems partly attributable to the amalgamation of councils. It remains to be seen whether these blockages will be smoothed out with this review process.

- The introduction of District Plans – these plans appear to be an attempt to bring NSW back to what some see as the planning utopia that existed with the Cumberland Planning Scheme in the 1950s. These plans provide a policy link between the state and regional-level strategic planning and local controls in LEPs, and will help inform the 2017 review of *A Plan for Growing Sydney* (Greater Sydney's regional plan). District Plans also contain matters for consideration relevant to development applications or rezonings.
- Further SEPP refinement and consolidation (with six SEPPs being repealed) and changes to SEPP 44 relating to koala habitat protection to broaden the scope of land that falls within the core koala habitat area.
- The replacement of JRPPs with Sydney Planning Panels (SPPs). The SPPs determine regionally significant development applications (generally development with a capital investment value of more than $20 million) within the Greater Sydney Region (as defined in the GSC Act), and consider rezoning reviews. These are the same functions previously performed by the former Sydney East and Sydney West JRPPs.

Significant planning and environment cases

R v Turnbull murder case

The Supreme Court issued its sentencing decision involving a lengthy custodial sentence of 35 years in *R v Turnbull (No. 26)* [2016] NSWSC 847, for the murder of an environmental officer while exercising his public functions investigating native vegetation clearance. While not strictly an environmental law case, this decision marks the conclusion of a two-year trial, preceded by investigations into allegations of unlawful clearance of native vegetation for the purpose of converting two properties to broadacre farms. It also provides some background to the repeal of the *Native Vegetation Act 2003* and the introduction of the *Biodiversity Conservation Act 2016*.

Compulsory acquisition cases before the Land and Environment Court

The Land and Environment Court has had a busy year dealing with the number of compulsory acquisitions going on within NSW. Judgments in *Dial a Dump Industries Pty Ltd v RMS* [2016] NSWLEC 39, and in (the long-awaited) *RMS v Allandale Blue Metal Pty Ltd* [2016] NSWCA 7 were handed down. Both cases have helped clarify the types of interests that are compensable when an interest in land is compulsorily acquired. *Bligh Consulting Pty Ltd v Ausgrid* [2016] NSWLEC 75 also provides some useful analysis on the approach to valuing construction easements that are compulsorily acquired, although the matter is under appeal.

Reysson Pty Limited v Roads and Maritime Services (No. 4) [2016] NSWLEC 159 was perhaps one of the most novel compulsory acquisition appeals in 2016. The case involved an appeal against the amount of compensation offered by the RMS for the compulsory acquisition of land at Banora Point in far north New South Wales. The primary hearing was conducted in November 2012. Due to the age-barred imposition on judges at retirement age, the sitting Judge in that matter was unable to hand down judgment on a weekday before leaving the bench. Accordingly, the decision in favour of RMS was handed down to the parties and their legal representatives on Sunday 5 June 2016 at about 4.30 pm via teleconference – the day before Justice Craig's 72nd birthday. In these proceedings, the applicant submitted that the judgment and orders should be set aside because of the procedural irregularities observed by the court in handing down its primary decision. The court rejected these arguments, but interestingly did not award costs given the compulsory acquisition context and due to the novel nature of the issues and the reasonableness of the arguments put.

Cases dealing with commencement and lapses of development consents

There have also been a number of cases that have cleared the air on physical commencement and lapses of development consents, which has been a recurring theme for us this year with numerous owners and purchasers requesting advice on this issue. The three key take home points from these cases are:

1. The following questions need to be answered affirmatively in order for the development consent not to lapse:
   - Is there a development consent for the erection of a building or the carrying out of a work?
   - Will the work relate to the approved development?
   - Will the work be commenced on the land to which the development consent applies before the lapse date?

   (Kunc J in *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District*; *Sydney Local Health District v Macquarie Health Corporation Ltd*; *Macquarie International Health Clinic Pty Ltd v City of Sydney Council (No. 9)* [2016] NSWSC 155 at [69]).
2. It is well established that survey and geotechnical works can constitute "engineering work" for the purposes of section 95(4) of the EP&A Act (*Benedict Industries Pty Ltd v Minister for Planning*; *Liverpool City Council v Moorebank Recyclers Pty Ltd* [2016] NSWLEC 122 per Robson J (at [59]).
3. But the answer on these matters, as Tobias JA acknowledged in *Hunter Development Brokerage Pty Ltd v Cessnock City Council*; *Tovedale Pty Ltd v Shoalhaven City Council* [2005] NSWCA 169 (at [86]), that these cases turn on questions of "fact and degree" – shows that each case needs to be considered in light of the statute and case law that have emerged.

The EDO's case for *Millers Point Fund Inc v Lendlease (Millers Point) Pty Ltd* [2016] NSWLEC 166 was also heard in November 2016, regarding a challenge to decisions by the NSW Planning Assessment Commission (**PAC**) on the Crown Casino development at Barangaroo. It will be interesting to see what results from this case in terms of the PAC's obligation to assess modifications of the development's proposed location.

Changes to other environment and planning legislation and processes

There have also been a myriad of other reforms but too many to substantively deal with each one. So in the spirit of 2016, we set out in "listicle" form a summary of the other changes that have occurred:

- A new Container Deposit Scheme commencing in July 2017 that will reduce the strain on councils' obligations for waste collection. Under the scheme, anyone who returns an empty eligible beverage container to an approved NSW collection depot or reverse vending machine will be eligible for a 10-cent refund. A network of depots and reverse vending machines will open across NSW to receive the empty containers.
- Proposed amendments to the *Protection of the Environment Operations (Waste) Regulation 2014* to repeal the "proximity principle". This change will place an obligation on occupiers of levy-liable waste facilities who wish to claim a transported waste deduction to provide evidence of the lawfulness of the receiving facility to use the waste for the relevant purpose.
- A new *Coastal Management Act 2016* that will have a significant impact on development within the "coastal environment area" which is expansively defined to include land adjoining coastal waters, estuaries, coastal lakes and coastal lagoons.
- A new *Crown Land Management Act 2016*. Crown land comprises 50% of land within NSW and often has high ecological importance. The new Act provides, among other things, for:
    - Ministerial powers to require Crown land managers to take environmental and heritage considerations into account in making decisions about Crown land;
    - community engagement in decisions about Crown land by requiring the preparation of a community engagement strategy for proposals that could affect public use of Crown land;
    - Councils managing Crown reserves being required to follow detailed community engagement provisions under the *Local Government Act 1993*;
    - enabling the most appropriate local owner of Crown land to engage in negotiations during the process to transfer land out of the Crown Estate thereby providing for involvement for Aboriginal communities in Crown land and managing Crown land with native title rights and interests;
    - greater powers to stop illegal activity on Crown land.
- Strata law reforms under the *Strata Schemes Development Act 2015* allowing developers to carry out "renewals" where 75% of lot owners in a strata scheme vote to support the strata renewal plan. This has also created appeal rights for owners to the Land and Environment Court to challenge the compensation they receive for these forced private acquisitions. We have started to see a run on these matters. The provisions form a new mechanism for enabling urban redevelopment with increased density.
- Changes to the *Land Acquisition (Just Terms Compensation) Act 1991* and the processes to be followed for councils in acquiring land. These changes: impose longer time frames for the pre-acquisition process; the potential for reinstatement to be compensated; and increase the amount paid for what was previously known as solatium (increased from $25,000 to $75,000). We mention this change as planning for the infrastructure required to support NSW's projected population increases will inevitably require more compulsory acquisitions.
- The introduction of the new Biodiversity Conservation Act and repeal of various other laws (eg *Threatened Species Conservation Act 1995*, *Native Vegetation Act 2003* and parts of the *National Parks and Wildlife Act 1974*), including a Biodiversity Offsets Scheme. The changes include: requiring the preparation of a biodiversity development assessment report for development approvals if the activity is likely to significantly affect threatened species; and introducing a new biodiversity offsetting scheme (replacing biobanking) to create biodiversity credits which can then be transferred (meaning sold) or retired (meaning they cannot be sold).

Planning and environment watch list for 2017

The key things to watch out for in 2017:

- further substantive amendments to the EP&A Act;
- how the new *Crown Land Management Act*, *Biodiversity Conservation Act*, *Strata Schemes Development Act* and *Land Acquisition (Just Terms Compensation) Act* are implemented and what develops practically;
- the enforcement of large planning approvals and the conditions attached to them;
- on a lighter note, judgments on a Sunday (per *Reysson*).

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