COLIN BIGGERS & PAISLEY LAWYERS

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PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

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COLIN BIGGERS & PAISLEY LAWYERS

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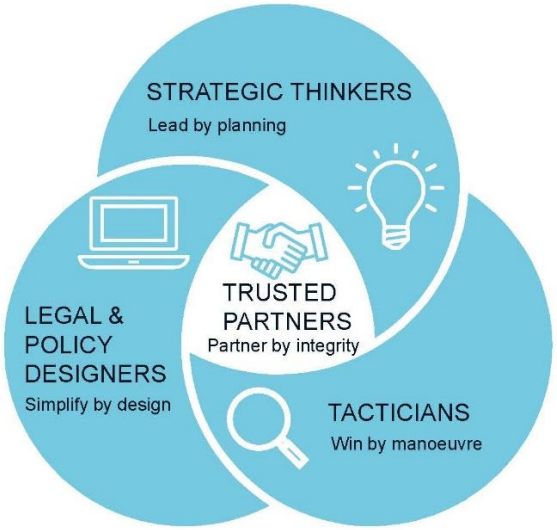

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COLIN BIGGERS & PAISLEY LAWYERS

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Refusal of an extension to an existing abattoir

Ronald Yuen | Elton Morais

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wattlevilla Pty Ltd v Western Downs Regional Council & Anor* [2014] QPEC 47 heard before Robertson DCJ

January 2015

In brief

The case of *Wattlevilla Pty Ltd v Western Downs Regional Council & Anor* [2014] QPEC 47 involved an appeal in the Planning and Environment Court commenced by Wattlevilla Pty Ltd against the Western Downs Regional Council's decision to refuse a development application on land located in Jimbour East for the following:

- a material change of use for an extension to an abattoir (being a noxious industry); and
- an environmentally relevant activity, processing, not including rendering, 1000t to 5000t of meat in a year.

The court had to consider a number of issues including:

- the lawfulness of the existing abattoir;
- the appropriateness of the proposed development having regard to the size, dimensions and location of the subject land, and its impacts on the amenity, ambience and character of the locality, adjoining premises and Jimbour Station Road;
- the extent of conflict between the proposed development and the council's Wambo Shire Planning Scheme, and if the conflict could be justified by sufficient grounds.

The court determined that the abattoir was not a lawful use, and the proposed development was in significant conflict with the council's planning scheme and there were no sufficient grounds to warrant an approval of the proposed development despite such conflict. As such the appeal was dismissed.

The court determined that the existing abattoir was not a lawful use

The council and Russell Pastoral Company contended that the existing abattoir was an unlawful use in that:

- the existing abattoir was above the scale and intensity of the historic use as a slaughter house or abattoir;
- no development approval had been issued in respect of the existing abattoir.

The court in finding that the abattoir was unlawful determined that:

- historically, no town planning permit had ever been granted over the subject land authorising the use of an abattoir;
- with the introduction of the *Local Government Act 1936* and the council's superseded planning scheme, provision was made to allow for existing non-conforming uses to be carried out on the subject land provided the use did not materially change;
- the evidence before the court suggested that the operation of the abattoir had materially changed over time;
- it appeared that in the year 2006-2007, a material change of use had occurred and consequently, Wattlevilla was required to obtain a development approval from the council to legalise the use.

Impacts on amenity from measurable sources such as noise and air quality were not be simply determined by the evidence of experts whose joint opinions were nonetheless important for the court's consideration

In considering the impact of the proposed development, the court had particular regard to the noise and air quality impact, and its impact on the visual amenity and landscape.

The court observed relevantly that:

- In relation to the area of noise, the expert witnesses agreed on more appropriate noise control and management measures to protect the locality specifically the uses at Jimbour House and the objectors' premises. Wattlevilla accepted all of the conditions proposed by the experts.

- In relation to the area of air quality, the expert witnesses also agreed on further conditions in relation to the design and management of the proposed development. Wattlevilla accepted all of the conditions proposed by the experts.
- In relation to surface water, ground water and effluent disposal, the expert witnesses agreed to a set of conditions to be imposed on the proposed development. Wattlevilla accepted all of the conditions proposed by the experts.
- In relation to flooding, it was resolved over the course of the joint expert meeting process.

Based on the findings during the joint expert meeting process, Wattlevilla asserted that in its view, such matters were no longer in contention. However, the council and Russell Pastoral Company maintained their respective views that despite the expert witnesses reaching agreement, the proposed development was still in conflict with the council's planning scheme in relation to the discrete issues of noise and air quality.

The court accepted the view of the council and Russell Pastoral Company, and in doing so, noted that impacts on amenity from measurable sources such as noise and air quality were not to be simply determined by the evidence of experts whose joint opinions were nonetheless important for the court's consideration.

The court determined that the proposed development conflicted with the council's planning scheme

The court determined that the proposed development was in conflict with the council's planning scheme. In doing so the court determined that:

- the concept of amenity was wide and flexible and not necessarily determined by reference to the evidence of experts alone, and accordingly, the standard of amenity that residents were entitled to enjoy or expect uses to be assessed objectively having regard to the planning scheme and its intent for the development of that area;
- the planning scheme would reasonably lead residents to an expectation that there should be no amenity impacts as a consequence of the proposed development;
- whilst non-rural activities were contemplated in the rural zone in which the subject land was located, the rural zone code sought to protect the amenity of the locality;
- the proposed development represented a highly prominent visual feature because of the size of the complex, proximity to the road frontage and the character of the use;
- the proposed development was significantly in conflict with the provisions of the council's planning scheme, generally relating to operating hours, delivery of goods for non-rural activities, design location and setbacks, lack of separation distances between adjoining uses, landscaping and rural character.

The court determined that there was no need which would warrant an approval of the proposed development

The court considered whether there were sufficient grounds to warrant an approval of the proposed development, in particular whether there was sufficient need which would warrant an approval. The court determined that such need would be decided from the perspective of the community and not that of the applicant for a development, its competitors or objectors.

In this regard, the court determined that Wattlevilla had not demonstrated any community need for the proposal, as the benefits in relation to employment, infrastructure and economics were minimal.

Dismissal of an application to challenge the lawfulness of a compensation package issued in accordance with conditions of a declared significant project

Ronald Yuen | Nadia Czachor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Falzon v Gladstone Ports Corporation* [2014] QPEC 37 heard before Andrews SC DCJ

January 2015

In brief

The case of *Falzon v Gladstone Ports Corporation* [2014] QPEC 37 involved an application to the Planning and Environment Court commenced by Mr Trevor Falzon challenging the lawfulness of Gladstone Ports Corporation's compensation package published in accordance with conditions of its long-term dredging and dredged material disposal program in the Port of Gladstone as part of the "Western Basin Dredging and Disposal Project". After the close of pleadings, Gladstone Ports Corporation applied to the Planning and Environment Court to strike out Mr Falzon's Points of Claim. The mains issues in dispute were whether Mr Falzon had established standing necessary to apply for the declarations and whether a sufficient case had been pleaded to obtain the declarations that he sought.

The court found that Mr Falzon did not have standing, and that he had not sufficiently pleaded his case and his pleading was too vague to obtain the declarations that he had applied for.

Standing to seek declarations limited to persons "significantly adversely affected"

The Western Basin Dredging and Disposal Project was declared a significant project for which an environmental impact statement was required, under the *State Development and Public Works Organisation Act 1971*. As such, the Coordinator-General published a Report for the environmental impact statement, which included certain conditions. The relevant conditions in the case were:

Condition number	Condition
20	Gladstone Ports Corporation must mitigate all reasonable financial losses to existing commercial fishing operators attributable to the maritime development in the Western Basin of the Port of Gladstone. This is to cover temporary and permanent loss of access to fishing areas and marine fish habitat.
21	Gladstone Ports Corporation must meet any costs associated with the investigation, negotiation and administration of any compensation package, including all costs incurred by the Department of Employment, Economic Development and Innovation in the management of development of any compensation package.

Mr Falzon argued that the compensation package published by Gladstone Ports Corporation contravened the conditions in the following way:

- in respect of condition 20, it did not mitigate all reasonable financial losses to "existing commercial fishing operations";
- in respect of condition 21, it did not meet the costs associated with the administration of the package.

The court observed that it was not enough for Mr Falzon to show a "purely academic interest" in whether the conditions had been contravened. The declaration-making powers of the court, in section 54G of the *State Development and Public Works Organisation Act 1971*, were limited to proceedings brought by a person whose interests were "significantly adversely affected" by the subject matter of the proceeding. Therefore, to establish standing, the court found that Mr Falzon would need to plead a tenable case that he had suffered reasonable financial losses which would not be mitigated by the compensation package.

Mr Falzon had not pleaded reasonable financial loss, as distinct from financial cost, and therefore did not have the requisite standing

The court emphasised that the proper focus of attention, for determining whether Mr Falzon had the requisite standing to apply for the declarations was whether there was a tenable argument that reasonable financial loss had been suffered as opposed to the new cost of doing business and those impacts from the project.

The court observed that, although it may seem semantic, damages would traditionally be claimed for a loss which was quite different from a financial cost. Proof of cost, would not necessarily equate to proof of loss and it was necessary to examine the nature and extent of the additional costs and impacts suffered and how they caused reasonable financial loss.

In Mr Falzon's case, it was not enough for him to point to the cost of more expensive longer nets as proof of loss. The longer nets could have, resulted in an increase in catch such that no financial loss was suffered.

The court found that because Mr Falzon had failed to identify material facts to create a tenable argument that he had suffered reasonable financial losses, his interests were not "significantly adversely affected" and therefore he did not have standing to apply for the declarations sought.

Pleadings also too vague to establish non-compliance with conditions 20 and 21

Even if Mr Falzon could establish the threshold requirement for standing, the court found that the pleadings did not establish non-compliance with conditions 20 and 21.

In respect of condition 20, the court found that the pleadings were insufficient because:

- they failed to allege reasonable financial losses had been suffered by Mr Falzon or anyone else;
- they failed to established that Mr Falzon and other fishermen that he purported to represent had the requisite licenses to qualify as "existing commercial fishing operators".

In respect of condition 21, the court found that the pleading did not allege Mr Falzon or any of the fishermen he purported to represent has suffered reasonable financial losses attributable to the project as a result of legal and accountancy fees associated with the preparation, submission and prosecution of a claim.

Court declines to award costs to successful party in planning appeal

Ronald Yuen | James Nicolson

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Friend v Brisbane City Council* [2014] QPEC 39 heard before Robertson DCJ

January 2015

In brief

In the case of *Friend v Brisbane City Council* [2014] QPEC 39, the Queensland Planning and Environment Court considered an application for costs by Trentham Holdings Pty Ltd.

The court determined that there was no basis to award costs in favour of Trentham Holdings, and dismissed its application, with the consequence of each party bearing its own cost.

Court not persuaded by Trentham Holdings' success in the appeal

Trentham Holdings argued that because it was wholly successful in the appeal, and that the court preferred the evidence of its town planner over that of the town planner of Robert Friend, and Gregory and Karen Manning, costs should be ordered in its favour.

The court rejected this argument, noting that while the court preferred the evidence of Trentham Holdings' town planner, it was not unusual for the opinion of experts within the same field to differ. Significantly, the divergence of opinion between the experts was in this case due to the drafting anomalies within the critical planning instrument and such anomalies underpinned the opinion of the town planner of Mr Friend and Mr and Ms Manning.

No evidence proceedings commenced for an improper purpose

Trentham Holdings argued that Mr Friend and Mr and Ms Manning commenced the appeal for an improper purpose, namely, continuing to proceed with the appeal to prevent a precedent from being set within the locality despite being previously told by the court that such basis lacked merits in a planning sense.

The court rejected this argument noting that the precedent argument was never raised as an issue or argued during the appeal.

In support of its contention that the appeal was commenced for an improper purpose, Trentham Holdings also argued that Mr Friend, in his capacity as a director and shareholder of the incorporated legal practice acting for himself and Mr and Ms Manning, continued the appeal in order to profit from the litigation and fees paid to the incorporated legal practice.

As there was no evidence before the court to suggest Mr Friend proceeded for an improper purpose as a result of his involvement in the incorporated legal practice, the court did not accept Trentham Holdings' argument.

Prospects of success on different issues not to be considered in isolation

Trentham Holdings argued that Mr Friend and Mr and Mrs Manning's town planner's opinions were "perverse" and no reasonable party would have proceeded with the appeal on the basis of such opinions.

The court acknowledged that while Mr Friend and Mr and Ms Manning's town planner's opinions were rejected by the court essentially on all planning issues, his opinions did not lack objectivity and were not "perverse". In the circumstances, Trentham Holdings could not show why it was unreasonable or improper for Mr Friend to rely on his town planner's opinion, particularly given the drafting anomalies in the critical planning instrument.

Trentham Holdings also argued that Mr Friend had no reasonable prospects of success in relation to a number of discrete issues including traffic and heritage related issues.

The court did not accept that there were no real prospects of success having regard to the manner in which those issues were addressed during the appeal. The court observed that Trentham Holdings' apparent approach of considering the success of these issues in isolation from other relevant issues in the appeal was being unnecessarily restrictive.

Appeal had sufficient public interest aspect

Trentham Holdings argued that Mr Friend and Mr and Ms Manning had not identified any matter of public interest in maintaining the appeal.

The court rejected this argument, noting that the inclusion of the temporary local planning instrument and the draft planning scheme were issues which were appropriately raised both in terms of the justice between the parties and the public interest, to ensure that the decision of the court took into account all relevant matters.

Mr Friend and Mr and Mrs Manning did not act unreasonably

Trentham Holdings, by reference to the withdrawal from the appeal of the Kangaroo Point Residents' Association prior to the hearing, argued that it was unreasonable for Mr Friend and Mr and Ms Manning to proceed with the appeal.

The court rejected this argument, observing that it was difficult to see how the decision of one party to discontinue should render another party's decision to proceed unreasonable.

Trentham Holdings further argued that Mr Friend and Mr and Ms Manning had acted unreasonably in rejecting offers to settle the appeal.

The court also rejected this argument, on the basis that it was not unreasonable for Mr Friend or Mr and Ms Manning to proceed in light of the opinions of their town planner, and further the offers were pre-conditioned on agreement by all appellants including Mr Friend and Mr and Ms Manning.

No evidence of failure to comply with procedural requirements

Trentham Holdings argued there was a failure by Mr Friend and Mr and Mrs Manning to disclose the marital relationship between their town planner and one of the adverse submitters to the proposed development. It alleged the failure to disclose was a calculated decision to not undermine their case by exposing the personal interest of their principal witness.

The court rejected the argument on the basis of the lack of evidence and observed that it was nonetheless far from establishing impropriety or unreasonableness on the part of Mr Friend or Mr and Ms Manning.

Queensland's new environmental offsets framework – Where does local government stand?

Luke Grayson | Nadia Czachor | Ian Wright

This article discusses the key aspects of Queensland's new environmental offsets framework under the *Environmental Offsets Act 2014*, particularly for Queensland's local governments

February 2015

In brief

Legislative scheme

On 28 May 2014, the Queensland Parliament passed the *Environmental Offsets Act 2014* (**Act**) and *Environmental Offsets Regulation 2014* (**Regulation**), the operative provisions of which commenced on 1 July 2014. The current reprints of the Act and the Regulation are each dated 19 December 2014.

The main purpose of the Act is stated to be *"to counterbalance the significant residual impacts of particular activities on prescribed environmental matters through the use of environmental offsets."*[1]

The Act provides that the main purpose is achieved by the following:[2]

- *"establishing a framework for environmental offsets"*;
- *"recognising the level of protection given to prescribed environmental matters under other legislation"*;
- *"providing for national, State and local matters of environmental significance to be prescribed environmental matters for the purpose of this Act"*;
- *"coordinating the implementation of the framework in conjunction with other legislation"*.

Themes of the paper

This paper focusses on the ability of a local government to impose an offset condition on a development approval or infrastructure agreement under the *Sustainable Planning Act 2009* (**SPA**), along with any pre-conditions to, and limitations on, that ability.

In particular the paper addresses the following questions:

- What is an offset condition?
- What is an environmental offset?
- When can an offset condition be imposed by a local government?
- How are environmental offsets provided?
- What action is required from a local government?

What is an offset condition?

In general terms, an offset condition is a condition which:

- may be imposed on an agreement, licence, permit or other authority; and
- requires, or otherwise relates to, an environmental offset.[3]

When considered in the context of a local government's power under the SPA, an offset condition includes a condition imposed by a local government on a development approval, or as part of an infrastructure agreement,[4] so long as the condition relates to an environmental offset.

The interpretation of 'environmental offset' must therefore be considered to determine whether a condition is an offset condition.

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1 Section 3(1) (Purpose and achievement) of the Act.
2 Section 3(2) (Purpose and achievement) of the Act.
3 See section 7(1) (What is an offset condition and an environmental offset) and schedule 2 (Dictionary) of the Act.
4 See schedule 2 (Dictionary) of the Act, definition of "authority" and "administering agency".

What is an environmental offset?

In general terms, an environmental offset is an activity which is undertaken to counterbalance an adverse impact of a prescribed activity on a prescribed environmental matter that:

- remains, or will or is likely to remain, despite on-site mitigation measures; and
- is, or will or is likely to be, significant.[5]

For an offset condition to be valid, the following conditions must therefore be satisfied:

- *Prescribed activity* – The activity for which the environmental offset the subject of the offset condition is required must be a prescribed activity.
- *Counterbalance for a prescribed environmental matter* – The environmental offset must require activities to be undertaken to counterbalance an adverse impact on a prescribed environmental matter.
- *Remaining adverse impact* – The adverse impact must remain, or be likely to remain, despite on-site mitigation measures.
- *Remaining adverse impact is significant* – The remaining adverse impact must be, or be likely to be, significant.

Prescribed activity

A prescribed activity relevantly includes development the subject of a development approval for which an environmental offset may be required under a local planning instrument.[6] A number of other activities are also prescribed activities, however these are not considered as part of this paper.

Counterbalance for a prescribed environmental matter

Under the Act, a 'prescribed environmental matter' is:[7]

> *any of the following matters prescribed under a regulation to be a prescribed environmental matter—*
>
> *(a) a matter of national environmental significance;*
>
> *(b) a matter of State environmental significance;*
>
> *(c) a matter of local environmental significance.*

The Regulation relevantly states the matters of national environmental significance along with the matters of State environmental significance.[8] (These matters are not thoroughly addressed in this paper, however local governments should be aware of the content of these matters as they are of relevance to a local government for reasons discussed below.)

In addition to the prescribed matters of national and State environmental significance, the Regulation relevantly provides that a matter of local environmental significance is a prescribed environmental matter if:[9]

- an environmental offset is required under a local planning instrument for the matter; and
- the matter is not the same, or substantially the same, as any of the following:
  - a matter of national environmental significance under section 5(1) of the Regulation;
  - a matter of State environmental significance under schedule 2 or section 5(3) of the Regulation.

It is unclear at this stage what degree of similarity is required for matters to be considered 'substantially the same'.

Remaining adverse impact

In order for a local government to impose an offset condition, the adverse impact for which the offset condition is imposed must remain, or be likely to remain, despite on-site mitigation matters.

If on-site mitigation will prevent the adverse impact from being likely to remain, an offset condition cannot be imposed in respect of that adverse impact.

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5 See sections 7(2) (What is an offset condition and an environmental offset) and 8(1) (What is a significant residual impact) of the Act.

6 See section 9 (What is a prescribed activity) of the Act and section 4 (Prescribed activities—Act, s 9) and schedule 1, item 7 (Activities prescribed for section 9(c) of the Act) of the Regulation.

7 Section 10(1) (What is a prescribed environmental matter and a matter of environmental significance) of the Act.

8 See section 5(1) (Prescribed environmental matters—Act, s 10) of the Regulation and section 5(2) and (3) (Prescribed environmental matters—Act, s10) and schedule 2 (Prescribed environmental matters—matters of State environmental significance) of the Regulation for matters of national environmental significance and State environmental significance, respectively.

9 See section 5(4) (Prescribed environmental matters—Act, s 10) of the Regulation.

If on-site mitigation will not prevent all adverse impacts from being likely to remain, an offset condition may be imposed in respect of the remaining adverse impact.

Remaining adverse impact is significant

In order for a local government to impose an offset condition, there must be a remaining adverse impact for which the offset condition is imposed which is, will or is likely to be, significant.

The Act does not provide any guidance as to what is considered significant in respect of matters of local environmental significance.[10] The Queensland government has produced the following guidelines, however these specifically do not apply to the assessment of matters of local environmental significance:

- *Significant Residual Impact Guideline - For matters of State environmental significance and prescribed activities assessable under the Sustainable Planning Act 2009* (**DSDIP Significant Residual Impact Guideline**).[11]
- *Significant Residual Impact Guideline - Nature Conservation Act 1992, Environmental Protection Act 1994, Marine Parks Act 2004* (**DEHP Significant Residual Impact Guideline**).[12]

If a local government decides to identify matters of local environmental significance in a local planning instrument, the local government may develop its own set of significant residual impact guidelines for the matters of local environmental significance, which should be made publicly available.[13] By developing and making available local significant residual impact guidelines, the local government would provide more certainty for developers and greater efficiency in the assessment of development applications for local governments.

For a condition imposed for a non-juvenile koala habitat tree under the Koala SPRP, the DSDIP Significant Residual Impact Guideline refers to the decisional criteria contained in the Koala SPRP to determine whether an action is likely to have a significant residual impact.[14]

When can an offset condition be imposed by a local government?

Under the Act and Regulation a local government is subject to the following restrictions on imposing an offset condition:

- *Local significance* – A local government may impose an offset condition only for one of the following two matters:[15]
  - a matter of local environmental significance identified in a local planning instrument, which by definition excludes matters which are the same, or substantially the same, as a matter of national environmental significance or State environmental significance;[16]
  - a non-juvenile koala habitat tree located in an area shown as bushland habitat, high value rehabilitation habitat or medium value rehabilitation habitat on the 'Map of Assessable Development Area Koala Habitat Values' under the *South East Queensland Koala Conservation State Planning Regulation Provisions* (**Koala SPRP**).[17]
- *Timing restrictions* – Generally, a local government may only impose an offset condition on a development approval or as part of an infrastructure agreement where the application was lodged on or after 1 July 2014,[18] subject to the following exceptions:
  - *Permissible change* – Where an application is made after 1 July 2014 to amend a development approval (or infrastructure agreement) granted prior to 1 July 2014 and the amendment may or is likely to result in a significant residual impact on a prescribed environmental matter, the local government may impose an offset condition on the amended approval or agreement.[19] This most relevantly includes an application for permissible change to a development approval where the approval was granted prior to the commencement of the Act on 1 July 2014.

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10 See section 8 (What is a significant residual impact) of the Act. Note that sub-sections (2)-(6) relate to matters of State environmental significance: see schedule 2, sections 7 (Protected areas) and 12 (Legally secured offset areas) of the Regulation.
11 Section 1.2.1 (Relationship with MLES and MNES) of the DSDIP Significant Residual Impact Guideline.
12 Section 1 (Introduction) of the DEHP Significant Residual Impact Guideline.
13 See also section 1.1.2 (Application and scope) of the *Queensland Environmental Offsets Policy (version 1.1)*.
14 Section 3.5.1 (SRI criteria for prescribed activities assessable under SPA) on page 17 of the DSDIP Significant Impact Guidelines.
15 Section 15(4) (Restriction on imposition of offset condition) of the Act.
16 Schedule 2 (Dictionary), definition of 'matter of local environmental significance' of the Act and section 5(4)(b) (Prescribed environmental matters—Act, s 10) of the Regulation.
17 See section 37 (Non-juvenile koala habitat tree prescribed as relevant for Act, s 15(4)) and schedule 2 (Prescribed environmental matters—matters of State environmental significance), section 6(3) (Protected wildlife habitat) of the Regulation.
18 Section 95(1) (Application of this Act or existing Act) of the Act.
19 Section 95(4) (Application of this Act or existing Act) of the Act.

- *Undecided applications* – Where a development application was lodged but not dealt with before the commencement of the Act and the local government is considering whether to impose an offset condition on the development approval, the local government may, at the request of or with the agreement of the applicant, consider all or part of the environmental offsets policy under the Act instead of all or part of any other previously relevant policy.[20]

  It is unclear how this applies in the context of an infrastructure agreement which includes an offset condition which was not executed prior to 1 July 2014, however it is likely that the infrastructure agreement must be considered against the Act, Regulation and Environmental Offsets Policy, rather than against the law in force at the time the infrastructure agreement was initially being negotiated.

- *Decided applications* – Where a development approval or infrastructure agreement which was lodged before the commencement of the Act has been granted subject to an offset condition imposed under another Act, the applicant may apply for an amendment of the approval or agreement to:[21]

  > *allow the selection and delivery of an environmental offset in accordance with the environmental offsets policy;*

  > *allow a financial settlement offset determined in accordance with the environmental offsets policy; or*

  > *remove a requirement to provide an environmental offset for an environmental value that is not a prescribed environmental matter or an impact on a prescribed environmental matter that is not a significant residual impact.*

  Where a local government receives an application of this type, the local government may:[22]

  > *decide to make the amendment only if satisfied that the environmental values for which the environmental offset was required have not yet been impacted by the activity that is authorised by the approval or agreement; and*

  > *if the local government decides to make the amendment, make any other amendments the local government considers relate to the amendment and are necessary or desirable.*

- *Commonwealth restrictions* – A local government cannot impose an offset condition if either of the following has been assessed under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) or the *Great Barrier Reef Marine Park Act 1975* regardless of whether or not the assessment has resulted in the imposition of an offset condition:[23]

  - the same, or substantially the same, impact;
  - the same, or substantially the same, prescribed environmental matter.

  Interestingly, if an impact has been assessed by the Commonwealth government, a strict interpretation of the legislation would prohibit a local government from imposing an offset condition on the same, or substantially the same, impact even where the impact is being assessed on a different matter by each government. It is unclear whether this was the intention of this restriction.

- *Removal of conditions* – An applicant may apply for the removal of an offset condition imposed by a local government where the Commonwealth government or State government has imposed an offset condition which relates to the same, or substantially the same, impact and the same, or substantially the same, prescribed environmental matter.[24] However, the offset condition imposed by the local government will prevail over the condition imposed by the State government in the circumstances prescribed in the Regulation, most notably where a local government imposes an offset condition in respect of koala habitat or a non-juvenile koala habitat tree under the Koala SPRP.[25]

Imposing an offset condition for koalas

Of particular relevance to local governments (especially in South-East Queensland) are conditions in respect of koalas, which have the following characteristics:

- *All levels of government* – All levels of government may impose an offset condition in respect of either koalas or koala habitat.

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20 Section 95A (Undecided applications for authorities) of the Act.
21 Section 95B(1) and (2) (Amendment of existing authorities) of the Act.
22 Section 95B(6) and (8) (Amendment of existing authorities) of the Act.
23 Section 15(1), (2) and (5) (Restriction on imposition of offset condition) of the Act. Note also that no other Commonwealth Act has been prescribed by the Regulation as at the reprint dated 19 December 2014.
24 Section 25A(1) and (2) (Removing duplicate conditions) of the Act.
25 Section 25A(3) (Removing duplicate conditions) of the Act and section 36 (Administering agency to apply to for removal of particular duplicate offset condition) of the Regulation. Note that a local government offset condition will never prevail over a Commonwealth government offset condition on the basis of section 25A(3)(a) (Removing duplicate conditions) of the Act.

- *Matter of national environmental significance* – Koala (combined populations of Queensland, New South Wales and the Australian Capital Territory) is a listed vulnerable species under the EPBC Act and as such is a matter of national environmental significance under the Act.[26]
- *Matter of State environmental significance* – Koala habitat is a matter of State environmental significance in any of the following circumstances:[27]
  - *Non-juvenile koala habitat tree* – A tree will be a matter of State environmental significance as a non-juvenile koala habitat tree if the tree is:
    - *a koala habitat tree, being* Angophora*,* Corymbia*,* Eucalyptus*,* Lophostemon *or* Melaleuca *(this list is quite broad, including trees which are not typically considered koala food trees, as many of these trees are potentially utilised by koalas for shade rather than food);*
    - *non-juvenile, being more than 4m high or having a trunk with a circumference of more than 31.5cm at 1.3m above the ground; and*
    - *in an area shown as bushland habitat, high value rehabilitation habitat or medium value rehabilitation habitat on the Map of Assessable Development Area Koala Habitat Values under the Koala SPRP;*
  - *Habitat for vulnerable koala* – Habitat will be a matter of State environmental significance if it is habitat for the koala (South-East Queensland bioregion);
  - *Habitat for special least concern koala* – Habitat will be a matter of State environmental significance if it is habitat for the koala.
- *Local government powers* – A local government may impose an offset condition in respect of koalas in either of the following circumstances:[28]
  - where the condition relates to a non-juvenile koala habitat tree that is a matter of State environmental significance;
  - where a local planning instrument identifies an environmental matter in respect of the koala that is not, and is not substantially the same as, a matter of national environmental significance or State environmental significance, however it is difficult to imagine circumstances in which this could arise.
- *Interplay between Commonwealth and local government conditions* – It is unclear whether an offset condition imposed by the Commonwealth government in respect of a significant impact on the listed vulnerable koala overrides an offset condition imposed by a local government in respect of a significant impact on a number of non-juvenile koala habitat trees, on the basis that the conditions relate to substantially the same matter. This will be particularly controversial where the Commonwealth government purports to override a condition imposed by a local government by deciding not to impose a Commonwealth offset condition.

How is an environmental offset provided?

Once a local government imposes an offset condition on a development approval or as part of an infrastructure agreement under the SPA, a proponent may elect to deliver the environmental offset for the activity, or a stage of the activity, by one of the following methods:[29]

- *Proponent-driven offset* – This delivery method involves providing an environmental offset through an action that a proponent undertakes directly or indirectly.
- *Financial settlement offset* – This delivery method involves making a payment by the proponent to the local government in relation to delivering an environmental offset, of an amount required by the local government.
- *Combination of a proponent-driven offset and financial settlement offset* – This delivery method involves providing some combination of the two previous delivery methods.

Determination of delivery method

When electing the delivery method, the following is required:

- *Approved form* – The proponent must provide the notice of election in the approved form, which may be found on the Queensland government website.[30]
- *Offset delivery plan for proponent-driven offsets* – Where the proposed delivery method involves a proponent-driven offset, the notice of election must be accompanied by an offset delivery plan about how the proponent will undertake the offset, which must satisfy each of the following:[31]

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26 Section 5(1)(d) (Prescribed environmental matters—Act, s 10) of the Regulation.
27 Schedule 2, section 6(3)-(5) (Protected wildlife habitat) of the Regulation.
28 Section 15(4) (Restriction on imposition of offset condition) of the Act and section 37 (Non-juvenile koala habitat tree prescribed as relevant for Act, s 15(4)) of the Regulation.
29 Sections 18(1) and (2) (Electing how to deliver environmental offset), 21 (What is a proponent-driven offset) and 23 (What is a financial settlement offset) of the Act.
30 Section 18(2) (Electing how to deliver environmental offset) of the Act. Approved forms may be found at: https://www.qld.gov.au/environment/pollution/management/offsets/.

- *Describe how an offset will be undertaken* – Describe how an environmental offset will be undertaken and the conservation outcome will be achieved. A conservation outcome is achieved if the offset is selected, designed and managed to maintain the viability of the matter to which the offset relates.[32]

  This requirement is achieved by:

  - Managing risk of failure – *Effectively accounting for and managing the risks of the environmental offset failing to achieve the conservation outcome;*
  - Ensuring benefits are provided – *Ensuring the environmental offset provides benefits in relation to the relevant matter of local environmental significance or the non-juvenile koala habitat tree, in addition to any other benefit provided under a requirement of, or of an authority under, an Act;*
  - Transparent governance – *Having transparent governance arrangements that can be readily measured, monitored, audited and enforced; and*
  - Offset proportionate to impact – *Ensuring the environmental offset is of a size and scale proportionate to the significant residual impact on the matter of local environmental significance or the non-juvenile koala habitat tree.*
- *Agreement of landowner* – State that the proponent, and any other entity that owns land on which the environmental offset will be undertaken agree to the offset being undertaken and be signed by each of these entities.
- *Description of impacted matter* – Describe the matter of local environmental significance or the non-juvenile koala habitat tree to which the offset condition relates.
- *Description of land* – State the following in respect of the land on which the environmental offset will be undertaken:
  - *whether the offset condition will be delivered, wholly or partly, on this land (this requirement is uncertain in its operation and may be a drafting error in the Regulation);*
  - *particulars of, or a description sufficient to identify, this land;*
  - *details of any person with an interest in this land;*
  - *the existing land use of this land and any impact that land use may have on the delivery of the offset;*
  - *the measures the proponent will take to secure this land as a legally secured offset area, including why the measures are considered reasonable and practicable, the period during which the proponent will take the measures and why the period is considered reasonable for securing the land.*

- *Local government determination* – Once the local government receives a notice in the correct form and any required offset delivery plan, the local government must satisfy each of the following:
  - *Consideration* – Consider the notice and any offset delivery plan, including by considering:[33]
    - *each relevant environmental offsets policy, which is currently the* Queensland Environmental Offsets Policy (version 1.1) *(**Environmental Offsets Policy**), which is discussed below, but can also include any local government policy approved by the Minister and prescribed under the Regulation;*
    - *whether the offset delivery plan satisfies the requirements for an offset delivery plan which are stated above;*
    - *whether an activity proposed in the offset delivery plan is restricted or prohibited or requires permission under any law, such as where the proposal would involve the proponent undertaking assessable development; and*
    - *the impact undertaking the environmental offset under the offset delivery plan will, or is likely to, have on other prescribed environmental matters on the land on which the environmental offset will be undertaken.*
  - *Decision* – Decide whether it is appropriate to deliver the environmental offset in the way stated in the notice and any offset delivery plan, or whether the offset should be delivered in a different way.[34]

    There is no statutory authority for making an information request. However, it is reasonable for a local government to make a non-statutory and informal request for information where there is insufficient information in the notice for the local government to make a decision.

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31 Section 18(3)-(5) (Electing how to deliver environmental offset) of the Act and section 8 (Requirements for offset delivery plans—Act, s 18(4)(d) of the Regulation.

32 Section 11 (Conservation outcome achieved by environmental offset) of the Act.

33 Section 19(1) (Agreed delivery arrangements) of the Act and section 9 (Matters administering agency to consider—Act, s 19) of the Regulation.

34 Section 19(2) (Agreed delivery arrangements) of the Act.

- *Notification* – Give the proponent a notice which states:[35]
  - *the way in which the environmental offset is required to be delivered;*
  - *the proponent is required to enter into an agreed delivery arrangement within a stated reasonable period of time;*
  - *that the proponent may apply for a review of the decision; and*
  - *how and when the proponent may apply for a review of the decision.*

- *Environmental Offsets Policy* – The Environmental Offsets Policy relevantly provides the following for the delivery of environmental offsets:
  - *Offset principles* – The Environmental Offsets Policy states the following 7 offset principles with which all environmental offsets must comply:[36]
    - *offsets will not replace or undermine existing environmental standards or regulatory requirements, or be used to allow development in areas otherwise prohibited through legislation or policy;*
    - *environmental impacts must first be avoided, then minimised, before considering the use of offsets for any remaining impact;*
    - *offsets must achieve a conservation outcome that achieves an equivalent environmental outcome;*
    - *offsets must provide environmental values as similar as possible to those being lost;*
    - *offset provision must minimise the time-lag between the impact and delivery of the offset;*
    - *offsets must provide additional protection to environmental values at risk, or additional management actions to improve environmental values;*
    - *where legal security is required, offsets must be legally secured for the duration of the impact on the prescribed environmental matter.*
  - *Offset size and scale* – The size and scale of an environmental offset is stated to be that which is necessary to achieve a conservation outcome. Specific requirements are provided in respect of each type of delivery method, which generally relate to the following:
    - Land-based offsets – *The land required to be provided is based on a habitat quality assessment, but cannot exceed four times the size of the land impacted by the prescribed activity.*
    - Direct Benefit Management Plan – *The suitability of this type of offset is considered on a case-by-case basis by reference to the benefits of the proposal.*
    - Financial settlement offsets – *The amount payable is determined in accordance with the methodology provided in the Environmental Offsets Policy.*
  - *Staged offset delivery* – A proponent may deliver offsets in stages in line with stages of the prescribed activity, subject to the following:
    - *the proposal to stage the offset delivery must be identified before the development approval is issued or infrastructure agreement is executed so that the conditions of the authority can reflect the arrangement;*
    - *the assessment of the development application or infrastructure agreement will need to consider, for the whole project, avoidance and mitigation of impacts on prescribed environmental matters and the maximum likely extent and duration of the impact on prescribed environmental matters;*
    - *detailed assessment of the impact of each stage of the proposal, including the offset requirement for that stage, will need to be conducted prior to providing a notice of election for that stage;*
    - *information in relation to completed stages is to be sought by the local government with the notice of election so that offset debits and credits may be assessed for subsequent stages;*
    - *offset credits may be used in subsequent stages where the impact is on the same prescribed environmental matter, along with offset debits for earlier stages in unavoidable circumstances for unforeseen impacts;*
  - *Strategic offset investment corridors* – Strategic offset investment corridors are pre-identified areas of land which may be suitable for land-management activities which provide a benefit to matters likely to be impacted by development. These areas are subject to the following:

[35] Section 19(3) (Agreed delivery arrangements) of the Act. Note also section 19(6) and (8) (Agreed delivery arrangements) of the Act and part 7 (Review of decisions and appeals) of the Regulation in relation to a proponent reviewing and appealing the local government's decision.

[36] Section 1.3 (Offset principles) of the Environmental Offsets Policy.

- *offsets are not required to be provided in these areas, but proponents are encouraged to do so wherever possible to provide strategic landscape-scale benefits;*
- *these corridors are intended to connect conservation hubs (e.g. national parks) in areas subject to low development pressure which are not zoned for activities such as urban development;*
- *at this stage only the Galilee Basin is identified as a strategic offset investment corridor on the Queensland government website.*

- *Agreed delivery arrangement* – The local government and proponent must enter into an agreed delivery arrangement[37] which has the following qualities:
  - the agreement is about the proponent's delivery of an environmental offset, with reference to any offset delivery plan;[38]
  - the agreement is entered into either before or after the development approval is granted or infrastructure agreement is executed;[39]
  - if the agreement is entered into before the development approval is granted or infrastructure agreement is executed, the following requirements are satisfied:[40]
    - *the proponent may start to deliver a proponent-driven offset before the development approval is granted or infrastructure agreement is executed, but must not pay any amount under a financial settlement offset until after the authority is granted;*
    - *the delivery method may be varied by the local government where the proponent changes the proposal after the agreement is entered into but not more than 10 business days after the development approval is granted or infrastructure agreement is executed;*[41]
  - either or both of the agreement and the offset delivery plan may be amended by entering into another agreed delivery arrangement before the proponent starts the relevant prescribed activity or stage of a prescribed activity.[42]

Proponent-driven offset

Where under an agreed delivery arrangement a proponent is required to deliver an environmental offset in whole or in part by a proponent-driven offset, the following matters apply:

- *Form of offset* – The proponent-driven offset may be one of the following:
  - *Land-based offset* – This form of proponent-driven offset involves providing suitable land as an environmental offset. The suitability of the land for an offset condition imposed by a local government is determined by undertaking a habitat quality analysis under one of the following:
    - *for a non-juvenile koala habitat tree under the Koala SPRP, the Guide to Determining Terrestrial Habitat Quality or an alternative approach approved by DEHP;*
    - *for a matter of local environmental significance, the local government's habitat quality assessment, provided any area of land for the offset does not exceed the impacted site area by more than a factor of 4;*

    For a land-based offset, the site must be capable of delivering a conservation outcome for the impacted prescribed environmental matter. Most relevantly this means that for vegetation and for wetlands, the offset site must be of the same broad vegetation group or within the same wetland habitat type as the impacted vegetation and wetlands, respectively.[43]
  - *Direct Benefit Management Plan* – This form of proponent-driven offset involves identifying priority actions in a pre-approved Direct Benefit Management Plan (**DBMP**) to address threats to, and provide substantial benefits for, prescribed environmental matters. Examples of conservation outcomes which may be achieved by a DBMP include the following where the activities are additional to existing management practices or requirements, and are priority actions for the prescribed environmental matter:
    - *enhancing, restoring and establishing key habitat across multiple tenures or properties;*
    - *threat mitigation activities such as (but not restricted to) weed or feral animal control on a landscape scale or across multiple properties;*

37 Section 19B (Deemed condition for agreed delivery arrangement) of the Act.
38 Section 19(4) (Agreed delivery arrangements) of the Act.
39 Section 19(5) (Agreed delivery arrangements) of the Act. Note: where the agreed delivery arrangement is entered into before the development approval or infrastructure agreement is granted, additional requirements are provided in section 19A (Agreed delivery arrangement before authority granted) of the Act.
40 Section 19A (Agreed delivery arrangements) of the Act.
41 See section 19A(3) and (4) (Agreed delivery arrangements) of the Act for a description of the circumstances.
42 Section 19(7) (Agreed delivery arrangements) of the Act. See also section 20 (Amending agreement after prescribed activity starts) of the Act in relation to entering into another agreed delivery arrangement after the prescribed activity starts.
43 See section 2.3.1.6 (Characteristics of a proponent-driven offset site) of the Environmental Offsets Policy for further detail.

  - *propagating and planting of threatened plant species or establishment and intensive management of new populations of threatened fauna in appropriate habitat;*
  - *protecting and restoring significant freshwater, marine or estuarine ecosystems;*
  - *landscape scale fire management activities such as patch burning or protective burns;*
  - *fencing or other management techniques to manage access impacts on the prescribed environmental matter including legal security where relevant to all or part of the area.*
- *Combination of land-based offset and DBMP* – This form of proponent-drive offset involves providing a combination of land-based offset and DBMP.

- *Legally secured offset area* – Generally a proponent-driven offset is required to be, or to be undertaken on, a legally secured offset area. The consequences of land being a legally secured offset area include:
  - *Significant residual impacts* – Any use of the area which is inconsistent with how the environmental offset was or is required to be undertaken, is a significant residual impact on the prescribed environmental matter for which the area was set aside;[44]
  - *Deemed condition of other authorities* – It is a deemed condition of certain authorities that a prescribed activity cannot be undertaken in the legally secured offset area if carrying out the prescribed activity will delay, hamper or stop the delivery of the conservation outcome as stated in the agreement for the offset area (note that this is discussed further below).[45]
- *Compliance with agreements* – The proponent is required, as a deemed condition of the development approval or infrastructure agreement, to comply with the agreed delivery arrangement, including the agreed offset delivery plan.[46]
- *Advanced offsets* – A landowner may apply to a local government for an area of land to be registered as an advanced offset to be used for the purposes of an environmental offset in the future.[47] Advanced offsets are subject to the following:[48]
  - *Approved form* – The applicant must provide the application in the approved form, which may be found on the Queensland government website.[49]
  - *Local significance or SPRP* – A local government may only consider an application which relates to an environmental impact for which an offset condition may be imposed under a State planning regulatory provision or a local planning instrument of the local government. However, where an environmental offset may be required by the State, the application must be made to the Chief Executive.
  - *Consideration* – The local government must have regard to the Environmental Offsets Policy and any other relevant environmental offsets policy.
  - *Decision* – The local government may:
    - *approve the identification of all or part of the area as an advanced offset; or*
    - *refuse the identification of the area as an advanced offset.*
  - *Registration or notification* – As soon as practicable after making the decision, the local government must:
    - *if the application was approved or partly approved, register the area as an advanced offset in the local government's register of environmental offsets; or*
    - *if the application was refused, give the applicant a notice stating the decision, reasons for the decision and all rights of internal review. It is unclear whether such a notice must be given where the local government partly approves the application.*
  - *Deregistration* – An owner of land may apply, at any time in the approved form, for an area of land registered as an advanced offset to no longer be identified as an advanced offset and to be removed from the register. As soon as practicable after the application is made, the local government must remove the record for the advanced offset from the register. There is no provision for the local government to refuse a request of this type.

Financial settlement offset

Where under an agreed delivery arrangement a proponent is required to deliver an environmental offset in whole or in part by a financial settlement offset, the following matters apply:

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44 Section 8(4) (What is a significant residual impact) of the Act.
45 Section 25 (Impacts on legally secured offset area) of the Act.
46 Section 22 (Requirement for proponent-driven offset) of the Act.
47 Section 93(2)(b) (Regulation-making power) of the Act.
48 Sections 13 (Meaning of decision-maker) and 14 (Identification and registration of advanced offsets—Act, ss 90(1)(b) and 93(2)(b)) of the Regulation.
49 Approved forms may be found at: https://www.qld.gov.au/environment/pollution/management/offsets/.

- *Maximum amount* – The maximum amount payable for a financial settlement offset where the administering agency is a local government is the amount determined by the local government in accordance with the Environmental Offsets Policy.[50]
- *Payment requirements* – The proponent must pay to the local government, the amount required by, and in the way stated in, the agreed delivery arrangement:[51]
  - before the proponent starts any part of the prescribed activity to which the offset condition relates; or
  - if the development approval or infrastructure agreement allows the prescribed activity to be carried out in stages, the proponent may pay the amount required by the agreed delivery arrangement for a stage.
- *Local government management* – The amount payable as a financial settlement offset is held on trust by the local government and may only be transferred for one or more of the following:[52]
  - paying expenses incurred, directly or indirectly, by the local government in the delivery of the environmental offset to achieve a conservation outcome;
  - paying fees or expenses related to administering the trust fund.

Deemed conditions

Where an offset condition is imposed on a development approval or an infrastructure agreement, the following conditions are deemed to be conditions of the authority:[53]

- *Agreed delivery arrangement condition*[54] – The local government and proponent holding a development approval or an infrastructure agreement which includes an offset condition must have entered into an agreed delivery arrangement before starting:
  - any works that impact on the matter of local environmental significance or the non-juvenile koala habitat tree to which the offset condition relates; or
  - if the development approval or an infrastructure agreement allows the prescribed activity to be carried out in stages, any works for the stage that impact on the matter of local environmental significance or the non-juvenile koala habitat tree to which the offset condition relates.
- *Proponent-driven offset condition*[55] – Where under an agreed delivery arrangement a proponent holding a development approval or an infrastructure agreement is to deliver an environmental offset in whole or in part by a proponent-driven offset, the proponent must comply with the agreed delivery arrangement, including the agreed offset delivery plan. This condition has the effect of locking a proponent to its proposal for offset delivery.
- *Financial settlement offset condition*[56] – Where under an agreed delivery arrangement a proponent holding a development approval or an infrastructure agreement is to deliver an environmental offset in whole or in part by a financial settlement offset, the proponent must pay to the local government, the amount required by, and in the way stated in, the agreed delivery arrangement:
  - before the proponent starts any part of the prescribed activity to which the offset condition relates; or
  - if the development approval or infrastructure agreement allows the prescribed activity to be carried out in stages, the proponent may pay the amount required by the agreed delivery arrangement for a stage.
- *Legally secured offset area condition*[57] – Where a development approval or an infrastructure agreement authorises a prescribed activity to be undertaken in a legally secured offset area, the proponent holding the approval or agreement must not carry out any prescribed activity in the legally secured offset area if:
  - a delivery or management plan or agreement applies to all or part of the offset area; and
  - carrying out the prescribed activity will delay, hamper or stop the delivery of the conservation outcome for a prescribed environmental matter as stated in the delivery or management plan or agreement.

  This appears to apply even where no offset condition is imposed, however the Explanatory Notes to the *Environmental Offsets Bill 2014* indicate that this section is intended to be read down such that this section only applies where an offset condition is imposed.[58]

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50 Section 23(2) (What is a financial settlement offset) and section 12(1) (What is an environmental offsets policy) of the Act and section 6 (Environmental offsets policy—Act, s 12) of the Regulation.
51 Section 24 (Requirements for financial settlement offsets) of the Act.
52 Section 89 (Payment of amounts into and from trust fund) of the Act. Note that there is also an ability for the State government to prescribe other amounts under the Regulation to be paid out of the trust fund, however in the Regulation dated 19 December 2014 this has not yet been done.
53 Section 16 (Conditions that apply under this Act to authority) of the Act. These conditions have effect despite section 347(b) and (c) (Conditions that cannot be imposed) of the SPA.
54 Section 19B (Deemed condition for agreed delivery arrangement) of the Act.
55 Section 22 (Requirement for proponent-driven offset) of the Act.
56 Section 24 (Requirements for financial settlement offsets) of the Act.
57 Section 25 (Impacts on legally secured offset areas) of the Act.
58 See sections 16 (Conditions that apply under this Act to authority) and 25 (Impacts on legally secured offset areas) of the Act and page 17, clause 24 of the Explanatory Notes to the *Environmental Offsets Bill 2014*.

It is also relevant to note that legally secured offset areas are matters of State environmental significance and on this basis a local government may not impose an offset condition in respect of a legally secured offset area.[59] A local government may impose an offset condition in respect of a matter of local environmental significance within the legally secured offset area, but not in respect of the area itself.

Delivering an environmental offset for koalas

Delivery of environmental offsets in respect of koalas is subject to the following:

- *Proponent-driven offset requirements* – For proponent-driven koala offsets, the following apply:
  - *SEQ requirements* – For koala habitat within South East Queensland and under the Koala SPRP the only acceptable approach to meeting a proponent-driven offset is to meet all of the following requirements:[60]
    - DBMPs – *A DBMP cannot be used to manage a proponent-driven koala offset and therefore proponent-driven koala offsets in SEQ can only be delivered through a land-based offset;*
    - Habitat rehabilitation, establishment and protection – *The rehabilitation, establishment and protection of koala habitat is the only appropriate action to offset koala habitat within South East Queensland and under the Koala SPRP;*
    - 3-to-1 replacement – *Establish three new koala habitat trees for every one non-juvenile tree removed;*
    - Same local government area – *Offset plantings must occur within the same local government area as the impact site, except relevantly where the impact occurs within the Koala Coast (as identified in the Koala SPRP maps) and the impact area crosses local government boundaries. In these circumstances the assessment manager, local authority, Minister or State agency may determine an appropriate area within the Koala Cost for the offset plantings to occur;*
    - Habitat value – *In an area of high value or medium value suitable for rehabilitation habitat, or where these are not available, within low value suitable for rehabilitation habitat or where appropriate, within bushland habitat to enhance the quality of bushland within the local government area;*
    - Tree density – *Koala habitat trees to be established must be reflective of the species endemic to the site and planted at densities that will produce a mature density reflective of the regional ecosystems present on the site;*
  - *Requirements outside SEQ* – For koala habitat outside SEQ a proponent may choose either of the following:[61]
    - 3-to-1 replacement – *Establish three new koala habitat trees for every one non-juvenile tree removed;*
    - Land-based offsets – *Provide a land-based offset in accordance with the Guide to Determining Terrestrial Habitat Quality and the Land-Based Offsets Multiplier Calculator tool.*

    It is unclear whether these offsets must be provided in the same local government area as the impacted site.
  - *General offset site requirements* – For fauna habitat under the *Nature Conservation Act 1992*, including koala habitat, the offset site must contain, or be capable of containing, a self-sustaining population of that same species;
- *Financial settlement offsets* – Where appropriate, koala related offsets may also be provided by way of financial settlement offsets.

What action is required from a local government?

In order to impose an offset condition, other than a condition in respect of a non-juvenile koala habitat tree under the Koala SPRP, a local government must take action in relation to the following:

- *Local planning instrument* – A local government must make a local planning instrument that identifies the following:
  - matters of local environmental significance for which an environmental offset is required;[62]
  - development for which an environmental offset may be required.[63]

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59 Section 5(2) and (4)(b)(ii) (Prescribed environmental matters—Act, s 10) and schedule 2, section 12 (Legally secured offset areas) of the Regulation and section 15(4) (Restriction on imposition of offset condition) of the Act.

60 Section 2.3.1.6 (Specific requirements for koala related offsets in South East Queensland) on page 11 of the Environmental Offsets Policy.

61 Section 2.3.1.6 (Requirements for all other koala related offsets) on page 11 of the Environmental Offsets Policy.

62 Section 10(1)(c) (What is a prescribed environmental matter and a matter of environmental significance) of the Act and section 5(4)(a) (Prescribed environmental matters—Act, s 10) of the Regulation.

63 Section 9 (What is a prescribed activity) of the Act and section 4 (Prescribed activities—Act, s 9) and schedule 1, item 7(a) (Activities prescribed for section 9(c) of the Regulation.

- *Local government administrative matters* – A local government must comply with the following when administering environmental offsets:
  - a trust fund must be established for the holding of money received as a financial settlement offset by the local government, which may only be transferred in certain circumstances;[64]
  - a register of information must be kept about each authority with an offset condition that has been issued by the local government, which must be made available for inspection in the way in which the local government reasonably considers appropriate, including being made electronically available.[65]

Local planning instrument

Should a local government decide to make or amend a local planning instrument to provide for the requirements of the Act and Regulation, the local government should consider the following:

- *SPA requirements* – The requirements of the SPA, including the applicable guideline, apply to the process for making or amending the local planning instrument.[66]
- *Adoption of additional documents* – To assist in interpreting the local planning instrument and explaining the local environmental significance of relevant matters, the local government should also consider adopting the following documents with the local planning instrument:
  - a significant residual impact guideline, to explain the significance of the local environmental matters and set guidelines for the types of impacts on these matters which will be considered significant residual impacts;
  - an environmental offsets policy, to set guidelines around the delivery of environmental offsets for the identified matters of local environmental significance;
  - a habitat quality assessment tool, to provide a local tool for assessing the suitability of a proposed offset site.

Key matters

The key matters for local governments include the following:

- *Local planning instrument required* – A local government may only impose conditions in respect of:
  - a non-juvenile koala habitat tree under the Koala SPRP; or
  - a matter of local environmental significance set out in a local planning instrument.
- *Development approval or infrastructure agreement* – For the purposes of this paper, the offset condition must be imposed as a condition of a development approval or as part of an infrastructure agreement.
- *Commonwealth condition prevails* – An offset condition imposed by the Commonwealth government (or a decision not to impose a condition) will prevent a local government from imposing a condition on the same, or substantially the same, matter. There is still some uncertainty as to how this will operate in practice.
- *State condition generally prevails* – Generally, an offset condition imposed by the State government will prevent a local government from imposing a condition on the same, or substantially the same, matter, however this is not the case for conditions in respect of a non-juvenile koala habitat tree imposed under the Koala SPRP.
- *Koala conditions* – All levels of government continue to have a stake in imposing some form of offset condition in respect of koalas or koala habitat.
- *Offset delivery* – Offsets may be delivered by a proponent-driven offset (land-based offset or DBMP) or a financial settlement offset.
- *Advanced offsets* – A landowner may apply for an area of land to be designated as an advanced offset to be used as an environmental offset for a future impact.

Next steps

With the result of the State election on 31 January 2015 still in doubt, there is now some uncertainty about whether and how the Act will continue to evolve. Whilst a complete overhaul is unlikely, the environmental offsets regime is one of many areas to keep an eye on until the direction of the new government becomes clear.

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64 Section 89(1) (Payment of amounts into and from trust fund) of the Act. See section 89(2) (Payment of amounts into and from trust fund) of the Act for the list of circumstances in which trust money may be transferred.

65 Section 90 (Register to be kept by each administering agency) of the Act. See section 90(1)(a) (Register to be kept by each administering agency) of the Act for a list of information which must be kept in the register.

66 See in particular chapter 3, part 5 of the SPA and *Statutory guideline 04/14 – Making and amending local planning instruments*.

How to access your neighbour's land to carry out work

Maysaa Parrino | Salam Kaoutarani

This article discusses the processes involved for accessing neighbouring land in New South Wales

February 2015

In brief – Courts may impose orders if agreement not reached

If negotiations to access neighbouring land fail, consider the criteria that must be met in order to obtain an easement or access order.

Obtaining easement and access orders

Developers, builders, contractors or landowners may require access to an adjoining property for the purposes of carrying out work on their own land or adjoining land, or carrying out work to a utility service. Where no agreement can be reached between the parties, other avenues are possible including an access order under the *Access to Neighbouring Land Act 2000*, an easement under section 88K of the *Conveyancing Act 1919* (NSW), or an easement under section 40 of the *Land and Environment Court Act 1979* (NSW).

Access onto adjoining property is commonly sought for construction purposes including installing rock anchors beneath the adjoining property, erecting scaffolding or hoarding on the boundary of the sites, a crane swing over the airspace of the adjoining property, drainage, electricity and roads.

Neighbouring land access order or utility services order preferred for temporary access

Under the *Access to Neighbouring Land Act*, the Local Court may order a "neighbouring land access order" or a "utility service access order" or both. This is generally the preferred approach where access is sought on a temporary basis, as it is relatively time and cost effective. In granting orders, the Local Court must be satisfied that:

- access to the adjoining land is required for the purpose of carrying out work on your land (this applies when a neighbouring land access order is sought, as outlined below), or
- access to the adjoining land is required for the purpose of carrying out work on or in connection with the utility service located on the adjoining land (this applies when a utility service access order is sought, as outlined below), and
- a reasonable effort to reach agreement with every person whose consent to access is required has been made, and
- there has been at least 21 days' notice of the lodging of the application and the terms of any order sought to the owner of the adjoining land and to any person entitled to use any utility service on which work is proposed.

Unlike a utility services order, a neighbouring land access order only permits access to adjoining property for the purposes of carrying out work on your land. A utility service access order is broader in application in the sense that if you are entitled to use a utility service (or a proposed utility service), and you need access to the adjoining land which the utility service runs through for carrying out work in connection with the utility service, then you may apply for an utility service access order.

The procedure required under the *Access to Neighbouring Land Act* is not available in all circumstances. For example, due to the nature of rock anchors being required to be installed on adjoining property, an access to neighbouring land order is not available and an easement may be required.

Supreme Court considerations regarding granting an easement under section 88K

You may apply to the Supreme Court for an order imposing an easement over the adjoining land, under section 88K(1) of the *Conveyancing Act*. However, you will need evidence to satisfy the court of:

- *Reasonable necessity* – the easement is reasonably necessary for the effective use or development of the land. Importantly, "reasonably necessary" **does not mean "absolutely necessary"**. The easement must be the preferred approach, when compared to the use or development without the easement.

- *Public interest* – the use of the land will not be inconsistent with the public interest. That is, the grant of the easement will not prevent or impact adversely upon any activity of the public.
- *Compensation* – the owner of the adjoining land and each other person having a registered interest in the land (such as a tenant or mortgagee) can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement.
- *Negotiation* – all reasonable attempts have been made to obtain the easement but have been unsuccessful.

The power of the court to grant an easement is discretionary, meaning that the court itself will need to be convinced that it is appropriate to grant the easement. In doing so, the court has generally approached its decisions by observing the burdening nature of section 88K, that is, the provision interferes with existing property rights of a landowner.

Land and Environment Court preferred when seeking easement order

Like section 88K applications, an application for an easement can be made under section 40 of the *Land and Environment Court Act* which enables the Land and Environment Court to exercise the Supreme Court's jurisdiction under section 88K of the *Conveyancing Act*.

However, section 40 only applies to development applications or modification applications which have been determined or are pending before the Land and Environment Court. The Land and Environment Court also has power to modify any associated conditions of a development consent granted by it, in addition to granting an easement.

As a specialised valuation and development jurisdiction, the Land and Environment Court generally provides a quicker and easier approach to obtaining an easement, and is generally the preferred option if you are seeking an easement for the purposes of development.

The *Civil Procedure Act 2005* (NSW) enables the transfer of proceedings between the Supreme Court and the Land and Environment Court. In determining whether proceedings are to be transferred to, for example, the Land and Environment Court, the Supreme Court must be satisfied that it is more appropriate for the proceedings to be heard in the Land and Environment Court. A transfer may be done by way of an application by any party to the proceedings, or be imposed by an order of the court.

However, prior to applying for a transfer, consideration must be given to cost and time implications while having regard to the proposed timeline of your development. In the event that an urgent easement is sought, it may be also possible to apply for expedition.

Costs and timing in easement or access order applications

Court applications may be more costly than a negotiated agreement. The general costs rule for obtaining an easement or an access order is that the costs of an application are generally payable by the person seeking the easement or access.

Applying for an easement can take many months of negotiation prior to commencing proceedings, in addition to the time required to prepare for and have the matter heard by the court. Expert costs are also likely to be incurred.

We have facilitated many agreements between parties where access to neighbouring land is required and an agreement can be reached. In the matters that have proceeded to court, we have found the Land and Environment Court to be the most effective and timely jurisdiction where that option is available.

Consider criteria for easement and access orders, and engaging a valuer

When you first realise that you may need access to neighbouring land, you should consider your options in the event negotiations fail so that your negotiations are based on the criteria you are required to meet in order to obtain an easement or access order. Engaging a valuer early on in negotiations may be useful if the matter proceeds to court and that evidence becomes important to any offers made and to the reasonableness of those offers.

Contempt of court led to a fine

Ronald Yuen | Shaun Pryor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gold Coast City Council v Christophi* [2014] QPEC 62 heard before Everson DCJ

March 2015

In brief

In the case of *Gold Coast City Council v Christophi* [2014] QPEC 62, the Planning and Environment Court considered an application by the Gold Coast City Council seeking that Mr Talaat Christophi be punished for contempt of court for his contravention of orders made by the court on 22 July 2013. The relevant court order required Mr Christophi to not use his premises for any purpose other than a single detached self-contained dwelling as defined in the council's planning scheme for the exclusive use of one household only unless otherwise authorised by an effective development permit.

The court held that the letting of the individual rooms in his house was a use for a purpose other than a single detached self-contained dwelling for the exclusive use of one household only and as such Mr Christophi was in contempt of the court order. The court imposed a fine of $5,000 and ordered that the unlawful use of Mr Christophi's house be ceased within 28 days and that he pay the council's costs of and incidental to the application on a standard basis.

Council took enforcement action against Mr Christophi for the unlawful use of his house and consequential orders were made by the court which were not opposed by Mr Christophi

The council previously took enforcement action against Mr Christophi in respect of the unlawful use of his house and unlawful building work which had been carried out by Mr Christophi.

Following a mediation, the court made orders requiring, amongst other things, Mr Christophi to not use his house for any purpose other than a single detached self-contained dwelling for the exclusive use of one household only unless authorised by an effective development permit (paragraph 5). The court orders were not opposed by Mr Christophi.

Mr Christophi's failure to comply with the court order resulted the council bringing an application before the court seeking that he be punished for contempt of court

Since the court orders were made, Mr Christophi continued to individually let out rooms in his house by way of separate rooming agreements. The tenants were required to comply with house rules and they shared the kitchen and laundry facilities of the house. Evidence was adduced from a former tenant which suggested that not all residents of the house knew each other and there was limited interaction between the residents.

Before the council brought the application before the court, the council wrote to Mr Christophi on two separate occasions reinforcing the importance of his compliance with the court orders and noting that the manner in which his house was being used constituted a non-compliance with paragraph 5 of the court order.

Despite that, Mr Christophi did not seek to regularise the use by obtaining an appropriate development permit. The court observed that he berated staff of the council at the hearing and made groundless allegations challenging the character and reputations of the council's officers, witnesses and legal representative.

The letting of individual bedrooms by way of rooming agreements constituted a breach of court order and a fine was an appropriate penalty for the contempt

The court found that the letting of individual bedrooms by way of rooming agreements by Mr Christophi for different periods to people who did not know or had limited interaction with each other constituted a breach of paragraph 5 of the court order. The court observed that the conduct of Mr Christophi was "deliberate and calculated" and as such he was in contempt of the court order.

The council submitted that a fine was an appropriate penalty for the contempt, with which the court agreed. The court considered a fine of $5,000 was appropriate taking into account Mr Christophi's conduct and attitude as well as his capacity to pay the fine.

The court also declared that the letting of individual bedrooms in his house was not a lawful use and ordered that it be ceased within 28 days to avoid causing undue hardship to the tenants.

The council sought its costs against Mr Christophi in respect of the application. The court considered it appropriate that the council's costs of the application be paid by Mr Christophi on a standard basis having regard to the prior warning given by the council in relation to the breach of the court order, his conduct at the hearing and the groundless allegations made by him.

Private airstrip not permitted in the rural zone due to its impact on amenity

Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ward & Anor v Rockhampton Regional Council & Anor* [2014] QPEC 67 heard before Rackemann DCJ

March 2015

In brief

The case of *Ward & Anor v Rockhampton Regional Council & Anor* [2014] QPEC 67 concerned two appeals heard concurrently in the Planning and Environment Court. The appeals related to a decision of the former Rockhampton Regional Council to conditionally approve the development application for a material change of use for an established private grassed airstrip (Tungamull airstrip) made by RC Toole Pty Ltd. The development application was made consequently upon enforcement proceedings brought by the council.

The two appeals involved a submitter appeal challenging the council's decision and an appeal by Toole against certain conditions of the approval. The submitters, Jeffrey Ward and Leanne Lever, who were opposed to the proposed development were occupiers of nearby residences.

The court found that the proposed development was significantly in conflict with the council's planning scheme as it was not a consistent use and not located to minimise adverse impacts on the amenity of adjacent properties. The court was not persuaded that sufficient grounds existed to approve the proposed development despite the conflict. Consequently, the submitter appeal was allowed and Toole's conditions appeal was dismissed on the limited ground that there was no development approval.

The proposal would permit a combined total for helicopters and fixed wing aircraft takeoffs and landings each year much greater than the then existing facility

The Tungamull airstrip initially operated in an unconstrained way until such time Toole gave undertakings about its use, in the context of the enforcement proceedings, which ultimately restricted the number of flights to a maximum of six per week for both takeoffs and landings.

As a consequence of the enforcement proceedings, Toole submitted a development application for the Tungamull airstrip. The proposal would permit a combined total for helicopters and fixed wing aircraft of 520 takeoffs and landings each year (on average, approximately 1.4 takeoffs and 1.4 landings per day), which was of much greater use than the then existing facility. As part of the proposal, Toole also sought flexibility to have significantly more movements on some days.

Court accepted the evidence from the nearby residents about the annoyance which the Tungamull airstrip's activities had caused them in the past

Mr Ward and Mrs Lever contended psychological and acoustic amenity impacts from the Tungamull airstrip. The court was satisfied that the Tungamull airstrip was sufficiently safe for use, but considered by reference to Australian Standard 2021-2000, the airstrip was likely to cause some psychological amenity impacts including psychological factors such as fear of aircraft crashing.

In considering acoustic amenity impacts from the Tungamull airstrip, the court observed that the aircraft noise generated by both aircraft passing overhead and aircraft takeoffs and landings, to and from the Iron Mill airstrip located on the adjoining property (which was also owned by Toole), was part of the existing amenity of the broader locality. As such the Tungamull airstrip would not introduce a substantially different type of noise.

The concern about acoustic amenity mainly related to residences which had the greatest exposure to activities associated with the Tungamull airstrip being the Mr Ward, Mrs Lever and Mr Miller's residences. By the time of the hearing, Mr Miller had sold his property as a result of the stress associated with the operation of the Tungamull airstrip.

Evidence from Mr Ward, Mrs Lever and Mr Miller about the annoyance which the Tungamull airstrip's activities had caused them in the past was put before the court and was accepted by the court. Toole proposed a management plan imposing a number of operational constraints to address the potential for future annoyance of residents which included designating flight paths with minimum separation distances from the affected residences and limiting the number of aircraft movements.

Court was not persuaded that the number of movements sought to alleviate the adverse noise impact was acceptable and found the operational controls to be difficult to monitor and enforce at a practical level

The parties' acoustic experts assessed the potential for noise impact. All of the experts considered the noise level to be high and intrusive whilst noting that the impact could be acceptable if the number and frequency of the events was sufficiently constrained.

As there was no applicable standard or guideline, the experts ultimately relied on their professional judgment in expressing their views about the extent of the restriction on movements necessary to achieve an acceptable outcome. In this regard, the court acknowledged that published standards or guidelines might not provide an answer in every situation but noted that the conclusions reached by the experts appeared to lack any compelling scientific or other intellectual basis within their field of specialist knowledge.

The court was referred by Mr Ward and Mrs Lever to the decision of *Bassingthwaite v Roma Town Council* (2011) QPELR 63 in which it was stated that "*reasonable and genuine concerns about impacts on amenity must be given weight notwithstanding contradictory conclusions that might be expressed by expert witnesses*". Having considered both the evidence of the experts and the affected residents, the court was of the view that the proposed operation of the Tungamull airstrip would cause adverse noise impacts.

Whilst the adverse noise impacts could potentially be kept within reasonable limits by movements controls, the court was not persuaded that the number of movements sought would be acceptable. The court also examined the nature and implications of the operational controls proposed by Toole and found them to be problematic from a monitoring and enforcement perspective particularly at a practical level.

Court found the proposed operation of the Tungamull airstrip was in significant conflict with the council's planning scheme and there were no sufficient grounds to justify approval despite the conflict

The subject site was in the Rural zone under the council's planning scheme. The Tungamull airstrip was characterised as an undefined use under the planning scheme, which itself raised a point of conflict with the planning scheme.

In its consideration of the extent of conflict with the planning scheme, the court observed that the intensity of the proposal was not similar to surrounding rural purposes although noting that the grass airstrip and the hangars could be said to be of a similar scale to farm sheds. Further, the court was not satisfied that the substantive purpose for which the Tungamull airstrip was established was to support preferred uses in the Rural zone.

As noted above, the proposed operation of the Tungamull airstrip would cause adverse amenity impacts in particular on the nearby residences. Even if the Tungamull airstrip were operated to minimise adverse impacts, it was not located to minimise adverse impacts on the amenity of adjacent properties. The court therefore found that it was in significant conflict with the relevant provisions of the planning scheme.

In considering whether there were grounds to support approval of the development application despite the conflict with the planning scheme, the court recognised that airstrips in rural areas could provide a benefit for aircrafts that were in need of landing facilities in remote localities. The court observed that the subject site was relatively proximate to Rockhampton and there were seven private or public airfields within 30 kilometres of the site including the Mill Iron airstrip to provide light aircraft and helicopters landing facilities.

Further, the court did not find there to be an economic demand from residents of the area for the proposed facility or anything more than a minor need for such facilities. Overall, the court found that the grounds of support being sought were weak and Toole had failed to discharge the onus of demonstrating that the development application should be approved.

Court found approval of a reconfiguration of a lot application not inconsistent with an existing development approval

Ronald Yuen | Monica Wilkie

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Homes R Us (Australia) Pty Ltd v Gladstone Regional Council* [2014] QPEC 66 heard before Everson DCJ

March 2015

In brief

The case of *Homes R Us (Australia) Pty Ltd v Gladstone Regional Council* [2014] QPEC 66 concerned an appeal in the Planning and Environment Court against a decision of Gladstone Regional Council to refuse a development application for a reconfiguration of a lot lodged by Homes R Us (Australia) Pty Ltd.

The council refused the application on the basis that it was inconsistent with conditions of an existing development approval for a reconfiguration of a lot. The appeal was confined to solely concerning the development application in the context of the conditions requiring infrastructure contributions under the existing development approval for a reconfiguration of a lot.

The court found no basis to refuse the development application in that regard and therefore allowed the appeal.

Homes sought to have the reconfiguration of a lot approved under the existing development approval reapproved under the new infrastructure charging regime

Homes was given a development approval for a material change of use from community use to village and reconfiguration of a lot (1 lot into 66 lots stage 1 and 2) for a residential estate at Tarrawonga Drive, Calliope. The development approval for the reconfiguration of a lot relevantly included conditions of approval relating to infrastructure contributions under various planning scheme policies of the council which were in force at the time.

By operation of the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011*, a new regime for levying infrastructure charges applied, which was significantly more favourable to Homes.

To enable the council to apply the new infrastructure charging regime, Homes lodged a new development application for a development permit for the reconfiguration of a lot (stage 1 (32 lots, easement and balance lot) and stage 2 (32 lots)), which sought to have the reconfiguration of a lot approved under the existing development approval reapproved under the new regime.

The council refused the new development application on the basis that it was inconsistent with the conditions of the existing development approval.

The court observed that there were differences between the plan of subdivision approved under the existing development approval and the plan of subdivision the subject of the new development application but considered them to be minor.

Court had to determine whether approval of the new development application would result in a condition being imposed which was inconsistent with a condition of the existing development approval in the context of the conditions requiring infrastructure contributions under the existing development approval

The appeal was confined to solely concerning the new development application in the context of the conditions requiring infrastructure contributions under the existing development approval for a reconfiguration of a lot. The issue primarily related to whether an approval of the new development application would result in a condition being imposed which was inconsistent with a condition of the existing development approval.

The council contended that a decision to approve the new development application would be inconsistent with the existing development approval for a reconfiguration of a lot in that the existing development approval required infrastructure contributions under the previous infrastructure charging regime and conditions requiring such infrastructure contributions could no longer be lawfully imposed.

Conversely, Homes contended that since conditions requiring such infrastructure contributions could not lawfully be imposed, no such conditions could be imposed which would be inconsistent with the conditions of the existing development approval.

Homes also contended that the new development application would simply replace the existing development approval for the reconfiguration of a lot and there would be no inconsistency between the two approvals, whilst the council argued the following, by reference to the principles outlined in *Genamson Holdings Pty Ltd v Caboolture Shire Council* (2008) 163 LGERA 386 at 392 and *Peet Flagstone City Pty Ltd v Logan City Council & Ors* [2014] QCA 210 at [28]:

- if the new development application was approved, it would have the benefit of two development approvals in effect for the subject land and both of them would authorise substantially the same development but with "inconsistent concomitant burdens"; and
- there were strong discretionary grounds for dismissing the appeal given the loss of significant revenue to the council resulting from Homes' "unashamedly cynical attempt" to avoid paying infrastructure contributions.

Court found that approval of the new development application would not result in a condition being imposed which was inconsistent with a condition of the existing development approval and discretionary grounds were not enlivened from the legislative policy intent under the new infrastructure charging regime to justify the council's decision to refuse the new development application

The court found that an approval of the new development application would not result in a condition being imposed which was inconsistent with a condition of the existing development approval as infrastructure contributions could not be imposed by conditions but rather by giving adopted infrastructure charges notices.

The court observed that the present situation was not same as that in *Genamson Holdings Pty Ltd v Caboolture Shire Council* (2008) 163 LGERA 386 and *Peet Flagstone City Pty Ltd v Logan City Council & Ors* [2014] QCA 210. In those cases, there was an attempt made to avoid the legal obligations imposed by conditions of earlier development approvals necessary for the development to lawfully be carried out. In this regard, Homes only sought to substitute the existing development approval for a reconfiguration of a lot with the new development application under the new infrastructure charging regime which was more beneficial to Homes from an infrastructure charges perspective.

The court noted that there was no discernible legislative policy intent under the new infrastructure charging regime which sought to prevent developers making a development application to reduce their infrastructure charges liability. Accordingly, the court did not consider any discretionary grounds were enlivened which would justify the council's decision to refuse the new development application.

Extension of time was granted by court to join the appeal

Ronald Yuen | Eva Coggins

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *BTS Properties (Qld) Pty Ltd v Brisbane City Council* [2015] QPEC 2 heard before Rackemann DCJ

April 2015

In brief

The case of *BTS Properties (Qld) Pty Ltd v Brisbane City Council* [2015] QPEC 2 concerned applications heard by the Queensland Planning and Environment Court. BTS Properties (Qld) Pty Ltd, which was a developer appealing Brisbane City Council's decision to refuse its development application, made an application to strike out notices of election filed out of time by Mr Byrne, Ms Daiga and Mr and Ms Gibson. Mr Byrne, Ms Daiga and Mr and Ms Gibson made a cross-application for an extension of time within which to file the notices of election.

The main issues in dispute were whether sufficient grounds had been established to grant the extension of time, and whether it was in the interests of justice for the court to do so.

The court considered the circumstances under which the various individuals had filed their notices of election late, the impact of the delay, and the extent of prejudice suffered by the developer (if the extension was granted) and the individuals (if the extension was not granted). On balance, the court was satisfied that there were sufficient grounds for granting the extension of time and that it was in the interests of justice to do so. However, the court considered it appropriate that the developer be compensated for the costs it had incurred as a result of the non-compliance with the time limitation and therefore ordered that Mr Byrne, Ms Daiga and Mr and Ms Gibson pay the developer's costs relating to the applications.

Mr Byrne had a genuine interest in the development application and promptly instructed his solicitors to file a notice of election after his return from vacation and being prompted by information given by another unit owner

Mr Byrne owned unit 1 in a complex known as "Solitaire" which was next to the site the subject of the proposed development. As such, he had a genuine interest in the development application which explained his desire to become a party to the appeal. Whilst he resided at a different address, he used the Solitaire address in his submission against the development application.

Consequently, the notice of appeal was sent to the Solitaire address which at the time was vacant. During that period, Mr Byrne was also on a vacation. It was in that context the notice did not get to Mr Byrne for several weeks.

Nonetheless, Mr Byrne promptly instructed his solicitors to file a notice of election after he returned from his vacation and being prompted by information given by another unit owner.

Ms Daiga was an owner occupier of a unit in Solitaire and promptly instructed her solicitors to file the notice of election after she became aware of the appeal

Ms Daiga was an owner occupier of a unit in Solitaire. She was away during the relevant period within which the notice of appeal was sent. However, she arranged for her mail to be collected and taken to her accountant with instructions that mail which appeared to contain accounts should be opened but otherwise mail which appeared to be personal should not be opened.

The letter containing the notice of appeal was not opened and was not seen by Ms Daiga until she checked her mail after 20 November 2014. However, while she was away in Noosa, she was contacted by other members of the body corporate for Solitaire who informed her about the appeal and actions she would need to take to become a party to the appeal. It was by that time she promptly instructed her solicitors to file the notice of election.

Mr and Ms Gibson resided in a unit in Solitaire and promptly instructed the solicitors to file a notice of election after they became aware that they had to act separately notwithstanding the notice was filed in the name of the trustee company which owned the unit

Mr and Ms Gibson resided in a unit in Solitaire whilst the unit was owned by the trustee company which joined the appeal. Their delay in filing a notice of appeal in their own names was partly explained by the filing of the notice in the name of the trustee company whilst noting that the submission against the development application was made in their own names. The notice of election in the name of the trustee company was filed late but only by a relatively short time.

It was noted that Mr and Ms Gibson were on vacation in a remote location during the relevant period but by the time they returned from the vacation, there was still sufficient time to file a notice of election within time. It was explained to the court that Mr Gibson wasted several days seeking advice from the manager of the body corporate of Solitaire as he considered it was appropriate for the body corporate to become a party to the appeal.

After being advised that that was not practical, Mr and Ms Gibson promptly instructed the solicitors to file a notice of election notwithstanding that it was filed in the name of the trustee company.

Court accepted the explanations for the delay were genuine whilst noting that there were deficiencies in each of Mr Byrne, Ms Daiga and Mr and Ms Gibson's explanations

The court noted that the explanation for non-compliance with the time limitation was a relevant consideration in deciding whether to grant an extension of time, whilst noting that demonstration of an adequate explanation was not a prerequisite.

Although no application for an extension of time was made on the basis that a notice of appeal was not "given" until the recipient returned from holidays, the court by reference to the following passage in the decision of *Demiscto Pty Ltd v Brisbane City Council & Ors* [2008] QPEC 22, noted that such submission would not have been accepted:

> *…In modern conditions, it is not acceptable that an entity become effectively incommunicado and exempt from service by closing its office or refraining from collecting mail at the address given for delivery of mail for a month to provide the luxury of a holiday. It is necessary that arrangements be put in place to receive important communications without subjecting the senders of them to inappropriate delay.*

The court observed that there were deficiencies in each of the explanations provided by Mr Byrne, Ms Daiga and Mr and Ms Gibson in particular the lack of sufficient arrangements or no arrangements were in place to deal with correspondence while they were on holidays. However, the court accepted that they were genuine and observed that the time limit was missed because of a combination of "*ignorance, confusion, misadventure and mismanagement*", rather than "*wilful disregard*".

Court ultimately found that there were sufficient grounds for granting the extension of time and it was in the interests of justice to do so

The court observed that Mr Byrne, Ms Daiga and Mr and Ms Gibson all had an obvious interest in the development application the subject of the appeal. In the event that an extension of time was not granted, they would be prejudiced by not being able to participate in the appeal.

On the other hand, the developer did not identify any prejudice that it would suffer if an extension was granted. Further, as this was an appeal by the developer against council's decision to refuse its development application, no development would occur until the appeal was resolved, so allowing additional parties to join the appeal would not materially change the developer's position in the appeal.

In any case, there were other parties who had joined the appeal in time such that the developer would not have avoided facing a proceeding. As the appeal had not proceeded in any significant way and in light of the above matters, the court was on balance satisfied that there were sufficient grounds for granting the extension of time and it was in the interests of justice to do so.

Court ordered Mr Byrne, Ms Daiga and Mr and Ms Gibson to pay the developer's costs of the applications

The court noted that the application for an extension of time made by Mr Byrne, Ms Daiga and Mr and Ms Gibson was in response to the strike out application brought by the developer.

Given that the developer had to incur costs as a result of the non-compliance with the time limitation, the court considered it appropriate that the developer be compensated for the costs it incurred in the applications. As such Mr Byrne, Ms Daiga and Mr and Ms Gibson were ordered to pay the developer's costs of each of the applications.

Court found the description of the proposed use in the public notice was deficient

Ronald Yuen | Kathryn O'Hare

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *CQ Group Australia Pty Ltd v Isaac Regional Council* [2015] QPEC 3 heard before Everson DCJ

April 2015

In brief

The case of *CQ Group Australia Pty Ltd v Isaac Regional Council* [2015] QPEC 3 concerned an application made by Isaac Regional Council in the Planning and Environment Court seeking that CQ Group Australia Pty Ltd's appeal be struck out on the basis that CQ Group had failed to comply with the public notification requirements of the *Sustainable Planning Act 2009*.

The court found that CQ Group failed to comply with the public notification requirements of the *Sustainable Planning Act 2009* and that the court had no jurisdiction to entertain the appeal. The failure by CQ Group to candidly disclose in the development application and its response to an information request the true nature and extent of the workers' accommodation proposed as part of the development caused the court to decline exercising its discretion not to strike out the appeal. As such the appeal was struck out.

Council asserted that the public notice did not properly describe the proposed development and proposed use of the subject land

The description of the proposed development on the signs erected on the subject land and in the newspaper advertisement was that:

> *From: Extractive Industry (up to 50,000 t per year), General Industry (Heavy Vehicle Depot & Ancillary Motor Vehicle Workshop & Ancillary Office Building) & Rural.*
>
> *To: Extractive Industry (up to 1,000,000 t per year) & Ancillary Facilities, General Industry (Heavy Vehicle Depot & Ancillary Motor Vehicle Workshop & Ancillary Office Building) & Rural.*

Council asserted that it did not properly describe the proposed development and proposed use of the subject land. The details of the scale and density of the proposed development were not included and the notice was misleading as it did not describe the "Ancillary Facilities" which was a reference to workers' accommodation for up to 30 staff.

Workers' accommodation was not necessarily associated with the proposed use of the land for Extractive Industry and the definition of Extractive Industry could not be construed to include it

The court observed that the workers' accommodation component of the proposed development was not clearly stated to be a component of the proposed development in the public notice.

By reference to council's *Nebo Shire Plan 2008*, the court noted that it did not fall within the definition of "Extractive Industry" and the definition made no reference to the term "ancillary". The court further noted that the term "ancillary facilities" was not a use definition in the *Nebo Shire Plan 2008*.

The court considered that workers' accommodation could arguably fall within either the definition of "Accommodation Units" or "Works Camp" whilst CQ Group submitted that it was an innominate use under council's *Nebo Shire Plan 2008*.

The court ultimately was of the view that there was nothing in the definition of "Extractive Industry" which could be construed to include workers' accommodation and further, workers' accommodation was not necessarily associated with the use of the premises for Extractive Industry.

Court found that the description of the proposed development in the public notice was not sufficient to delineate the workers' accommodation of the proposed development to put a person who had an interest of that component of the proposed development on notice and move the person to search council's files

The court had regard to the decisions in *Rathera Pty Ltd v Gold Coast City Council* (2000) 115 LGERA 348, *Curran & Ors v BCC & Ors* [2002] QPELR 58 and *S & L Developments v Maroochy Shire Council* (2008) 161 LGERA 331 in its consideration of the sufficiency of publication notification of development applications. The key issue for determination was whether the description of the proposed development was sufficient to delineate the nature of the proposed development and proposed use to put an interested person on notice and move the person to search council's files.

CQ Group submitted, by reference to the decision of *Zappala Family Co v Brisbane City Council* (2014) 201 LGERA 82 that the public notification was adequate and "ancillary facilities" was a sufficient description as it was entitled to choose an innominate use to best categorise the workers' accommodation component of the proposed development. Further, it was submitted that the plan which accompanied the sign erected on the subject land contained a reference to workers' accommodation and that the proposed workers' accommodation was referred to in the development application which was available for inspection at council's offices by an interested party.

However, the court found that CQ Group's submission did not have regard to the complete absence of this information from the notice published in the newspaper and that it was difficult to discern the reference to workers' accommodation from the signage on the land given the print size. Such findings were supported by the evidence of an operator of an underutilised workers' accommodation facility in the locality who was made aware of the proposed development from the signage on the land but not the accommodation component of the proposed development.

Accordingly, the court found that the public notice failed to contain a description of the proposed development which was sufficient to communicate the workers' accommodation component of the proposed development such that an interest person would be put on notice and moved to search council's files in relation to the development application.

Court declined to exercise its discretion not to strike out the appeal

In light of its findings, the court declared that CQ Group failed to comply with the public notification requirements of the *Sustainable Planning Act 2009* and that the court had no jurisdiction to entertain the appeal.

CQ Group submitted that the court should exercise its discretion not to strike out the appeal. However, the court declined to exercise its discretion in that manner given the failure of CQ Group to candidly disclose the true nature and extent of the workers' accommodation proposed as part of the proposed development both in the development application and its response to an information request. The court therefore struck out the appeal.

Development approval given under a superseded planning scheme was held not to be consistent with the current planning scheme

Ronald Yuen | Min Ko

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Langton & Anor v Douglas Shire Council* [2014] QPEC 71 heard before Everson DCJ

April 2015

In brief

The case of *Langton & Anor v Douglas Shire Council* [2014] QPEC 71 concerned an appeal commenced by Fred Langton and Lola Langton against the decision of Douglas Shire Council to refuse the Langtons' request to extend the relevant period of their development approval by a further four years.

The Langtons' development approval was for a material change of use for four multiple dwellings (tourist) given by council under the *1996 Douglas Shire Planning Scheme* in June 2010.

The court dismissed the appeal because:

- the development approval was not consistent with the council's 2006 Planning Scheme, which sought less intensive residential development and discouraged holiday accommodation in respect of the subject land;
- if the appeal was dismissed, given how development of this nature on the subject land would be treated under the 2006 Planning Scheme, the adjoining owner to the east who objected to the subject development would exercise his right to make a submission, and other persons might also exercise the rights to make a submission on any prospective development application.

Court observed that there was a significant shift in the way the subject land was treated under the 2006 Planning Scheme compared to the 1996 Planning Scheme

In its consideration of the appeal, the court compared the zoning and planning intent for the subject land between the 1996 Planning Scheme and the 2006 Planning Scheme.

The court observed that the underlying planning strategy for the subject land under the 2006 Planning Scheme was to seek "*less intensive residential development and discourage holiday accommodation*", which was a significant shift from how the subject land was treated in the 1996 Planning Scheme.

Court found that the development was not consistent with the 2006 Planning Scheme and considered a dismissal of the appeal was warranted on that ground alone

The development provided for under the development approval was characterised as "Holiday Accommodation" under the 2006 Planning Scheme which was Impact Assessable (Inconsistent). For the purpose of the planning scheme, the development was "*not considered to be consistent with the achieving of ecological sustainability or the DEO's for the Shire in that particular Planning Area*".

The court acknowledged that the DEO's or desired environmental outcomes expressed the broad outcomes sought by the planning scheme and the applicable codes were one of the measures in the planning scheme to achieve the DEO's.

The Port Douglas and Environs Locality Code, the Residential 1 Planning Area Code and the Vehicle Parking and Access Code were considered by the court. It was relevantly noted that:

- the purpose of the Port Douglas and Environs Locality Code for the relevant locality was to "*protect existing and future residential areas from the intrusion of tourist accommodation activity*" and performance criteria P16 provided for a maximum plot ratio of 0.35:1;
- the purpose of the Residential 1 Planning Area Code was to "*maintain and enhance the residential character and amenity of established residential neighbourhoods*" and performance criteria P1 provided that "*the establishment of uses is consistent with the outcomes sought for the Residential 1 Planning Area*";

- the purpose of the Vehicle Parking and Access Code was to "*ensure the provision of sufficient vehicle parking to the site*" and performance criteria P2 and P11 of the code required "*the provision of parking spaces to meet the needs of vehicle occupants with disabilities, and the provision of access for people with disabilities to the building from the parking area and from the street*".

The court found that:

- the development was not in compliance with P16 of the Port Douglas and Environs Locality Code as its plot ratio was 0.52:1;
- the development was not in compliance (and could not comply) with P2 and P11 of the Vehicle Parking and Access Code;
- the development was not consistent with the purpose of the Residential 1 Planning Area Code particularly having regard to the express discouragement of tourist accommodation activity in residential areas.

Accordingly, the court found that the development approval was inconsistent with the 2006 Planning Scheme. Given the extent of the inconsistencies, the court considered that the appeal would be dismissed on that ground alone.

Court was of the view that the adjoining owner to the east who objected to the subject development would exercise his right to make a submission, and other persons might also exercise the rights to make a submission on any future development application in the event that the appeal was dismissed

Nonetheless, the court considered the remaining matters provided for under section 388 of the *Sustainable Planning Act 2009* namely:

- the community's current awareness of the development approval;
- the view of any concurrence agency for the approval;
- in the event that the request was refused (or the appeal was dismissed), whether further rights to make a submission may be available for a further development application and the likely extent to which such rights may be exercised.

The court noted that there was no meaningful evidence before the court in relation to community's current awareness of the development approval and the Department of Infrastructure and Planning being the only concurrence agency for the development approval had no objection to the proposed extension.

As to the likelihood of a submission being made on any prospective development application, given how development of this nature on the subject land would be treated under the 2006 Planning Scheme, the court was of the view that:

- the adjoining owner to the east who objected to the subject development would exercise his right to make a submission; and
- other persons might also exercise the rights to make a submission on any future development application.

Such considerations provided a further basis for the court to dismiss the appeal.

Council's power to issue a section 118BA Notice to Answer Questions

Maysaa Parrino | Salam Kaoutarani

This article discusses a council's powers to require answers and record evidence pursuant to section 118BA of the *Environmental Planning and Assessment Act 1979* (NSW)

April 2015

In brief – Land and Environment Court determines that Notice is invalid

In *Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10, the Land and Environment Court of NSW recently held that the council's Notice To Answer Questions was invalid because it was issued not for regulatory and administrative functions under the EPA Act, but for prosecutorial functions in criminal proceedings.

Council's powers under section 118BA questionable

This firm's longstanding position has been that council's powers to require answers and record evidence pursuant to section 118BA of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) are questionable and in some instances abused.

This position was validated by Chief Justice Preston of the Land and Environment Court in the recent case of *Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10. The decision was handed down on 6 February 2015.

Section 118BA enables authorised persons to require answers and record evidence to exercise its functions under the EPA Act

Section 118BA provides that a council can require an accredited certifier, a person carrying out building work or subdivision work, or any other person suspected on reasonable grounds to have knowledge of matters in respect of which information is reasonably required to enable council to exercise its functions under the EPA Act, to answer questions in relation to those matters and have them recorded.

Council alleges that excavation works not in accordance with development consent

Lane Cove Council granted Mr Zhang development consent to carry out alterations and additions to the existing dwelling house. During the course of his development, Lane Cove Council alleged that Mr Zhang carried out excavation works which were not in accordance with the development consent.

Council commences criminal proceedings in Land and Environment Court

During March 2014, Mr Woodgate (a building surveyor employed by the council) commenced criminal proceedings against Mr Zhang in the Local Court, pursuant to section 14 of the *Criminal Procedure Act 1986* (NSW) (**CP Act**) for an offence under section 125(1) of the EPA Act, for carrying out development otherwise than in accordance with a development consent, contrary to section 76A(1)(b) of the EPA Act.

Prior to the council's issue of its brief of evidence to Mr Zhang, Mr Woodgate issued a notice pursuant to section 118BA to Mr Richard Ferguson, the author of Mr Zhang's Statement of Environmental Effects, requiring him to answer questions in relation to the excavation of Mr Zhang's property (**Notice**).

Judicial review proceedings in Land and Environment Court

Mr Zhang commenced class 4 judicial review proceedings in the Land and Environment Court in relation to the Notice, on the following grounds:

- **Statutory construction** – Section 118BA grants power to require a person to answer questions only for the purpose of obtaining information to enable council to perform regulatory or administrative functions under the EPA Act, and not for obtaining information to enable council to exercise prosecutorial functions in relation to the current criminal proceedings.

- **Contempt of court** – It is contempt of court to exercise power under section 118BA for the sole or dominant purpose of obtaining evidence to be used in criminal proceedings against Mr Zhang that would amount to an advantage which could not be obtained under the procedural rules of the Local Court.
- **Defective notice** – The Notice failed to identify the relevant conditions precedent to the proper exercise of the power under section 118BA.

Court determines that Notice invalid

Initially, Pain J granted an interlocutory injunction restraining the exercise of powers under the Notice pending the final determination of the proceedings.

Ultimately, Mr Zhang was successful on the first ground, but not the second. On the third ground, the court held that the Notice was defective in a technical respect because it failed to indicate to the addressee the matter with which it was concerned. Notwithstanding this, success on the first ground was sufficient for the court to determine that the Notice was invalid.

Council found to have overstepped the limit of its powers under Section 118BA

In particular, Preston CJ held that:

- It is not a function of council under the EPA Act, to institute a prosecution for an offence against the EPA Act. The right of a council to institute a prosecution is found in section 14 of the CP Act, whereas the power of a council to institute proceedings for an offence under the EPA Act is conferred by the *Local Government Act 1993* (NSW).
- Accordingly, the power under section 118BA cannot be used to issue a notice to obtain information to enable a council to exercise its function to prosecute for an offence against the EPA Act, because that function is not a function under the EPA Act.
- Section 118BA can still be used against a person other than a defendant in pending criminal proceedings.
- A contempt of court requires the statutory power to be exercised in such a way that interferes with the course of justice. The issue of the Notice did not amount to a contempt of court.

Ultimately, the Notice was declared to be ultra vires, or beyond the powers of the council, and therefore invalid.

Court did not make enforcement orders as the applicant failed to establish the alleged development offences on the balance of probabilities

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Phillips v Wareham & Ors* [2015] QPEC 5 heard before RS Jones DCJ

May 2015

In brief

The case of *Phillips v Wareham & Ors* [2015] QPEC 5 concerned an application for enforcement orders to remedy the commission of a development offence for the construction of two tennis courts adjacent to Ms Elizabeth Phillips' property and to request an order under section 601 of the *Sustainable Planning Act 2009* to prevent the installation of nightlights at the tennis courts.

The Planning and Environment Court dismissed Ms Phillips' application for enforcement orders because the current use of the tennis courts and the works associated with the tennis courts did not constitute development offences.

Ms Phillips carried the onus to prove the alleged development offences on the balance of probabilities

Ms Phillips alleged that the owners of the adjacent premises committed the following development offences under the *Sustainable Planning Act 2009*:

- carrying out development without a compliance permit (section 575);
- contravention of a compliance permit or compliance certificate (section 576);
- carrying out assessable development without a development permit (section 578);
- unlawful use of premises (section 582).

The court observed that Ms Phillips carried the onus to prove the alleged development offences, and the proof of the commission of the alleged offences in this proceeding was to be assessed by applying the civil standard, namely on the balance of probabilities and the "sliding scale" discussed in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

The court further observed that this was different from the prosecution of a development offence by the relevant authority in the Magistrates Court in which the standard of proof was beyond reasonable doubt.

Court found that Ms Phillips failed to establish the works required compliance assessment or the issuing of a compliance permit or compliance certificate

In relation to the alleged offences concerning the carrying out of development without a compliance permit and contravention of a compliance permit or compliance certificate, the court found that Ms Phillips failed to show that the works required compliance assessment or the issuing of a compliance permit or compliance certificate. As such the commission of those alleged offences was not established.

Court accepted that there was an intensification in the use of the tennis courts but it did not amount to a material change of use

Ms Phillips alleged that the activities being carried out on the tennis courts constituted a "dramatic intensification of use" and the intensification amounted to a material change of use. The activities involved the introduction of coaching and the increase in the number of games of tennis being played. It was further alleged that a development approval was required for the carrying out of the activities and no such approval was given.

The court noted that there had not been a start of a new use of the premises. Further, the activities being carried out on the tennis courts were not a re-establishment of a use that had been abandoned given that the use of the tennis courts remained ongoing although at different levels of intensity.

Whilst it was accepted that there had been an intensification in the use of the tennis courts, the court did not consider there was a material change in the intensity or scale of the use of the courts particularly given the historical use of the tennis courts for social and competitive tennis.

In the court's view, the increase in the number of games being played on the tennis courts and the introduction of coaching could not be described as a material change of use.

Whilst the introduction of nightlights would give rise to a material change in the intensity of the use of the tennis courts or possibly the start of a new use, as a development application for a material change of use for that purpose was being considered by the council, the court did not see any basis for interfering with the application process

In addition to the activities being carried out on the tennis courts, Ms Phillip also alleged that the likely future use of the courts for night tennis as a result of the introduction of nightlights would constitute a material change of use for which a development approval would be required.

The court acknowledged that the introduction of nightlights would give rise to a material change in the intensity of the use of the tennis courts or possibly the start of a new use being night tennis. However, given that a development application for a material change of use for that purpose had been made and was being considered by the council, the court did not see any basis for interfering with the application process at this point in time.

The resurfacing of the tennis courts and their re-orientation did not require an approval from the council and the fencing work was subject to the council's permission

Ms Phillips alleged that the following works associated with the tennis courts required a development permit:

- the installation of a new fence which exceeded three metres in height;
- the resurfacing of the courts including wiring which as alleged by Ms Phillips had been undertaken to accommodate the installation of the nightlights;
- the re-orientation of the courts.

The court noted that the resurfacing of the courts or their re-orientation did not require an approval from the council and nonetheless, they would be exempt development if they could be properly described as "building works" for the purposes of the *Sustainable Planning Act 2009*.

The new fence was not an exempt building work as it exceeded three metres in height. However, the council granted permission for the work by way of a decision notice and the fencing work was therefore lawful.

A study or multi-purpose room in a relocatable home was declared by Court not to be a third bedroom

Eva Coggins | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Walter Elliott Holdings Pty Ltd v Fraser Coast Regional Council* [2015] QPEC 8 heard before Morzone QC DCJ

May 2015

In brief

The case of *Walter Elliott Holdings Pty Ltd v Fraser Coast Regional Council* [2015] QPEC 8 concerned an application heard by the Queensland Planning and Environment Court. Walter Elliott Holdings Pty Ltd, a developer that had received a development approval for a relocatable home park, sought declaratory and consequential relief from the court to the effect that infrastructure charges should have been levied at the rate for 2 bedroom relocatable dwellings, and the development was subject to a 20% subsidy of applicable infrastructure under the Fraser Coast Regional Council's *Infrastructure Charges Incentives Administrative Policy*.

The main issues in dispute were whether a study or multi-purpose room in a 2 bedroom relocatable home constituted a third bedroom for the purpose of infrastructure charging, and whether the 20% subsidy under the Incentives Administrative Policy should have been applied by the council to the development.

The court found that the development was only for 2 bedroom relocatable homes and the council should have applied the rate for a 2 bedroom dwelling, and that the council did not consider the Policy. The adopted infrastructure charges notice given by the council was set aside and the council was ordered to issue an adopted infrastructure charge notice by applying the correct rate, and decide whether the 20% subsidy under the Policy applied to the development.

Court found that the developer only sought to reserve flexibility to internal design choice and it was clear that the proposed homes would be 2 bedroom relocatable homes

The court observed that the planning report which accompanied the development application included example designs of proposed relocatable homes, some of which contained 2 bedrooms and some contained an additional room which was labelled as either a "study" or "multi-purpose room". The council applied the higher infrastructure charging rate for a 3 or more bedroom relocatable dwelling, rather than the charging rate for a 2 bedroom relocatable dwelling because it considered that the study or multi-purpose room could be used as a bedroom.

The council relevantly noted that the planning report provided that "it is requested that these designs not be stamp (sic) approved as to allow for flexibility in house design for future stages" and that the example design plans were not part of the approved plans. The report also contained statements about the development containing only 2 bedroom relocatable homes.

Accordingly, in the court's view the developer only sought to reserve some flexibility to internal design choice for the proposed 2 bedroom dwellings, and the council would be in no doubt that the developer was seeking a development approval for 2 bedroom relocatable homes only. The court did not consider there was any factual or legal justification for the council to unilaterally treat the additional room labelled as a "study" or "multi-purpose room" as a third bedroom.

Court found that the approved development was for 2 bedroom relocatable homes and the council should have used the infrastructure charging rate for a 2 bedroom dwelling

The development approval did not expressly specify the bedroom type or otherwise limit the number of bedrooms. On that basis, the council applied the infrastructure charge for the highest use permitted by the development approval being a 3 or more bedroom relocatable dwelling.

The court referred to the decision of *Aqua Blue Noosa Pty Ltd v Noosa Shire Council* [2005] QPELR 318, where the court stated that "the responsibility to ensure approvals of development are clear and unambiguous rests with the approving authority". The court in that decision also made reference to the decision in *Matijesivic v Logan City Council* (1984) 1 QR 599, where the court stated that:

> *planning decisions are apt to have considerable effects on the value of property and in my judgment it would accord with principle where planning decisions are ambiguous to construe them in the way which places the least burden on the landowner.*

However, the court noted that such remarks were required to be "read in the context that councils are only empowered to properly assess and approve a development within the four corners of the application. A development application marks out the boundaries of the approval sought, and a resultant approval can be no wider than the application to which it relates."

The court found that when the development approval was construed in that light, any perceived lack of clarity or certainty in the approval was absolved. As such the court concluded that:

- the approved development was for 2 bedroom relocatable homes only and the development approval should be construed accordingly;
- the council should have used the infrastructure charging rate for a 2 bedroom dwelling;
- the council acted beyond power by imposing a charge for a 3 or more bedroom dwelling.

Court found that the council did not consider the Incentives Administrative Policy and failed to exercise its discretion under the Policy

The developer challenged the approach taken by the council in relation to the application of the Incentives Administrative Policy in the context of the proposed development.

Whilst there was an express statement in the Policy that it was entirely at the council's or the Chief Executive Officer's discretion to apply the Policy, the court noted that "it is trite law that the discretion be exercised properly in good faith and for a proper, intended and authorised purpose, and not arbitrarily or capriciously".

The court considered the operation of the Policy and the eligibility criteria. In the court's view, there was no evidence which indicated that the council had considered the policy, considered whether the development satisfied the criteria under the Policy, or decided that the development did not satisfy the criteria. As such the court found that the Policy was not considered by the council, and that the council failed to exercise its discretion under the Policy.

The court ordered the council to consider whether or not to apply the 20% subsidy to the charge under the Policy and advise the developer accordingly.

Court overturned ADR Registrar's decision to allow demolition of pre-1946 house in Demolition Control Precinct

James Nicolson | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *West v Brisbane City Council* [2015] QPEC 1 heard before Everson DCJ

May 2015

In brief

The case of *West v Brisbane City Council* [2015] QPEC 1 concerned an application for a review of a decision of the Alternative Dispute Resolution Registrar to allow an appeal filed by Brett West against a decision of the Brisbane City Council to refuse a development application to demolish a pre-1946 house in a Demolition Control Precinct under the *Brisbane City Plan 2000*.

The Planning and Environment Court set aside the decision of the Registrar to allow the appeal, finding that on the evidence before the Registrar the proposed demolition was contrary to the provisions of the Demolition Control Precinct, and the appeal should therefore be dismissed.

Court's jurisdiction when reviewing decisions by the Registrar was broad and unfettered subject to the evidence before the Registrar in reaching the decision

The court first considered how it should approach a review of a decision by the Registrar, as there was no specific legislative guidance.

By reference to a number of New South Wales decisions in the context of a review of a decision, the court observed that its jurisdiction was broad and the decision of the Registrar may be reviewed in an unfettered manner, subject to the evidence before the Registrar in reaching the decision.

Both architectural heritage experts agreed that the house was recognisably a pre-1946 house exhibiting traditional building character but disagreed on the impact of the change of alignment of Gordon Street and the racecourse adjoining the house

The house is located at the end of Gordon Street which comprises predominantly pre-1946 houses that adjoin a racecourse. The location of the house is slightly out of alignment with the remainder of the houses in the street due to a curve in the road. The entire residential neighbourhood is effectively within the Low Density Residential Area and a Demolition Control Precinct.

Both parties relied on the expert opinion of their respective heritage architects. Both experts agreed that the house was recognisably a pre-1946 house that exhibited traditional building character. However, both experts had different views concerning the impact of the change of alignment of Gordon Street and the racecourse adjoining the house.

Mr West's expert considered that the house was visually isolated from the remainder of the Precinct, and its demolition would have negligible impact on the overall traditional character in the Precinct. However, the council's expert considered that Gordon Street had remarkably strong traditional character and that the demolition of the house "would result in the loss of traditional building character within the DCP".

However, both experts conceded in various aspects in their views in the course of oral evidence. Relevantly, Mr West's expert conceded that Gordon Street was a "unusually representative of traditional building character and that at the southern end of Gordon Street all the houses exhibited it".

Court disagreed with the Registrar's determination and found that the proposed demolition was contrary to the purpose and intent of the Demolition Control Precinct and did not satisfy the relevant performance criterion and acceptable solution

The court observed that the Registrar was correct that the dispute was limited to the application of one performance criteria and one corresponding acceptable solution relating to the demolition of a residential building, being Performance Criterion P1 and Acceptable Solution A1.3 of the Demolition Code.

In considering the Registrar's determination, the court noted that:

- the Registrar preferred the evidence of Mr West's expert over that of the council's that the "house does not contribute positively to the visual character of the street" and as such found that Performance Criterion P1 was satisfied; and
- the Registrar also considered the relevant part of Acceptable Solution A1.3 in case the Registrar was incorrect about compliance with Performance Criterion P1 and found that in relation to the loss of the house "the loss would not be 'significant, concerning or unacceptable rather than no loss at all' or in the words of Jones DCJ [in *Wallace v Brisbane City Council* [2012] QPELR 689] the loss will not be 'meaningful, or significant'."

The court disagreed with the Registrar's determination and considered that the Registrar could not have arrived at such determination when the Demolition Code was read as a whole, having regard to the Purpose of the Code and the Performance Criteria and Acceptable Solutions.

In this respect the court found that the intention of the Demolition Code was that "structurally sound residential buildings constructed before the end of 1946 are retained in the Development Control Precincts and Low Density Residential Areas" and it had little relevance whether or not the house was visually isolated.

Given the character and location of the house and Mr West's expert opinion in relation to the character of Gordon Street, the court was of the view that the house would contribute positively to the visual character of the street and therefore, found that Performance Criterion P1 was not satisfied.

The court was also not convinced that Acceptable Solution A1 was satisfied since the demolition of the house would result in the loss of traditional building character within the Demolition Control Precinct, which in this circumstance was at least meaningful.

The court consequently set aside the decision of the Registrar and dismissed the appeal.

Fries or a burger: is a food and drink outlet an ancillary use to a service station?

James Nicolson | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Witmack Industrial Pty Ltd v Toowoomba Regional Council* [2015] QPEC 7 heard before Morzone QC DCJ

May 2015

In brief

The case of *Witmack Industrial Pty Ltd v Toowoomba Regional Council* [2015] QPEC 7 involved an application by Witmack Industrial Pty Ltd seeking declaratory and consequential relief against the Toowoomba Regional Council's decision that Witmack's development application was not properly made. The council asserted that the development application was not a properly made application as it failed to identify the proposed fast food tenancy use (food and drink outlet) as a separate use under the development application.

Witmack failed to demonstrate that the proposed fast food tenancy use was an ancillary use to the proposed service station. The Planning and Environment Court refused the declaratory relief sought by Witmack and held that the proposed development comprised both a service station and a food and drink outlet. As such the court ordered that the development application was not a properly made application and upheld the council's decision to issue a "not properly made" notice.

Council and Witmack had a different view on whether the proposed food and drink outlet was an ancillary use to the proposed primary use of a service station

Witmack made a code assessable development application in respect of land fronting the Warrego Highway seeking a development permit for a material change of use of a service station and operational works for advertising signage.

The development application materials provided that the proposed service station would include an ancillary retail area and food and drink outlet. The court observed that the definition of a "service station" use under the Queensland Planning Provisions relevantly "*include[d], where ancillary, a shop, food and drink outlet, maintenance, repair servicing and washing of vehicles, the hire of trailers, and supply of compressed air.*" The definition of a "service station" use under the *Toowoomba Regional Planning Scheme 2012* was substantially the same.

However, the council asserted that the proposed food and drink outlet was not ancillary to the service station. As the development application had only sought approval for a service station and related advertising devices and not the food and drink outlet, the council asserted that it did not contain the mandatory requirements stated in section 260 of the *Sustainable Planning Act 2009*.

Consequently, the court had to determine whether the proposed food and drink outlet was an ancillary use to the proposed primary use of a service station.

The court was of the view that an ancillary use would need to be dependent, subservient or subordinate to the primary use although it would be necessary to have regard to the individual facts and circumstances to determine whether a planning use is ancillary to another

The court noted that the term "ancillary" was not defined under the *Toowoomba Regional Planning Scheme 2012*, the *Sustainable Planning Act 2009*, the *Sustainable Planning Regulation 2009* or the *Acts Interpretation Act 1954*.

Accordingly, the court had to give the term its ordinary meaning by reference to its definitions in the Macquarie Dictionary and the Oxford English Dictionary as well as consider a number of case authorities in which the term "ancillary" was considered.

In essence, the court found that an ancillary use would need to be "dependent, subservient, or subordinate to the primary use" whilst noting that one must have regard to the individual facts and circumstances and its context in order to determine whether a planning use is ancillary to another.

The court found that the proposed fast food outlet was not dependent, subservient or subordinate to the primary use of the service station and therefore not an ancillary use to the service station

In determining whether the proposed food and drink outlet was an ancillary use to the proposed service station, the court observed some of the relevant features of the proposed food and drink outlet in the context of the proposed development as a whole which included:

- slightly over half of the proposed building's gross floor area would be devoted to the food and drink outlets and associated dining areas;
- the proposed fast food tenancy use was disassociated with other areas of the development;
- the proposed fast food tenancy use would have its own pylon signage fronting the Warrego Highway that would potentially exceed the size of the service station signage;
- the traffic report which accompanied the development application indicated that the fast food tenancy could be a significant contributor to overall traffic generated by the development;
- based on the traffic expert's evidence, the proposed fast food tenancy use had the potential to be the "prime traffic generator" and "the significant traffic generating component of the development and could generate the majority of that traffic demand independent of the service station function".

While it was recognised that the proposed fast food outlet was compatible with the service station, in the court's view, there was insufficient evidence that the proposed fast food outlet was dependent, subservient or subordinate to the primary use of the service station.

After weighing up the evidence, the court found that the fast food outlet was more likely to co-exist in an independent and dominant way, as opposed to being ancillary to the primary use of the service station.

Accordingly, the court concluded that Witmack had failed to establish that the proposed fast food tenancy use was ancillary to the primary use of the service station and as such it was not part of the service station use as defined under the Queensland Planning Provisions and planning scheme.

Given that the proposed development comprised both a service station and a food and drink outlet, the court found that the development application was not a properly made application and upheld the council's decision to issue a "not properly made" notice.

A Gentle Reminder – Councils and officers are not immune from liability for misleading or deceptive conduct

Mathew Deighton

This article discusses the ramifications for councils (and their officers) of misleading or deceptive conduct under the *Competition and Consumer Act 2010* (Commonwealth)

May 2015

In brief

It has long been considered that local councils (like trade unions) are not engaged in trade or commerce and therefore are exempt from the operation of the *Competition and Consumer Act 2010* (Commonwealth) (**CCA**) (which replaced the well known, *Trade Practices Act 1974*). However, that is not the case. Councils like individuals, partnerships and companies can fall foul of the CCA, including its misleading or deceptive conduct provisions.

The application of the CCA to the conduct of local councils was considered in the Supreme Court of New South Wales case of *Fabcot Pty Ltd v Port Macquarie - Hastings Council* [2010] NSWSC 726.

In late 2005, the council ran an "Expression of Interest" (**EOI**) process and received interest from Coles and Woolworths. The council initially approved Woolworths' proposal. When those negotiations reached an impasse the council commenced negotiations with Coles.

In late 2007 the council ran another EOI process. Coles and Woolworths again expressed their interest. In early 2008, the council shortlisted Woolworths. In February 2008, the council informed Woolworths that it had approved Woolworths' proposal. However, the parties were unable to reach agreement on the terms of the contract.

In early 2009 the council re-opened negotiations with Coles. The council deliberately refrained from telling Woolworths that it had re-opened negotiations with Coles. Throughout 2009, the council was in active negotiations with both parties. Woolworths sued the council, alleging amongst other things that the council's non-disclosure of its negotiations with Coles was misleading and deceptive.

The court held that the council's conduct was misleading and deceptive. Moreover, the court found that council's conduct fell well short of commercial fair dealing and the standards which a commercial party was entitled to expect when dealing with a council.

Ramifications for councils

Councils (and their officers) need to ensure that when carrying on their commercial activities that they act with honesty and candour. Otherwise, councils, like any other person or entity involved in trade or commerce, run the risk of being found to have engaged in misleading or deceptive conduct in contravention of the CCA. Councils that are found to have engaged in misleading or deceptive conduct expose themselves to:

- having damages awarded against them (eg. a party in Woolworths' position would in most cases be entitled to receive compensation for the expenditure it incurred in negotiating with the council;
- being injuncted from engaging in the contravening conduct;
- having executed contracts set aside or varied in order to overcome the contravention;
- prosecution, and the imposition of penalties, by the ACCC.

Further, officers acting as the organ of the council are also exposed to the risk of being found to having been knowingly involved in, or aiding, abetting, counselling or procuring the contravention. In the event that an officer is found to have been a party to the contravention of the CCA, the aggrieved party would be entitled to seek damages from the officer.

To the extent that council officers are involved in commercial negotiations or commercial decisions, officers ought to ensure that the council has appropriate directors and officers liability insurance policies in place.

Need for an independent verification scheme for stormwater quality improvement devices

Ben Caldwell

This article discusses the need for an independent verification scheme for stormwater quality improvement devices

June 2015

In brief – Local studies of stormwater quality improvement devices may take months or years to complete

The guidelines under the Model for Urban Stormwater Improvement Conceptualisation operate as a barrier to competition and new providers entering the market.

Use of Model for Urban Stormwater Improvement Conceptualisation

In Queensland a manufactured stormwater quality improvement device is considered for its acceptability as part of an operational work application having regard to the criteria in applicable council planning scheme codes and the Queensland government State Planning Policy.

The usual method of demonstrating that a proposed site-based stormwater management plan will achieve a required reduction in pollutants is the Model for Urban Stormwater Improvement Conceptualisation (**MUSIC**).

MUSIC is a software program that models the performance of stormwater devices in urban catchments. The model relies on the input of pollutant reduction parameters for the stormwater device proposed to be used.

Need for rigorous scientific testing and publication of results

The guidelines for MUSIC require that the pollutant reduction parameters for a stormwater device be independently verified by rigorous scientific testing using a method to suit local or regional conditions and that the results of the testing be published in a credible engineering or scientific journal.

The practical outcome of this requirement is that for any new device to enter the market, the distributor must commission a local study which may take many months or even years to complete, depending on rainfall conditions. This may be despite the device having undergone rigorous scientific testing and being accepted for use in another jurisdiction.

While there is no questioning the intention of the requirement of the MUSIC guidelines, the practical effect is they operate as a barrier to competition and new providers entering the market.

Independent verification scheme will encourage innovation and competition

To ensure that new technologies and products come to market in Queensland quickly, there is value in developing an independent verification scheme for stormwater devices which can be relied on by councils.

Steps are already underway to develop such as system. Once in place, the scheme should help to encourage innovation and competition, leading to a better outcome for the community as a whole.

Considering the Planning and Environment Court's jurisdiction to make declarations under section 456 of the Sustainable Planning Act 2009, what are the limits?

Ronald Yuen | William Lacy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Connolly v Brisbane City Council and Ken Drew Town Planning Pty Ltd* [2015] QPEC 16 heard before Bowskill QC DCJ

June 2015

In brief

The case of *Connolly v Brisbane City Council and Ken Drew Town Planning Pty Ltd* [2015] QPEC 16 involved an application by Mr Trevor John Connolly seeking declarations from the Planning and Environment Court that the consent given by the Brisbane City Council, as owner of the land, to the making of a development application for an extension of the Sandgate Aquatic Centre lodged by Ken Drew Town Planning Pty Ltd, was not valid as the council did not consent to the whole of the development and the council could not lawfully consent to the development as proposed in the development application.

The council and Ken Drew Town Planning challenged the court's jurisdiction to make the declaration sought by Mr Connolly in relation to the lawfulness of the council's consent under the *Land Act 1994*. The court found that it was not within the jurisdiction of the court to deal with the matters raised by Mr Connolly associated with the lawfulness of the council's consent.

As to Mr Connolly's challenge on the validity of the consent on the basis that the council did not consent to the whole of the development, the court found no basis to impugn the consent on that ground and as such dismissed the application.

Mr Connolly challenged the validity of the council's consent as the landowner to the development application on the basis that the council did not consent to the whole of the development and it could not in any case lawfully provide consent to the development sought

Ken Drew Town Planning made a development application for a development permit for a material change of use, and a preliminary approval for building work, in respect of extensions to the Sandgate Aquatic Centre. The proposed development involved construction of new structures including a gymnasium, kiosk and pools and rearrangement of the existing uses and structures.

The council was the trustee of the land for the proposed development by deed of grant in trust under the *Land Act 1962*, which was granted "for Local Government (Swimming Pool) purposes".

As the development application sought an approval for a material change of use, the consent of the owner of the land was required. The council provided its consent, as the owner of the land, to the development application by way of a letter dated 22 October 2013 "for the purpose of building a new swimming pool and facilities within the leased area of the Sandgate Swimming Pool".

Mr Connolly challenged the validity of the council's consent on the following basis:

- the council's letter did not contain the council's consent to the whole of the development, as it only referred to a new swimming pool and facilities and not to a new gymnasium;
- the council could not lawfully provide consent to the development as proposed in the development application because to do so would place the council in breach of the *Land Act 1994* by taking action that was not consistent with the purpose for which the land was granted in trust.

The court concluded that it did not have jurisdiction under section 456(1)(a) of the Sustainable Planning Act 2009 to look behind the consent once an owner of the land gave the consent in the manner provided for under section 260 of the Sustainable Planning Act 2009

The council and Ken Drew Town Planning challenged the court's jurisdiction to deal with the issues associated with the lawfulness of the council's consent under the *Land Act 1994*.

Section 456(1)(a) of the *Sustainable Planning Act 2009* confers jurisdiction on the court to make a declaration about "a matter done, or to be done or that should have been done for" the *Sustainable Planning Act 2009*.

The court found that to the extent the declaratory relief sought involved consideration of the lawfulness of the uses of the land for the purposes of the *Land Act 1994* that matter was not within the jurisdiction of the court under section 456(1)(a) of the *Sustainable Planning Act 2009*.

The relevant matter "for" the *Sustainable Planning Act 2009* was the obtaining of the owner's consent to the making of the development application which could either be done by providing it with the development application or including, in the application, a declaration that the consent had been obtained.

In the court's view, where an owner of the land gave the consent in the manner provided for under the *Sustainable Planning Act 2009*, that would be the end of the enquiry and the court did not have jurisdiction under section 456(1)(a) of the *Sustainable Planning Act 2009* to look behind the consent such as considering matters arising under the *Land Act 1994*. Such view was supported by the decision in *Cornerstone Properties Pty Ltd v Caloundra City Council (No. 2)* [2005] QPELR 96.

The court found no basis to impugn the consent given by the council on the ground that the council did not consent to the whole of the development

In considering Mr Connolly's challenge on the validity of the consent on the basis that the council did not consent to the whole of the development, the court had regard to the rationale for requiring an owner's consent to the making of a development application explained in the decision of *Petrie v Burnett Shire Council* [2001] QPELR 510 at 511.

It was noted by the court that the rationale was to provide the assessing authority with assurance that the proposed development was realistically proposed and that the development application was not an exercise that would result in wasted effort and expense to the assessing authority where the development application was not made by the owner of the land.

The council gave consent, as the owner of the land, in wording that was apt to cover the development application that was made. There was also evidence before the court showing that the "new gym and amenities" were known to the council when it gave its consent.

Accordingly, the court did not consider there to be any basis to impugn the consent given by the council on the ground that it did not contain the council's consent to the whole of the development.

Unlawful filling within a designated waterway – breach of development approval and conflict with planning scheme provisions

Ronald Yuen | Kathryn O'Hare

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stankovic v Brisbane City Council* [2015] QPEC 17 heard before Jones DCJ

June 2015

In brief

The case of *Stankovic v Brisbane City Council* [2015] QPEC 17 concerned an appeal by Mr Dusan Stankovic in the Planning and Environment Court against conditions imposed by Brisbane City Council in respect of filling work undertaken by Mr Stankovic on his land.

The council contended that Mr Stankovic carried out filling on his land in breach of the conditions under the development permit and relevant provisions of the *Brisbane City Plan 2000* and *Brisbane CityPlan 2014* and required the unlawful fill to be removed from his land. Mr Stankovic denied that the fill was deposited on his land unlawfully and commenced an appeal in the court.

The court found that Mr Stankovic introduced fill material onto his land in breach of the conditions under the development permit and was otherwise in conflict with the *Brisbane City Plan 2000* and *Brisbane CityPlan 2014*.

The court concluded that the unlawful fill interfered with local drainage and overland flows which caused water diversion and ponding on neighbouring land, and the remedial works proposed by the council's hydraulic engineer were necessary and reasonable, other than the removal of the surface of part of the access easement.

Mr Stankovic was ordered by the court to comply with the conditions package dated 15 December 2014 as modified by the drainage relief works other than the requirement to lower the surface level of the access easement.

Council contended that filling work undertaken by Mr Stankovic was in breach of the development permit and the work required an additional development permit which Mr Stankovic had failed to obtain, and required Mr Stankovic to remove the fill deposited beyond the footprints of the house and tennis court

In December 2007, Mr Stankovic obtained a development permit for a material change of use for a house and tennis court in respect of his land which included a number of conditions concerning the grant of easements to facilitate underground drainage and overland water flow and the prohibition of the deposition of material within the area of the waterway corridor.

In June 2012, the council issued a show cause notice to Mr Stankovic, following an inspection of his land, alleging that:

- material had been deposited within the waterway corridor in breach of the development permit; and
- the filling work was assessable development as it was not necessary for or incidental to the building work for the house and Mr Stankovic had not obtained a development permit for carrying out such filling work.

Mr Stankovic denied that there was a breach of the development permit and there was a need for any additional development permit.

The council subsequently issued an enforcement notice to Mr Stankovic requiring the removal of fill deposited beyond the house and tennis court footprints. Mr Stankovic sought to challenge the enforcement notice by bringing a proceeding before the Building and Development Dispute Resolution Committee.

However, the proceeding was dismissed by the committee as it did not have jurisdiction to deal with the matter. Mr Stankovic consequently commenced an appeal in the Planning and Environment Court in respect of matters contended by the council associated with the filling work.

The court found that the filling work undertaken by Mr Stankovic on his land was in breach of the development permit and relevant provisions of the council's planning scheme and was therefore unlawful

The first issue was whether the filling work undertaken by Mr Stankovic on his land was in breach of the development permit and relevant provisions of the *Brisbane City Plan 2000* and *Brisbane CityPlan 2014*.

Mr Stankovic acknowledged that material was introduced onto his land. However, he maintained that it was not introduced in breach of the development permit or the council's planning scheme provisions since the filling work was ancillary to the construction of the house and tennis court and was therefore not operational work.

During cross-examination, Mr Stankovic sought to change his initial position and contend that the purpose of the filling was to restore his land back to its original or natural levels due to some alleged excavation works on his land carried out by an unknown person.

Overall, the court found that Mr Stankovic's evidence was unsatisfactory. Nonetheless, on Mr Stankovic's evidence itself as well as the evidence of the hydraulic engineering experts and the owner of the neighbouring property, the court was satisfied that the filling work undertaken by Mr Stankovic on his land was in breach of the development permit and relevant provisions of the council's planning schemes.

The court found that the unlawful filling work caused ponding which impacted on neighbouring properties

The second issue was whether the unlawful filling work caused ponding which impacted on neighbouring properties.

Whilst there was a dispute about the volume of material introduced into the waterway, the court found that the unlawful fill had a significant adverse impact on flows across the waterway corridor, irrespective of its volume.

With the benefit of the evidence of the hydraulic engineering experts and the owner of the neighbouring property, the court was satisfied that the unlawful fill significantly restricted the natural east to west flow of water across Mr Stankovic's land, which caused an impact on neighbouring properties.

In the context of the planning scheme provisions concerning flooding, the court found that the introduction of unlawful fill was in conflict with those provisions.

The court found that the remedial works proposed by the council's hydraulic engineering expert were necessary and reasonable except for the removal of material from the access easement surface

The third issue was whether the remedial works proposed by the council's hydraulic engineering expert were reasonably necessary to rectify the issues caused by the unlawful fill.

The council's hydraulic engineering expert proposed a number of remedial works which included the provision of a 225mm pipe under the northern section of the access easement and removal of material from part of the access easement surface, to which the hydraulic engineering expert retained by Mr Stankovic did not oppose or provide any alternatives.

However, the council's hydraulic engineering expert later conceded that further survey work might be necessary prior to requiring the removal of material from part of the access easement surface.

Accordingly, the court was satisfied that the remedial works proposed by the council's hydraulic engineering expert were necessary and reasonable, other than the removal of material from the access easement surface.

Court allowed a strike out application following prolonged and uncertain proceeding

Kathryn O'Hare | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Lambert Property Group Pty Ltd v SJ Daly & Ors* [2015] QPEC 4 heard before Jones DCJ

August 2015

In brief

The case of *Lambert Property Group Pty Ltd v SJ Daly & Ors* [2015] QPEC 4 concerned an application by the Dalys to strike out an originating application made by Lambert Property Group Pty Ltd on the basis that its originating application had not been progressed. Lambert opposed the application on the grounds that it lacked merits or, alternatively should be done formally including a timetable for filing and serving of material by both parties.

The court found that a timetable such as that proposed by Lambert would involve the parties in further delay and expense. Given that Lambert would have been aware of the factual matters and that there was no material surprise or prejudice on Lambert, the court accepted that the Dalys could make this application.

The court concluded that Lambert's originating application should be struck out since it would not be able to sensibly prosecute its application until its Supreme Court action had resolved and it would be unfair to the Dalys by keeping the legal proceeding on foot with such uncertainty particularly where there was no fault of the Dalys.

Lambert considered making changes to its development involving land owned by the Dalys and sought declaratory relief that it did not require owner's consent from the Dalys for its lodgement of a development application or changes to the development

Lambert was carrying out a major multi-unit residential development at Kangaroo Point. The development land owned by Lambert had the benefit of an easement for a right of way over land owned by the Dalys.

The proposed development was the subject of two Planning and Environment Court appeals in which the Dalys were submitters opposing to the proposed development. Both appeals were ultimately resolved through negotiations.

After the resolution of the appeals, Lambert considered making changes to stage 3 of the proposed development by way of a permissible change application. The Dalys made it clear that it would oppose any such application and would not consent to the changes or any new development application involving its land the subject of the benefiting easement.

Lambert by way of an originating application in the Planning and Environment Court sought declaratory relief that owner's consent from the Dalys was not required "for the lodging of a development application nor for the lodging of an "alternative" development application as particularised … or some further iteration of that development".

The Dalys' strike out application was dismissed by the court but the court foreshadowed that it may end the proceedings if the nature of the actual form of the development Lambert intended to rely upon for its application remained uncertain when it next came back before the court

Since Lambert's application was made, it had been adjourned with the Dalys' consent on a number of occasions. In July 2014, Lambert was advised by the Dalys that it would not consent to any further adjournments and would bring a strike out application if the application was not withdrawn.

The Dalys subsequently brought a strike out application which was heard by the court in August 2014. Whilst the strike out application was dismissed, the court foreshadowed that if the nature of the actual form of the development Lambert intended to rely upon for its application remained uncertain when it next came back before the court, the court may end the proceedings and would be minded to do so based on an oral strike out application.

The court accepted the Dalys' renewed application since Lambert would have been aware of the factual matters and that there was no material surprise or prejudice on Lambert

In February 2015, the Dalys made an application to renew the strike out proceeding. The Dalys' application was premised on the allegations that Lambert still had not properly identified a defendable form of the development, there had been little progress made by Lambert on its application and the Dalys suffered prejudice by continuing to incur costs of the proceeding.

It was further alleged by the Dalys that Lambert's application would be further delayed as it seemingly depended upon a proceeding in the Supreme Court for a statutory easement against the Body Corporate for the neighbouring land filed by Lambert in November 2014.

Lambert resisted the application and submitted that it denied Lambert's ability to fairly consider its position and evidence it required to call in response. It was further submitted that the strike out application should be done formally including a timetable for filing and serving of material by both parties.

The court disagreed with Lambert's submissions and considered that the proposed timetable would involve the parties in further delay and expense. Further, the court was of the view that Lambert would have been aware of the factual matters, in particular the Daly's position and that there was no material surprise or prejudice on Lambert.

The court accepted the strike out application be made by way of an oral application.

Lambert's application was struck out as it would be unfair to the Dalys to allow the proceeding to continue with a state of uncertainty where the delay was of no fault of the Dalys

The court proceeded to consider the merits of the strike out application. In doing so, it considered the relevant factors outlined in the Queensland Court of Appeal decision in *Tyler v Custom Credit Corp Ltd & Ors* [2008] QCA 178 that the court took into account when determining whether the interests of justice required a case to be dismissed.

It was observed by the court that Lambert's application would be expected to have been prosecuted and determined. The Dalys had been prejudiced by the continued delay by incurring costs of the proceedings. The court agreed with the Dalys' submissions that "the Dalys are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its potential consequences hanging over their heads … in circumstances where the facts that are intended to be relied on by LPG in support of its application are in apparent continual state of flux".

In the court's view, the continued delay in prosecuting Lambert's application was mainly attributed to its difficulty in identifying a defendable form of the development and was of no fault of the Dalys. Lambert had not provided a satisfactory explanation for the delay and by implication was in breach of its implied undertaking to the court and to the Dalys to proceed with the matter expeditiously.

Based on the material before the court, it was concluded that Lambert's application would not be able to be sensibly prosecuted until the Supreme Court action was resolved, which could take over several months. The outcome of the Supreme Court action would also affect the factual matters which Lambert's application was relied on.

Given that it would be unfair to the Dalys to allow the proceeding to continue with a state of uncertainty, and that the strike out application would not prevent Lambert to commence fresh proceedings in the future, the court dismissed Lambert's application.

Court not exercising its discretion to extend time for the removal of unlawful fill under consent order

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 Bowman & Ors and Bowman & Ors v Brisbane City Council* [2015] QPEC 14 heard before Searles DCJ

August 2015

In brief

The case of *Brisbane City Council v Bowman & Ors and Bowman & Ors v Brisbane City Council* [2015] QPEC 14 concerned applications heard by the Queensland Planning and Environment Court relating to the enforcement order made by the court with respect to unlawful fill on Mr John Alexander Bowman's land situated in Bald Hills, Brisbane.

In 2013, Mr Bowman, who had a history of carrying out unlawful filling work, consented to an enforcement order requiring him to remove introduced fill material from his land in accordance with the rehabilitation plan within twelve months of approval by the Brisbane City Council of the plan, or such further time as agreed in writing between the parties with reference to the relevant experts.

Mr Bowman sought orders from the court varying the enforcement order to extend the period for the removal of the fill material or seeking a stay of the enforcement order and alternate orders for the removal of the fill material.

The court found that there was no evidence of an extension of time agreed between Mr Bowman and the council as contemplated in the enforcement order. Mr Bowman had not provided an explanation for his non-compliance with the order or established any good reason for the exercise of the court's discretion to vary or stay the operation of the enforcement order. Accordingly, the court dismissed both applications.

Mr Bowman adopted the options for carrying out the fill removal works proposed by his ecological expert as part of his contention for the variation of the enforcement order

Mr Bowman adduced expert evidence from his ecological and civil and hydraulic engineering experts in contending for the orders being sought. Mr Bowman's ecological expert, in reliance of Mr Bowman's engineering expert's inputs, concluded that the fill removal would take over 36 years if Mr Bowman was to remove the fill using his existing equipment only.

The ecological expert therefore proposed four options for carrying out the fill removal works, which also relied upon Mr Bowman's engineering expert's inputs. One of the options was a partial removal of the fill which included the removal of the gross pollutants relying on Mr Bowman's engineering expert's opinion that the existing fill did not cause unacceptable off site impacts in terms of flooding.

All four options provided a range of different removal timeframes and they all exceeded the twelve month period in the enforcement order consented to by Mr Bowman in 2013.

As part of the orders being sought by Mr Bowman, he adopted a combination of the options proposed by his ecological expert which included the partial removal of the fill.

Court found Mr Bowman's engineering expert's evidence to be unreliable and unhelpful and preferred the council's expert's evidence regarding the timeframe for completing the fill removal work

The court found Mr Bowman's engineering expert's evidence to be unreliable and unhelpful. In particular, the court observed that Mr Bowman's engineering expert did not critically analyse the work on flood impact in the locality undertaken by another hydraulic engineer in another litigation matter, but rather merely relied on it in arriving at his opinion. As a result, little weight was given by the court to Mr Bowman's engineering expert's evidence.

The council adduced evidence from its engineering expert who considered the options and associated timeframes proposed by Mr Bowman's expert. In the council's expert's view, the fill removal could be completed between 8 and 28 weeks if a commercially-efficient moving contractor was engaged, and the timeframes proposed by Mr Bowman's expert were "not cost effective for a normal earth moving contractor".

On balance, the court preferred the evidence of the council's expert and concluded that the council's expert's proposal was sensible, feasible and realistic in all the circumstances.

As there was no explanation for Mr Bowman's non-compliance with the enforcement order or good reason to deprive the council of the benefit of the agreement between Mr Bowman and the council by varying the enforcement order, the court found no sufficient grounds to warrant the exercise of its discretion to vary or stay the operation of the enforcement order

As a starting point, the court had to decide whether Mr Bowman had established good reason for the court to exercise its discretion to vary the enforcement order.

As a general rule, an applicant who was seeking relief from the consequences of non-compliance with a consent order would be required to explain the reasons for the non-compliance. In this instance, Mr Bowman provided no explanation for the non-compliance.

In the context of the enforcement order being made by consent of the parties, the court was satisfied that the consent order was underpinned by a formal and binding agreement between Mr Bowman and the council. In the court's view, it would also be necessary for Mr Bowman to establish good reason to deprive the council of the benefit of the agreement by varying the enforcement order.

The court observed that by Mr Bowman reaching agreement with the council and consenting to the enforcement order, it was reasonable for the council to assume that Mr Bowman had the capacity and willingness to remove introduced fill material from his land in accordance with the enforcement order.

As far as the court was concerned, the terms of the enforcement order were clear. If Mr Bowman required an extension of the removal period, it was incumbent on him to seek agreement from the council with the required expert evidence. However, Mr Bowman chose to ignore the orders and did nothing until it was close to the deadline.

Accordingly, the court found that Mr Bowman had not established any good reason to deprive the council of the benefit of the agreement by varying the enforcement order.

In the circumstances, the court was not persuaded that sufficient grounds were established by Mr Bowman which would warrant the court to exercise its discretion to vary or stay the operation of the enforcement order.

Code assessable restaurant use was available – no compensation under section 705 of the Sustainable Planning Act 2009

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Chong & Anor v Logan City Council* [2015] QPEC 12 heard before Andrews SC DCJ

August 2015

In brief

The case of *Chong & Anor v Logan City Council* [2015] QPEC 12 concerned an appeal in the Planning and Environment Court against the decision of Logan City Council to refuse the landowners, Tyam Heong Chong and Chin-Jui Yang's claim for compensation under section 705 of the *Sustainable Planning Act 2009* arising from the change to the council's planning scheme.

The court found that a public purpose was not the only purpose for which the land could be used as a result of the change to the council's planning scheme and as such the landowners were not entitled to a compensation under section 705 of the *Sustainable Planning Act 2009*.

Council carried the onus to establish that the land could be used for a public purpose only after the change to the council's planning scheme, other than the purpose for which it was being used when the change was made

Section 705 of the *Sustainable Planning Act 2009* provides that "an owner of an interest in land is entitled to be paid reasonable compensation by a local government if because of a change the only purpose for which the land could be used, other than the purpose for which it was lawfully being used when the change was made, is for a public purpose".

The council carried the onus to establish that the landowners' appeal should be dismissed. In order for the council to be successful, the council must establish that the land could be used for a public purpose only, after the change to the council's planning scheme, other than the purpose for which it was being used when the change was made.

Based on the parties' submissions, the primary matters that the court had to decide were as follows:

- whether the code assessable use for a "home business", which was available for the land after the change to the council's planning scheme, was a use for the purpose for which the land was being used when the change occurred;
- whether the code assessable use for a "restaurant" or "food outlet" if carried out with but incidental and subordinate to a public recreation or nature based recreation activity, which was available for the land after the change to the council's planning scheme, was a use for a public purpose.

Court found that a home business use involved no change to the purpose for which a dwelling house was used and as such it was a use for the purpose for which the land was being used when the council's planning scheme was changed

The court first considered whether a home business was a use for the purpose for which the land was being used when the change to the council's planning scheme was made.

The land was being used for a residential dwelling at the time of the change. The court accepted the landowners' submission that a home business was a residential use, which must be subordinate to the residential use of the premises by a person who resided in the dwelling unit permanently.

Since a home business was a component or aspect of a residential use, the court was of the view that "starting a home business involves no change to the purpose for which a dwelling house is used". On that basis, the court concluded that a home business was a use of the land for the purpose for which the land was being used at the time of the change to the council's planning scheme.

Court found that a restaurant use in a park could be for a commercial purpose and therefore was satisfied that the land could be used for a purpose other than only a public purpose after the change of the council's planning scheme

The court then considered whether a use for a restaurant or food outlet subject to being "carried out with but incidental and subordinate to a public recreation or nature based recreation activity" was a use for a public purpose.

Whilst the court acknowledged that the word "carried out with but incidental and subordinate to" had the effect of defining and limiting the available use, it was of the view that in the context of a restaurant in a park, the restaurant and the park could be "appropriately described as two complementary uses and two complementary purposes". For a restaurant, the most appropriate description of the purpose would be a commercial purpose. On that basis, the court was satisfied that the land could be used for a purpose other than only a public purpose.

Court struck out irrelevant paragraphs of the notice of appeal and allowed a partial stay of the environmental protection order

Eva Coggins | 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 36 heard before Searles DCJ

September 2015

In brief

The case of *Cuthbert v Moreton Bay Regional Council* [2015] QPEC 36 concerned two applications made by the parties in an appeal in the Planning and Environment Court by Ms Cuthbert, the operator of a boat maintenance and repair facility, against an environmental protection order issued over the facility by the Moreton Bay Regional Council. The council applied to the court to strike out certain paragraphs of the notice of appeal. Ms Cuthbert applied to the court seeking a stay of the environmental protection order pending the final determination of the appeal.

The main issue in dispute regarding the application to strike out paragraphs of the notice of appeal was whether those paragraphs were relevant to the determination of the appeal. The main issues in dispute regarding the application to stay the environmental protection order were, if a stay was not granted, whether Ms Cuthbert would be irreparably prejudiced, and whether it would render ineffective the final decision in the appeal.

The court found that the paragraphs of the notice of appeal which related to the history of the matter were not relevant to the determination of the appeal. The court therefore struck out those paragraphs.

The court found that the relevant requirements of the environmental protection order conceded by the council would have financial implications for Ms Cuthbert and that a stay of those requirements would be necessary to secure the effectiveness of the final decision in the appeal. The court did not find that the other requirements of the environmental protection order would prejudice Ms Cuthbert or render ineffective the final decision in the appeal. The court therefore granted a stay in relation to those requirements of the environmental protection order conceded by the council pending the final determination of the appeal.

Court found that disputed paragraphs of the notice of appeal related to the historical conduct of the facility and matters which had already been dealt with by the court in previous proceedings and therefore ordered that they be struck out on the premise of irrelevance

The council submitted that a number of paragraphs of the notice of appeal were not relevant to the determination of the issues in dispute in the appeal.

There were four issues to be determined in the appeal. The first issue was whether Ms Cuthbert had failed to comply with the general environmental duty under the *Environmental Protection Act 1994* in the conduct of the boat maintenance and repair facility. The second issue was whether Ms Cuthbert had failed to comply with the conditions of the environmental authority for the facility.

The third issue was whether the requirements of the environmental protection order were necessary to secure Ms Cuthbert's compliance with the general environmental duty and the conditions of the environmental authority, and the final issue was whether the proper exercise of the discretion would warrant the issue of the environmental protection order.

The disputed paragraphs of the notice of appeal dealt with the historical use of the land between 1962 and 1996 (paragraphs 3 and 4), the operation of the facility between 2002 and 2007 (paragraph 13), and an appeal of a previous enforcement notice relating to the facility (paragraphs 14 to 26).

The basis of the council's submission for its strike out application was that the relevant environmental protection order was issued as a result of an inspection by its officers in 2014 and therefore, the historical conduct of the facility or the previous enforcement notice set out in the disputed paragraphs had no relevance to the determination of the issues in the appeal.

Despite Ms Cuthbert arguing the contrary, the court agreed with the council's submission that the matters the subject of the disputed paragraphs were not relevant and by allowing them to stand, it would involve unnecessary expenses to be incurred by the parties. Accordingly, the court ordered that paragraphs 3 to 4 and 13 to 26 of the notice of appeal be struck out.

Council accepted that those parts of the environmental protection order requiring physical works and upgrade would involve financial implications for Ms Cuthbert and on that basis, a stay of those parts of the environmental protection order was granted by the court

Ms Cuthbert sought a stay of the environmental protection order pending the final determination of the appeal.

The council accepted that parts of the environmental protection order requiring physical works and upgrades would involve financial implications for Ms Cuthbert. If a stay was not granted and Ms Cuthbert was required to comply with those requirements of the environmental protection order before the appeal was determined, this may render the ultimate decision ineffective. The council therefore did not oppose a stay of those parts of the environmental protection order. For that reason, the court granted a stay of those parts of the environmental protection order conceded by the council pending the final determination of the appeal.

As to the remaining requirements of the environmental protection order, the council submitted that they mainly involved procedural and operational requirements of the facility for its day to day operation and opposed a stay of those requirements.

In support of the stay application, Ms Cuthbert submitted that there was a lack of evidence before the court in relation to the alleged environmental harm arising from the operation of the facility, the alleged non-compliance with the relevant environmental authority and the relevance of the environmental protection order requirements.

In the court's view, the information available to Ms Cuthbert relating to those issues was sufficient to inform Ms Cuthbert of the council's case and in any event, the further and better particulars to be given by the council would expand or clarify those issues.

Court found that the remaining requirements of the environmental protection order would not threaten the integrity of the appeal decision or irreparably prejudice Ms Cuthbert and therefore decided not to grant a stay of those requirements

Ms Cuthbert also relied on the history of previous proceedings involving the council and the fact that she was not given warning by the council or opportunity to discuss the issues with the council before the environmental protection order was issued in order to support the stay application.

However, the court noted that the council had no obligation to give such warning or allow such opportunity, with which Ms Cuthbert agreed.

The court, by reference to the principles outlined in the decision of *Cougar Energy Limited v Debbie Best Chief Executive under the Environmental Protection Act 1994* [2011] QPEC 150, found that compliance with the remaining requirements of the environmental protection order would not threaten the integrity of the appeal decision, and that Ms Cuthbert had not established any threat of irreparable prejudice if a stay of those requirements was not granted. On this basis, the court did not grant a stay of the remaining requirements of the environmental protection order.

Court dismissed Mr Stankovic's application for costs and ordered Mr Stankovic to pay 85% of the council's costs

Kathryn O'Hare | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stankovic v Brisbane City Council (No. 2)* [2015] QPEC 27 heard before Jones DCJ

September 2015

In brief

The case of *Stankovic v Brisbane City Council (No. 2)* [2015] QPEC 27 concerned cost applications made by Mr Stankovic and Brisbane City Council for an earlier appeal to the Planning and Environment Court against conditions imposed by the council for filling carried out by Mr Stankovic.

The court considered relevant matters from the earlier appeal, such as the "systematic and deliberate" conduct of Mr Stankovic and the almost complete success of the council and ordered Mr Stankovic to pay 85% of the council's costs of the earlier appeal and dismissed Mr Stankovic's application for costs.

There should be no presumption that costs should follow the event although the court's discretion to award costs is a broad one

Section 457 of the *Sustainable Planning Act 2009* provides that the "costs of a proceeding, including an application in a proceeding, are in the discretion of the court." Whilst a number of matters are identified in section 457 which the court may have regard to in making a costs order, the court's consideration is not limited to those matters only.

The court in interpreting section 457 had reference to the court's earlier decisions of *Altitude Corporate Pty Ltd v Isaac Regional Council (No. 2)* [2014] QPEC 55, *Cox & Ors v Brisbane City Council & Anor (No. 2)* [2013] QPEC 78 and *YFG Shopping Centres Pty Ltd v Brisbane City Council & Ors (No. 2)* [2014] QPEC 43 and observed that no presumption should be made that costs should follow the event whilst noting that the court had a broad discretion and the success of a party was a relevant consideration.

The court dismissed the costs application as it found the allegations made by Mr Stankovic in support of the application were unsustainable and unmaintainable as well as scandalous and vexatious

In support of the costs application, Mr Stankovic alleged that the earlier appeal was triggered by the issuing of an inappropriate decision notice by the council and that Mr Stankovic was "the innocent victim of unlawful uses on his land that required restoration by carrying out the introduction of fill".

The court considered that Mr Stankovic's allegations lacked any evidential basis and, as such, rejected them. The court also rejected Mr Stankovic's unsubstantiated allegations of the council's unreasonable and inappropriate conduct concerning the earlier appeal.

Not only did the court find that Mr Stankovic's allegations were unsubstantiated, in the court's view, a number of them were "scandalous and vexatious", which were consistent with Mr Stankovic's unsatisfactory conduct in the earlier appeal. The court therefore dismissed Mr Stankovic's costs application.

The deliberate and systematic conduct of Mr Stankovic and the council's success in the earlier appeal resulted in Mr Stankovic being ordered to pay 85% of the council's costs in the appeal

In deciding whether to award costs against Mr Stankovic, the court took into consideration the council's success in the earlier appeal as well as Mr Stankovic's conduct from which the unlawful works arose and its consequences.

The court was of the view that "this was not a case of unintended unlawful works occurring; it was a deliberate and systematic course of conduct which resulted in a nuisance being caused to neighbouring properties. In that context, issues raised in this proceeding went beyond the personal rights and interests of the parties".

The court considered that the council had no other alternative but to proceed in the way that it did and therefore, it was appropriate that Mr Stankovic pay a significant proportion of the council's costs in the appeal.

Since Mr Stankovic achieved some success in the earlier appeal by not having to undertake excavation works in relation to the easement, the court ordered Mr Stankovic to pay 85% of the council's costs in the appeal.

Understanding the nature of a challenge under section 456 of the Sustainable Planning Act, what does the court consider?

William Lacy | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wheldon and Armview Pty Ltd v Logan City Council and RG Property Three Pty Ltd as Trustee* [2015] QPEC 22 heard before Morzone QC DCJ

September 2015

In brief

The case of *Wheldon and Armview Pty Ltd v Logan City Council and RG Property Three Pty Ltd as Trustee* [2015] QPEC 22 involved an application in the Planning and Environment Court by Mr Wheldon and Armview Pty Ltd, seeking declarations and consequential relief under section 456 of the *Sustainable Planning Act 2009* in relation to the validity of a negotiated decision notice given by a delegate of the Logan City Council. The negotiated decision notice related to an extension and refurbishment of an existing shopping centre at Park Ridge. The development application was code assessable under the *Logan Planning Scheme 2006*.

The issues the court had to consider included whether condition 1.2 of the negotiated decision notice was beyond power and invalid, whether there had been inconsistent findings of fact, whether there had been a failure to take into account relevant considerations, whether there had been findings about which there was no evidence, whether the decision maker had erred in a number of his findings and whether the decision was unreasonable.

The court considered and dismissed each of those issues and consequently dismissed the application.

A proceeding, under section 456 of the Sustainable Planning Act 2009, was analogous to a judicial review proceeding and was limited to reviewing the legality of the decision of a decision maker and did not involve a merits review of the decision

The court, by reference to a number of High Court and the Planning and Environment Court decisions, noted that proceedings under section 456 of the *Sustainable Planning Act 2009* were not concerned with the merits of the approval but were similar to judicial review proceedings having regard to the material before the decision maker. That means, it would be limited to reviewing the legality of the decision of the decision maker and, where the decision was legally and factually defensible, the decision should stand.

The court, in considering the relevant decisions, noted the following:

- *Jurisdictional error* – This would include a failure to take into account all relevant considerations, taking into account irrelevant considerations and purported exercise of powers. Consideration would need to be given to whether the council, through its delegate, had exceeded its authority or powers in making the decision and how it had affected the decision.
- *Fact finding* – There was no reviewable error simply in making a wrong finding of fact. The question was whether, on the available material, it was reasonably open for council's delegate to come to the view in question.
- *Wednesbury unreasonableness* – The decision made must be accepted unless it was able to be shown to have been one that no reasonable council could have formed or that it was based on irrelevant considerations, or that it was unjustifiable. Where the decision was justifiable, it should stand irrespective of whether or not others agree with it.

The court dismissed the challenge of condition 1.2 and found that the condition was not beyond power or invalid

Mr Wheldon and Armview challenged condition 1.2 which required the relocation or removal of one of the approved uses, namely the mini-major use, within a specified timeframe. They asserted that the condition was beyond power on two grounds, firstly that it approved a temporary retail development which had not been the subject of the development application and secondly that it offended the principle of finality.

The court found that the council's imposition of a time limit on the mini-major use at the given location was a proper exercise of the power under section 346(1)(a) of the *Sustainable Planning Act 2009* which allowed the imposition of a condition which placed a limit on how long a lawful use may continue. The court did not accept that the use could be characterised as a temporary retail development or that the condition lacked finality as the condition did not alter the development in a fundamental way and did not excuse or truncate the need for the developer to comply with approval processes in relation to the relocation or removal of the mini-major use in the future.

The court dismissed the assertion that inconsistent findings of fact had been made and was not satisfied that the council's decision was not unreasonable in the Wednesbury sense

Mr Wheldon and Armview asserted that the council, through its delegate, had made inconsistent findings which were relevant to the exercise of the power to conclude that there was no conflict with the council's planning scheme with respect to integration.

The court considered that the approach taken by Mr Wheldon and Armview was flawed for a number of reasons. Firstly, the findings relied upon were findings in a council officer's precursor report which the court did not accept could be attributed to the council's decision made through its delegate as there was no evidence of the delegate adopting or incorporating the report. This fatal flaw of unsupported attribution was observed by the court in respect of a number other assertions by Mr Wheldon and Armview. Secondly, their assertion relied on findings on the Overall Outcomes when instead it was the consistency of findings on the Specific Outcomes which were relevant to a code assessable development application. Finally, the overall findings were not materially inconsistent when considered in their full context.

The court found that this was a situation where reasonable minds may differ in relation to integration and the court was not satisfied that the council's decision in this respect was unreasonable in the Wednesbury sense.

The court dismissed the assertion that the council had failed to take into account relevant considerations

Mr Wheldon and Armview asserted that the council, through its delegate failed to take into account relevant considerations when determining conflict with the council's planning scheme. The court observed that Mr Wheldon and Armview would only succeed where there had been a failure to take account of a consideration that the decision maker was bound to do so in reaching a decision.

The court was unable to draw any inference, from the council's conduct, that the council had failed to take account of relevant considerations and even if such a failure could have been established, in the circumstances it was considered that it would have had no bearing on the ultimate result.

The court dismissed the assertion that the council's delegate's findings were based on matters about which there were no evidence and dismissed the remaining assertions in respect of a material error or unreasonableness

Mr Wheldon and Armview asserted that the council's delegate made a number of findings about which there was no evidence and had erred in a number of his findings.

The court, by reference to *Waratah Coal Pty Ltd v Coordinator-General, Department of State Development, Infrastructure and Planning* [2014] QSC 36, observed that to establish the no evidence ground there must be absolutely no evidence and the error relating to the lack of evidence must be a jurisdictional error which would be a basis to invalidate an administrative decision. In the court's view, the matters raised by Mr Wheldon and Armview as lacking evidence were obvious and could be gleaned without the need for strict proof of evidence and that the findings were not unreasonable in the Wednesbury sense.

As to the remaining assertions, the court was not satisfied that Mr Wheldon and Armview had discharged the requisite burden of establishing any material error or unreasonableness in the Wednesbury sense in the council's delegate's findings, particularly in relation to the following:

- there was no conflict with a desired environmental outcome under the council's planning scheme;
- the identification of the nature and extent of the conflict with the council's planning scheme; and
- there were sufficient grounds to overcome conflict with the council's planning scheme.

Legal and policy issues for discussion – PIA Conference September 2015

Ian Wright

This article presented at the Planning Institute of Australia Conference discusses the legal and policy issues surrounding climate change

September 2015

Issue 1 – Ideological divide

- *Individual rights based approach* – scientific consensus (that is proof) is required before action is taken of 3 matters:
  - significant climate change is happening;
  - human activities are a contributing cause of significant climate change;
  - public health and welfare impacts are sufficiently serious to take action.
- *Public interest based approach* – precautionary approach is required even if scientific consensus has not been achieved.
- *Personal view* – is that whilst scientific consensus has not been achieved on whether human activities are a contributing cause of significant climate change, there is sufficient evidence that:
  - significant climate change is happening;
  - public health and welfare impacts warrant action.

Issue 2 – Understanding the climate change problem

- *Wicked problem* – climate change is a wicked problem.

  Temporal incongruity

  - Actions in the short term may cause acute problems in the long term.
  - Those who may be causing the problem have the least incentive to manage the problem.
  - Management of the problem requires very long term responses.

  Spatial incongruity

  - The problem affects each lot, community, city, region, state and country differently, for example sea level rise varies differently throughout the planet and along the Australian coast being higher in the southern areas and lower as you proceed north.
- *Policy and legislative responses* – must be both steadfast and flexible:
  - Steadfast – entrenchment of pre-commitments of the policy goals to be achieved - legislation, agreements etc.
  - Flexibility – strategies have to be flexible to address the temporal and spatial affects of the problem.

Issue 3 – Australian government responses

- *Governance structure*
  - Commonwealth governments – broadly responsible for foreign affairs, defence, taxation and national economy.
  - State governments – broadly responsible for service delivery and regional economies.
  - Local governments – broadly responsible for local service delivery and regulation.
- *Commonwealth governments*
  - International treaties – climate change goals.
  - Taxation or market based mechanisms to implement goals.
  - Legislation or intergovernmental agreements to entrench goals.

- *State governments*
  - Legislative and policies to entrench goals – for example State Planning Policies.
  - Previous Labor – Coastal Management Plan had prescriptive targets such as .8m for sea level rise.

    Previous LNP – initially removed Coastal Management Plan and prescriptive targets and left it to local governments to set targets based on hazard assessment and best available science. Then lost the plot by seeking to remove climate change from planning schemes.
  - Current Labor – probably a nuanced approach will be adopted involving prescriptive targets which can be replaced by locally derived targets based on a hazard assessment and best available science.
- *Local governments*
  - Local based hazard assessment and best available science/evidence.

Issue 4 – Hazard assessments at local government level

- *Policy and legislative imperative*
  - Hazard assessment is required by the Guidelines to the State Planning Policy.
  - A hazard assessment considers both likelihood of the risk (frequency) and magnitude of the risk (minor to catastrophic).
- *State of current practice*
  - Previous practice – only focused on likelihood of risk and then only 1 event being the 100 yr ARI.
  - Current practice – focus only on the likelihood of 100 yr ARI with climate change factors modelled.
  - Future practice– focus on multiple likelihoods and magnitudes of the risk.
- *Why practice must change*
  - Policy and legislative imperative – State Planning Policy and Guidelines.
  - Flood Commission of Inquiry Report 2012 – Recommendations.
  - Grantham Flood Inquiry 2015 – 12 people were killed by an event which was greater than 100 yr ARI (without climate change) but its magnitude was catastrophic.
  - Insurance risk – insurers want the risks identified and disclosed so that they may be priced otherwise they will seek to void the policies.
  - Class action lawyers – note the 2 flood inquiries in Queensland and Victorian bushfire claims.

Issue 5 – Policy prescriptions at local government level

- *Map the hazard*
  - Low, Medium and High risk subcategories of an overlay.
  - Do not map just the likelihood (100 yr ARI/PMF with climate change factors).
- *Graduate the policy response to the risk*
  - Very high risk – constrained development by inclusion in Limited Development (constrained land) zone.
  - High risk – prescriptive goals and strategies.
  - Medium risk – prescriptive goals and flexible strategies.
  - Low risk – flexible goals and strategies.
- *Goals and strategies*
  - Defined flood event – 100 yr ARI 2100.
  - Freeboard – responsive to the uncertainty of the science.
  - Building design and materials – build for inundation especially in High risk and Medium risk areas.
  - Limit the uses in High risk and Medium risk areas.
- *Reporting*
  - Hazard Assessment Report.
  - Planning Study that links the policy responses to the hazard assessment.

Issue 6 – Selling the problem and response to the punters

- *Applied forward reasoning model* – generate path dependency in the community through:
  - Lock in – interventions that create lock in such as small policy changes which ratchet up over time.
  - Self-reinforcing – short term coalition building to expand the supportive population and entrench support over time.
  - Increasing returns – create new interests whose identities align with ameliorating the problem, for example training and education (schools), community groups, funding grants.
  - Positive feedback– focus on norms and values that create new "logics of appropriateness" that are self-reinforcing.
- *Need to play the long game* – from lock in to positive feedback.

Statutory Guideline 06/09 is helpful but is still a guide

Kathryn O'Hare | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Dickson Properties Pty Ltd as Trustee for the Dickson Investment Trust v Brisbane City Council & Ors* [2015] QPEC 18 heard before Jones DCJ

November 2015

In brief

The case of *Dickson Properties Pty Ltd as Trustee for the Dickson Investment Trust v Brisbane City Council & Ors* [2015] QPEC 18 concerned an application made by Dickson Properties Pty Ltd as Trustee to the Planning and Environment Court as part of a substantive appeal against a decision of the Brisbane City Council to refuse a development application involving a reconfiguring of a lot and a preliminary approval for a material change of use to enable the construction of dwelling houses in a rural area. The application sought an order that the proposed changes to the development application were minor changes for the purposes of section 4.1.52(2)(b) of the repealed *Integrated Planning Act 1997* and section 350 of the *Sustainable Planning Act 2009*.

There were a number of changes proposed to the development application. The court was content that all of the proposed changes were considered minor other than the introduction of a flood emergency accommodation and assembly point, which required further consideration by the court.

The council did not oppose the minor change application. However, the application was resisted by a number of submitters who joined the appeal and were primarily concerned with Dickson Properties' proposed methodology of dealing with significant flood events. Those submitters contended that the introduction of a flood emergency accommodation and assembly point would introduce a new use and new impacts and also increase the severity of known impacts.

The court acknowledged that the proposed flood emergency measures would have the potential to create new and not insignificant impacts. However, the fundamental nature and extent of the proposed development remained unchanged and these measures would be characterised as being operational in nature. Accordingly, the court concluded that the proposed changes were minor changes.

Court found that the introduction of the proposed flood emergency accommodation and assembly point would create new use and new impacts but the underlying dominant use remained unchanged

The proposed flood emergency accommodation and assembly point was introduced as a result of the joint expert meeting process. The submitters who resisted the minor change application considered the proposed flood emergency measures to be unsatisfactory and its introduction could not be reasonably described as being minor for several reasons. In particular, the proposed measures would do the following:

- fundamentally alter the nature of the proposed development and introduce a new use;
- involve the construction of a large and bulky building and introduction of a car park, storage sheds and other services;
- introduce new impacts and increase the severity of known impacts;
- encourage residents to believe that they could remain and be safely accommodated in "fail safe" Emergency Flood Accommodation as an alternative to evacuation.

The court had regard to the *Statutory Guideline 06/09: Substantially different development when changing applications and approvals* when determining whether the introduction of the proposed flood emergency accommodation and assembly point would result in a substantially different development.

The court considered the following matters listed in the Statutory Guideline to be relevant, whilst noting that the matters listed in the Guideline were not intended to be exhaustive or definitive:

> *A change may result in a substantially different development if the proposed change:*
>
> • *involves a new use with different or additional impacts*
>
> *…*

- *dramatically changes the built form in terms of scale, bulk and appearance*

…

- *introduces new impacts or increases the severity of known impacts*

…

In relation to the first matter, the court acknowledged that the introduction of the proposed flood emergency accommodation and assembly point might create a "new" use for the proposed development. However, it did not change the dominant use contemplated in the development application, particularly given the infrequent and temporary nature of the "new" use.

As to the second matter, the court found that the proposed flood emergency accommodation "would not in any material way impact on the scale, bulk and appearance" of the built form proposed in the development application.

For the third matter, the court noted that the potential impact contended by the submitters was the introduction of a false sense of security which would prevent the proper response to a flood event, namely early mandatory evacuation. In the context of the proposed development, given that the land was subject to flooding and its associated risk to human life, the court considered the word "impact" in the Guideline was broad enough to encompass such a risk.

On this basis, the court was of the view that the introduction of the proposed flood emergency accommodation and assembly point had the potential to introduce new impacts.

Court found that the proposed changes did not change the fundamental nature and extent of the proposed development and by considering the changes objectively they would not result in a substantially different development

Nonetheless, in considering the introduction of the proposed flood emergency accommodation and assembly point objectively, the court found that the proposed changes to the development application would not result in a substantially different development.

This was particularly so where the overall purpose of the proposed development remained the same, the road layout was materially the same and the frontages to the Brisbane River were to remain undeveloped. Furthermore, no probative evidence was put before the court which supported the seriousness of the impacts contended by the submitters.

The court noted that the minor change application was proposing a solution to a flood-prone development and, by adopting the approach taken by the court in *Parcel One Pty Ltd v Ipswich City Council and Ors* [2007] QPEC 33, the proposed changes did not change the fundamental nature and extent of the proposed development and the proposed works would be characterised as being operational in nature.

It was therefore concluded by the court that the proposed changes were minor changes for the purposes of section 4.1.52(2)(b) of the repealed *Integrated Planning Act 1997* and section 350 of the *Sustainable Planning Act 2009*.

Court found that the proposed changes to the development approval were permissible changes under section 367(1) of the Sustainable Planning Act 2009

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Solac No. 14 Pty Ltd v Sunshine Coast Regional Council* [2015] QPEC 44 heard before Long SC DCJ

November 2015

In brief

The case of *Solac No. 14 Pty Ltd v Sunshine Coast Regional Council* [2015] QPEC 44 concerned an application to the Planning and Environment Court made by Solac No. 14 Pty Ltd involving a request to make changes to a development approval previously given by the court which related to the proposed construction of self-storage facilities on land situated at Coral Street, Maleny.

The proposed changes to the development approval were to "*(a) allow the height of part of one of the proposed buildings to exceed 8.5m above natural ground level; (b) delay the dedication of land as a reserve for park; and (c) vary the stormwater management methods.*"

The court concluded that the proposed changes were permissible changes within the meaning of section 367(1) of the *Sustainable Planning Act 2009* and as such allowed the changes to the development approval.

Proposed changes to the development approval were considered by the court in the context of whether they were permissible changes under section 367(1) of the Sustainable Planning Act 2009

The first proposed change to the development approval was to add the words "except as shown on the approved plans" to condition 3 so it would read as follows:

> *The maximum height of the development must not exceed 8.5m above natural ground level, except as shown on the approved plans. A verification survey of the building is to be carried out by a licensed Surveyor and a certificate lodged with Council at completion of the building work confirming compliance with the maximum allowable building height.*

This proposed change would enable part of the proposed building to exceed the prescribed height limit of 8.5 metres above natural ground level, due to the sloping nature of the site.

It was submitted that this proposed change involved a matter which was an oversight in the development approval because the prescribed height limit would nonetheless be exceeded if the proposed development was to be carried out in accordance with the approved plans. Accordingly, the proposed change was necessary.

As part of the proposed change, the floor level of the proposed building was to be reduced by 1 metre, which was the lowest permissible flooding level, to achieve compliance with the prescribed height limit as far as practicable.

The second proposed change to the development approval was to amend condition 58 to delay the dedication of a 10 metres waterway corridor buffer as follows:

> *Prior to the commencement of use of Stage 1 of the development; the applicant must transfer and surrender to the Crown as Reserve for Park, the area defined within the 'Approximate Line of Open Space Conservation and Waterways Precinct', which is to be no less than 10 metres wide, as identified on the Proposed Site Plan, Project 06681, Sheet p1.01 Issue G, Dated 11/3/11, prepared by Covey & Associates Pty Ltd (as amended).*

It was submitted that it was not practical to rehabilitate and then dedicate the land before completing the adjacent building works. On this basis, the proposed change was to facilitate the construction of Stage 1 of the proposed development prior to the surrender and transfer of the waterway corridor buffer.

The third proposed change to the development approval was to enable a more contemporary and efficient stormwater management treatment method "*which dispenses with the need for rainwater tanks, bio-retention basins and gross pollutant traps in favour of a swale and 'level spreader' system*" which was approved in an operational works permit given by the Sunshine Coast Regional Council.

Court did not consider there being any change to the substance of the proposed development and therefore found that the proposed changes would not result in a substantially different development

In its consideration of whether the proposed changes to the development approval would result in a substantially different development, the court had regard to the Ministerial guideline No. 06/09 whilst noting that it was not intended to be exhaustive or prescriptive. It was ultimately a determination of facts and degree having regard to the effect of the proposed changes.

In the court's view, the proposed changes involved no change to the substance of the proposed development. The proposed changes were "*in the nature of refinements to the implementation of the development*". As such the court found that the proposed changes would not result in a substantially different development.

Court was satisfied that the proposed change would not be likely to cause a person to make a properly made submission objecting to the proposed changes if the circumstances allowed

In considering the likelihood of the proposed changes causing a properly made submission, the court observed the remarks made by the court in the decision of *Collard v Brisbane City Council* [2010] QPEC 39 that "*if circumstances allowed … the contemplation of the Court must necessarily be with putative submitters who may act reasonably in that regard*".

The court further observed that the term "likely" had been subject to judicial consideration in other decisions of the Planning and Environment Court and varied meanings had been assigned to that term depending on the context. The prevailing view, whilst not settled, was that it meant "*a substantial chance, a real, not remote chance, regardless of whether it is more or less than 50 percent*".

By reference to *Scanlon Group Pty Ltd v SCRC* [2012] QPELR 394 and *Orchard (Oxenford) Developments Pty Ltd (ACN 167 310 509) v Gold Coast City Council* [2015] QPEC 11, and the meaning of "likely", the court noted that it had to be satisfied that none of the proposed changes would, on the balance of probabilities, give rise to "*a real, or not remote, chance or probability, of causing a properly made submission to be made objecting to any change, if the circumstances allowed.*"

There were four submissions made in respect of the original development application. The matters raised in those submissions were relevantly concerned with water quality and visual amenity impacts.

The court considered the proposed changes in the context of those concerns and found that those concerns remained appropriately addressed. Having regard to the nature and extent of the proposed changes, the court concluded that the changes would not give rise to "*any real or substantial chance or possibility of causing any reasonable decision to make a submission objecting to any proposed change, if the circumstances allowed.*"

Court concluded that inaccuracies in the preliminary approval did not warrant refusal of the application and excused partial non-compliance with public notification requirements

Eva Coggins | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Nadic Investments Pty Ltd v Townsville City Council and Stockland Developments Pty Ltd* [2015] QPEC 40 heard before Bowskill QC DCJ

November 2015

In brief

The case of *Nadic Investments Pty Ltd v Townsville City Council and Stockland Developments Pty Ltd* [2015] QPEC 40 concerned an application made by the developer, Stockland Developments Pty Ltd in a submitter appeal to the Planning and Environment Court, seeking to have a preliminary issue determined. The preliminary issues related to inaccuracies in the preliminary approval given under section 242 of the *Sustainable Planning Act 2009* and the partial non-compliance with the public notification requirements.

In relation to the issues concerning the preliminary approval, on a proper construction, the court found that the inaccuracies in the preliminary approval did not affect its operation and did not warrant refusal of the development application.

In relation to the issues concerning the public notification, the court excused the non-compliance with the public notification requirements as the public notification undertaken for the development application sufficiently met the purposes of public notification under the *Sustainable Planning Act 2009*.

Court found that on a proper construction, the preliminary approval sought to override the planning scheme and not the existing plan of development and the inaccurate title did not warrant refusal of the development application

The title of the preliminary approval stated that the approval overrode the "North Shore Plan of Development", being an existing plan of development for a previous preliminary approval which applied to the subject land. Under section 242 of the *Sustainable Planning Act 2009*, a preliminary approval may override a planning scheme, but not a plan of development. The question was whether the approval was therefore not a valid preliminary approval under section 242.

The court considered the principles of construing a development approval, being that the approval must be construed according to its actual contents and function rather than the intention of the local government, and should not be construed in an overly technical manner. In applying these principles, the court found that despite the inaccurate references to the existing plan of development in the title of the preliminary approval, its context and operation made it clear that the approval was to override the planning scheme, not the existing plan of development. As such the inaccuracy did not warrant refusal of the development application.

Court found that the Structure Plan might have included land outside the subject land, but on a proper construction, the preliminary approval did not affect land outside the subject land

The Structure Plan map, which formed part of the preliminary approval, appeared to have included land outside the subject land.

However, the court observed that there were express terms in the preliminary approval including the approved plan of development which specified that the preliminary approval and the plan of development applied to the subject land only. Given those express terms, on a proper construction, the court concluded that the preliminary approval did not affect land outside the subject land.

Nevertheless, to avoid confusion, the parties agreed that the Structure Plan should be amended to correct the inaccuracy.

Court found that on a proper construction of the preliminary approval, the operation and effect of the plan of development was sufficiently clear despite its reference being incorrectly included in condition 1(a) of the preliminary approval

Condition 1(a) of the preliminary approval provided that the proposed development "must generally comply" with the drawings listed in the table of drawings, which included the plan of development. However, as the plan of development was not a drawing, it was erroneously included in condition 1(a) of the preliminary approval.

Nadic Investments Pty Ltd contended that the incorrect inclusion of the reference to the plan of development to the table of drawings in condition 1(a) gave rise to a number of issues including uncertainty about the nature and extent of future development under the preliminary approval. Whilst acknowledging that it was an erroneous inclusion of the reference to the plan of development in the table, the court was of the view that the requirement "to generally comply with drawings" was not directed to the plan of development since it was not a drawing. Further, the court noted that condition 2(a) of the preliminary approval expressly provided that "subsequent development over the subject site must be in accordance with the relevant Assessment tables under the *Plan of Development North Shore Mixed Use sub-area*".

Since condition 2(a) was the leading provision, given its express terms, the court was satisfied that the purpose and operation of the plan of development could be appropriately given effect under the preliminary approval.

Nevertheless, the parties agreed that the reference to the plan of development in condition 1(a) should be removed.

Court found that the public notification of the development application sufficiently met the purposes of public notification under the Sustainable Planning Act and excused the non-compliance with the public notification requirements

There were two issues in relation to public notification. The first issue was that a notice was not placed on one of the road frontages to the subject land, and the second issue was that the content of the public notice was not accurate in that it did not describe each proposed use for the proposed development and incorrectly described the proposed development as overriding the existing plan of development rather than the planning scheme.

As to the first issue, the court found that it was impossible to get to the road frontage in question without first passing the other public notice that had been erected. On this basis the court exercised its power to excuse the non-compliance with the public notification requirements in this regard.

As to the second issue, the court found that given the number of proposed uses for the proposed development, it would have been impractical for the public notice to list all of the proposed uses.

Nonetheless, the court noted that it would not be expected that a person would decide whether to make a submission about a development application based on the public notice alone. The court considered that the notice that was displayed contained sufficient information to put an interested person on notice to go and look at the full application.

Further, the court found that the inaccuracies in the public notice would not have substantially restricted a person's right to make a submission.

On this basis, the court also exercised its power to excuse the non-compliance with the public notification requirements in this regard.

Court found that the condition proposed by the council was beyond what was reasonably required by the proposed development

Min Ko | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Exchequer Property Finance Pty Ltd v Fraser Coast Regional Council* [2015] QPEC 60 heard before Wall QC DCJ

December 2015

In brief

The case of *Exchequer Property Finance Pty Ltd v Fraser Coast Regional Council* [2015] QPEC 60 concerned an appeal in the Planning and Environment Court against the decision of Fraser Coast Regional Council to partly approve a request by Exchequer Property to change conditions 29 and 30 of its development approval for reconfiguring a lot for the Parklands Estate.

Conditions 29 and 30 related to the upgrade of Doolong South Road progressively as each stage of the estate fronting the road was developed. The dispute in question concerned stages 3A and 3B of the estate which had frontage to the north-south section of Doolong South Road.

As condition 30 was resolved, the court only had to determine the dispute in relation to condition 29. After having considered the arguments advanced by Exchequer Property and the council as well as their respective traffic and town planning experts' opinions, the court concluded that the council's proposed condition 29 "*goes beyond what is reasonably required by the subject development*".

The court found that the contribution proposed by Exchequer Property would allow the upgrade of Doolong South Road to a safe and acceptable standard and was a reasonable response to the traffic impact generated by the proposed development. As such, the court allowed the appeal and amended condition 29 on similar terms as proposed by Exchequer Property.

Exchequer Property contended that its contribution to future construction of Doolong South Road should be limited to the traffic impact generated by the proposed development

Exchequer Property made a request to the council to change condition 29 of its development approval for the Parklands Estate to specify that the assessment of the contribution to future construction of Doolong South Road should be based upon traffic generated by the proposed development. This request was prompted as a result of a change of the status of Doolong South Road from Traffic Distributor Road to Major Collector Road (bus route).

It was estimated by Exchequer Property that the proposed development would generate about 12% of the traffic likely to use Doolong South Road. Based on an estimated cost of the road construction of $1,079,701, Exchequer Property submitted that its contribution should amount to $129,564.12.

Exchequer Property therefore proposed that condition 29 be amended on the following terms:

> *29. In lieu of constructing kerb and channel together with all associated road widening and underground drainage for the full length of the existing Doolong South Road frontage to the development, the developer shall make a cash contribution towards the roadworks by Council in the amount of $129,564.12.*

Council contended for a condition requiring that part of Doolong South Road fronting the proposed development to be upgraded to a Major Collector Road standard or alternatively Exchequer Property to pay the council an amount equal to the upgrade cost

The council disagreed with Exchequer Property's proposal and contended for an amended condition 29 such that the relevant part of Doolong South Road fronting the proposed development would be upgraded in accordance with the council's design requirements for a Major Collector Road (bus route) or in the alternative, a payment would be made to the council of an amount equal to the cost of the upgrade.

It was submitted by the council that, in the absence of its proposed condition 29, Doolong South Road might not be upgraded in the future where the other developments in the area such as the Insight Estate and Ring Estate did not proceed and that the interim upgrade solution proposed by Exchequer Property's traffic expert would not provide a safe road or traffic outcome.

Court accepted that the interim road upgrade solution proposed by Exchequer Property would provide a reasonable and acceptable traffic outcome as it was sufficient to bring Doolong South Road to a safe reasonable standard which would accommodate the existing traffic and traffic generated by stages 3A and 3B of the proposed development

Both parties adduced expert evidence from their respective traffic and town planning experts. After having heard the evidence of the parties' experts, the court preferred the evidence of Exchequer Property's traffic and town planning experts.

It was accepted by the court that the interim road upgrade proposed by Exchequer Property's traffic expert would accommodate the existing traffic and traffic generated by stages 3A and 3B of the proposed development and was sufficient to the bring the road to a safe reasonable standard. The court also observed that the interim road upgrade would provide a foundation for upgrading Doolong South Road to a Major Collector Road.

Further, the court accepted that the proposed 12% contribution would allow the council to carry out works which would adequately accommodate traffic demand generated by the proposed development and existing uses, in light of the fact that other developments in the area would be expected to contribute to the road construction or cost in the future.

The court therefore found that "*the appellant's proposal better reflects likely future development in the area and resultant cost sharing for ultimate construction of the road to Major Collector Road (bus route) standard. Only a small part of Parklands Estate will use this section of Doolong South Road whereas most, if not all, of Ring Estate and probably most of Insight Estate (recognising that there will be a road connection between Insight Estate and Parkland Estate) will use the road.*"

Court found that Exchequer Property's proposal was a reasonable response to traffic likely to be generated by the proposed development and was not inconsistent with likely future residential development in the area

The town planning experts agreed that "*the Ring and Insight developments would complete the urbanisation picture intended by the local plan*".

The court accepted Exchequer Property's town planning expert's opinion that the proposed "12% contribution" and the interim upgrade solution was an appropriate and reasonable response to the traffic generated by the proposed development, particularly given that the largest single contributor to urbanisation would be Ring Estate.

It was concluded by the court that "*the contribution suggested by the appellant will allow the upgrading of the road to a safe (interim) standard, would be a reasonable response to traffic likely to be generated by the subject development, would not be inconsistent with likely future residential development in the area or inconsistent with the provisions of the planning schemes … It is of course a matter for the respondent whether it carries out the interim solution but the evidence is to the effect that any work now would not be wasted in future upgrading of the road.*"

COLIN BIGGERS & PAISLEY LAWYERS

The importance of forensic and scientific investigations

William Lacy | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Council of the City of Gold Coast v Thi Hoa Dam* [2015] QPEC 51 heard before Morzone QC DCJ

December 2015

In brief

The case of *The Council of the City of Gold Coast v Thi Hoa Dam* [2015] QPEC 51 involved an application in the Planning and Environment Court by the Gold Coast City Council seeking declarations about the lawfulness of development and enforcement orders against Thi Hoa Dam, the owner of land at 183-185 Monaco Street, Broadbeach Waters. These proceedings concerned the lawfulness of certain development that had occurred on the land in respect of a satellite dish, a pool cover and rock armouring works.

The council was successful in establishing that the pool cover was assessable development for which a development permit was required. As to the satellite dish, the court found that it was not assessable development. However the council's case failed in relation to the rock armouring works primarily due to a lack of adequate expert evidence.

The court made a declaration that the pool cover constituted code assessable development for which a development permit was required and made a consequential order requiring the landowner to remove or regularise the unlawful development by obtaining a development permit within set timeframes.

The court was satisfied that, on the balance of probabilities, the landowner or her agents had erected both the satellite dish and the pool cover but was not satisfied that the rock armouring works were carried out by the landowner

On the evidence presented the court was satisfied that the landowner, or her agents, had erected both the satellite dish and the pool cover.

In respect of the construction of the rock armouring the council adduced evidence from its development compliance officer who had observed the rock armouring when inspecting the land and made a desktop comparison of aerial photographs. The court considered the opinion evidence adduced by the council was "*no more than mere conclusions drawn on matters upon which the court is equally qualified to draw an opinion, and it is inadmissible*".

The court was of the view that more forensic and scientific investigations could and should have been undertaken in the circumstances. In this regard, the court by reference to *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, noted that expert evidence should provide criteria for testing the accuracy of conclusions reached thereby enabling the court to reach its own independent judgment by applying the relevant criteria. Such evidence should also be intelligible, convincing, tested and supported by materials which would convince the court of its fundamental soundness.

Whilst the court had sought to review the aerial photographs to determine the difference in the rock armoury before and after the landowner purchased and occupied the land, it was not able to identify any increase of the rock armoury. Ultimately the court concluded that there was not sufficient evidence to establish that, on the balance of probabilities, the landowner had carried out, or caused to be carried out, the works.

The court found that the pool cover constituted assessable development for which a development permit was required

The council adduced evidence from its development compliance officer and senior building certifier that the pool cover was a class 10a structure under the *Building Code of Australia*. The court again found this evidence to be deficient on similar grounds to the evidence about the rock armouring. The court emphasised that further investigations could have been undertaken and that the opinion evidence of council officers were mere conclusions drawn on matters that the court was equally qualified to reach an opinion on and were therefore inadmissible.

In its interpretation of the relevant provisions of the *Building Code of Australia*, the court found that the pool cover was a class 10a structure, being a non-habitable shelter or storage structure, irrespective of whether the structure was fixed to the ground or not.

Having made this finding the court then considered whether the pool cover was self-assessable or exempt development under the *Building Act 1975*. Given the dimensions of the pool cover, the court found that it did not fall within the relevant criteria for self-assessable development. The court further noted that the pool cover did not constitute exempt development. Accordingly, the pool cover was assessable development for which a development permit was required.

The court found that the work on the satellite dish including its removal was not assessable development and therefore did not require a development permit

As to the satellite dish the court found that it was a class 10b structure under the *Building Code of Australia*. In reaching this conclusion, the court had to solely rely on the historical photographs of the structure taken at some distance, and from the ground, by council's development compliance officer.

Having reached the conclusion on the classification of the structure, the court found that the building work for the satellite dish was exempt development under the *Building Act 1975* as the satellite dish was no higher than 3m above its natural ground surface. On this basis, the work on the satellite dish including its removal did not require a development permit.

The court made a declaration that the pool cover was code assessable development for which a development permit was required and consequentially ordered the landowner to remove or regularise the unlawful pool cover, but declined to make an enforcement order

The court noted that the power to make the declaration and enforcement order sought by the council was discretionary.

It was observed by the court that the council had established only the pool cover was erected by the landowner and constituted assessable development for which a development permit was required.

The court did not accept the council's submission that the development offence in this case was "flagrant", rather the court held the view that it was borne out of limited comprehension, confusion and uncertainty on the part of the landowner. The court accepted that the landowner intended to remove or regularise the unlawful building work.

In this context the court made a declaration that the pool cover was code assessable development for which a development permit was required and made a consequential order requiring the landowner to remove or regularise the unlawful development by obtaining a development permit within set timeframes. However the court declined to make an enforcement order.

The demolition of a pre-1946 house was approved due to its diminished traditional building character as a consequence of unsympathetic alterations

Kathryn O'Hare | Ronald Yuen | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mariott v Brisbane City Council* [2015] QPEC 45 heard before Bowskill QC DCJ

December 2015

In brief

The case of *Mariott v Brisbane City Council* [2015] QPEC 45 concerned an appeal in the Planning and Environment Court against the Brisbane City Council's decision to refuse Julie Lois Mariott's development application for a preliminary approval to demolish a house on Sydney Street at Kedron.

The council's refusal of Ms Mariott's development application was on the grounds that the proposed demolition did not comply with the Traditional building character (demolition) overlay code.

The relevant codes of the demolition overlay code under consideration by the court were performance outcome PO5(c) and acceptable outcomes AO5(c) and (d). However, the court noted that each of the outcomes were alternatives and if any one of the outcomes were met, then by operation of the *Brisbane City Plan 2014*, the purpose and overall outcomes would be complied with, and, consequently, the demolition overlay code would be complied with.

The court concluded that the demolition of the house would not result in "*significant, concerning or unacceptable loss of traditional building character*" (AO5(c)). In forming this conclusion, the court had regard to the character of Sydney Street as a whole and the representation of traditional building character offered by the house to the street. Accordingly, the appeal was allowed by the court.

The court found that the whole of Sydney Street was the relevant area of assessment for the purpose of assessing whether there was any conflict with PO5(c), AO5(c) and (d) of the demolition overlay code

The court considered the differing positions taken by the heritage architectural experts in their joint report in relation to what the "*area under assessment*" was. Ms Mariott's expert focussed on the whole of the street where the house was located. However, the council's expert focussed on a smaller section of the street more relevantly known as the area comprising the 8 properties (including the house) that were covered by the demolition overlay.

Considered in the context of the *Brisbane City Plan 2014*, the court adopted a flexible, case-by-case approach in its interpretation and application of the relevant outcomes of the demolition overlay code. Whilst acknowledging that it was the area the subject of the overlay which would primarily be protected by the demolition overlay code, the court considered it appropriate, also in some instances, to apply the demolition overlay code over a broader area. In this instance, the court was of the view that the relevant area of assessment was the whole of Sydney Street and not confined to the 8 properties covered by the demolition overlay as submitted by the council's expert.

The court found that the demolition of the house would not result in the loss of traditional building character as prescribed under AO5(c) of the demolition overlay code

The loss of traditional building character contemplated by acceptable outcome AO5(c) was not considered to be absolute. By reference to *Lynch v Brisbane City Council* [2010] QPELR 314, Ms Mariott submitted that the loss required to be "*significant, concerning or unacceptable, rather than to any loss at all*". The council submitted to the contrary but was not successful. In any case, the court accepted Ms Mariott's submission and found no basis to adopt a different interpretation.

Ms Mariott's expert was of the opinion that due to several unsympathetic alterations, the traditional building character of the house had diminished and as such the extent of loss of the character as a result of the demolition was limited. The court found support from the decisions of *Litbit Pty Ltd v Brisbane City Council* [2009] QPELR 197 and *Wallace v Brisbane City Council* [2012] QPELR 689 in taking into account the altered appearance of the house.

The council's expert, on the other hand, contended that the demolition of the house would result in the loss of traditional building character. A number of supporting arguments were submitted by the council's expert. One of the arguments was that in assessing whether the demolition of a pre-1946 house would result in a significant, concerning or unacceptable loss of traditional building character from the relevant street, this loss should be measured against the post-1946 houses which were considered sympathetic to the traditional building character, instead of measuring the loss in terms of the actual traditional building character present in the street.

The court found difficultly in that approach and noted that the traditional building character in Sydney Street was confined to particular houses and that their effect on the character of the street had been diluted by the overwhelming amount of surrounding post-1946 development. Further, the contribution of the house to the traditional building character in Sydney Street had also been diluted due to the unsympathetic alterations made to it.

Accordingly, the court preferred the evidence of Ms Mariott's expert and held that having regard to the character of Sydney Street as a whole and the representation of the traditional building character by the house, its demolition would not result in significant, concerning or unacceptable loss of traditional building character.

Although the court found that the house was in a street that had traditional character as prescribed under AO5(d), the demolition overlay code was complied with given that the demolition of the house would not result in "significant, concerning or unacceptable loss of traditional building character"

The court did in turn deal with acceptable outcome AO5(d) and performance outcome PO5(c). Acceptable outcome AO5(d) dealt with whether the house was in a street that had no traditional character. The court found in favour of the council's expert in that it was difficult to conclude that the street had no traditional character due to the "*not insignificant traditional character*" represented by the pre-1946 houses on the street.

Performance outcome PO5(c) concerned whether the house was a building which did not contribute positively to the visual character of the street. The court observed that for this performance outcome to be met, it had to be shown that the house contributed positively to, or added to, the visual character of Sydney Street. It would not be considered sufficient where the house positively contributed to the visual character of the street because of the traditional building character represented by the house and its location within a group of houses covered by the overlay.

Nonetheless, given that the proposed development complied with acceptable outcome AO5(c), it complied with the purpose and overall outcomes of the demolition overlay code and therefore, complied with the demolition overlay code.

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