COLIN BIGGERS & PAISLEY LAWYERS

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PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

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

COLIN BIGGERS & PAISLEY LAWYERS

Our Planning Government Infrastructure and Environment group

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

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

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

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

Our specialist expertise and experience

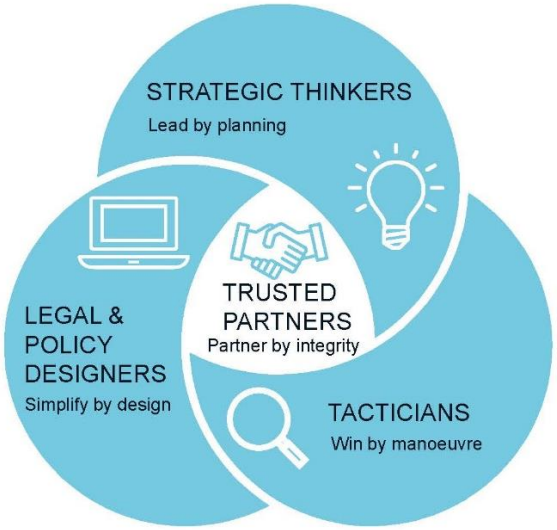
Our Planning Government Infrastructure and Environment group is recognised for our specialist expertise and experience:

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

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

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

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



Lead, Simplify and Win with Integrity

Our Team of Teams and Credo

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

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

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

COLIN BIGGERS & PAISLEY LAWYERS

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Infrastructure for Queensland's cities and towns

Ian Wright

This article discusses the increasing demand for new and upgraded infrastructure for Queensland's cities and towns

January 2012

Issue

Queensland's prosperity is underpinned by the agriculture, property and construction, energy and resources and tourism sectors.

However, the growth of these sectors is resulting in increasing demand for new and upgraded public services and the economic and social infrastructure that is necessary to deliver those services.

This is particularly the case with Queensland's cities and towns which face a key challenge in ensuring that economic infrastructure, such as a water supply, sewerage, flood mitigation, stormwater drainage, solid waste disposal, roads, public transport, electricity, gas and telecommunications is provided efficiently and equitably.

Importance of the issue

It is important to ensure that economic infrastructure is provided efficiently (with minimum use of resources) and equitably (with appropriate sharing of costs) to service the residents of Queensland's cities and towns for the following reasons:

- Equity and the rights for citizens – These services should be available at least at a basic level to all residents irrespective of their ability to pay to satisfy their needs and protect their health and wellbeing.
- Minimise adverse impacts – These services are needed to protect the environment and the health and wellbeing of residents including future generations.
- Demand management is limited – The amount of these services used by residents is not significantly affected by the cost of the services to residents.
- Reasonable costs – These services should be available to all residents at a reasonable costs.
- Lack of competition – These services are natural monopolies for which there is no or limited competition thereby allowing infrastructure providers to charge high prices in the absence of regulation.
- Sprawl – Where the price charged for these services does not reflect the actual costs which vary with location, development pattern and development type, efficient land uses are overcharged whilst less efficient uses are subsidised creating distortions in the land development process and promoting urban sprawl with its attendant costs.

Commitments to address the issue

PIA seeks a commitment that the following is adopted in policy platforms for the next State Parliament:

- Queensland Strategic Land Use Plan – That the State prepare a Queensland Strategic Land Use Plan with a planning horizon of 20 years which identifies the key sectors underpinning Queensland's future and the anticipated location and timing of population and employment for each region of the State.
- Queensland Infrastructure Plan – That the State prepare a Queensland Infrastructure Plan with a planning horizon of 20 years which is consistent with the Queensland Strategic Land Use Plan and identifies the anticipated scope, timing and cost of State infrastructure projects for each region.
- Infrastructure Corridor Plans – That the State prepare Infrastructure Corridor Plans with a planning horizon of 20 years which are consistent with the Queensland Infrastructure Plan and identify critical infrastructure corridors and sites and sufficient buffers to prevent infrastructure from being encroached upon by incompatible land uses.
- Integrated regional plans – That the State prepare a regional plan for each region of the State with a planning horizon of 20 years which is consistent with the Queensland Strategic Land Use Plan, Queensland Infrastructure Plan and Infrastructure Corridor Plans, integrates the planning of land use and State infrastructure for each region; and balances competing State economic, social and environmental interests to provide certainty for land use and infrastructure projects identified in the regional plan.

- Fiscal impact analysis of regional plans – That the State undertake a fiscal impact analysis which is publicly notified for each regional plan to assess the fiscal impact on State and local governments in terms of the additional costs and revenues associated with the land use and infrastructure provided for in the regional plan.
- Shovel ready infrastructure projects – That the State ensure that selected infrastructure projects of national and State significance identified in the Queensland Infrastructure Plan are the subject of fully developed infrastructure investment proposals so that they can be brought online as shovel ready during a cyclical downturn.
- Cost-benefit analysis for infrastructure projects – That where the State invests in an infrastructure project identified in the Queensland Infrastructure Plan, it is essential that it seek to achieve the maximum economic, social and environmental benefits determined through a rigorous cost-benefit analysis, to ensure that the spending does not detract from the wellbeing of Queenslanders.
- Integration of capital programs – That the State establish an integrated approach to capital programs and growth management to coordinate capital maintenance and construction between State government departments, local governments and other infrastructure providers to ensure that recently built or maintenance infrastructure is not torn up to work on other infrastructure - for example tearing up recently built roads to work on water and sewerage mains.
- Infrastructure charges and utility charges based on actual costs – That the State restructure the current system of capped infrastructure charges for development infrastructure and average cost pricing for utilities in particular, water, sewerage and electricity to reflect actual servicing costs which vary with location, development pattern and development type, to ensure that efficient land uses are not overcharged whilst less efficient land uses are subsidised, creating distortions in the land development process and promoting sprawl and its associated problems.
- Designation process for infrastructure projects – That the community infrastructure designation process under the *Sustainable Planning Act 2009* be amended to facilitate all public and private sector infrastructure projects by enabling State and local governments to make designations for community infrastructure on behalf of public and private sector entities to accommodate the increasing desire of all levels of government to develop and operate infrastructure by using innovative financing vehicles such as public-private partnerships and private financing initiatives and alternative procurement methods such as alliancing and design and build.

Bank guarantees or bonds not required for voluntary planning agreements

Anthony Perkins | Lucinda Morphett

This article discusses the decision of the NSW Court of Appeal in the matter of *Huntlee Pty Ltd v Sweetwater Action Group Inc* [2011] NSWCA 378 heard before Biscoe J

January 2012

In brief – Court of Appeal overturns decision in Huntlee v Sweetwater

A NSW Court of Appeal decision on 8 December 2011 in the matter of *Huntlee Pty Ltd v Sweetwater Action Group Inc* [2011] NSWCA 378 is good news for developers entering into voluntary planning agreements (**VPAs**).

Voluntary planning agreement relating to residential subdivision in the Lower Hunter region

The case related to a proposed residential subdivision in the Lower Hunter region south of Branxton in New South Wales, comprising some 1,702 hectares of land, with an expected yield of 7,200 new residential dwellings, to be constructed over a period of 15 years.

As part of the project, the developer, Huntlee Pty Limited, entered into a planning agreement with the Minister for Planning and the Minister for Environment. Among other things, the agreement required the developer to dedicate 5,612 hectares of environmentally significant land for conservation purposes, provide a monetary contribution of $1,000,000 for conservation works and pay a contribution of $100,000 towards the recovery of certain vegetation.

Rezoning of the land declared void as a result of voluntary planning agreement

A local community group, Sweetwater Action Group Inc, challenged the Minister's decision to rezone the land. Sweetwater argued that in entering into the planning agreement with the developer, the Minister failed to have proper regard to how the developer's commitments under the planning agreement might be enforced if the developer failed to make good on those commitments as and when required.

In the case at first instance, Justice Biscoe held that the planning agreement failed to provide for the enforcement by "suitable means, such as a bond or guarantee" required by section 93F(3)(g) of the *Environmental Planning and Assessment Act 1979* (NSW).

His Honour concluded that "suitable means, such as a bond or guarantee" required an additional, independent and enforceable assurance that the developer's promises would be honoured. As a result, the rezoning of the land by the Governor was declared void.

Enforcing voluntary planning agreements by "suitable means"

The decision was overturned in the NSW Court of Appeal.

The Court of Appeal held that the use of the expression "suitable means" in the Act reflects a very wide range of obligations that a planning agreement may impose on a developer and a variety of mechanisms for enforcement of those obligations that may be suitable.

Among other things, the planning agreement:

- had imposed a liability on the developer to make development contributions by a series of instalments amounting to $1.1 million dollars;
- had established a suitable means of enforcement of that obligation in the event of a breach;
- contained provisions for registration on title, which meant that the developer's obligations ran with the land.

Safeguards were also in place to minimise, if not eliminate entirely, the risk of insolvency, including the effect of registration of the planning agreement on successive owners of the land.

The Court of Appeal held that despite the absence of bank guarantees and the like, the planning agreement complied with the requirements of the *Environmental Planning and Assessment Act 1979*.

Implications of Huntlee v Sweetwater decision for developers

The decision has been welcomed by the development industry. It provides greater flexibility for developers to adopt a range of measures under planning agreements for security arrangements relating to contributions. Developers are no longer necessarily required to pay up-front bank guarantees or bonds.

If you have any further queries in relation this article or in relation to voluntary planning agreements, please do not hesitate to contact us.

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Must a development application be an ideal use?

Samantha Hall | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bird v Logan City Council & Ors* [2011] QPEC 145 heard before Robin QC DCJ

February 2012

Executive Summary

This appeal was concerned with whether there was sufficient need for a discount department store (**DDS**) in Jimboomba to justify conflict with the Beaudesert Planning Scheme. In answering, the Planning and Environment Court (**court**) stated that it was not the court's role to refuse a development application because it considered that the proposed use was not the best possible use of the land, rather if the court considered that the development application was acceptable, then that was enough.

Case

This case was concerned with a submitter appeal by GJ and PK Bird (**appellant**), against the decision of the Logan City Council (**respondent**) to approve an impact assessable development application submitted by Stockland (**the developer**) under the *Integrated Planning Act 1997* (**IPA**) for a shopping centre development in Jimboomba.

Facts

Relevant to the case were two areas of land the developer owned in Jimboomba, one located on the northern side of Cusack Lane, where the developer's existing shopping centre was (**site 1**), and the other located on another site further north (**site 2**). Both sites were contained within the same block, with frontages to Mt Lindesay Highway in the east and Johanna Street in the west. The Jimboomba State Primary School (**the school**) separated the two sites.

Site 1 comprised an area of about 4 hectares and two separate parcels of land. The existing shopping centre on site 1 comprised six buildings, with a total GFA of 10,492m².

Site 2, north of the school, comprised an area of about 17 hectares and four separate parcels of land. The developer proposed building a 21,566m² shopping centre, which would include a DDS, an enlarged Woolworths Supermarket to be relocated from Site 1 and other retail and convenience stores.

The respondent approved the developer's development application for the redevelopment of site 1 and the development of site 2 (**the proposal**). The appellant appealed the respondent's decision submitting that the proposal:

- contradicted the hierarchy of the *South East Queensland Regional Plan 2009-2031* (**SEQRP**) by undermining regional Major Activity Centres such as Flagstone and Yarrabilba;
- conflicted with the Beaudesert Shire Planning Scheme (**planning scheme**); and
- had not demonstrated overwhelming community or economic need.

The appellant submitted that the proposal should not go ahead as approved. Instead the proposal should be located entirely at site 1.

Decision

His Honour, Judge Robin QC DCJ, dismissed the appeal subject to adjustments being made to the proposal.

Conflict with the SEQRP

The appellant argued that conflict with the SEQRP required refusal of the proposal as unlike situations of conflict with a planning scheme, which may be overcome if there are sufficient grounds (section 3.5.14(2)(b) (Decision if application requires impact assessment) of the IPA), the IPA allows no similar possibility for conflict with a regional plan. His Honour dismissed the argument, stating that "*while section 3.5.5(2) (Impact assessment) of the IPA requires any conflict with the SEQRP to be taken into account, it does not render such conflict determinative*".

The appellant alleged that the proposal, if approved, would offend the hierarchical structure of the SEQRP by elevating Jimboomba (designated a major rural activity centre) above Flagstone and Yarrabilba (designated Major Regional Activity Centres) by providing more than district level services to more than surrounding rural residential developments. In reply, his Honour considered that the construction of a DDS would not result in Jimboomba providing something exceeding district level services. Nor would such a facility, assuming it attracted custom from Flagstone and Yarrabilba residents, be serving a geographical area beyond its surrounding rural residential development. His Honour went on to say that "*no other single location would serve residents of the general area so well*", as a DDS built in Beaudesert would only serve residents of Beaudesert and a DDS at either Flagstone or Yarrabilba would be seen as "*too far off the beaten track*". His Honour concluded by saying that he detected nothing in the SEQRP that would count against the proposal being approved.

Need

As for whether there was sufficient need for the proposal, the experts engaged by the developer and the respondent agreed there was an economic and community need, but the expert engaged by the appellant insisted that this need did not translate to a planning need, as in his opinion, the proposal should be located at Beaudesert (a higher order centre) as opposed to Jimboomba. His Honour was not persuaded by this reasoning and pointed out that since there were not any developers looking at Beaudesert for the moment, he could not see why the inhabitants of Jimboomba and the surrounding areas should be forced to wait for a DDS.

Where in Jimboomba?

The appellant argued that the proposal should not proceed on site 2 but should instead proceed on site 1. Whilst his Honour did agree that site 2 was not optimal due to its remoteness from present commercial development, he observed that the "real question" for the court was whether the proposal was acceptable and not whether it was the "best use" of the site. His Honour cited the following passage from the judgement of Judge Brabazon in *Wingate Properties Pty Ltd v Brisbane City Council* [2001] QPELR 272 in support of his statement:

> *It is not the function of this Court (or indeed any planning authority) to refuse an application because it considers that the proposed use is not the best possible use for the site. It is not the function of the Court to redesign a proposal. Its function is to pass judgement on that which is proposed. In this case, the issue is whether or not the current proposal has been shown to be acceptable. The fact that some alternative proposal may be thought to be even more acceptable is by the way. If the current proposal is acceptable, then that is enough.*

Conflict with planning documents

The appellant led a variety of evidence as to how the proposal conflicted with the applicable planning documents (SEQRP and the planning scheme), including; fragmentation, character conflict, exceeding the 14,000 square metre cap on retail uses and traffic considerations.

In regard to the fragmentation issue, his Honour accepted that the proposal would result in fragmentation of the Jimboomba town centre by effectively creating two separate shopping centres in two separate locations. However, his Honour added that Jimboomba already had separate centres in separate locations and that the issue for the court was "*not whether the proposal is ideal, but whether it is acceptable*".

In regard to the character conflict issue, the appellant relied on policies of the SEQRP along with provisions of the planning scheme to support their case. His Honour noted that the SEQRP policies relied upon by the appellant were predominantly vision statements and that while demonstrated compliance with such policies may well be a potent factor supporting a particular development proposal, his Honour was unpersuaded that the SEQRP had "*the intention or the effect that failure to provide the benefits described is a factor telling against approval of a development proposal*". As for conflict with the planning scheme, his Honour noted that since the appellant did not provide him with any decisions of the court or similar courts rejecting a similar proposal on aesthetic/character grounds and could not point to anything resembling a Jimboomba character in the relevant districts, his Honour concluded that the developer's proposal was acceptable.

In regard to traffic considerations, the appellant alleged that their evidence showing that increased traffic volumes would result from the proposal being approved reinforced their argument regarding fragmentation. In reply, his Honour stated that he did not think it was necessary for the court to rely on anything other than "need" for the purposes of justifying conflict under section 3.5.14(2) (Decision if application requires impact assessment) of the IPA.

His Honour was quick to admit that the proposal did conflict with the planning scheme by exceeding the 14,000 square metre cap on retail uses, but added that the need for the proposal, particularly the DDS was an overwhelming one. His Honour concluded by saying that in his opinion, need for the proposal satisfied section 3.5.14 (Decision if application requires impact assessment) of the IPA and the proposal ought to be approved.

Held

- The appeal was dismissed and the development application approved subject to changes being made to the proposal to which the developer agreed.
- The parties would have the opportunity to make submissions about appropriate final orders.

Distributor-Retailers: Managing water and wastewater infrastructure in South East Queensland

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Nonmus & Anor v Sunshine Coast Regional Council* [2011] QPEC 147 heard before Robertson DCJ

February 2012

Executive Summary

From 1 July 2010, new integrated retail and distribution authorities called 'distributor-retailers', were created to deliver and manage water and wastewater services and infrastructure in South East Queensland. These distributor-retailers act on behalf of the local government areas they serve and they have the power to charge customers for water and wastewater services as well as acting as a referral agency in the assessment of development applications, though these powers are delegated back to the relevant local governments. It is because these services have been transferred from local governments to distributor-retailers that recently the Planning and Environment Court has observed an increase in applications by distributor-retailers to join appeals that involve infrastructure contributions for water and wastewater services.

Case

This case concerned an application by the Northern SEQ Distributor-Retailer Authority trading as Unitywater (**Unitywater**), to join an appeal by Maxwell Nonmus and Elfie Nonmus (**appellants**) against the decision of the Sunshine Coast Regional Council (**respondent**) to approve a development application for a mixed commercial and accommodation units complex.

Facts

In December 2010, the appellants filed an appeal in the Planning and Environment Court (**court**) against a condition of a development permit issued by the respondent for a mixed commercial and accommodation units complex with respect to land situated at Ballinger Road, Buderim. The condition specifically appealed against related to the payment of contributions for trunk infrastructure for water supply and sewerage infrastructure.

In December 2011, Unitywater filed an application pursuant to rule 69(1)(b) (Including, substituting or removing party) of the *Uniform Civil Procedure Rules 1999* (**UCPRs**), to be joined as a party to the appeal. Rule 69(1)(b) of the UCPRs relevantly provides as follows:

> *(1) The court may at any stage of a proceeding order that— ...*
>
> *(b) any of the following persons be included as a party—*
>
> *(i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding*
>
> *(ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.*

Pursuant to the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (**SEQ Water Act**), Unitywater was established as the distributor-retailer authority for the Sunshine Coast and Moreton Bay local government areas.[1] Unitywater was responsible for providing water and wastewater services for its geographical area and was responsible for infrastructure contributions for water and wastewater. Relevantly, from 1 July 2010, the liability for a charge for water and wastewater services under a development approval was taken to be a liability of Unitywater instead of the respondent.[2]

Accordingly, in light of the above, it was argued that Unitywater had a material interest in respect of the issues in dispute in the appeal, to the extent they related to infrastructure contributions for water and wastewater services.

1 Sections 5 (Who are a distributor-retailer's participating local governments) & 8(a) (Establishment) of the SEQ Water Act.
2 Section 77J (Transfer of liability in particular circumstance) of the SEQ Water Act.

In response to this, it was advanced by the appellants that Unitywater's application should be refused because it had no assessment role in the development application, it was not a concurrence agency to the development application, it was not required to be served with a copy of the notice of appeal and it was not entitled under the *Sustainable Planning Act 2009* to be a party to the appeal.

Decision

His Honour, Judge Robertson, concluded that Unitywater was not prevented from applying pursuant to rule 69 of the UCPRs to be included as a party to the appeal and was a party whose interests would be affected by the outcome of the appeal.

In respect of the arguments advanced by the appellants, his Honour noted that whilst those submissions were correct, the statutory authorities relied upon did not support their primary submission that a person or entity with no statutory right to be a party to a proceeding has no right to rely on rule 69 of the UCPRs. In this regard, his Honour referred to the case of *Leda Holdings Pty Ltd v Caboolture Shire Council* [2007] 1 Qd R 467, which is authority for the proposition that an entity who has no statutory right to join proceedings is still nonetheless not prevented from applying to join pursuant to rule 69 of the UCPRs. In *Leda*, Keane JA relevantly noted at page 470 that:

> *The discretion conferred by r69 should be approached as intended to facilitate the determination of proceedings in accordance with the rules of natural justice. It should not be approached as if it were intended to restrict the availability of the common law right of a person likely to be affected by a decision to be heard in relation to that decision.*

Accordingly, his Honour concluded that as infrastructure contributions were clearly a major focus of the appeal and as any decision on the appeal could affect the liability of Unitywater for water and wastewater infrastructure, then it should be included as a party to the proceedings pursuant to rule 69(1)(b) of the UCPRs.

Held

It was ordered that Unitywater be joined as a co-respondent to the appeal.

No error of law in construction of planning scheme

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Drew v Bundaberg Regional Council* [2011] QCA 359 heard before McMurdo P, Muir JA and Douglas J

February 2012

Executive Summary

The Court of Appeal considered the decision of the Planning and Environment Court in *Bundaberg Regional Council v Bruce Desmond Loeskow & Ors* [2011] QPEC 95, where it was held that a development offence had occurred in respect of the construction of a shed without a valid development approval. A summary of the decision of the Planning and Environment Court was included in our Legal Knowledge Matters publication for July 2011.

Case

This case concerned an application for leave to appeal brought by a building certifier (**Drew**) in respect of a decision of the Planning and Environment Court (**P&E Court**) in *Bundaberg Regional Council v Bruce Desmond Loeskow & Ors* [2011] QPEC 95. The P&E Court considered an application brought by the Bundaberg Regional Council (**council**) for declaratory relief and enforcement orders against a developer (**Loeskow**) and private certifier (**Drew**) in relation to the construction of a shed by Loeskow on land at 6 Seahorse Court, Innes Park (**land**). The P&E Court made the declaration and orders sought by the council.

Facts

Loeskow applied to Drew for approval for building work for the construction of a large shed on the land (**application**). Drew lodged a "Request for Concurrence Agency Assessment - Planning" with the council for building matters pursuant to the *Sustainable Planning Regulation 2009*. The council considered the application and notified Loeskow of its refusal of the application. Notwithstanding the council's decision, Drew proceeded to grant a building approval for the application, on the mistaken belief that the council's period for assessing the application expired prior to it issuing a decision in respect of the application.

The council made an application to the P&E Court for a declaration that the building approval was invalid and for orders restraining Loeskow from carrying out assessable development on the land, being a material change of use for the purpose of domestic storage, until an effective development approval was obtained. The P&E Court declared the building approval invalid and made an order which required Loeskow to lodge an application for a material change of use in respect of the construction of a shed on the land.

Drew sought leave under section 498 (Who may appeal to Court of Appeal) of the *Sustainable Planning Act 2009* to appeal against the decision of the P&E Court on the basis that the primary judge erred in finding that the application was governed by Table 3.4 (Assessment table—making a material change of use—Urban Residential Zone) of the *Burnett Shire Planning Scheme 2006* (**planning scheme**) which made the application impact assessable. Further, Drew alleged that clause 1.12(3) (Planning scheme identifies alternative provisions) of the planning scheme operated such that the application was to be assessed by the council as a concurrence agency to the application for building work.

During the hearing in the P&E Court, Drew and the council adopted different positions in respect of the construction of the word "Otherwise" in Table 3.4 (Assessment table—making a material change of use—Urban Residential Zone) of the planning scheme. The primary judge in the P&E Court agreed with the council's construction, whereby "Otherwise" was a default provision which applied to require an impact assessment of the application as it expressed the default provision for applications for material change of use of premises in urban residential zones which were not identified in Table 3.4 (Assessment table—making a material change of use—Urban Residential Zone) of the planning scheme as being self assessable or code assessable. It was on this basis that the P&E Court declared the building approval invalid and directed Loeskow to apply for a development approval for a material change of use.

Decision

The Court of Appeal held that the decision of the P&E Court in respect of the construction of Table 3.4 (Assessment table—making a material change of use—Urban Residential Zone) of the planning scheme was correct. Given that Drew's argument was reliant on establishing that Table 3.4 (Assessment table—making a material change of use—Urban Residential Zone) of the planning scheme did not apply to render the application impact assessable, it was unnecessary for the Court of Appeal to consider the further development of Drew's argument. However, the Court of Appeal went on to observe that clause 1.12 (Planning scheme identifies alternative provisions) of the planning scheme was of the nature of a general default provision whereas Table 3.4 (Assessment table—making a material change of use—Urban Residential Zone) of the planning scheme was a specific provision which was intended to provide for the assessment of a material change of use for domestic storage.

The Court of Appeal also considered Drew's argument that an amendment to Table 3.4 (Assessment table—making a material change of use—Urban Residential Zone) of the planning scheme in February 2011 supported his construction of Table 3.4 (Assessment table—making a material change of use—Urban Residential Zone) of the planning scheme. The Court of Appeal relevantly indicated that in construing a provision of statute by reference to a later amendment, "*care must be exercised to ensure that the words in the later statute have not been inserted to remove possible doubts*" [16]. The Court of Appeal indicated the amendment was not of assistance in the circumstances as there was no confusion or ambiguity about the role of "Otherwise" in Table 3.4 (Assessment table—making a material change of use—Urban Residential Zone) of the planning scheme.

The Court of Appeal went on to consider an ancillary point raised by Drew in relation to the content of the order of the P&E Court as the order did not specify what level of assessment the material change of use was to be. The Court of Appeal doubted that Drew had standing to object to that part of the order, but in any event went on to state that no error of law, or practical difficulty, was identified in relation to the order.

Held

Leave to appeal refused with costs.

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Agreed compensation for resumption

Samantha Hall | James Langham

This article discusses the decision of the Queensland Land Court in the matter of *Bortoli v Brisbane City Council* [2011] QLC 75 heard before his Honour WA Isdale

February 2012

Executive Summary

This case involved the resumption of land located on Lutwyche Road, Windsor under the *Acquisition of Land Act 1967* (**ALA**) by the Brisbane City Council (**respondent**) for road purposes incidental to the construction of the "Clem 7" tunnel. The subject land was described as Lots 100 and 101 on RP800004 (**land**). The respondent and the applicant were unable to reach an agreement on the amount of compensation payable. The Land Court (**court**) agreed with the valuation given by the applicant's expert valuer and awarded the applicant compensation to that amount.

Case

This case involved a claim for compensation by the applicant against the respondent. The respondent and the applicant were unable to reach an agreement on the amount of compensation payable for the land acquired for road purposes incidental to the construction of the "Clem 7" tunnel.

Facts

The applicant was the owner of the land which comprised two adjoining blocks. On the blocks were two Queenslander style timber houses which were set up as five flats and were let out to tenants. The land was resumed on 8 December 2006 for road purposes incidental to the construction of the "Clem 7" tunnel and the parties were unable to reach an agreement on the amount of compensation payable.

The applicant claimed the value of the Land was $1,050,000 and being an investment, claimed compensation for stamp duty which would be payable on a replacement property. He further claimed interest on the compensation as to preserve the value of the land.

The respondent contended that the value of the land should be assessed at $700,000 at the date of the resumption and there should not be any allowance for stamp duty.

Both parties obtained the assistance of registered valuers who provided several reports, including a joint report. The valuers were guided by the agreement of the town planners who were of the opinion that the council, who was the respondent, would permit the existing structures to be demolished and would be likely to permit a combined commercial and residential development. The valuers also agreed that concluded sales were the best test of market value.

Mr Jorgensen, the valuer for the respondent, indicated in the joint report that in his view the value of the property was $670,000. His calculation was based on a previous listing price for the property in 2006 and previous sales within the surrounding area. The applicant gave evidence that the property was only on the market for this price due to external circumstances and he would not have ordinarily sold the property for this price.

Mr Johnston, the valuer for the applicant, indicated the value of the property to be $1,014,000. His calculation was based upon previous sales within the surrounding area under similar circumstances.

Disturbance items, were agreed to be paid at $13,942.46.

Decision

The stamp duty claim

His Honour WA Isdale referred to section 20(1)(b) (Assessment of Compensation) of the ALA which requires, in assessing compensation for acquisition that regard be given to the claimant's "costs attributable to disturbance". This expression is defined in section 20(5)(b)(i) (Assessment of Compensation) of the ALA to include stamp duty. However, as the respondent noted, these provisions were not inserted in the ALA until after the resumption.

Previous to the amendment there was no specific reference to actual financial loss or the concept of "costs attributable to disturbance". In reaching a decision, his Honour made reference to the position of Member Trickett in *Thirty-Fourth Philgram Pty Ltd v the Crown* (1993) 14 QLCR 13 where he stated:

> *I am of the opinion that it is now well established that in the case of the resumption of an investment property the costs of acquiring a replacement are not compensable. I do not propose to allow this claim*.

His Honour took into account the construction of the section, in particular, the wording which did not claim to have any retrospective operation. Based upon this interpretation and that of Member Trickett, his Honour held that no payment for compensation of stamp duty could apply in this case.

Valuation of the land

In respect of the compensation payable for the value of the land, his Honour referred to the evidence given by Mr Johnston and Mr Jorgensen and the joint report.

Upon reflection of this evidence, his Honour stated that the reliance on the listing price in 2006 had been a significant factor in Mr Jorgensen's valuation and had fatally flawed it. His Honour accepted the valuation of Mr Johnston, which was based on direct sales comparisons and awarded compensation of $1,014,000 for land compensation and $36,000 for dwelling compensation.

Held

The court ordered as follows:

- Compensation was assessed at One Million and Fifty Thousand Dollars ($1,050,000) in respect of the land compulsorily acquired.
- Disturbance was assessed at the agreed figure of Thirteen Thousand Nine Hundred and Forty-two Dollars and forty six cents ($13,942.46).
- Interest was payable at the rate adopted for the relevant year in the table of interest rates published by the Land Court.
- Costs of and incidental to the hearing and determination of the claim were awarded to the claimant on the standard basis.

No stay given by the court

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cougar Energy Limited v Debbie Best, Chief Executive under the Environmental Protection Act 1994* [2011] QPEC 150 heard before Jones DCJ

February 2012

Executive Summary

This case was an application to the Planning and Environment Court (**court**) for a stay of the effect of the Department of Environment and Resource Management's (**DERM**) decision to amend an environmental authority to impose certain conditions, until after the determination of the appeal against the DERM's decision. The application was dismissed.

Case

This case was an application for a stay pursuant to section 535 (Stay of operation of decisions) of the *Environmental Protection Act 1994* to stay until the appeal was determined that part of the decision made by DERM in respect of the inclusion of two new conditions to the relevant environmental authority held by the applicant.

Facts

The project the subject of the application was for the carrying out of an underground coal gasification project under an environmental authority over land located approximately 10km south of Kingaroy.

The applicant commenced operations on or about 15 March 2010. Within 5 days of commencement, the only operational production well had a failure involving the fracturing of the cement grout lining of the well wall. As a result of the incident, the well became blocked and gas, including the contaminants benzene and toluene, escaped into the surrounding geology.

Despite a condition in the environmental authority which required the applicant to advise the DERM as soon as practicable of an incident which resulted in the release of contaminants not in accordance with the environmental authority, the DERM was not informed of the incident until 30 June 2010.

As a result, the DERM took a number of formal steps including the issuing of an environmental order, and on 28 August 2011, the issuing of a notice of a proposal to amend the environmental authority to include the following conditions:

> *C10-7: Within 30 days of this amended environmental authority taking effect a documented decommissioning and rehabilitation procedure must be prepared and submitted to the administrating authority, to fully decommission and rehabilitate the underground cavity to ensure removal of all residual contaminants attributed to underground coal gasification processes from the cavity and from groundwater impacted by the underground coal gasification. The procedure must reflect proven practices, and include a methodology and programme of monitoring to determine that the removal of contaminants has been effective.*
>
> *C10-8: Within 60 days of this amended environmental authority taking effect the decommissioning and rehabilitation procedure must be commenced and then continued until the objectives identified in C10-7 are achieved.*

The applicant appealed the imposition of the new conditions on the basis that the conditions have the effect of requiring the applicant to decommission and rehabilitate its gas project site.

The application for the stay was based on the following assertions by the applicant:

- there was no serious environmental risk involved;
- in the event of a successful appeal, if a stay is not granted, the applicant would have been required to commit expenditure of both time and money it was not lawfully required to do and there would be no prospect of the applicant being reimbursed for that work;
- if a stay is not granted, the applicant could be exposed to criminal and enforcement proceedings;
- if a stay is not granted, the applicant would in effect have to cease all meaningful operations on the site because the conditions would require the applicant to decommission and rehabilitate the site before the appeal was heard.

Decision

The court held that the general principles associated with the granting of a stay in usual civil litigation were applicable, subject to some variation or adjustment where necessary, to the application.

By reference to *Cook Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* (2008) Qd R 453; *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685; and *Attorney for the State of Queensland v Farden* (2011) QCA 111, the court relied on the following established principles for the stay:

- it is not necessary for the applicant for a stay to show special or exceptional circumstances which warrant the grant of a stay;
- the fundamental justification for granting a stay pending an appeal is to ensure that the orders which might ultimately be made by the court are fully effective;
- while the prospects of success on the appeal are a relevant consideration, unless it can be said that the appeal is frivolous or not arguable, the court will generally not descend into a detailed assessment of the prospects of the appeal;
- finally, will the applicant for the stay be irreparably prejudiced if the stay is not granted.

The court also held that cases such as this application "*require a consideration of impact on the parties from any decision concerning the stay. That is, it is not only the applicant's position that has to be considered if the stay were not to be granted, but also the respondent's position if the stay is granted.*"

After having regard to the various technical evidence put before him, his Honour Judge Jones dismissed the application for the following reasons:

- on the evidence, his Honour considered that the potential for environmental harm associated with the case was real and significantly exceeded that contended for by the applicant;
- the applicant provided no evidence as to the actual cost of compliance with the conditions and did not particularise a more efficient and effective approach for dealing with the situation;
- the risk of exposure to prosecution and enforcement proceedings, future events and consequences lie in the hands of the applicant, including taking steps to prosecute its appeal as quickly as practicable;
- His Honour held that the allegation that the applicant would have to decommission and rehabilitate its entire gas project before the appeal was determined was not made out, the conditions were not directed towards the whole of the applicant's gas project site, but to the subject underground cavity.

Accordingly, his Honour was not persuaded to exercise his discretion to grant the stay.

Held

The application for the stay was dismissed. His Honour would hear the parties as to costs and directions for the future conduct of the appeal.

Infrastructure contributions reform in Queensland

Ian Wright | Susan Cleary

This article discusses the practical, legal and public policy issues arising from the reform of Queensland's infrastructure contributions regime which commenced on 1 July 2011. This article is based on a presentation to a seminar of the Planning Institute of Australia delivered in Brisbane on 26 July 2011

February 2012

Executive Summary

Infrastructure charges reform

The Queensland government has made significant changes to the infrastructure contributions regime that is to be applied by local governments and South-East Queensland distributor-retailers.

New infrastructure contributions regime

A new infrastructure contributions regime has been implemented through two legislative instruments:

- the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011*, which commenced on 6 June 2011 (**amended SPA**); and
- the draft State Planning Regulatory Provision (Adopted Charges), which commenced on 1 July 2011 (**draft SPRP**).

Significant practical implications

The new infrastructure contributions regime has made significant changes to the infrastructure contributions powers of local governments and SEQ distributor-retailers including the following:

- First, infrastructure charges capping has been implemented for infrastructure charges that may be levied by local governments and SEQ distributor-retailers.
- Second, the general power of local governments to impose conditions for infrastructure contributions for development infrastructure has been removed and replaced with specific powers which are aligned with the powers of SEQ distributor-retailers (that are currently delegated to local governments). These powers increase in scope once a local government makes a priority infrastructure plan.

These changes will have significant practical implications for all stakeholders; local governments and their ratepayers, SEQ distributor-retailers and their customers as well as developers and land owners.

Themes of paper

This paper has 4 themes:

- First, the paper analyses the capping of infrastructure charges for development infrastructure levied by local governments and SEQ distributor-retailers.
- Second, the paper analyses the limitations imposed on local government conditioning powers for infrastructure contributions for development infrastructure.
- Third, the paper considers the response of local governments and SEQ distributor-retailers to the new infrastructure contributions regime.
- Fourth, the paper considers some of the practical implications from a legal and policy perspective that arise from the new infrastructure contributions regime.
- Finally, the paper concludes with some observations on the public policy implications of the new infrastructure contributions regime that will be further developed in a paper to be presented at the forthcoming Planning Institute of Australia State conference.

Capped infrastructure charges

Implementation of reform

Turning then to the first theme of this paper, the capping of infrastructure charges. The new infrastructure contributions regime has implemented infrastructure charges capping through the following:

- First, the Minister is given the power to make a State planning regulatory provision (adopted charges) (**Adopted Charges SPRP**).[3]
- Second, where the Minister has made an Adopted Charges SPRP, local governments and SEQ distributor-retailers are prevented from exercising their financial contribution powers under the previous infrastructure contributions regime.[4]
- Third, where the Minister has made an Adopted Charges SPRP, local governments and SEQ distributor-retailers may only levy their respective proportions of an adopted infrastructure charge.[5]
- Fourth, a local government may make an adopted infrastructure charges resolution which states an adopted infrastructure charge.[6]
- Fifth, an SEQ distributor-retailer's board may decide matters about an adopted infrastructure charge.[7]

Adopted Charges SPRP

The Minister is given power to make an Adopted Charges SPRP which contains the following:

- The Adopted Charges SPRP must include an adopted infrastructure charges schedule containing maximum adopted charges, which may be stated for different development in different parts of local government areas.[8]
- The Adopted Charges SPRP may include a priority infrastructure area for a local government area.[9]
- The Adopted Charges SPRP may include the relevant proportion of an adopted infrastructure charge that may be levied by a local government and SEQ distributor-retailer, if agreement cannot be reached between them.[10]

Previous financial contribution powers excluded

Where the Minister has made an Adopted Charges SPRP, local governments and SEQ distributor-retailers are generally prevented from exercising their existing financial contribution powers. In particular:

- Local governments without a priority infrastructure plan (or an infrastructure charges plan) cannot condition a financial contribution for development infrastructure under a planning scheme policy.[11]
- Local governments with a priority infrastructure plan (or an infrastructure charges plan) cannot levy an infrastructure charge in accordance with an infrastructure charges schedule in the priority infrastructure plan (or infrastructure charges plan) or a regulated infrastructure charges schedule.[12]
- SEQ distributor-retailers cannot levy an infrastructure charge in accordance with their SEQ infrastructure charges schedule.[13]

However, the financial contribution powers under the previous infrastructure contributions regime can continue to be exercised in respect of development in a declared master planned area, unless the local government has made an adopted infrastructure charges resolution which states that an adopted infrastructure charge is to be levied for that development.[14]

Adopted infrastructure charge

Where the Minister has made an Adopted Charges SPRP and the existing financial contribution powers are excluded, local governments and SEQ distributor-retailers may only levy their respective proportions of an adopted infrastructure charge in respect of development that is not excluded by the amended SPA.

An adopted infrastructure charge is the following:

- for an adopted infrastructure charge levied by a local government:
  - if a local government has not made an adopted infrastructure charges resolution – the charge equivalent to the lesser of the maximum adopted charge in the Adopted Charges SPRP and an amount calculated under an existing planning scheme policy, infrastructure charges schedule in a priority infrastructure plan (including an infrastructure charges plan) or regulated infrastructure charges schedule;15

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3 See section 648B of the *Sustainable Planning Act 2009*.
4 See sections 345, 347, 848 and 880 of the *Sustainable Planning Act 2009*.
5 See sections 648G and 755A of the *Sustainable Planning Act 2009*.
6 See section 648D of the *Sustainable Planning Act 2009*.
7 See section 755KA of the *Sustainable Planning Act 2009*.
8 See sections 648B(3) and 648B(4)(a) and (b) of the *Sustainable Planning Act 2009*.
9 See section 648B(4)(c) of the *Sustainable Planning Act 2009*.
10 See sections 648B(4)(d) and 648G(2) of the *Sustainable Planning Act 2009*.
11 See sections 345, 347, 848, 863 and 880 of the *Sustainable Planning Act 2009*.
12 See sections 629, 863 and 880 of the *Sustainable Planning Act 2009*.
13 See section 755K of the *Sustainable Planning Act 2009*.
14 See section 648E(c) of the *Sustainable Planning Act 2009*.
15 See sections 648A(1)(b) and 863 of the *Sustainable Planning Act 2009*.

  - if the local government has made an adopted infrastructure charges resolution – the stated infrastructure charge;[16]

- for an adopted infrastructure charge levied by an SEQ distributor-retailer:
  - if an SEQ distributor-retailer's board has decided to adopt a charge – the adopted charge;[17]
  - if an SEQ distributor-retailer's board has not decided to adopt a charge – the distributor-retailer's relevant proportion of the adopted infrastructure charge.[18]

Respective proportions of an adopted infrastructure charge

An adopted infrastructure charge levied by local governments or SEQ distributor-retailers must be limited to their respective proportions of the adopted infrastructure charge.

The proportions of an adopted infrastructure charge for a local government and SEQ distributor-retailer is to be determined as follows:

- if the local government has not made an adopted infrastructure charges resolution – the relevant proportion being the proportions agreed by the local government and SEQ distributor-retailer or otherwise stated in an Adopted Charges SPRP;[19]
- if the local government has made an adopted infrastructure charges resolution – the proportion that would have applied before the resolution took effect being either:[20]
  - the proportions under the previous infrastructure contributions regime being an existing planning scheme policy, infrastructure charges schedule in a priority infrastructure plan (including an infrastructure charges plan) or regulated infrastructure charges schedule; or
  - the proportions agreed by the local government and SEQ distributor-retailer or stated in an Adopted Charges SPRP.

Excluded development

Local governments and SEQ distributor-retailers must not levy an adopted infrastructure charge for the following development:[21]

- work or use of land under a State Resources Act;[22]
- development in an urban development area under the *Urban Land Development Authority Act 2007*;
- development in a declared master planned area, unless an adopted infrastructure charges resolution states that an adopted infrastructure charge is to be levied for that development.

Adopted infrastructure charges resolution

As noted earlier, local governments may make an adopted infrastructure charges resolution which includes an adopted infrastructure charge.

The adopted infrastructure charge must accord with the following:

- the maximum adopted charge in the adopted infrastructure charges schedule in the Adopted Charges SPRP;[23]
- the respective proportion of the adopted infrastructure charge for the local government and SEQ distributor-retailer.[24]

Discount for existing usage

The adopted infrastructure charges resolution may also state that an adopted infrastructure charge is to be discounted to take account of the existing usage of trunk infrastructure by the premises to which a development relates.[25]

Trunk infrastructure planning matters

The adopted infrastructure charges resolution may also state the following trunk infrastructure planning matters if the local government does not have a priority infrastructure plan:[26]

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16 See section 648A(1)(a) of the *Sustainable Planning Act 2009*.
17 See section 755KB(2) of the *Sustainable Planning Act 2009*.
18 See sections 755KB(2) and 755A of the *Sustainable Planning Act 2009*.
19 See sections 648G(2) and (3)(b) and 648B(4)(d) of the *Sustainable Planning Act 2009*.
20 See sections 648G(3)(a) and 755A of the *Sustainable Planning Act 2009*.
21 See section 648E of the *Sustainable Planning Act 2009*.
22 See references to the *Mineral Resources Act 1989*, *Petroleum Act 1923*, *Petroleum and Gas (Production and Safety) Act 2004* and *Greenhouse Gas Storage Act 2009* in section 648E of the *Sustainable Planning Act 2009*.
23 See section 648D(1)(a) of the *Sustainable Planning Act 2009*.
24 See section 648D(2) of the *Sustainable Planning Act 2009*.
25 See section 648D(1)(d) of the *Sustainable Planning Act 2009*.

- trunk infrastructure;
- the trunk infrastructure networks to which the adopted infrastructure charge applies;
- the standards of service for each trunk infrastructure network;
- the establishment cost of each network.

The specification of these trunk infrastructure planning matters is relevant to the following:

- the assessment of development;[27]
- the conditioning powers for land and work contributions for development infrastructure;
- the calculation of offsets against an adopted infrastructure charge for the provision of land and work contributions for trunk infrastructure.

Restricted infrastructure contribution powers

It is appropriate therefore to consider the second theme of this paper; the restrictions imposed by the new infrastructure contributions regime on the powers of local governments and SEQ distributor-retailers to impose conditions for infrastructure.

In general terms, the powers of local governments have been aligned with those of SEQ distributor-retailers (which are currently delegated to local governments) and gradually increase as a local government makes a priority infrastructure plan.

Conditions for financial contributions

Local governments and SEQ distributor-retailers have the following powers to condition financial contributions for infrastructure:

- conditioned payment for development infrastructure under a planning scheme policy – however as already noted this power has been removed where an Adopted Charges SPRP is made;[28]
- conditioned payment for development outside a priority infrastructure area – this power applies where a priority infrastructure area is stated in a priority infrastructure plan or an Adopted Charges SPRP;[29]
- conditioned payment for development inconsistent with the planning assumptions in a priority infrastructure plan (including an infrastructure charges plan).[30]

Conditions for land and work contributions

Local governments and SEQ distributor-retailers also have the following powers to condition land and work contributions for infrastructure:

- conditioned land and work contribution under a planning scheme policy – however as already noted this power is removed where an Adopted Charges SPRP has been made;[31]
- conditioned land and work contribution for development infrastructure – this power applies where a local government has not identified trunk infrastructure in a priority infrastructure plan (including an infrastructure charges plan) or adopted infrastructure charges resolution;[32]
- conditioned land and work contribution for non-trunk infrastructure – this power applies where a local government has identified trunk infrastructure in a priority infrastructure plan (including an infrastructure charges plan) or adopted infrastructure charges resolution;[33]
- conditioned land and work contribution for necessary trunk infrastructure – this power applies where the local government has identified trunk infrastructure in a priority infrastructure plan (including an infrastructure charges plan) or adopted infrastructure charges resolution.[34]

Dedication notice for land contributions

In addition to conditioning powers, local governments and SEQ distributor-retailers also have the power to give a dedication notice for a land contribution for trunk infrastructure.

This power applies where the local government has identified trunk infrastructure in a priority infrastructure plan (including an infrastructure charges plan) or adopted infrastructure charges resolution.[35]

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26 See section 648D(1)(e) of the *Sustainable Planning Act 2009*.
27 See sections 313(2)(f) and 314(2)(k) of the *Sustainable Planning Act 2009*.
28 See sections 345, 347, 848 and 880 of the *Sustainable Planning Act 2009*.
29 See sections 650 and 755R of the *Sustainable Planning Act 2009*.
30 See sections 650 and 755R of the *Sustainable Planning Act 2009*.
31 See sections 345, 347, 848 and 880 of the *Sustainable Planning Act 2009*.
32 See sections 626A and 755J of the *Sustainable Planning Act 2009*.
33 See sections 626 and 755J of the *Sustainable Planning Act 2009*.
34 See sections 649, 755Q and 863 of the *Sustainable Planning Act 2009*.
35 See sections 637, 648K, 755L and 863 of the *Sustainable Planning Act 2009*.

Application of infrastructure contributions powers

The effect of the new infrastructure contributions regime on the infrastructure contribution powers of local governments and SEQ distributor-retailers is summarised in Table 1.

As is evident in Table 1, the new infrastructure contributions regime provides for the infrastructure contributions powers of local governments and SEQ distributor-retailers to gradually increase as they move from reliance on planning scheme policies to the following:

- first, an adopted infrastructure charges resolution without identified trunk infrastructure;
- second, an adopted infrastructure charges resolution with identified trunk infrastructure; and
- finally, a priority infrastructure plan (including an infrastructure charges plan).

Response of local governments and SEQ distributor-retailers

Limited timeframe

Local governments and SEQ distributor-retailers were provided with less than 6 weeks to consider the implications of the new infrastructure contributions regime, determine their respective legal and policy positions and implement their decisions.

The Bill was introduced into Parliament on 10 May 2011 and the amended SPA commenced on 6 June 2011. The Adopted Charges SPRP which triggers the operation of the new infrastructure contributions regime was initially released confidentially on 31 May 2011 with further confidential redrafts released subsequently before the draft SPRP was publicly released and commenced on 1 July 2011.

Local governments and SEQ distributor-retailers and their officers are to be congratulated for the professionalism that they have demonstrated in responding to the limited timeframe which does not encourage the formulation and implementation of considered public policy.

Local government and SEQ distributor-retailer responses

Local governments and SEQ distributor-retailers have responded differently to the new infrastructure contributions regime depending on their individual circumstances. Their responses can be summarised generally as follows:

- First, all participating local governments and SEQ distributor-retailers, other than the Ipswich City Council and Queensland Urban Utilities, appear to have reached agreement as to their respective proportions of the adopted infrastructure charges.
- Second, generally speaking, most urban and regional local governments have decided to make adopted infrastructure charges resolutions whilst most rural local governments have as yet not made a resolution.
- Third, of those local governments that have made adopted infrastructure charges resolutions, only those local governments with draft priority infrastructure plans in an advanced state of preparation appear to have included trunk infrastructure planning matters in their resolutions. As a result most resolutions appear not to contain these matters.
- Finally, Gold Coast City Council, being the only local government with a priority infrastructure plan was rewarded for its significant work to date by only needing to make a resolution specifying adopted infrastructure charges.

Review of draft SPRP

The draft SPRP which triggered the commencement of the new infrastructure contributions regime on 1 July 2011 provides for the following:

- First, an adopted infrastructure charges schedule which states a maximum adopted charge for different development classes that are to apply uniformly to all local government areas.[36]
- Second, a priority infrastructure area for each local government.[37]
- Third, in the case of Ipswich City Council and Queensland Urban Utilities, their respective proportions of the adopted infrastructure charges.[38]

Practical implications of new infrastructure contributions regime

The new infrastructure charges regime has significant legal, policy and practical implications. Some of the most significant implications are considered below.

[36] See sections 648B(3) and (4) of the *Sustainable Planning Act 2009*.
[37] See section 648(4)(c) of the *Sustainable Planning Act 2009*.
[38] See section 648(4)(d) of the *Sustainable Planning Act 2009*.

Planning scheme policies

Planning scheme policies are of limited effect under the new infrastructure contributions regime other than to assist with the following:

- the calculation of an adopted infrastructure charge where an adopted infrastructure charges resolution has not been made;[39]
- the determination of the respective proportions of an adopted infrastructure charge that may be levied by local governments and SEQ distributor-retailers in the absence of an agreement between them.[40]

However, as noted above, planning scheme policies may continue to be of relevance under the previous infrastructure contributions regime in respect of development in a declared master planned area which is not the subject of an adopted infrastructure charge under an adopted infrastructure charges resolution.[41]

Transitional arrangements for development applications and appeals

The amended SPA provides that local governments and SEQ distributor-retailers must not exercise their powers under the previous infrastructure contributions regime from the day the draft SPRP takes effect.[42]

Whilst there are contending interpretations of the amended SPA, our view is that existing development applications and appeals as at 1 July 2011 are to be treated as follows:

- The previous infrastructure contributions regime applies to a development application or appeal in respect of which a local government has exercised its previous infrastructure contribution powers such as by giving a decision notice or infrastructure charges notice.
- The new infrastructure contributions regime applies to a development application or appeal in respect of which a local government has not exercised its previous infrastructure contribution powers such as where no decision has been made or there has been a refusal.

Development assessment

The new infrastructure contributions regime also requires local government assessment managers to assess to the extent considered relevant a development application against an adopted infrastructure charges resolution or priority infrastructure plan (including an infrastructure charges plan).[43]

In particular the development application can be assessed against the trunk infrastructure planning matters for the purpose of determining whether the development would conflict with relevant planning principles, such as the following:

- whether the development is premature in that it is not serviced or intended to be serviced by trunk infrastructure to the desired standards of service;
- whether the development compromises trunk infrastructure planning;
- whether the development proposes to provide trunk infrastructure that does not accord with the desired standards of service.

Specific condition powers

When determining a development application, local governments and SEQ distributor-retailers can only impose a condition for an infrastructure contribution for development infrastructure under the general conditioning powers in the amended SPA where specifically provided for under the new infrastructure contributions regime.

Therefore, a condition requiring an infrastructure contribution for development infrastructure must meet the following:

- First, it must be within a specific conditioning power applicable to development infrastructure as discussed above and summarised in Table 1;[44]
- Second, it must otherwise be relevant or reasonable.[45]

The specific conditioning powers for development infrastructure are consistent with the powers under the previous infrastructure contributions regime applicable to local governments with a priority infrastructure plan (or infrastructure charges plan).

However the specific conditioning powers are materially narrower than those powers under the previous infrastructure contributions regime applicable to local governments with a planning scheme policy.

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39 See section 648A(1)(b) of the *Sustainable Planning Act 2009*.
40 See sections 648G and 755A of the *Sustainable Planning Act 2009*.
41 See section 648A(1)(b) of the *Sustainable Planning Act 2009*.
42 See sections 880(1) and (2) of the *Sustainable Planning Act 2009*.
43 See sections 313(2)(f), 314(2)(k) and 826 of the *Sustainable Planning Act 2009*.
44 See sections 347(1)(b) and 880 of the *Sustainable Planning Act 2009*.
45 See sections 345 and 406 of the *Sustainable Planning Act 2009*. cf: Section 649(8) which states the circumstances in which a condition under that section is reasonable and relevant.

Under the previous infrastructure contributions regime, a condition requiring a land and work contribution only had to be reasonable or relevant. Under the new infrastructure contributions regime the powers are limited to the following:

- For trunk infrastructure—land and work contributions can only be required in the following circumstances:[46]
  - existing trunk infrastructure servicing the premises is inadequate;
  - future trunk infrastructure necessary to service the premises is not available; or
  - existing or future trunk infrastructure is located on the premises.
- For other infrastructure—land and work contributions can only be required for the following:[47]
  - infrastructure internal to the premises;
  - infrastructure connecting the premises to external infrastructure;
  - infrastructure protecting or maintaining the safety or efficiency of a trunk infrastructure network.

The conditioning powers in respect of land and work contributions for trunk infrastructure are further limited in that a condition requiring a land or work contribution for trunk infrastructure must meet certain requirements in order to satisfy the "relevant and reasonable" test.

- A condition requiring a land or work contribution where existing trunk infrastructure servicing the premises is inadequate or future trunk infrastructure necessary to service the premises is not available is "relevant and reasonable":[48]
  - to the extent that the infrastructure is necessary to service the premises; and
  - if the infrastructure is the most efficient and cost-effective solution for servicing the premises.
- A condition requiring a land or work contribution where existing or future trunk infrastructure is located on the premises is "relevant and reasonable" to the extent the infrastructure is not an unreasonable imposition on:[49]
  - the development; or
  - the use of premises as a consequence of the development.

The changes to the conditioning powers in respect of infrastructure contributions will require local governments and SEQ distributor-retailers to reassess the exercise of their conditioning powers for land and work contributions for development infrastructure.[50]

Offsets for land and work contributions

Where a condition power is exercised to require a land or work contribution for trunk infrastructure, the new infrastructure contributions regime provides for the offsetting of the value of the land or work contribution against an adopted infrastructure charge and in particular circumstances the payment of a refund.[51]

However, no guidance is given in relation to the following practical issues in respect of offsets:

- First, the calculation of the value of a land or work contribution for trunk infrastructure in terms of either the establishment cost of that trunk infrastructure stated in an adopted infrastructure charges resolution or the actual cost of the land or work contribution.
- Second, the timing for the accrual of the offset.
- Third, the indexation of the offset from the time of accrual to the date it is applied to offset an adopted infrastructure charge.
- Finally, the terms of any refund of an unused offset.

These matters are left to local governments and SEQ distributor-retailers to determine their own policy positions.

Indexation of an adopted infrastructure charge

The previous infrastructure contributions regime applicable to priority infrastructure plans[52] provided for the indexation of an infrastructure charge under an infrastructure charges schedule, in order to preserve the value of an infrastructure charge from the date that it is levied to the date that it is paid.

Indexation was also provided for in respect of financial contributions under a planning scheme policy.[53]

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46 See section 649(1) of the *Sustainable Planning Act 2009*.
47 See sections 626 and 626A of the *Sustainable Planning Act 2009*.
48 See section 649(8)(a) of the *Sustainable Planning Act 2009*.
49 See section 649(8)(b) of the *Sustainable Planning Act 2009*.
50 See section 848 of the *Sustainable Planning Act 2009*.
51 See sections 649 and 755Q of the *Sustainable Planning Act 2009*.
52 See section 631(3) of the *Sustainable Planning Act 2009* and Statutory Guideline 01/09 Priority Infrastructure Plans and Infrastructure Charges Schedules, page 23.

Unfortunately the new infrastructure contributions regime does not expressly deal with the indexation of an adopted infrastructure charge.

The *Sustainable Planning and Other Legislation Amendment Bill 2011*, introduced into Parliament on 11 October 2011, seeks to address the issue of indexation of an adopted infrastructure charge.

The Amendment Bill provides that a local government's adopted infrastructure charges resolution and a distributor-retailer's board decision may state how an increase to an adopted infrastructure charge is to be worked out, provided any increase is not more than the lesser of the following amounts:[54]

- the amount that is the difference between the amount of the adopted infrastructure charge levied for the development and the amount of the maximum adopted charge that could have been levied at the time the charge is paid;
- an amount representing the increase in the consumer price index for the period starting on the day the charge is levied and ending on the day the charge is paid.

Public policy considerations

Finally I would like to make some observations from a broader public policy perspective of some aspects of the new infrastructure charges regime.

Capped infrastructure charges

The draft SPRP states maximum adopted charges for different classes of development that are to apply uniformly throughout different local government areas.

The maximum adopted charges appear to have been derived from a consideration of infrastructure charges under existing and draft planning scheme policies and priority infrastructure plans within selected local government areas in Queensland.[55]

At best, it could be argued that the maximum adopted charges are a reflection of the generalised average cost across all local government areas for the supply of trunk infrastructure to service the relevant classes of development. As such the maximum adopted charges have no relationship to the marginal cost of supplying trunk infrastructure to service development in different parts of different local government areas.

The rejection of the marginal cost pricing methodology for financial contributions for trunk infrastructure is contrary to the overwhelming weight of public policy analysis over the last 20 years that is set out in the following landmark reports:

- 1993 Industry Commission Report on Taxation and Financial Policy Impacts on Urban Settlement.
- 2004 Productivity Commission Report on First Home Ownership.
- 2009 Australian Future Tax System: Report to the Treasurer (Henry Tax Review).
- 2011 Productivity Commission Report on Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments.

The application of maximum adopted charges rather than a marginal cost methodology for financial contributions for trunk infrastructure has significant public policy implications:

- First, the price signal which would encourage economic efficiency and effectiveness has been emasculated such that the cost of funding infrastructure to service development in an outer suburban greenfield area is the same as an infill area.
- Second, it results in significant cross subsidies from local government ratepayers and SEQ distributor-retailer customers to landowners and developers.
- Third, it encourages the development of fringe or remote greenfield areas at the expense of infill areas.
- Finally, but not least, the funding of cross subsidies will result in increased rates and user charges to landowners and customers thereby worsening the cost of living pressures especially on those least capable of affording it. As such, this reform will have a regressive impact on taxpayers.

Housing affordability

The short title of the amended SPA as the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011*, would indicate that infrastructure charges are adversely affecting housing affordability in Queensland and that the amended SPA will improve housing affordability.

The Final Report of the Infrastructure Charges Taskforce supports this when it states that where infrastructure charges are "*set too low, local government will under recover money to pay for infrastructure. Set too high, projects will not proceed and housing affordability will be further eroded*".[56]

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53 See sections 848(4), (5) and (6) of the *Sustainable Planning Act 2009*.
54 See clauses 88 and 96 of the *Sustainable Planning and Other Legislation Amendment Bill 2011*.
55 See Final Report Infrastructure Charges Taskforce (2011), Queensland Government, pages 62-65.

Whilst this statement is literally correct, the Final Report does not acknowledge the findings and recommendations of the Productivity Commission and the Henry Tax Review which:

- First, endorse the appropriateness of infrastructure charges that relate to the cost of the provision of infrastructure to service development; and
- Second, indicate that infrastructure charges that are not related to the cost of provision of infrastructure to service development such as capped infrastructure charges are inappropriate from a public interest perspective.

In relation to the impact of infrastructure charges on housing affordability, these landmark reports relevantly provide as follows:

- 1993 Industry Commission Report on Taxation and Financial Policy Impacts on Urban Settlement –

  An apparent dilemma facing governments is the need to promote efficiency (and relieve fiscal stress) through user pays policies for publicly provided infrastructure, while keeping accommodation 'affordable' and 'accessible' to those on lower incomes. There is apprehension that the reforms of charges and taxation may lead to unacceptable escalation in housing prices… For the reforms advocated in this report, there do not appear to be grounds for these concerns.[57]

- 2004 Productivity Commission Report on First Home Ownership –

  In summary, greater use of upfront development charging is unlikely to have any substantial effect on housing affordability, irrespective of whether infrastructure was previously subsidised…[58]

  The claimed cost savings and improvements in affordability from reducing reliance on developer charges for infrastructure appear overstated.[59]

- 2009 Australian Future Tax System (Henry Tax Review) –

  Findings:

  > *Infrastructure charges can be an effective way of encouraging the efficient provision of infrastructure to areas where it is of greatest value and of improving housing supply. Charging for infrastructure may be a more effective means of allocating resources than regulating land release.*
  >
  > *Where land supply is constrained, well-designed infrastructure charges are more likely to be factored in to the price that developers pay for raw land, than to increase the price of housing in the development where the charge is levied. However, where infrastructure charges are poorly administered – particularly where they are complex, non-transparent or set too high – they can discourage investment in housing, which can lower the overall supply of housing and raise its price.*

  Recommendation 70:

  > *COAG should review infrastructure charges (sometimes called developer charges) to ensure they appropriately price infrastructure provided in housing developments. In particular, the review should establish practical means to ensure that these charges are set appropriately to reflect the avoidable costs of development, necessary steps to improve the transparency of charging and any consequential reductions in regulations.*[60]

In short, there is a case for the review of the previous infrastructure contributions regime to improve its transparency and thereby provide certainty for stakeholders.

However, there is no persuasive evidence that supports the conclusion that existing or proposed infrastructure charges calculated and imposed in accordance with the methodology applicable to priority infrastructure plans (or infrastructure charges plans) do not relate to the cost of provision of necessary trunk infrastructure and as such would operate as a tax.

Indeed the balance of evidence, in particular the reviews carried out by the Queensland Competition Authority on local government priority infrastructure plans prepared under the previous infrastructure contributions regime, would indicate that the draft priority infrastructure plans appropriately priced trunk infrastructure, and if anything, underpriced that infrastructure.

Furthermore, the implication that the new infrastructure charges regime involving as it does capped infrastructure charges will improve housing affordability is not supported by reports of the Productivity Commission and the Henry Tax Review.

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56 See Final Report Infrastructure Charges Taskforce (2011), Queensland Government, pages 62-65.

57 Industry Commission (1993) Taxation and Financial Policy Impacts on Urban Settlement, Australian Government, pages 8-9.

58 Productivity Commission (2004) First Home Ownership, Australian Government, page 165.

59 Productivity Commission (2004) First Home Ownership, Australian Government, page 167.

60 Australian Government (2009) Australia's Future Tax System, page 93.

Rather, it is apparent that capped infrastructure charges will adversely affect housing affordability in those areas (generally inner city suburban areas) with previously lower infrastructure charges which will be increased in order to offset the capping of higher infrastructure charges applicable to other areas (generally outer fringe or remote greenfield areas).

Therefore perversely it is likely that increased infrastructure charges in some areas will operate as a tax and adversely impact on housing affordability in those areas.

Table 1 Infrastructure contributions powers of local governments and SEQ distributor-retailers

Infrastructure contribution powers	No adopted infrastructure charges resolution			Adopted infrastructure charges resolution		
	Planning scheme policy	Infra-structure charges plan (Noosa)	Priority infra-structure plan (Gold Coast)	Trunk infra-structure not included in resolution	Trunk infra-structure included in resolution	Trunk infra-structure included in PIP (or ICP)
Financial contributions						
Conditioned financial contribution under planning scheme policy (s345, 347, 848 and 880) Note 1	–	–	–	–	–	–
Infrastructure charge for trunk infrastructure under infrastructure charges schedule or regulated infrastructure charges schedule (s629, 863 and 880)Note 1	–	–	–	–	–	–
Infrastructure charge for trunk infrastructure for water service and wastewater service under SEQ infrastructure charges schedule (s755K)Note 1	–	–	–	–	–	–
Infrastructure charge under adopted infrastructure charges schedule (s629, 648A and 755KB)	✓	✓	✓	✓	✓	✓
Conditioned contribution for cost of development outside priority infrastructure area (s650 and 755R)	–	–	✓	✓	✓	✓
Conditioned financial contribution for cost of development inconsistent with planning assumptions of priority infrastructure plan (or infrastructure charges plan) (s650, 755R and 863)	–	✓	✓	–	–	✓
Land and work contributions						
Conditioned land and work contribution under planning scheme policy (s345, 347, 848 and 880)Note1	–	–	–	–	–	–
Conditioned development infrastructure (s626A and 755J)	✓	–	–	✓	–	–
Conditioned non-trunk infrastructure (s626 and 755J)	–	✓	✓	–	✓	✓

Infrastructure contribution powers	No adopted infrastructure charges resolution			Adopted infrastructure charges resolution		
	Planning scheme policy	Infra-structure charges plan (Noosa)	Priority infra-structure plan (Gold Coast)	Trunk infra-structure not included in resolution	Trunk infra-structure included in resolution	Trunk infra-structure included in PIP (or ICP)
Conditioned necessary trunk infrastructure (s649 and 755Q)	–	✓	✓	–	✓	✓
Dedication notice for land contribution (s637, 648K and 755L)	–	✓	✓	–	✓	✓

Note 1: This power applies to development in a declared master planned area to which the local government has not made an adopted infrastructure charges resolution which states that an adopted infrastructure charge is to be levied for the development (s648E of *Sustainable Planning Act 2009*).

New Work Health and Safety (WHS) Laws - Significant changes to principal contractor arrangements in Queensland

Paul Muscat | Andrew Cardell-Ree

This article outlines the significant changes made to the *Queensland Work Health and Safety Act 2011* and the *Work Health and Safety Regulation 2011* and their ramifications for the construction industry

February 2012

Executive Summary

From 1 January 2012, the *Work Health and Safety Act 2011* (Qld) (**WHS Act**) and the *Work Health and Safety Regulation 2011* (Qld) (**WHS Regulation**) made significant changes to how work health and safety (**WHS**) is managed in practice in Queensland. For construction, the most dramatic changes will reflect:

- the end of a principal contractor (**PC**) acting as a safety shield for the client that appoints them;
- the introduction of an express duty on all construction industry participants to consult, cooperate and coordinate construction activities; and
- changes to worker consultation.

Other key changes include an express requirement to ensure there is a safe work method statement (**SWMS**) for high risk construction work (**HRCW**), the removal of the reverse onus, changes in officer liability and tougher penalty regime.

Key changes for construction in Queensland

Changes to PC arrangements – Bringing the client back into the fold

In a significant shift in Queensland, appointing a PC from 1 January 2012 will *not* shield a client from WHS responsibility. Instead, as we discuss below, the PCBU that commissions a PC ("client" is not a term used in the WHS Act) will have an express duty to consult, cooperate and coordinate construction work activities with the PC and others.

Until the law changed on 1 January 2012, a client could commission a PC to manage construction work with a value of more than $80,000, and by lodging the necessary form, give the PC primary responsibility for WHS. In stark contrast, from 1 January 2012:

- a PC can be appointed for construction work with a value of $250,000 or more; and
- the appointment of a PC does not, of itself, automatically relieve the client of any WHS responsibility.

Under transitional provisions, PC appointments made before 1 January 2012 will continue to have effect and alleviate some of a client's WHS obligations if the value of the construction work is at least $250,000 but not otherwise. Clients appointing a PC for construction work with a value of between $80,000 and $250,000 will not be shielded from WHS responsibility. Prudent PCBUs – and clients – will revisit their existing arrangements now.

Changes for clients – Duty to consult, cooperate and coordinate

Construction typically involves different PCBUs (eg a client, designer/s, contractor/s, subcontractor/s, specialist sub-contractors, labour hire, etc). Under the new laws, each PCBU with a duty in relation to the same work must, so far as is reasonably practicable, consult, cooperate and coordinate activities with all other persons.[61] For example:

- a PCBU must, so far as is reasonably practicable, consult with a designer about eliminating WHS risks associated with the design;[62] and
- the designer of a structure must give the commissioning PCBU a written report identifying hazards relevant to the design.[63]

61 Section 46 of the WHS Act.
62 Regulation 294 of the WHS Regulations.
63 Regulation 295 of the WHS Regulations.

To fulfil this critical WHS duty, at the very least a PCBU that appoints a PC must, so far as is reasonably practicable, consult, cooperate and coordinate regularly with the PC and the designer/s it appoints, about all of these matters and to check that they, in turn, are consulting, cooperating and coordinating all of their construction-related (and all other) activities with all others involved. In this context also, prudent PCBUs – and clients – will revisit their existing arrangements now.

The nature and extent of consultation with workers

A PCBU must consult with workers who are directly affected (or likely to be) by a matter regarding WHS.[64] Workers includes contractors, sub-contractors, labour hire, and the individuals they engage,[65] and consultation includes giving affected "workers" a genuine opportunity to express views and be involved in the decision-making process.

Other changes for WHS in construction

Express duty to ensure there is a SWMS for high risk construction work

From 1 January 2012 a PCBU in construction has an express duty to manage WHS risks associated with the carrying out of construction work, in the first instance by eliminating those risks.[66]

From 1 January 2012 a PCBU that includes the carrying out of HRCW (which is defined broadly) also has express duties to:

- ensure that a SWMS is prepared prior to HRCW commencing, check that the HRCW is carried out according to the SWMS and stop the job if it is not;[67]
- ensure that the workplace is secured from unauthorised access, if the person has management or control of a workplace;[68] and
- ensure that a designer of a structure provides a design report identifying WHS hazards and risks associated with the design, and to demand a design report if one is not volunteered.

Removing the reverse onus

Up to 1 January 2012, on being charged with a WHS breach, a PCBU was guilty until the PCBU proves its innocence. In a welcome change, from 1 January 2012 the onus shifted to the prosecutor. The change will have its primary impact at trial, and will not reduce the need to adopt a proactive, preventative risk management focus, to eliminate the risk of harm. Without clear evidence of how the duty holder is meeting that duty, day by day in practice, the prosecutor may have little difficulty meeting its onus.

Officer liability

The WHS Act imposes a positive duty on all officers of a PCBU to exercise due diligence at all times to ensure that the PCBU complies with the requirements of the WHS Act.[69] To discharge this duty, appropriate processes and systems will need to be in place to ensure that the PCBU – and each officer – complies with the new laws. Examples include:

- ensuring the PCBU has access to information regarding risks, incidents and hazards; and
- ensuring adequate resources are available to the PCBU to assist in fulfilling their duties.

Prudent PCBUs and officers will revisit their obligations and how well their existing systems and processes are operating.

Increased penalty range

The WHS increases the current maximum penalty from $1 million to:

- $1.5 million for a failure to comply with a WHS duty if the failure exposes an individual to a risk of death or serious injury or illness (a Category 2 offence); and
- $3 million for a failure to comply with a WHS duty if the failure exposes an individual to a risk of death or serious injury or illness *and* the person is reckless as to that risk (a Category 1 offence).

The structure of the maximum penalties reinforces the need to take proactive, preventative steps, so far as reasonably practicable, to ensure the WHS of every person affected by the conduct of the business or undertaking, by saving the higher penalty range to instances where preventative action is missing.

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64 Section 47 of the WHS Act.
65 Section 7 of the WHS Act.
66 Regulation 35 of the WHS Regulations.
67 Regulations 299 and 300 of the Regulations.
68 Regulation 298 of the WHS Regulations.
69 Section 27 of the WHS Act.

What do you need to do now?

Now is the time to consider:

- reviewing and amending your agreements to ensure that they reflect the new duties, including to engage in active consultation, cooperation and coordination with all other dutyholders and consult actively with all "workers", and to provide and obtain design reports identifying hazards;
- reviewing and updating your WHS procedures to reflect these practices and ensure compliance with the legislation;
- identifying practical steps that you will need to adopt to help PCBUs and officers meet your duties; and
- providing information sessions to your officers, employees and "workers" regarding the new duties and what is expected.

Please call us if we can assist with educating your officers or reviewing your processes and how they operate in practice.

Carbon offset conditions imposed on coal mining operation

Anthony Perkins | Lucinda Morphett

This article discusses the decision of the NSW Land and Environment Court in the matter of *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 heard before Pain J

February 2012

In brief – Ulan Coal Mines required to offset carbon emissions

The recent Land and Environment Court decision in *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 has effectively upheld the validity of a condition requiring a NSW coal mine to offset carbon emissions.

Ulan Coal obtains approval to consolidate and expand extraction

Ulan Coal Mines Limited, based in the Mudgee district of NSW, sought and obtained approval from the Minister of Planning under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) to consolidate a number of pre-existing approvals and to further expand its maximum rate of extraction from 10 million tonnes per annum (Mtpa) to 20 Mtpa.

The Minister imposed a range of standard operating conditions on Ulan Coal, requiring the mining operator to manage and mitigate the environmental impacts of the mining operation, including a requirement that Ulan Coal "*implement all reasonable and feasible measures to minimise the release of greenhouse gas emissions from the site to the satisfaction of the Director General*".

Environment lobby seeks to impose range of conditions on Ulan Coal

The Hunter Environment Lobby Inc (**HEL**), dissatisfied with the Minister's decision, commenced proceedings as an "objector" in the Land & Environment Court, challenging various aspects of the Minister's approval.

HEL's original application sought to have the Minister's approval declared void, but this position was later modified. What HEL ultimately pressed was the imposition of a range of conditions addressing the mining project's impact on climate change, groundwater and biodiversity.

Offset of carbon emissions to address climate change concerns

One of the more contentious issues pressed by HEL was a condition requiring Ulan Coal to offset **scope 1 carbon emissions** (direct emissions as a result of the mining activity) and **scope 2 carbon emissions** (indirect emissions, such as the use of diesel and electricity at the facility) produced by the mining operation. This condition was to be achieved by requiring Ulan Coal, upon exceeding certain carbon emission limits, to purchase carbon credits to offset the emissions.

The thrust of HEL's argument was that the mining project would exacerbate global climate change and would increase Australia's contribution to greenhouse gas (GHG) concentrations in the atmosphere, contrary to the principles of inter-generational equity and the conservation of biological diversity and ecological integrity. It argued that the current conditions imposed by the Minister, though well intended, did not go far enough in addressing GHG.

Ulan Coal and the Minister opposed the conditions being pressed by HEL. They did so on the grounds that the carbon offset condition had not been imposed on any other mining operation in NSW and was therefore discriminatory. They also argued that a national carbon pricing scheme was a preferable means, from a policy and economic perspective, to drive reductions in GHG emissions.

Court examines powers to impose carbon offset condition

In considering the issues, the court embarked upon a wide ranging analysis of the Minister's powers in dealing with, amongst other things, GHG emissions in the context of development applications.

The court ultimately found that the scheme of the EPA Act is to ensure a proper consideration of all factors relevant to environmental planning and assessment, including the proper management, development and conservation of natural and artificial resources, for the purposes of promoting the social and economic welfare of the community and a better environment. The court held that this included the impact of GHG emissions.

The court found that it was within the Minister's power, and that of the court, to impose a carbon offset condition on Ulan Coal, in a modified form to that pressed by HEL. In relation to Ulan Coal's mining operation, the court held that it was appropriate to impose an offset condition on scope 1 carbon emissions, being emissions within the direct control of the mine, but not on scope 2 emissions, on the basis that scope 2 emissions are not emissions which Ulan Coal could control entirely.

The court found that a condition requiring the offsetting of scope 2 emissions would be open to the criticism that, to the extent that those emissions are under the control of others, the requirement did not fairly relate to the project.

Court finds that imposing carbon offset condition not discriminatory

In terms of the novelty of the condition, and the fact that such a condition had not previously been imposed in NSW, the court found that the condition was not discriminatory, but merely the first occasion on which the condition had been pressed.

At the time the judgment was handed down, the court acknowledged that no carbon pricing scheme was operating in Australia, but accepted that, once a carbon price is in place (from 1 July 2012), the prospect of similar conditions being imposed may be not as likely.

Before finalising the precise terms of the orders, the court invited the parties to submit appropriate wording for the offset condition, having regard to the terms of the order. The matter is back before the court in February 2012.

Decision sets significant precedent for carbon intensive industries

The extent to which the decision will apply to projects which directly produce significant GHG in NSW (and which do not fall within the "top 500 carbon emitters" to be caught by the Federal scheme) still remains uncertain.

In any event, the decision sets a very significant precedent which will be closely monitored by many carbon intensive industries in NSW over the coming months.

COLIN BIGGERS & PAISLEY LAWYERS

Infrastructure planning and charging in Queensland: evolution or revolution?

Bruce James | Ian Wright

This article discusses the Queensland Government's reforms to the infrastructure planning and charging frameworks

March 2012

Introduction

How we forget

"A nation that forgets its past is doomed to repeat it."

Winston Churchill's words are very pertinent to the current state of infrastructure planning in Queensland particularly in light of the Queensland Government's recent reforms to the infrastructure planning and charging frameworks.

Background to reform

The Queensland Government's reforms to the infrastructure planning and charging frameworks were made in response to the recommendations of the Infrastructure Charges Taskforce[70] which itself was a response to the Queensland Growth Management Summit.[71]

The reforms were implemented through three legislative instruments:

- First, amendments to the Sustainable Planning Act 2009 were made by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011* on 6 June 2011.
- Second, a draft State Planning Regulatory Provision (Adopted Charges) was made on 1 July 2011.
- Third, a draft Statutory Guideline for Priority Infrastructure Plans,[72] was issued in July 2011.

Significance of reforms

The reform of the infrastructure planning framework implemented by these instruments is considered to be evolutionary whilst the reform of the infrastructure charging framework is truly revolutionary perhaps dangerously so. The paper analyses reforms to the infrastructure planning and charging frameworks in the context of the infrastructure reform agenda of the Australian Government and Queensland Government more generally and concludes as follows:

- First, that the evolutionary reforms of the infrastructure planning framework will not avoid the mistakes of the past.
- Second, that the revolutionary reforms of the infrastructure charging framework are repeating the mistakes of the past.

Themes of paper

This paper therefore has 4 themes.

- First, the paper summarises the infrastructure planning reform agenda of the Australian Government and the Queensland Government, to provide the policy context for the recent reforms of the infrastructure planning and charging frameworks in Queensland.
- Second, the paper assesses the leading practice characteristics and shortcomings of Queensland's infrastructure planning framework.
- Third, the paper considers the public policy implications of the inconsistent planning horizons which currently exist under Queensland's infrastructure planning framework.

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70 Infrastructure Charges Taskforce (2011) Final Report: Recommended Reform of Local Government Development Infrastructure Charging Arrangements, March 2011.

71 Queensland Government (2010) Shaping Tomorrow's Queensland: A Response to the Queensland Growth Summit Planning Initiative 10, page 3.

72 Queensland Government (2011) Draft Statutory Guideline: Priority Infrastructure Plans, July 2011.

- Fourth, the paper considers the public policy benefits of adopting a broader cross sectoral focus to the preparation of planning schemes based on spatial planning rather than the current sectoral focus of land use planning and development management.

Finally, the paper identifies the adverse public policy implications of the infrastructure charges reforms.

Infrastructure reform agenda

Australian Government reform agenda

The Australian Government has initiated a reform agenda in relation to the planning, assessment, funding and regulation of infrastructure projects of national significance. This is reflected in the following policy documents recently released by the Australian Government:

- Sustainable Population Strategy for Australia (Sustainable Australia – Sustainable Communities)[73] – This document identifies planning and infrastructure investment as crucial to the objective of ensuring that Australia's population is compatible with economic prosperity, liveable communities and environmental sustainability.
- National Urban Policy (Our Cities; Our Future)[74] – This document identifies the objective of integrated land use and infrastructure as crucial to the policy goal of planning for and delivering an urban Australia that is more productive, sustainable and liveable.
- Regional policy agenda (Regional Development Australia)[75] – This agenda identifies that infrastructure investment and access to services is crucial to the sustainability of Australia's regions.
- National transport infrastructure policies (National Ports Strategy,[76] National Land Freight Network Strategy,[77] National Aviation Policy[78] and High Speed Rail Study)[79] – These documents identify improved planning and project assessment frameworks as crucial to future investment in Australia's transport infrastructure.
- National Broadband Network Overview[80] – This document identifies that high speed broadband is essential for Australia's economy, future growth and international competitiveness.
- Australia's Future Tax System – Report to the Treasurer (Henry Tax Review)[81] – This document recommends that the Council of Australian Governments (**COAG**) review State and local government institutional arrangements to ensure that zoning and planning do not unreasonably inhibit housing supply and housing affordability and also review infrastructure charges to ensure that they appropriately reflect the avoidable costs of infrastructure provided in housing developments.
- COAG Reform Council's Review of Capital City Strategic Planning Systems[82] – This document identifies the integration and coordination of infrastructure planning with land use planning as an assessment criteria for the COAG review of capital city strategic planning systems which is to report in December 2011.
- Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments[83] – This document recognises the following leading practice characteristics of the Queensland infrastructure planning framework:
  - First, there are detailed infrastructure plans with a level of committed funding from the State budget and committed delivery timeframes.
  - Second, detailed land use planning is supplemented by infrastructure specific planning.
  - Third, priority infrastructure plans which provide a transparent basis for local government decisions about infrastructure funding including the derivation and application of infrastructure charges.

Queensland Government reform agenda

The Queensland Government has also recognised that infrastructure planning and delivery is crucial to the continued development of Queensland and its regions. This is reflected in the following policy documents recently released by the Queensland Government:

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73 Australian Government (2011) Sustainable Australia – Sustainable Communities: A Sustainable Population Strategy for Australia, pages 26, 27.
74 Australian Government (2011) Our Cities; Our Future: A National Urban Policy for a Productive, Sustainable and Liveable Future, pages 6, 7, 19, 29-33.
75 Australian Government (2011) Regional Development Australian National Charter.
76 Australian Government (2010) National Ports Strategy: Infrastructure for an Economically, Socially and Environmentally Sustainable Future, November 2010.
77 Australian Government (2011) National Land Freight Network Strategy: Discussion Paper, February 2011.
78 Australian Government (2011) National Aviation Policy White Paper: Flight Path to the Future.
79 Australian Government (2011) High Speed Rail Study: Phase 1, July 2011.
80 Australian Government (2010) National Broadband Network: Overview, May 2010.
81 Australian Government (2009) Australia's Future Tax System: Report to the Treasurer, December 2009, pages 93, 422 and 428.
82 COAG Reform Council (2011) Capital City Strategic Planning Systems.
83 Australian Government (2011) Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments, pages 185, 223.

- Queensland Regionalisation Strategy[84] – This document is the overarching strategic framework for regional policy and planning in Queensland which identifies that infrastructure and services is crucial to the achievement of the vision for Queensland's regions.
- Regional Plans[85] – These State planning instruments provide an integrated planning policy to manage growth and change for Queensland's regions.
- Queensland Infrastructure Plan[86] – This document identifies State government infrastructure planned for delivery over 4 years to 2014/2015 including infrastructure investment which is jointly funded by the Australian and Queensland Governments under the Natural Disaster Relief and Recovery Arrangements arising from Queensland's devastating floods and which is administered by the Queensland Reconstruction Authority.[87]
- Regional Infrastructure Plans (South East Queensland Infrastructure Plan and Program) (**SEQIPP**)[88] and Far North Queensland Infrastructure Plan (**FNQIP**)[89] – These documents which are to be replaced by the Queensland Infrastructure Plan, identify State government infrastructure planned for delivery over 20 years to 2031 for the South East Queensland and Far North Queensland regions.
- Queensland Planning Provisions[90] – This State planning instrument is intended to provide a consistent framework for planning schemes in Queensland which state regional and local policy affecting land use and development.
- Priority infrastructure plans[91] – These documents are included in local government planning schemes under the *Sustainable Planning Act 2009* and identify the local government trunk infrastructure to service urban growth in the planning scheme area over a 10–15 year period.
- Infrastructure charges reform[92] – These reforms capped local government infrastructure charges under the claimed objective for development to increase business and investor confidence, stimulate the building industry and improve housing affordability.
- Local government (Finance, Plans and Reporting) Regulation 2010[93] – This legislation requires a local government to prepare a long term financial forecast, long term community plan and long term asset management plan for its local government area with a planning horizon of 10 years.

Key implications of the public reform agenda

The key implications of the public reform agenda of the Australian and Queensland Governments is as follows:

- First, change is considerable and constant.
- Second, there is an increasing focus on decentralised or localised solutions based on local governments or regions (such as the Commonwealth's regional development areas or Queensland's regional plan areas). This is being reflected in the following:
  - a common understanding of local and regional distinctiveness;
  - increasing community and stakeholder management;
  - devolved responsibilities;
  - managing more locally to achieve sustainable outcomes.
- Third, the public sector agencies are being joined up from the perspective of the user to reduce the public's frustration with having to deal with a variety of public sector entities and to reduce back office costs. This is being reflected in the following:
  - common and standard evidence bases;
  - common outcomes;
  - common delivery programs and delivery channels and outlets;

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84 Queensland Government (2011) Queensland Regionalisation Strategy: Strengthening Queensland's Regions: For Public Consultation, July 2011, pages 6, 22 and 23.

85 See Central West Regional Plan (September 2009), Far North Queensland Regional Plan 2009-2031, South East Queensland Regional Plan 2009-2031, South West Regional Plan (August 2009), North West Regional Plan (August 2010) and Maranoa-Balonne Regional Plan (September 2009).

86 Queensland Government (2011) Queensland Infrastructure Plan: Building Tomorrow's Queensland: For Public Consultation, July 2011.

87 Queensland Government (2011) Operation Queenslander – The State Community, Economic and Environmental Recovery and Reconstruction Implementation Plan 2011-2013.

88 Queensland Government (2010) South East Queensland Infrastructure Plan and Program 2010-2031, July 2010.

89 Queensland Government (2010) Far North Queensland Infrastructure Plan 2009-2031, February 2009.

90 Queensland Government (2011) Queensland Planning Provisions Version 2.0, 4 October 2010, page 4.

91 Queensland Government (2011) Draft Statutory Guideline: Priority Infrastructure Plans, July 2011.

92 Queensland Government (2011) Queensland Government Response to the Report by the Infrastructure Charges Taskforce: Improving Queensland's Local Government Infrastructure Charges System, April 2011, page 3.

93 See sections 104(4), 124 and 135(2) of the Local Government (Finance, Plans and Reporting) Regulation 2010.

- aligned budgets moving to pooled budgets.

Land use planning and development management, infrastructure planning and delivery and local government financial planning have critical roles to play in the implementation of these public sector reforms.

Table 1 summarises Queensland's infrastructure planning framework in terms of land use planning and development management, infrastructure planning and delivery and local government financial planning.

Table 1 Queensland infrastructure planning framework

Planning document	Planning agency	Object	Spatial boundary	Temporal boundary
Land use planning and development management				
Queensland Regionalisation Strategy	State government	Overarching strategic framework for regional policy and planning outlining a vision, strategic directions and proposed actions for Queensland's regions.[94]	State	20 years
Regional plan	State government	A planning instrument that provides an integrated planning policy to manage growth and change for a Queensland region.[95]	Region	20 years
Strategic framework	Local government	The part of a planning scheme that sets the policy position and future development intent for a planning scheme area.[96]	Local government area	20 years
Infrastructure planning and delivery				
Queensland Infrastructure Plan	State government	Long term infrastructure planning document for the State that links infrastructure delivery with population growth and economic development priorities.[97]	State	20 years
Regional infrastructure plan	State government	Long term infrastructure planning document which outlines State government infrastructure priorities to support a regional plan.[98]	Region	20 years
Priority infrastructure plan	Local government	That part of a planning scheme that identifies local government trunk infrastructure to service urban growth for 10–15 years.[99]	Local government area	10 – 15 years
Financial planning of local governments				
Long term financial forecast	Local government	Forecast of income, expenditure and value of assets, liabilities and equities.[100]	Local government area	10 years
Long term community plan	Local government	Plan which provides a strategic direction for the local government's planning processes.[101]	Local government area	10 years

94 Queensland Government (2011) Queensland Infrastructure Plan – Building Tomorrow's Queensland, page 7.
95 See section 23 of *Sustainable Planning Act 2009*.
96 Queensland Government (2010) Queensland Planning Provisions - Version 2.0: Module B Drafting Instructions, page 10.
97 Queensland Government (2010) Shaping Tomorrow's Queensland: A Response to the Queensland Growth Management Summit, page 3; Queensland Government (2011) Queensland Infrastructure Plan – Building Tomorrow's Queensland, page 7.
98 Queensland Government (2010) South East Queensland Infrastructure Plan and Program 2010–2031, page 3.
99 Queensland Government (2011) Draft Statutory Guideline: Priority Infrastructure Plans, July 2011, page 6.
100 See section 104(2) of the Local Government (Finance, Plans and Reporting) Regulation 2010.
101 See section 124 of the Local Government (Finance, Plans and Reporting) Regulation 2010.

Planning document	Planning agency	Object	Spatial boundary	Temporal boundary
Long term asset management plan	Local government	Document which states the strategies and capital expenditure for the management of assets.[102]	Local government area	10 years

Assessment of Queensland's infrastructure planning framework

Leading practice characteristics

The Queensland Government states that Queensland leads the nation in linking land use planning and infrastructure delivery.[103] This claim is supported by the Productivity Commission which has stated that Queensland has a number of leading practice characteristics in particular the following:[104]

- First, regional infrastructure plans such as SEQIP and FNQIP (and more recently the Queensland Infrastructure Plan) provide detailed infrastructure plans which have a level of committed funding from the State budget and committed delivery timeframes.
- Second, planning schemes through their strategic frameworks and structure plans for master planned areas, provide detailed land use planning which is supplemented by infrastructure specific planning through priority infrastructure plans.
- Third, priority infrastructure plans which provide a transparent basis for local government decisions about infrastructure funding including the derivation and application of infrastructure charges.

Leading practice undermined

However it is important to note that the Productivity Commission's findings predate the Queensland Government's recent reforms to the infrastructure planning and charging frameworks which appear to significantly undermine some of these leading practice characteristics:

- First, the local government trunk infrastructure plans in a priority infrastructure plan are not aligned with the land use planning reflected in a strategic framework of a planning scheme. Under the Queensland Planning Provisions, the strategic framework is to state strategic outcomes which are consistent with the timeframe of a regional plan (generally 20 years) and where there is no regional plan, a minimum of 25 years.[105] This is not aligned with the planning horizon for local government trunk infrastructure plans in a priority infrastructure plan which are only required to show trunk infrastructure to service urban growth over a 10–15 year period.[106] This is also inconsistent with the 10 year horizon for a long term financial forecast, long term community plan and long term asset management plan which is required to be prepared by a local government.[107]
- Second, a priority infrastructure plan no longer provides a transparent basis for local government decisions about infrastructure funding – including the derivation and application of infrastructure charges.[108] As a result of the infrastructure charges reforms, a priority infrastructure plan is no longer to contain an infrastructure charges schedule which states infrastructure charges that are derived from a cost apportionment methodology for the provision of the trunk infrastructure identified in the priority infrastructure plan. Rather the infrastructure charges are stated in an adopted infrastructure charges resolution which has no relationship to the cost of provision of the trunk infrastructure identified in the priority infrastructure plan.
- Finally, under the Queensland Planning Provisions, a planning scheme and in particular its strategic framework is focused on the setting and implementation of policies affecting land use planning and development management.[109] This sectoral focus on land use planning and development management excludes the opportunities provided by a broader cross sectoral focus based on spatial planning which would allow a greater linkage between urban development and the cost and sequencing of infrastructure.

Suggested reforms to Queensland's infrastructure planning framework

Given these shortcomings, the following improvements to Queensland's infrastructure planning framework are suggested:

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102 See section 136 of the Local Government (Finance, Plans and Reporting) Regulation 2010.
103 Queensland Government (2011) Queensland Infrastructure Plan: Building Tomorrow's Queensland, page 14.
104 Australian Government (2011) Performance Benchmarking of Australian Business Regulation: Planning Zoning and Development Assessments, April 2011, pages 185, 190-193.
105 Queensland Government (2010) Queensland Planning Provisions Version 2: Module B: Drafting Instructions, 4 October 2010, page 13.
106 Queensland Government (2011) Statutory Guideline: Priority Infrastructure Plan, November 2011, page 10.
107 See sections 104(4), 124 and 135(2) of the Local Government (Finance, Plans and Reporting) Regulation 2010.
108 Australian Government (2011) Performance Benchmarking of Australian Business Regulation: Planning Zoning and Development Assessment, April 2011, page 191.
109 Queensland Government (2010) Queensland Planning Provisions – Version 2.0, 4 October 2010, page 4.

- First, the claimed linkage between State government regional plans and regional infrastructure plans should be made more explicit and transparent to show the linkage between the timing of State infrastructure and the sequencing of urban development.
- Second, the different planning horizons of, 20 – 25 years for a strategic framework, 10–15 years for a priority infrastructure plan and 10 years for a local government financing plan should be made consistent.
- Third, the current sectoral focus of a planning scheme and its strategic framework on land use planning and development management should be changed to a broader cross sectoral focus based on spatial planning.
- Finally, the infrastructure charges reforms should be revisited given they are inconsistent with the leading practice characteristics for infrastructure planning and charging identified by the Productivity Commission, and will also give rise to significant adverse public policy outcomes as identified in previous Productivity Commission reports[110] and the Henry Tax Review.[111]

The remainder of this paper focuses on 3 of these suggested reforms, namely:

- achieving consistent planning horizons;
- broadening the focus of planning schemes; and
- reviewing the infrastructure charges reforms.

Consistent planning horizons

Problems in the making

The inconsistency between the 20–25 year planning horizon of a strategic framework and the 10–15 year planning horizon of a priority infrastructure plan will exacerbate the current disconnection between land use planning and development management and infrastructure planning and delivery.

Since the strategic framework will be focused on the year 2031, the planning scheme will have to provide for amended designations (up planning) and zones (up zoning), in order to facilitate development up to 2031.

Unlike the present, development extending beyond the normal 10 year review period of a planning scheme would no longer require discretionary actions such as planning scheme amendments by a local government and approval by the State government to provide for development beyond the 10 year planning horizon.[112]

Public policy implications

Whilst the rationale for these more permissive planning scheme designations (up planning) and zones (up zoning) is the need to accommodate new housing for the anticipated population growth up to the 2031 planning horizon of the regional plans, it is important to understand the consequences of this approach.

The significant beneficiaries of this approach will be private interests in particular existing land owners, real estate investors and speculators whose net worth will be inflated by the increased designations (up planning) and zones (up zoning).

The significant losers of this approach will be the public interest as local governments become increasingly responsible for the provision of infrastructure and services to accommodate the additional development. This will further exacerbate the funding difficulties and other adverse public policy consequences that will arise from the infrastructure charges reforms which are discussed later in this paper.

In the end it will be current local government's residents who need both improved public services and infrastructure to accommodate their day to day needs, as well as better housing, who will be providing financial support for new residents. Those residents will have to either pay for increased local government rates and user charges to provide for the required infrastructure or accept reduced levels of service for infrastructure as a result of the increased development.

It has been estimated that the State government's infrastructure capping reforms will result in a total additional unfunded infrastructure liability of $625 million over 5 years equating to in excess of $60.00 per ratepayer per annum.[113]

Water distributor retailers will also face similar policy implications to local governments. The distributor retailers have only two primary revenue streams being:

- user charges for water consumption and network access from all users of their networks; and
- infrastructure charges from developers to service new development.

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110 See Industry Commission (1993) Taxation and Financial Policy Impacts on Urban Settlement, Australian Government, pages 8 and 9; Productivity Commission (2004) First Home Ownership Report, Australian Government, pages 165 and 167.

111 Australian Government (2009) Australia's Future Tax System: Report to the Treasurer, December 2009, pages 93, 422 and 428.

112 See section 91 of the *Sustainable Planning Act 2009*.

113 Local Government Association of Queensland (2011) Impact of Maximum Infrastructure Charges on Queensland High Growth Councils, April 2011.

The distributor retailers have also been established to operate on business lines to achieve full cost recovery. Like local governments, the under recovery of infrastructure charges increases the user charges for consumption and access which have to be paid by all network users.

Suggested reforms

These problems can be avoided by resolving the disconnection between the 20–25 year planning horizon of a strategic framework and the 10–15 year planning horizon of a priority infrastructure plan.

A possible option would be to ensure that the planning horizon of a priority infrastructure plan is increased to 20-25 years consistent with that of a strategic framework. However this option would merely exacerbate the financial risks already faced by local governments as a result of the expected adverse public policy implications of the infrastructure charges reforms that break the connection between the cost of infrastructure and the infrastructure charge.

An alternative option would be to clarify within the Queensland Planning Provisions that whilst a strategic framework has a planning horizon of 20–25 years, the development entitlements in terms of increased designations (up planning) and zones (up zoning) are limited to a planning horizon of only 10–15 years consistent with a priority infrastructure plan.

This would ensure that permissive changes to designations (up planning) and zones (up zoning) beyond the 10-15 year planning horizon of the priority infrastructure plan, remain the discretion of a local government and the State government which can as part of the 10 year review of the planning scheme evaluate the necessary infrastructure planning and delivery requirements and resulting funding consequences of providing additional development entitlements in a new or amended planning scheme.

Spatial planning

Problems of a sectoral focus

In addition to achieving consistency between the planning horizons for land use planning and development management, infrastructure planning and delivery and local government financial planning, it is also critical to review the planning methodology that is underpinning the preparation of planning instruments in particular local government planning schemes.

Planning schemes are generally focussed on land use planning and development management consistent with the traditional sectoral focus of planners. However, the sectoral focus of planners on land use planning and development management whist indispensable has significant limitations.

- First, sectoral managers have a tendency to focus on cost reduction (that is work process efficiency in the development approvals process) rather than focussing on maximising the difference between costs and benefits as is the tendency of cross sectoral managers. This tendency to focus on cost minimisation is reflected in the desire of planners to:
  - minimise regulation by reducing development approvals and standardising planning schemes;
  - minimise development timeframes as evidenced by RiskSMART, Smart eDA (ePlanning, eAssessment) and privatising development approvals through certification and accreditation;
  - minimise development application fees and infrastructure charges.
- Second, a sectoral focus has the tendency to result in a lack of co-ordination in the planning and delivery of the necessary infrastructure to support land use planning and development management. Common weaknesses include:[114]
  - A failure to provide sufficient detail on the infrastructure requirements of the plan.
  - A lack of identification of the agencies responsible to deliver specific projects on proposals or who the key partners might be.
  - Insufficient consideration or evidence that the key partners are willing or able to take responsibility for delivering relevant infrastructure requirements.
  - Insufficient consideration of the existing plans, strategies and expenditure commitments of the key partners.
  - The inclusion of overly aspirational and unrealistic policies.
  - A narrow conceptualisation of infrastructure to development infrastructure which excludes other social, environmental and economic infrastructure.
- Third, a sectoral focus has the tendency to result in a lack of integration between policies and programs for land use planning and development management and other Government policies and programs which influence the nature of places and how they function.

[114] Baker, M. and Hincks, S. (2009) Infrastructure Delivery and Spatial Planning, May 2009, page 181, 188 and 189.

- Fourth, a sectoral focus has the tendency to result in a lack of understanding of the funding and financing of development by the private sector and the funding and financing of infrastructure by the public sector and increasingly the private sector. The tendency of planners to require infrastructure now but pay for it later is not realistic.

Cross sectoral spatial planning

These problems can be minimised by adopting a broader cross sectoral focus based on spatial planning.

Spatial planning is the practice of place making and delivery at all spatial scales which aims to achieve the following:[115]

- Enable a vision for the future of requirements and places that is based on evidence, local distinctiveness and community derived objectives.
- Translate this vision into a set of policies, priorities, programs and land allocations together with the public sector resources to deliver them.
- Create a framework for private investment and regeneration that promotes economic, environmental and social wellbeing for the area.
- Co-ordinate and deliver the public sector components of this vision with other agencies and processes.

A comparison between the sectoral approach of land use planning and development management and the cross sectoral approach of spatial planning is provided in Table 2.

Table 2 Comparison of land use planning and development management and spatial planning[116]

Attribute	Land-use planning and development management	Spatial planning
Purpose	Regulating land use and development through the designation of areas of development and protection, and application of performance criteria.	Shaping spatial development through the coordination of the spatial impacts of sector policies and decisions. Considers economic, social and environmental effects of development.
Form	Schedule of policies and decision rules to regulate land use for the administrative area. Mapping of the designation of areas and sites for development purposes.	Strategy identifying critical spatial development issues and defining clear desired outcomes across functional areas. Visualisation of spatial goals and key areas of change including place making of areas where there are synergies between the public realm and private land.
Process	Discrete process leading to adoption of final blueprint plan. Confrontational process, instigated through consultation on draft plans and political negotiation. Stakeholders use the process to protect and promote their interests.	Continuous process of plan review and adjustment. Mutual learning and information sharing, driven by debate on alternative development models as part of a collaborative political process. Stakeholders use the process to achieve their own and mutual goals.
Ownership and policy community	A document of the planning authority providing guidance to other professional planners promoting and regulating development.	A corporate document of the local government in shared ownership with communities and other stakeholders, partnerships and NGOs.
Procedural safeguards	Final plan determined through adversarial inquiry or parts of the plan are subject to objections.	Final plan determined by inquisitorial examination of the soundness and coherence of the whole plan.
Methods	Mapping of constraints and collection of sectoral policy demands. Bargaining and negotiation with objectors and other stakeholders, informed by broad planning principles.	Building understanding of critical spatial development trends and drivers, market demands and needs, and the social, economic and environmental impacts of development.

[115] Royal Town Planning Institute (2007) Shaping and Delivering Tomorrow's Places: Effective Practice in Spatial Planning, April 2007, page 11.

[116] Communities and Local Government (2006) The Role and Scope of Spatial Planning: Literature Review, HMSO, London; New Zealand Government (2010) Building Competitive Cities: Reform of the Urban and Infrastructure Planning System - A Technical Working Paper, pages 59 -60.

Attribute	Land-use planning and development management	Spatial planning
	Checking of proposals through sustainability appraisal/strategic environment assessment.	Analysis of options through visioning and strategic choice approaches. Generation of alternatives and options assisted by sustainability appraisal/strategic environmental assessment.
Delivery and implementation	Seeks to direct change and control investment activity in land use through prescriptive regulation, whilst mitigating local externalities through conditions and infrastructure agreements.	Seeks to influence decisions in other sectors by building joint ownership of the strategy and a range of incentives and other mechanisms, including land-use regulation and infrastructure agreements.
Monitoring and review	Measures conformance of the plan's policies and proposals with planning control outcomes. Data provides portrait of plan area as general context for implementation of proposals. Periodic but infrequent review of whole plan.	Measures performance of the plan in influencing sector policy and decision-making. Data informs understanding of spatial development and the application of the strategy. Regular adjustment of components of the plan around a consistent vision.

Return of physical planning

Spatial planning goes beyond traditional land use planning and development management to bring together and integrate policies and programs for land use planning and development management with other policies and programs which influence the nature of places and how they function.

As such spatial planning provides a renewed emphasis on physical planning involving as it does, core competencies related to place making, infrastructure and the physical environment, both built and natural.

It is time for planners to reject the jack of all trades, master of none tag that they have acquired since the traditional focus of physical planning was lost in the aftermath of Jane Jacobs' blistering attack on urban planners in her seminal work *The Death and Life of Great American Cities: The Failure of Town Planning*.[117]

The fate of today's urban planner has been summarised thus:

> *Too busy planning. Too busy slogging through the bureaucratic maze, issuing permits and enforcing zoning codes, hosting community get togethers, making sure developers get their submittals in on time and pay their fees. This is what passes for planning today. We have become a caretaker profession - reactive rather than proactive, corrective instead of pre-emptive, rule bound and hamstrung and anything but visionary. If we live in Nirvana, this could be fine. But we don't. We are entering the unchartered waters of global urbanisation on a scale never seen. And we are not in the wheelhouse, let alone steering the ship. We may not even be on board.*[118]

Suggested reforms

Spatial planning based as it is on physical planning should therefore become the centre around which the other planning specialties orbit such as transport planning, heritage planning, environmental planning and urban design to name but a few.

As a result, planning instruments and in particular local government planning schemes should be focussed on spatial planning rather than simply land use planning and development management.

Infrastructure charges reforms[119]

Capped infrastructure charges

The Queensland Government's infrastructure charges reform has resulted in the adoption of maximum charges for different classes of development that are to apply uniformly throughout different local government areas.

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117 Jacobs, J (1964) The Death and Life of Great American Cities: The Failure of Town Planning, Penguin.
118 Kampanellar, T.J. (2011) Jane Jacobs and the Death and Life of American Planning, The Design Observers Group, April 2011.
119 See Wright, I.L. and Cleary, S. (2011) Infrastructure Contributions Reforms in Queensland, Presentation to Planning Institute of Australia Seminar, July 2011.

The maximum adopted charges appear to have been derived from a consideration of infrastructure charges under previous planning scheme policies and priority infrastructure plans of selected local government areas in Queensland.[120]

At best, it could be argued that the maximum adopted charges are a reflection of the generalised average cost across all local government areas for the supply of trunk infrastructure to service the relevant classes of development. As such the maximum adopted charges have no relationship to the marginal cost of supplying trunk infrastructure to service development in different parts of different local government areas.

The rejection of the marginal cost pricing methodology for financial contributions for trunk infrastructure is contrary to the overwhelming weight of public policy analysis over the last 20 years that is set out in the following landmark reports:

- 1993 Industry Commission Report on Taxation and Financial Policy Impacts on Urban Settlement.
- 2004 Productivity Commission Report on First Home Ownership.
- 2009 Australian Future Tax System: Report to the Treasurer (Henry Tax Review).
- 2011 Productivity Commission Report on Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments.

The application of maximum adopted charges changed the whole decision making framework that local governments applied to infrastructure charges. As a result local governments are now required to juggle the issues of financial affordability, the willingness of ratepayers to subsidise urban development and the job creation of the development industry in determining their adopted infrastructure charges.

The adoption of maximum adopted charges which have no relationship to the marginal cost of funding trunk infrastructure to service new development will have the following significant public policy implications:

- First, the price signal which would encourage economic efficiency and effectiveness has been emasculated such that the cost of funding infrastructure to service development in an outer suburban greenfield area is the same as an infill area.
- Second, it can result in significant cross subsidies from local government ratepayers and SEQ distributor-retailer customers to landowners and developers.
- Finally, but not least, the funding of cross subsidies can result in increased rates and user charges to landowners and customers thereby worsening the cost of living pressures especially on those least capable of affording it. As such, this reform will have a regressive impact on taxpayers.

Housing affordability

The infrastructure charges reforms were implemented by amendments to the *Sustainable Planning Act 2009* made by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011.* The title of this amendment Act would tend to indicate that infrastructure charges are adversely affecting housing affordability in Queensland and that housing affordability will be improved by the amendments.

The Final Report of the Infrastructure Charges Taskforce supports this when it states that where infrastructure charges are "*set too low, local government will under recover money to pay for infrastructure. Set too high, projects will not proceed and housing affordability will be further eroded.*"[121]

Whilst this statement is literally correct, the Final Report does not acknowledge the findings and recommendations of the Productivity Commission and the Henry Tax Review which:

- first, endorse the appropriateness of infrastructure charges that relate to the cost of the provision of infrastructure to service development; and
- second, indicate that infrastructure charges that are not related to the cost of provision of infrastructure to service development such as capped infrastructure charges are inappropriate from a public interest perspective.

In relation to the impact of infrastructure charges on housing affordability, these landmark reports relevantly provide as follows:

- 1993 Industry Commission Report on Taxation and Financial Policy Impacts on Urban Settlement –

> *An apparent dilemma facing governments is the need to promote efficiency (and relieve fiscal stress) through user pays policies for publicly provided infrastructure, while keeping accommodation 'affordable' and 'accessible' to those on lower incomes. There is apprehension that the reforms of charges and taxation may lead to unacceptable escalation in housing prices … For the reforms advocated in this report, there do not appear to be grounds for these concerns.*[122]

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120 See Final Report Infrastructure Charges Taskforce (2011), Queensland Government, pages 62-65.
121 See Final Report Infrastructure Charges Taskforce (2011), Queensland Government, pages 62-65.
122 Industry Commission (1993) Taxation and Financial Policy Impacts on Urban Settlement, Australian Government, pages 8-9.

- 2004 Productivity Commission Report on First Home Ownership –

  In summary, greater use of upfront development charging is unlikely to have any substantial effect on housing affordability, irrespective of whether infrastructure was previously subsidised …[123]

  The claimed cost savings and improvements in affordability from reducing reliance on developer charges for infrastructure appear overstated.[124]

- 2009 Australian Future Tax System (Henry Tax Review) –

  Findings:

  > *Infrastructure charges can be an effective way of encouraging the efficient provision of infrastructure to areas where it is of greatest value and of improving housing supply. Charging for infrastructure may be a more effective means of allocation resources than regulating land release.*
  >
  > *Where land supply is constrained, well-designed infrastructure charges are more likely to be factored in to the price that developers pay for raw land, than to increase the price of housing in the development where the charge is levied. However, where infrastructure charges are poorly administered - particularly where they are complex, non-transparent or set too high - they can discourage investment in housing, which can lower the overall supply of housing and raise its price.*

  Recommendation 70:

  > *COAG should review infrastructure charges (sometimes called developer charges) to ensure they appropriately price infrastructure provided in housing developments. In particular, the review should establish practical means to ensure that these charges are set appropriately to reflect the avoidable costs of development, necessary steps to improve the transparency of charging and consequential reductions in regulations.*[125]

In short, there is a case for the review of the previous infrastructure contributions regime to improve its transparency and thereby provide certainty for stakeholders.

However, there is no persuasive evidence that supports the conclusion that existing or proposed infrastructure charges calculated and imposed in accordance with the methodology applicable to priority infrastructure plans (or earlier infrastructure charges plans) do not relate to the cost of provision of necessary trunk infrastructure and as such would operate as a tax.

Indeed the balance of evidence, in particular the reviews carried out by the Queensland Competition Authority on local government priority infrastructure plans prepared under the previous infrastructure contributions regime, would indicate that the draft priority infrastructure plans appropriately priced trunk infrastructure, and if anything, under-priced that infrastructure.

Furthermore, the implication that the new infrastructure charges regime involving as it does capped infrastructure charges will improve housing affordability is not supported by the reports of the Productivity Commission and the Henry Tax Review.

Rather, it is apparent that capped infrastructure charges will adversely affect housing affordability in those areas (generally inner city suburban areas) with previously lower infrastructure charges which will be increased by local governments in order to offset the capping of higher infrastructure charges applicable to other areas (generally outer fringe or remote greenfield areas).

Therefore perversely it is likely that a portion of increased infrastructure charges in some areas will operate as a tax and adversely impact on housing affordability in those areas.

Suggested reforms

It is therefore essential that the infrastructure charges reforms are reviewed to address the adverse public policy impacts on public sector funding and housing affordability. In this regard a return to the economically efficient and equitable marginal cost pricing methodology previously adopted is strongly recommended.

It is also recommended that the process for making priority infrastructure plans be reviewed to ensure that these documents are prepared and approved in a timely and cost efficient manner.

Conclusions - Back to the Future

In summary it is clear that we have forgotten the mistakes of the past and, if not corrected quickly, we are doomed to repeat them.

- First, there must be a clear linkage between land use planning and development management, infrastructure planning and public sector funding and financing. Land use and infrastructure plans which are based on

123 Productivity Commission (2004) First Home Ownership, Australian Government, page 165.
124 Productivity Commission (2004) First Home Ownership, Australian Government, page 167.
125 Australian Government (2009) Australia's Future Tax System, page 93.

consistent planning horizons, a common and standard evidence base and committed funding and delivery timeframes by State and local governments is critical.

- Second, there must be a return to physical planning involving as it does core competencies related to place making, infrastructure and the physical environment. Spatial planning can be used as a tool to enable this shift from traditional land use planning and development management.
- Third, infrastructure charges to service new development must once again be based on the marginal cost pricing methodology which provides the most economically efficient and equitable mechanism for funding a developer's financial contribution to the public's cost of providing trunk infrastructure to service new development. It is also consistent with over 20 years of established evidenced based public policy.

The mistakes are clear; as are the solutions. The commitment to implement the solutions is the issue. As a profession, urban planners must articulate and champion these matters in the public interest. If not we run the risk as noted earlier that:

> *We are entering the unchartered waters of global urbanisation on a scale never seen. And we are not in the wheelhouse, let alone steering the ship. We may not even be on board.*[126]

If this is the case then Churchill was right that "a nation that forgets its past is doomed to repeat it."

[126] Kampanellar T.J. (2011) Jane Jacobs and the Death and Life of American Planning, the Design Observers Group, April 2011.

Reduction a minor change?

Samantha Hall | James Langham

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Dempsey v Brisbane City Council & Ors* [2012] QPEC 2 heard before Jones DCJ

March 2012

Introduction

This case involved an application to the Planning and Environment Court (**court**) to determine whether a change to a proposed development was a minor change under section 350 (Meaning of minor change) of the *Sustainable Planning Act 2009* (**SPA**). The proposed development was for a multi-unit dwelling comprising six units over six storeys. The developer wanted to change the development to a multi-unit dwelling comprising four dwellings over four storeys.

Case

This case involved an application for a minor change under the SPA. The land was situated at 101, 101A and 101B Welsby Street, New Farm, more particularly described as Lots 130, 131 and 132 on SP173418 (**land**). The land was located within the Medium Density Residential Area of the *Brisbane City Plan 2000* and the Lamington Street precinct of the Newstead and Teneriffe Waterfront Local Plan.

Facts

On 7 September 2006, Toney Dempsey (**appellant**) lodged a development application with the Brisbane City Council (**respondent**) seeking a development permit for a material change of use for a multi-unit dwelling and preliminary approval for building works. The Queensland Heritage Council (**co-respondent**) issued a concurrence agency response advising the respondent to refuse the application pursuant to section 3.5.11(4) (Decision generally) of the *Integrated Planning Act 1997* (**IPA**). The respondent refused the development application on 13 March 2008 for a number of grounds, the majority dominated by references to "Amity House" and visual amenity.

The changes to the development that the court was asked to decide on were as follows:

- a reduction in the number of storeys from six to four;
- a reduction in overall height of the development;
- a reduction in the number of units from six to four;
- a reduction in site gross floor area (GFA) from 1461m^2 to 991m^2, resulting in a 32.2% reduction in GFA.

Counsel for the appellant argued that the reduction in the size of the proposed development was not in keeping with the Statutory Guideline 06/09 (**guideline**). The guideline is to exclude or control changes which make proposals larger or bulkier. Counsel for the appellant stated that it is appropriate to construe section 350 (Meaning of minor change) of the SPA in a way that accepts as minor such changes that result in reductions of the impact of developments and it is clear if one reads the guideline that the changes which cause concern are those which increase the bulk or scale of developments or increase their impacts.

Decision

In deciding this matter, his Honour Jones DCJ agreed in part with the submission of counsel for the appellant, but stated:

> *While it might fairly be said that the Explanatory Notes tended to focus on increases in the size of the proposal, on my reading of the Guideline, while there is reference to "additional: impacts", when reference is made to the scale and bulk and appearance of a development it is not restricted to only increases but is concerned with changes to the built form in terms of scale, bulk and appearance.*

His Honour stated that the question to be asked was whether the changes result in a substantially different development having regard to the nature and degree of the changes.

In determining what amounted to a substantially different development, he looked to the cases of *Pro-Active Developments Pty Ltd v Ipswich City Council & Anor* [2011] QPEC 52 (**Pro-Active**) and *Indigo (Palm Beach) Landowner Pty Ltd v Gold Coast City Council & Ors* [2011] QPEC 27 (**Indigo**). In Pro-Active, a reduction in the number of lots in a proposed subdivision from 35 to 22 over a reduced area of land was considered to be a minor change. In Indigo, the court was concerned with a unit development which was to be reduced from 13 levels to 7 levels and a reduction in the number of units from 57 to 52. Robin QC stated that:

> *..it is clear if one reads the guidelines that the changes which cause concern are those which increase the bulk and scale of developments or increase their impacts.*
>
> *I think it is appropriate to construe and apply s350 in that way, particularly if one bears in mind the injunctions at the beginning of the Act in sections 3, 4 and 5 as to how the court and other entities performing functions for the purpose of the Act ought to act its purpose…*

Whilst agreeing with the remarks of his Honour Robin QC in Indigo, his Honour decided that while he accepted that the changes to the proposal could not be described as anything other than significant, they did not, either separately or in combination, result in a substantially different development. While the scale and bulk of the proposal had been significantly changed, broadly speaking its overall appearance to the observer would be the same. However, his Honour stated that the degree of change was tending towards the limits of what might, in the context of the application, be considered to be a minor change.

Held

The determination of the court was that:

- The changes to the proposed development were a minor change for the purposes of section 350 (Meaning of minor change) of the SPA.
- His Honour would hear from the parties as to further orders if necessary.

Demolition of a house within a Demolition Control Precinct

Samantha Hall | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Lowther v Brisbane City Council* [2011] QPEC 152 heard before Searles DCJ

March 2012

Introduction

This case was concerned with whether a pre-1946 house within a Demolition Control Precinct (**DCP**) could be demolished. Although a number of issues were raised, due to the operation of the *Brisbane City Plan 2000* (**plan**), the Planning and Environment Court (**court**) focused its decision on whether the house contributed positively to the visual character of the street it was located on. The court found that the house did not contribute positively to the visual character of the street as whatever pre-1946 character the street may have possessed was now lost due to the intrusion of home unit developments.

Case

This case was concerned with an appeal pursuant to Section 461 (Appeals by applicants) of the *Sustainable Planning Act 2009* (**SPA**) against the refusal by the Brisbane City Council (**respondent**) of a development application for a preliminary approval for building work for the demolition of a house in a DCP and a material change of use for a multi-unit dwelling (six dwelling units) in Morningside (**DA**).

Facts

The house the subject of this appeal was located at 484 Wynnum Road, Morningside and was situated within the Low-Medium Density Residential Area Classification and within a DCP within the plan.

On the southern side of the relevant section of Wynnum Road was a cemetery and an RSL Club, while on the northern side, there were 18 buildings of the following categories:

- eight timber and tin pre-1946;
- one asbestos cement house;
- one post-1946 house;
- one pre-1946 house not in the DCP; and
- seven unit blocks of brick or masonry construction.

On 14 September 2010, Mr Ridwan Lowther (**appellant**) submitted the DA to the respondent. On 25 October 2010, the respondent advised the appellant that it had refused the DA due to the demolition component, stating that:

> 2. *Demolition of this house will result in the loss of a traditional pre-1946 house in the Demolition Control Precinct and is in conflict with the purpose of the Demolition Code which is to:*
>
> *i protect residential buildings that represent traditional building character and amenity in a Demolition Control Precinct; and*
>
> *ii ensure the preservation of buildings where they form an important part of a streetscape where constructed prior to 1946*.

Decision

His Honour, Judge Searles DCJ, began by stating that the plan formed the statutory regime for deciding the DA and that under the plan, the DA required code assessment under the Demolition Code (**code**). His Honour added that under the plan "*Development control precincts are those locations in older suburbs that contain pre-1946 housing with distinctive traditional architecture*" and that the intent for the Low-Medium Density Residential Area, in which the house was located, was that pre-1946 housing located within a DCP would be retained.

It was accepted by both parties that the Performance Criteria and Acceptable Solutions in section 5 (Performance Criteria and Acceptable Solutions) of the code contained alternative and not cumulative requirements so that should the appellant satisfy any one of the dot points under Performance Criteria 1 the appeal would succeed. Performance Criteria 1 of the code is set out below:

P1 The building:

- *Must not represent traditional building character, or*
- *Must not be capable of structural repair, or*
- *Must not contribute positively to the visual character of the street.*

In deciding whether the third dot-point was satisfied, his Honour stated that:

> *Whatever pre-1946 character this part of Wynnum Road had, I am of the view that it has lost it and that … the streetscape is now dominated by the intrusion of the home unit development. The building does not, in my opinion contribute positively to the visual character of the street*.

Due to this finding and that Performance Criteria 1 contained alternative requirements, it was unnecessary for his Honour to deal with the other issues raised before the court.

Held

The appeal was allowed.

Proper construction of easements: does a drainage easement allow drainage of sewage?

Samantha Hall | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS* [2012] QCA 9 heard before McMurdo P, Fraser JA and Fryberg J

March 2012

Introduction

This was an appeal to the Supreme Court of Queensland (**court**) in which the appellant, Currumbin Crest Development Pty Ltd (**CCD**), claimed that its right to use a "drainage" easement on the respondent's land (**Easement D**) included the drainage of sewage. The respondent, the Body Corporate for Mitchell Parkwood Community Title Scheme (**Parkwood**), argued that Easement D was intended to be used only for stormwater. The court held that in the proper construction of the terms of Easement D, "*drainage*" included the drainage of sewage.

Facts

Parkwood owned land at Currumbin (**Parkwood land**), abutting two lots owned by CCD (**CCD land**). Two easements benefiting the CCD land were in dispute in the appeal: Easement D for which the purpose was "*drainage and stormwater*"; and Easement AA for which the purpose was "*sewage*".

By way of background, Parkwood had objected to CCD's connection of new residential development on the CCD land to the public sewage main through mains that ran the full length of both Easement D and Easement AA. Parkwood had persuaded the sewage authority that the sewer main in Easement AA was privately owned by Parkwood, and on that basis permission was refused for CCD to connect its new residential development through Easement AA to the public sewage main. CCD applied to the court for declaratory relief.

Case

At first instance, only Easement AA was considered, however the primary judge indicated that the term "*drainage*" did not include drainage of sewage. As such, CCD was unsuccessful at first instance.

In the appeal, the issues to be decided were revised and identified to be whether the use of the word "*drainage*" in the Grant of Easement for Easement D encompassed the drainage of sewage, and whether CCD was entitled to use the drains in Easement AA for the passage of sewage into Easement D.

Decision

The court decided as follows:

- the assumption underlying the primary judge's decision had been falsified on appeal;
- CCD had the right to pass sewage through Easement D;
- the declarations sought, being that CCD was entitled to use the drains in Easement AA for the passage of sewage into Easement D, should be made.

With regard to the proper construction of the word "*drainage*", the following points made by Fryberg J are illustrative of the court's reasoning:

- the ordinary usage of the word "*drainage*" is consistent with the view that sewerage is a subset of drainage, as evidenced in its dictionary definitions;
- in the ancient case of *Pilbrow v Vestry of the Parish of St Leonard, Shoreditch* [1895] 1 QB 433, the following obiter dicta comments were made by members of the Queen's Bench:
  - regarding an underground pipe used to collect sewage from apartments: "*It is, in fact, according to the ordinary use of language, a drain made from these buildings to communicate with the public sewer*" (Lord Esher MR at 439);
  - "*….I am not aware that, apart from statutory definitions, there is any specific distinction in law between a 'drain' and a 'sewer'.*" (Rigby LJ at 441-2);

- statutory provisions relating to sewage at the time the easement was granted, such as the "*Standard Sewage Bylaws*" made under the *Sewerage and Water Supply Act 1949* indicated that "*drainage*" encompassed sewers. In particular, the definitions of types of drains in the Bylaws indicated that "*sewerage (which is a system of pipes carrying sewerage and associated pumps and works) is one form of drainage*", and Bylaw 34 was an example of the law recognising a "*clear distinction between sewage and stormwater drains*";
- the words "*and stormwater*" used in the terms of Easement D, were interpreted as extending the ambit of the easement to stormwater flowing across the property, such as in an open channel or overland flow. Sewage would be transported by pipe rather than an open channel. While an open stormwater drain in close quarters to sewage would be unlikely, the configuration of the ground supported this interpretation. However, an examination of the terms of Easement AA was not considered to be enlightening and the specific reference to "*sewage*" in its terms was not considered to be decisive for the interpretation of Easement D.

Held

- Appeal allowed with assessment of costs.
- The lower court's decision was set aside.
- In lieu thereof, the court:
  - declared that on a proper construction of Easement D, "*drainage*" encompassed the drainage of sewage;
  - declared that on a proper construction of Easement D and of Easement AA, the applicant is entitled to use the drains under the surface of the latter easement so that water and sewage entering them is permitted to pass through them and into easement D; and
  - ordered that the respondent pay the applicant's costs.

Cyclone safety necessitates enforcement notice

Samantha Hall | Katelin Kennedy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cairns Regional Council v Eldav Properties Pty Ltd & Ors* [2011] QPEC 153 heard before Jones DCJ

March 2012

Executive Summary

This case concerned a breach of section 578 (Carrying out assessable development without a permit) of the *Sustainable Planning Act 2009* (**SPA**) due to the carrying out of demolition work without a permit by Eldav Property Pty Ltd (**first respondent**). In deciding the matter and making interim orders, the court considered that the need to mitigate the danger of cyclone activity in the North Queensland region resulted in it being "*desirable if not necessary*" to make an interim enforcement order under section 603 (Making an interim enforcement order) of the SPA, despite the fact that the first respondent had already commenced activities to this effect.

Case

This case involved an application for enforcement orders pursuant to sections 601 (Proceeding for orders) and 603 (Making an interim enforcement order) of the SPA following a breach of section 578 (Carrying out assessable development without a permit) of the SPA. The breach in question was alleged to have been committed on the site at 302-304 Sheridan Street in North Cairns (**site**) upon which a building with a heritage listing is located.

Facts

On or about 4 August 2011, the Cairns Regional Council (**applicant**) became aware that demolition works were being carried out on the site. The demolition works included the removal of asbestos and roof sheeting. At this time, the demolition works were not authorised as the applicant had not issued the required permit.

Following the discovery of these demolition works, the applicant issued a show cause notice under section 588 (Giving show cause notice) of the SPA to the first respondent. It was asserted on behalf of the first respondent by a director and shareholder of the first respondent (**second respondent**) that it was believed that the necessary permits had been previously obtained and in addition that the works were implementing emergency works on the site.

Subsequently, the applicant began proceedings by an application for orders pursuant to sections 601 (Proceeding for orders) and 603 (Making an interim enforcement order) of the SPA on the basis that the first respondent had committed a breach of section 578 (Carrying out assessable development without a permit) of the SPA by carrying out demolition work without a permit.

The applicant sought relief and submitted draft orders to the effect that the first and second respondent should be ordered to complete the removal of some of the elements of the heritage listed building, while retaining the façade of the building. Additionally, the applicant sought to ensure that the first and second respondent would keep the site secure and free of loose objects due to the danger posed by cyclone activity in the Cairns area.

Decision

His Honour, Judge Jones was satisfied that the first and second respondent had acted in breach of section 578 (Carrying out assessable development without a permit) of the SPA and therefore that a development breach had occurred, despite the assertions of the first and second respondent that they believed they had obtained the required permits.

Furthermore, his Honour determined that a range of relevant considerations existed in this case which supported the granting of the relief sought by the applicant including:

- that there was evidence to suggest that the building on the site was in an unsound and unsafe condition, with loose objects located on the site;
- that the cyclone season is of particular concern in the area;
- that it was evident that the works outlined in the draft order were works that would be required to be carried out as a matter of course under the current development approval, meaning that the costs of such works would not be wasted; and

- that it was clear that in the past, agents of the respondents had represented to the applicant that they would carry out works on the site that were essentially the same as those described in the draft order, but had failed to fulfil those representations.

Although the court was advised by the solicitors for the respondent that works conforming to those outlined in the draft order had already commenced at the time that this matter came before the court, his Honour still considered it "*desirable if not necessary*" to make the orders and issue an enforcement notice due to the history of the site and the pending cyclone season.

Held

Interim orders were made in accordance with the draft orders provided by the applicant.

COLIN BIGGERS & PAISLEY LAWYERS

Relationship between building assessment provisions and local planning instruments

Samantha Hall

Committees are experiencing a tension between the building provisions in the *Building Act 1975* (BA) and the planning provisions in the *Sustainable Planning Act 2009* (SPA) that are to be applied when making a decision. The *Sustainable Planning and Other Legislation Amendment Act 2012* (SPOLA), which commenced on 17 February 2012, has attempted to address this tension

April 2012

Executive Summary

Prior to the commencement of the SPOLA, section 86 of the SPA provided that a planning scheme must not include provisions about building work, to the extent the building work was regulated under the "building assessment provisions" as defined in the BA. Section 86 went on to provide that to the extent the planning scheme sought to include provisions about building work, the planning scheme had no effect.

Section 30 of the BA defined "building assessment provisions" to include:

- IDAS;
- chapter 3 and chapter 4 of the BA;
- fire safety standard;
- fire safety standard (RCB);
- any relevant provisions of a regulation made under the BA;
- any relevant local law, local planning instrument or local government resolutions;
- the Building Code of Australia (**BCA**); or
- the Queensland Development Code (**QDC**).

Pursuant to section 86 of the SPA, "building assessment provisions", as used in section 86, did not include IDAS or a provision of a planning scheme.

Therefore, when making decisions about building work, referees were not required to take account of provisions in a planning scheme that sought to regulate building work in a manner inconsistent with the way the building work was regulated under the building assessment provisions.

Section 86 of the SPA was applied by the committee in Appeal number 12-2010. In this matter, the Sunshine Coast Regional Council (**SCRC**) approved a development application to construct two open farm sheds and imposed a condition requiring a finished floor level of 3.24 metres AHD pursuant to section 13 of the *Building Regulation 2006*, which provided power to local governments to declare an area to be a natural hazard management area (flood) and also declare the level to which habitable rooms must be built. The proposed work was code assessable due to the minimum floor height required by the SCRC's planning scheme. The Committee held that floor levels of buildings in flood prone areas were "building assessment provisions" within the scope of the BA and that pursuant to section 86 of the SPA, the planning scheme provisions with respect to minimum floor heights had no effect. As the Committee's site inspection revealed that considerable fill would be required to satisfy the required height of 3.24 metres AHD, the Committee directed the SCRC to remove the condition requiring the finished floor level of 3.24 metres AHD.

Appeal number 12-2010 was a clear example of a planning scheme including provisions about building work that were inconsistent with the "building assessment provisions". However, concerns remained that the narrow scope of section 86 of the SPA, that it only addressed inconsistencies between a planning scheme and the building assessment provisions, could lead to uncertainty about the extent to which other local planning instruments, local laws and local government resolutions could validly include matters relating to building work.

To address these concerns, the SPOLA removed section 86 of the SPA and introduced section 78A which, together with section 77, expanded the intent of the former section 86 of the SPA to prohibit the inclusion of building assessment provisions in "local planning instruments", which includes not only a planning scheme but also a temporary local planning instrument and a planning scheme policy.

The SPOLA also amended the BA to clarify the status of the "building assessment provisions". Section 31(3) of the BA now provides that the following building assessment provisions have the status of a code, which cannot be amended by a local law, local planning instrument or local government resolution:

- chapter 3 and chapter 4 of the BA;
- fire safety standard;
- fire safety standard (RCB);
- any relevant provisions of a regulation made under the BA;
- the BCA; or
- the QDC.

Section 31(4) of the BA also prohibits a local law, local planning instrument or local government resolution from including provisions about building work to the extent the building work is regulated under a code as defined in section 31(3).

It is expected that the SPOLA amendments to the SPA and to the BA will reduce delays and costs associated with inconsistencies between the building assessment provisions and local planning instruments. The SPOLA amendments make it very clear, that the local planning instruments will be invalid if they conflict in any way with the building assessment provisions. However, these amendments do not mean that local planning instruments have no place in the assessment of building work. Noting that a local planning instrument still forms part of the building assessment provisions, it may still regulate building work where that aspect of the building work is not regulated by another instrument that forms part of the building assessment provisions. Accordingly, Committees still need to be familiar with and apply the relevant provisions of local planning instruments where they are not otherwise inconsistent with the building assessment provisions.

Inability to comply with time limits on conditions: Still a breach?

Ronald Yuen | Aaron Madden

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Recora Pty Ltd & Anor* [2012] QPEC 8 heard before Robertson DCJ

April 2012

Executive Summary

The Planning and Environment Court of Queensland considered an originating application from the Sunshine Coast Regional Council (**applicant**) seeking a declaration that an offence had occurred (and was occurring) pursuant to section 580 (Compliance with development approval) of the *Sustainable Planning Act 2009* (**SPA**) for a failure to pay monetary infrastructure contributions. The applicant also sought enforcement orders against the owner of the land to pay the outstanding infrastructure contributions, as well as an enforcement order against both the owner of the land and the tenant of the premises on the land to restrain them from using the premises as an office until the outstanding contributions were paid.

Despite the triggering event for the payment of the infrastructure contributions occurring before Recora Pty Ltd (**first respondent**) became the owner of the land, as the development approval (including its conditions) attached to the land, non-payment of the infrastructure contributions was a development offence.

Case

This case involved an originating application by the applicant against the first respondent, as well as against the tenant of the premises on the land, Golder Associates Pty Ltd (**second respondent**).

The applicant sought a declaration that a development offence had occurred (and was occurring) pursuant to section 580 (Compliance with development approval) of SPA in that there had been non-compliance with conditions of a development approval in respect of payment of infrastructure contributions.

The applicant also sought an enforcement order pursuant to section 456 (Court may make declarations and orders) of SPA, requiring:

- the first respondent to pay the outstanding infrastructure contributions;
- the first and second respondents to stop using the premises as an office until the payment was made.

Facts

The first respondent became the owner of the subject Land at 55 Kingsford Smith Parade, Maroochydore (**land**) on 11 September 2008 which was subject to a development approval for a material change of use (office GFA 525m^2) (**approval**).

The search undertaken by the first respondent in respect of the land was insufficient to bring to its attention the outstanding monetary infrastructure contributions which were required to be made under conditions 6 to 10 of the Approval (**conditions**), which attached to the land.

The conditions were relevantly on the same terms and each of them required the contributions to be paid:

> *prior to the commencement of use or issue of a certificate of classification whichever is the sooner.*

Relevantly, the certificate of classification was received by the applicant on either 2 or 3 September 2008, with the use as an office commencing sometime after 11 September 2008, being the date on which the first respondent became the owner of the land.

The applicant however did not contact the first respondent in respect of the outstanding contributions until 19 January 2011, at which time the applicant also incorrectly asserted that a certificate of classification had not been issued.

Decision

In their submissions, the first and second respondents contended that the first respondent had not committed a development offence in that the infrastructure contributions were required to be paid by a specific date and they fell prior to the first respondent becoming the owner of the land. As a result, the conditions were incapable of being complied with.

This however, was rejected by his Honour Judge Robertson because pursuant to section 3.5.28 (Approval attaches to land) of the *Integrated Planning Act 1997* (which applied to the approval at the time it was given) the approval attached to the land and bound successors in title. The corresponding section under the SPA is section 245 (Development approval attaches to land).

By reference to relevant established principles which applied in construing development approvals, his Honour noted that the first and second respondents' approach in construing the conditions was one which was highly technical, and failed to properly consider the approval (including the conditions) as a whole. That is, the approach ignored the principle that those who took the benefit of an approval should pay their commensurate share of demand on infrastructure caused by development. His Honour found that the failure to pay in a timely way did not discharge the first respondent's responsibility to pay the contributions, and given that the approval (including the conditions) bound the first respondent, its failure to pay the contributions constituted a breach by non-performance.

Having established that there had been a breach of the conditions, pursuant to section 580 (1) (Compliance with Development Approval) of SPA, his Honour held that a development offence had been committed.

His Honour then went on to consider the exercise of the court's discretion to make enforcement orders under section 456 (Court may make declarations and orders) of SPA by reference to the principles outlined by Kirby P (as his Honour then was), in *Warringah Shire Council v Sedevic* (1987) 10 NSWLR 335.

In applying the relevant principles, whilst his Honour agreed with the applicant's submission that the breach by the first respondent was more than a 'purely technical' breach, the applicant's delay in pursuing the payments was also relevant to the exercise of his discretion.

Held

Pursuant to section 456 (Courts may make declarations and orders) of the SPA the use of the land as an office constituted a development offence pursuant to section 580 (Compliance with development approval) of the SPA, as the first respondent was contravening the conditions.

The application was otherwise adjourned to enable the parties to confer.

Minor changes and referral agencies

Ronald Yuen | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Comiskey Group (a firm) v Moreton Bay Regional Council & Anor* [2012] QPEC 4 heard before Jones DCJ

April 2012

Executive Summary

The Planning and Environment Court considered whether a change to a proposed development sought by Comiskey Group (**applicant**) was a "minor change" pursuant to section 350 (Meaning of a minor change) of the *Sustainable Planning Act 2009* (**SPA**). The court found that the change was a change which required referral to a referral agency that, prior to the change, had not been involved or, alternatively, the change would result in a substantially different development. The court therefore dismissed the application made by the applicant.

Case

This case was concerned with an application by the applicant for orders that changes to a proposed development constituted a minor change for the purpose of section 350 (Meaning of a *minor change*) of the SPA (**application**).

Facts

The subject land is situated at Lawnton in Brisbane and is generally bounded by Todds Road to the south, the North Pine River to the north, One Mile Creek to the west and residential development and some vacant land to the east and south. The proposed development involved a staged residential subdivision in excess of 200 lots and was impact assessable.

The development application for the proposed development was refused by the Moreton Bay Regional Council (**council**). The applicant subsequently filed a notice of appeal appealing the refusal (**appeal**). Pursuant to the transitional provisions of the SPA, the appeal was heard and determined under the *Integrated Planning Act 1997* (**IPA**). Pursuant to section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA, the court could only deal with a change to the development application if the change was a "minor" one. Despite the appeal being heard and determined under the IPA, section 350 (Meaning of minor change) of the SPA was applicable to the application.

Whilst there were a number of changes to the proposal sought by the applicant, the most controversial change was the one proposing to fill part of the proposed lagoon to the north of the bridge to RL 5.8 metres AHD.

Decision

His Honour Judge Jones noted that the original application did not involve any filling of the lagoon area north of the bridge. As a result of the significant flood event which occurred on 14 October 2010, the applicant sought to change the proposed development by filling part of the lagoon area which, as a consequence, would significantly reduce the risk of erosion from significant flood events.

His Honour noted that, whilst the proposed filling did not involve a new use or materially affect the bulk, scale or appearance of the development, a direct consequence was that it would require filling below RL 5 metres AHD. It was accepted by both parties that this would trigger the referral of that aspect of the proposed development to a referral agency, due to acid sulphate soils issues.

The council contended that the proposed changes included a change which would require referral to a referral agency that, prior to the change, had not been involved, was fatal to the application pursuant to section 350(1)(d)(ii) (Meaning of a minor change) of SPA.

The applicant, on the other hand, relied on sections 350(2) and (3) of SPA, and contended that a referral to an advice agency was not fatal, emphasising the different roles and responsibilities of advice agencies and concurrence agencies under SPA. It is noted that, pursuant to section 252 (Who is referral agency) of SPA, a referral agency is an advice agency or a concurrence agency.

His Honour, firstly, noted that section 440 (How court may deal with matters involving noncompliance) and section 820 (Proceedings for particular declarations and appeals) of SPA had no relevance in the circumstances of the application, as it did not involve compliance, non-compliance or partial compliance with a statutory provision. Secondly, his Honour noted that, the change sought by the applicant was inconsistent with section 350(1)(d)(ii) (Meaning of a minor change) of SPA and therefore, the court would not be "authorised" to make an order to permit the change pursuant to section 441 (Terms of orders etc) of SPA.

His Honour held that the construction of section 350(1)(d)(ii) (Meaning of a minor change) was sufficient to justify dismissal of the application. Whilst that was so, his Honour also considered the application of section 350(1)(d)(i) (Meaning of a minor change) and noted that, the proposed development introduced a new impact, namely "acid sulphate soil issues" notwithstanding that these issues would seem to be able to be appropriately managed and controlled. Relevantly, both parties' respective experts also held different opinions on the extent and severity of impact the proposed filling would cause. To that end, given the level of unresolved differences of opinion between both experts, his Honour was not sufficiently satisfied that the proposed changes would not result in a substantially different development by introducing significant new impacts or increasing the severity of known impacts.

Held

The application was refused.

Resolving overlapping use definitions – established principles of statutory interpretation must be applied before a best fit approach

Ronald Yuen | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44 heard before Chesterman JA, Margaret Wilson AJA and Philippides J

April 2012

Executive Summary

This was an application for leave to appeal to the Queensland Court of Appeal (**QCA**). The dispute centred on whether, on a proper construction, the proposed development was a "Multi-unit Dwelling" or "House" as defined by the *Brisbane City Plan 2000* (**City Plan**). The QCA held that a proper construction must occur in accordance with established statutory interpretation principles, as opposed to applying the "best fit" approach to determine which use definition was most suitable.

Facts

AAD Design Pty Ltd (**AAD**) made three development applications seeking development permits for a material change of use for "*residence not complying with house code*" in respect of residential buildings having 9, 10 and 11 bedrooms respectively. AAD intended to rent the bedrooms to students and student couples for accommodation under separate tenancy agreements and make provision for sharing of common areas and services.

The relevant use definitions in the City Plan were as follows:

- **House:** "*a use of premises principally for residential occupation by a domestic group or individual/s, that may include a secondary dwelling, whether or not the building is attached, but does not include a single unit dwelling*";
- **Multi – unit Dwelling:** "*a use of premises as the principal place of longer term residence by several discrete households, domestic groups or individuals irrespective of the building form. Multi–unit dwellings may be contained on one lot or each dwelling unit may be contained on its own lot subject to Community Title Schemes. Examples of other forms of multi–unit dwelling include boarding house, retirement village…hostel, institution (primarily residential in nature) or community dwelling (where unrelated people maintain a common discipline, religion or similar). The term multi–unit dwelling does not include a house or single unit dwelling as defined elsewhere*".

The application by AAD contended that the proposed development fitted within the 'House' definition. However, the Brisbane City Council (**council**) contended that the proposed development was appropriately fitted within the "Multi-unit Dwelling" definition which required a higher level of assessment and a higher fee to be paid and therefore, the three development applications were not properly made.

This matter was first decided by the Building and Development Dispute Resolution Committee (**BDDRC**) and it was concluded that:

- the proposed development fell under both "House" and "Multi-unit Dwelling" definitions;
- where two or more definitions applied to the proposed development, a "best fit" approach ought be adopted;
- the proposed development best fitted the definition of "Multi-unit Dwelling", rather than "House".

AAD appealed against the decision of the BDDRC to the Planning and Environment Court (**PEC**). The PEC dismissed AAD's appeal, effectively endorsing the reasoning of the BDDRC. Please refer to our Legal Knowledge Matters published in November 2011 for our summary of the PEC decision.

AAD made an application to the QCA seeking leave to appeal against the decision of the PEC.

Case

The QCA, in determining the application, decided which definition the proposed development ought to fall within, and the proper construction approach ought to be taken to make the decision.

Decision

Each member of the QCA gave separate reasons for judgment, with Margaret Wilson AJA and Philippides J concurring as to the orders made, and Chesterman JA dissenting.

Chesterman JA

Generally, Chesterman JA held that a planning scheme should be construed according to established principles of statutory construction such as those identified in the High Court of Australia decision, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at para 69, 70, 71 and 78 (**Project Blue Sky**). The following principles were relevantly set out in Project Blue Sky:

- a provision should be construed so that it was consistent with the language and purpose of all the provisions of the statute [at 69];
- any perceived conflict arising from the language of the instrument must be alleviated by adjusting the interpretation of the competing language to reconcile the conflict while giving effect to the relevant provisions [at 70];
- a court construing a statutory provision must strive to give effect to every word of the provision [at 71];
- whilst ordinarily the meaning of the words of a statutory provision would correspond with its grammatical meaning, in some circumstances, the context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the cannons of construction may require the words used to be read in a way that would not correspond with the literal or grammatical meaning [at 78].

Having regard to the above principles, his Honour considered that the words "*multi–unit dwelling does not include a house or single unit dwelling as defined elsewhere*" in the definition of 'Multi-unit Dwelling' operated to exclude the application of "Multi-unit Dwelling" where development otherwise satisfied the definition of a "House". Such construction was accepted by the council.

His Honour went on to consider the following three distinctions between the two definitions, upon which the council relied in contending that the proposed development was a "Multi-unit Dwelling":

- *the description of the use - 'principally for residential occupation' (house) and 'as the principal place of longer term residence' (multi-unit dwelling);*
- *the description of the user - 'a domestic group or individual/s' (house) and 'several discrete households, domestic groups or individuals' (multi-unit dwelling);*
- *the extent of the premises in which the relevant user or users carries on the relevant use.*

His Honour considered, however, that these were differences in terminology, but not in meaning. As such, whilst his Honour acknowledged the definitions were meant to apply having regard to different manners of residential occupation, by applying orthodox principles of statutory interpretation, the proposed development constituted a "House" and the definition of "Multi-unit Dwelling" did not apply because "*the term multi-unit dwelling does not include a house … as defined elsewhere*".

Given his Honour's findings, there was no need to determine which definition was the "best fit". His Honour however questioned the validity of the application of such approach, which his Honour believed facilitated the determination of planning appeals using intuitive judgments rather than applying an objective and logical examination of the words in accordance with the established legal principles of statutory construction.

Philippides J and Margaret Wilson AJA

Philippides J, with whom Margaret Wilson AJA agreed, endorsed the reservation expressed by Chesterman JA with respect to the validity of the "best fit" approach and held that the established principles of statutory construction should be applied in construing the provisions of the City Plan, and referred to Project Blue Sky at para 70 and 71.

Her Honour then went on to consider the three distinctions between the two definitions contended by the council as identified above and agreed with Chesterman JA that the first and third distinctions were irrelevant. However, in respect of the second distinction, Her Honour believed the words "*several discrete*" qualified the meaning to be given to the word "individuals" in the "Multi-unit Dwelling" definition, which in turn distinguished it from the "House" definition. That is, the "House" definition was not intended to cover "*several individuals residing "discretely" in the same dwelling*".

In this case, Her Honour held that the nature and extent of the sharing of accommodation, namely it involved individuals under separate tenancy agreements renting a room with access to some common areas, should be characterised as "*several discrete individuals*".

As such, her Honour, with whom Margaret Wilson AJA agreed, for the reasons identified above, upheld the council's contention that the proposed development fell within the "Multi-unit Dwelling" definition. However, the "best fit" approach applied by the PEC in reaching its decision was held to be an error.

Held

- Leave to appeal was granted but the appeal itself was dismissed.
- The parties were to provide written submissions as to costs in accordance with Practice Direction No 2 of 2010 (paragraph 52).

Costs for frivolous and vexatious proceedings

Ronald Yuen | Edith Graveson

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stevenson Group Investments Pty Ltd v Nunn & Ors* [2012] QPEC 7 heard before Searles DCJ

April 2012

Executive Summary

The Planning and Environment Court of Queensland considered two applications for costs following an order for summary judgment where the court was satisfied that Stevenson Group Investments Pty Ltd (**SGI**) had no real prospect of success. The first application was brought by the respondent and the first, second, third, fifth, twelfth and eighteenth respondents (**Tangalooma**) on the basis that the proceeding was frivolous and vexatious. The second application was brought by the fourth respondent, the Brisbane City Council (**council**) in respect of the adjournment of the trial on 26 May 2011.

The court ordered SGI to pay the costs of Tangalooma and the council on a standard basis.

Case

This case concerned two separate applications for costs against SGI, one was brought by Tangalooma and the other one was brought by the council.

The primary issue was whether the court should deviate from the general rule that each party to a proceeding in the Planning and Environment Court should bear their own costs in section 4.1.23(1) (Costs) of the *Integrated Planning Act 1997* (**IPA**). If so, whether SGI should pay Tangalooma's and the council's costs. In relation to Tangalooma's costs, whether it should be granted costs on a standard or indemnity basis.

Facts

On 22 December 2011, the court ordered that summary judgment be entered in favour of Tangalooma in respect of the originating application filed by SGI. Please refer to our summary of the summary judgment in the related *Stevenson Group Investments Pty Ltd v Nunn & Ors* [2010] QPEC 114 which was published in our Legal Knowledge Matters Publication on 9 December 2010.

Tangalooma contended that the proceeding the subject of the originating application filed by SGI, was frivolous or vexatious on three grounds:

1. The order for summary judgment previously given in its favour demonstrated that the proceeding was unmeritorious and devoid of any prospect of success or utility as a whole;
2. SGI continued the proceeding, despite knowing (by numerous correspondences) that Tangalooma considered the proceeding to be frivolous or vexatious and that it would claim costs against SGI;
3. SGI's past conduct in the proceeding evidenced disregard for its obligations for implied undertaking to the court which was consistent with the proceeding being run for its own convenience.

SGI, in reply, submitted that:

- the relevant questions for determination were whether the proceeding was commenced other than in good faith, or with no reasonable basis for arguments and therefore, whether it caused "unjustified" and "trouble and harassment" to Tangalooma;
- the proceeding could not be characterised as patently unarguable or anything of a similar nature, particularly given the significant legal arguments involved from both parties and the consideration by the court which did not express any view about the proceeding being baseless;
- whilst it is accepted that the court found overwhelmingly in favour of Tangalooma, its claim was legitimate and based on fact;
- the correspondence received from Tangalooma expressing its view as to the poor prospect of success and its position to claim costs was not unusual in court proceedings and no fundamental legal flaw claim, fatal to the proceeding was made by Tangalooma;
- matters raised by Tangalooma, in relation to its conduct of the proceeding provided no support to a finding that the proceeding was frivolous or vexatious.

SGI also contended that, Tangalooma had, by its own conduct, contributed to the incurring of costs which included, its failure to avoid the incurring of costs by not bringing the application for summary judgment earlier in the proceeding. In reply, Tangalooma made submissions, in effect, demonstrating why such contention was unfounded.

Decision

His Honour Judge Searles, by reference to the meaning of frivolous or vexatious observed in the Court of Appeal decisions, *Mudie v Gainriver Pty Ltd (No. 2)* [2003] 2 Qd R 271 and *Ebis Enterprises Pty Ltd v Sunshine Coast Regional Council* [2011] QCA 15, held that the proceeding was frivolous or vexatious in that:

- there was no reasonable basis for commencing it;
- it had no reasonable prospects of success from the beginning;
- its impact (not motivation) had caused Tangalooma "*serious and unjustified trouble and harassment*".

His Honour was not satisfied that Tangalooma's act or omission as alleged by SGI rendered it disentitled to costs, particularly given the conduct of SGI in the proceeding.

Having considered that SGI was put on notice, Tangalooma's view as to the poor prospect of success and its claim for costs and, that the concept of a frivolous or vexatious proceeding was appropriately identified by Tangalooma by numerous correspondence (albeit not articulated), his Honour was satisfied that the circumstances, bearing in mind the public policy considerations, warranted payment of Tangalooma's costs by SGI.

In all circumstances however, his Honour, taking into account the relevant principles and instances observed by Stepherd J in *Colgate-Palmolive Company & Colgate-Palmolive Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 225, did not believe it was appropriate to grant indemnity costs (which was sought by Tangalooma), notwithstanding that the proceeding was arguably unduly prolonged by SGI's imprudent refusal of an offer made by Tangalooma inviting SGI to discontinue the proceeding to avoid further unnecessary costs. SGI was therefore ordered to pay Tangalooma's costs on a standard basis.

Given that no reasonable notice of intention to apply for an adjournment of the proceeding was given, SGI was also ordered to pay the council's costs thrown away by the adjournment of the trial on 26 May 2011 on a standard basis.

Held

- That SGI pay the costs of Tangalooma of and incidental to the proceeding on a standard basis.
- That SGI pay the costs of the council thrown away by the adjournment of the trial on 26 May 2011 on a standard basis.

Joining a party to a proceeding

Samantha Hall | Lillian Javadi

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Eastpoint Mackay Pty Ltd v Mackay Regional Council & Anor* [2012] QPEC 20 heard before Robertson DCJ

June 2012

Executive Summary

This case involved an application by the Mackay Conservation Group Incorporated (**MCG**) to be joined as a party pursuant to rule 69(1)(b) (Including, substituting or removing a party) of the *Uniform Civil Procedure Rules 1999* (**UCPR**) to an originating application lodged by Eastpoint Mackay Pty Ltd (**applicant**) for a permissible change to amend a condition of its preliminary approval (**originating application**), file number BD4765/11. The parties agreed that should MCG's application be successful it should also be joined to a related appeal lodged by the applicant against the deemed refusal of a request under section 383(1) (Request to extend period in s 341) of the *Sustainable Planning Act 2009* (**SPA**), file number BD950/2012, to extend the period of a development approval which had lapsed. The Planning and Environment Court allowed MCG's application.

Case

This case involved an application by MCG to be joined as a party pursuant to rule 69(1)(b) (Including, substituting or removing a party) of the UCPR to the originating application lodged by the applicant for a permissible change to amend a condition of its preliminary approval. The parties agreed that should MCG's application be successful it should also be joined to a concurrent appeal lodged by the applicant against the deemed refusal of a request under section 383(1) (Request to extend period in s 341), file number 950/2012, to extend the period of a development approval which had lapsed.

Facts

The applicant filed an application with the court for a permissible change to amend a condition of its preliminary approval under section 367(1) (What is a permissible change for a development approval) of the SPA. The applicant sought to change a condition of its preliminary approval which stipulated that a hotel part of the development was to be constructed within five years of the commencement of the currency period. The five year period had elapsed.

The applicant had initially made a request to the Mackay Regional Council (**respondent**) under section 383(1) (Request to extend period in s 341) of the SPA seeking an extension to the aforementioned five year period. The respondent did not respond within the required time so the applicant appealed against the respondent's deemed refusal.

MCG made an application to be joined as a party to the originating application filed by the applicant pursuant to rule 69(1)(b) (Including, substituting or removing a party) of the UCPR. The application succeeded the decision in *Mackay Conservation Group Inc v Mackay City Council & Anor* [2006] QPELR 209, where MCG conducted a lengthy and unsuccessful appeal as an adverse submitter against the council's decision to approve the development.

In determining whether MCG should be joined as a party to the proceedings, the primary question before Judge Robertson was whether MCG's presence before the court was necessary or desirable pursuant to rule 69(1)(b) of the UCPR in order to completely adjudicate the issues that arose under the applicant's:

- **originating application** to change condition 2 of the preliminary development approval, being whether the proposed change amounts to a permissible change as per section 367(1) (What is a *permissible change* for a development approval) of the SPA; and
- **appeal** in respect of the respondent's deemed refusal of an extension, being whether the request should have been made under section 383(1) (request to extend period in s341) of the SPA.

In opposition to MCG's application the applicant argued that MCG's presence was not necessary or desirable as it had not raised any evidence or issues that would be connected to answering whether the proposed change amounted to a permissible change and/or whether the request should have been made under section 383(1) of the SPA. The applicant also contended that there were already two strong contradictors in relation to the relevant issues under the application and appeal.

MCG contended that if permitted it would have made a submission in relation to the proposed change.

Decision

Despite his Honour's opinion that MCG's presence before the court was not necessary, his Honour concluded that MCG's presence was desirable, just and convenient to enable the court to adjudicate effectually and completely on all the issues raised by the applicant's originating application.

His Honour Judge Robertson considered rule 69(1)(b) of the UCPR which states that:

(1) The court may at any stage of a proceeding order that –

(b) any of the following persons be included as a party –

(i) a person whose presence before the court is *necessary* to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding (**first limb**);

(ii) a person whose presence before the court would be *desirable, just and convenient* to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding (**second limb**).

In reaching a decision, his Honour distinguished the decision in *Coolum Properties Pty Ltd and Bunnings Group Limited v Maroochy Shire Council & Ors* [2007] QCA 299 (**Coolum**). In that case, the court held that the presence of the Bunnings Group, an entity who had a commercial interest in the premises as a tenant was not necessary to completely or effectively adjudicate the matter. His Honour held that *Coolum* was distinguishable from the present case because MCG had a public interest whereas the Bunnings Groups' interest was purely commercial.

Nevertheless, his Honour found that it would be difficult for MCG to satisfy the first '*necessary*' limb of the UCPR on the basis of its public interest.

However, his Honour considered, the Queensland Court of Appeal decision, *Leda Holdings Pty Ltd v Caboolture Shire Council & Ors* [2006] QCA 41 in which Keane JA (as his Honour was then) wrote at para 5:

> *The discretion conferred by rule 69 should …not be approached as if it were intended to restrict the availability of the common law right of a person likely to be affected by a decision to be heard in relation to that decision*.

His Honour emphasised MCG's position as a highly credentialed and responsible entity with a public interest in the Mackay region. Further, bearing in mind that MCG was also involved in the lengthy and expensive appeal heard before Judge Robin QC, and having considered Keane JA's observations in *Leda Holdings* (mentioned above), his Honour found it difficult to conceive that MCG should be shut out of the proceedings.

For these reasons, his Honour held that pursuant to the second limb of rule 69(1)(b), MCG's presence would be desirable, just and convenient to enable the court to effectively and completely determine the issues raised by the applicant's originating application.

Held

- MCG to be included as a party to the applicant's originating application.
- Since MCG's application was successful in respect to the applicant's originating application, the court held that MCG should also be joined as a party to the applicant's appeal.
- The appeal was to be consolidated with respondent's originating application.

The continuing effect of development conditions

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *KCY Investments (No. 2) Pty Ltd v Redland City Council & Anor* [2012] QPEC 17 heard before Durward SC DCJ

June 2012

Executive Summary

Whenever development is proposed for land, consideration and regard has to be given to any approvals that exist over that land. In planning law, development approvals and the conditions contained therein, attach to the land the subject of the approval and bind successors in title for the relevant period of that approval. This can be an issue for subsequent purchasers of land who are constrained by earlier approvals and the obligations the conditions impose upon that land. This was the case for a proposed house on Stradbroke Island that was subject to conditions of a development approval that was given over the land over 20 years ago.

Case

This case concerned an appeal by KCY Investments (No. 2) Pty Ltd (**appellant**) against the decision of the Redland City Council (**respondent**) to refuse a development application for a material change of use for the construction of a dwelling house and whether development conditions that previously attached to the land were binding on the appellant as owner of that land.

Facts

in March 2007, the appellant applied to the respondent for a development application for a development permit for a material change of use for the construction of a dwelling house (**development application**) with respect to land situated at 7 Samarinda Drive, Point Lookout on Stradbroke Island (**land**).

The land

The land the subject of the appeal comprised part of a larger parcel of land that was the subject of an earlier development approval given by the Planning and Environment Court (**court**) in 1994, which approved development of multiple dwellings units (**1994 approval**). The appellant's land was created as a result of subsequent reconfigurations of the land the subject of the 1994 approval in 1994 and 1999 respectively.

The 1994 approval was approved subject to conditions, which included requirements for the protection and retention of existing vegetation and associated dunal topography located in an environmentally sensitive area on the land (**1994 conditions**). Relevantly, the land was situated within an environmentally sensitive area of the land the subject of the 1994 approval.

In May 2008, the development application was refused by the respondent, who contended among other matters, that the proposed development conflicted with the 1994 conditions in force over the land.

The appeal

In June 2008, the appellant appealed the respondent's refusal of the development application to the court. Whilst during the appeal process the respondent changed its position to support an approval of the development application, the principal issue for determination by the court was whether the 1994 conditions continued to apply to the land and bind the appellant's development application.

The appellant submitted that the 1994 conditions no longer applied to the land, noting that in the multiple reconfigurations of the land the subject of the 1994 approval to create the land, no conditions were attached that would limit development of the kind proposed on the land. In the alternative the appellant also submitted, that the proposed development, being code assessable, was not affected by the 1994 conditions, which related to different development and a different planning scheme. The appellant also submitted in the alternative, that the 1994 conditions did not apply because they related to a different type of development, that being multiple unit development.

The respondent argued that the 1994 approval and 1994 conditions constituted a continuing approval pursuant to section 6.1.23 (Continuing effect of approvals issued before commencement) of the *Integrated Planning Act 1997* (**IPA**) and sections 801 (Continuing effect of development approvals) and 850 (Conditions attaching to land) of the *Sustainable Planning Act 2009* (**SPA**) and that pursuant to section 3.5.28 (Approval attaches to land) of the IPA, that approval and conditions attached to the land and bound the appellant as owner of the land, despite the multiple reconfigurations of that land. Accordingly, the respondent further contended that acting on any approval of the development application without those conditions would constitute a development offence.

In October 2011, Friends of Stradbroke Island Incorporated and Stradbroke Island Management Organisation Incorporated joined the appeal as co-respondents. They supported the reasoning advanced by the respondent, but contended that the development application ought to be refused and sought dismissal of the appeal and the making of declarations in a separate originating application against the development application.

Decision

His Honour, Judge Durward SC, determined that the 1994 conditions attached the land and bound the appellant pursuant to section 3.5.28 (Approval attaches to land) of the IPA.

In his reasoning, his Honour firstly identified that the 1994 conditions were made pursuant to the repealed *Local Government (Planning and Environment) Act 1990* (**LGPEA**). By virtue of section 4.13 (Assessment of town planning consent application) of the LGPEA, those conditions attached to the land and were binding upon successors in title. Pursuant to section 6.1.23(2) (Continuing effect of approvals issued before commencement) of the IPA, each continuing approval under the LGPEA and conditions contained therein have effect as a development approval and continuing approval for the purposes of the IPA.

His Honour further identified that the status of a development approval is confirmed by section 6.1.24 (Certain conditions attach to land) of the IPA, which provided that conditions attach to the land and are binding on successors in title. Accordingly, the 1994 approval became a continuing approval with continuing conditions for the purposes of the IPA. His Honour then relied upon section 3.5.28 (Approval attaches to land) of the IPA and confirmed that the 1994 approval attached to the land and applied even if later development was approved for the land (including reconfiguration of a lot).

His Honour distinguished the case of *Rofail & Ors v Wells* [2011] QPEC 125, and confirmed that the reconfiguration of the land the subject of the 1994 approval and the transfer in ownership of that land, did not defeat or avoid the 1994 conditions.

Held

1. The appeal was dismissed.
2. The development application was approved subject to a further condition that the appellant take necessary steps to free the land of the 1994 conditions.
3. The parties have liberty to apply for an order perfecting the approval of the development application as expressed in Order 2.
4. The originating application was dismissed.

A development application substantially conflicting with a planning scheme

Samantha Hall | Aaron Madden

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Prettejohn v Cairns Regional Council & Ors* [2012] QPEC 23 before Everson DCJ

June 2012

Executive Summary

This case involved an appeal by Robert Prettejohn (**appellant**) against the decision of the Cairns Regional Council (**respondent**) on 7 July 2010 to refuse a development application for a development permit for a material change of use for dwelling houses, and a development permit for reconfiguring a lot.

Ultimately the court found that pursuant to section 4.4(5A) (Assessment of proposed planning scheme amendment) of the *Local Government (Planning and Environment) Act 1990* (**PEA**) the planning grounds identified, namely securing public access to the beach and improved environmental management of the site, were insufficient to justify the substantial conflicts with the planning scheme in operation at the time the development application was lodged, as well as subsequent planning instruments which were able to be considered by the court pursuant to section 4.1.52(2) (Appeal by way of hearing anew) of the *Integrated Planning Act 1997* (**IPA**).

Case

This case involved an appeal by the appellant against the decision of the respondent on 7 July 2010 to refuse a development application for a development permit for a material change of use for dwelling houses, and a development permit for reconfiguring of a lot on land at Taylor Point, north of Cairns.

The development application the subject of the appeal specifically involved the reconfiguration of a lot into 30 residential lots and park area, as well as a material change of use for dwelling houses (**development application**).

Facts

The site

The site the subject of the development application covered an area of approximately 18.8 hectares and had a low lying frontage to Trinity Beach, rising to a steep ridge at the internal section of the site. It was revealed during evidence that the site had been used for some unlawful structures along the beachfront (now removed), as well as for unlawful dumping of rubbish. The presence of invasive flora species was also noted.

The appellant sought to develop the site in an environmentally sensitive manner, with controls on clearing by way of covenants which ran with the land; controls on building envelopes on residential lots; publicly owned beach reserves; and the preservation of ecologically significant areas of the site. The respondent and second co-respondent however sought to demonstrate that development as identified in the development application was not contemplated by the relevant planning instruments for the site, and that it represented a significant overdevelopment of the site, negatively impacting on environmental and amenity aspects.

The legal framework

The appeal was brought under section 819 (Appeals to Court - generally) of the *Sustainable Planning Act 2009* (**SPA**) requiring the court to decide the application under the IPA. The planning scheme in force at the time of the lodging of the development application was the 'Planning Scheme for the Balance of the City of Cairns', gazetted on 29 November 1996 (**1996 planning scheme**). As such, sections 6.1.29(3) (Assessing applications (other than against the building assessment provisions)) and 6.1.30(3) (Deciding applications (other than under the building assessment provisions)) of the IPA provide that both the material change of use and reconfiguration of a lot components of the development application were required to be assessed and decided pursuant to the PEA.

In respect of the assessment of the development application then, section 4.4(5A) (Assessment of proposed planning scheme amendment) (mirrored in section 5.1(6A) (Application for subdivision etc)) of the PEA relevantly provided that the development application must be refused if:

- *the application conflicts with any relevant strategic plan or development control plan; and*
- *there are not sufficient planning grounds to justify approving the application despite the conflict*.

Relevant planning instruments

As outlined above, the 1996 planning scheme was the relevant planning instrument in force at the time the development application was lodged. The particularly relevant sections of the scheme for the purpose of the development application were in the strategic plan, and the Hillslopes Demolition Control Plan (**DCP**).

Under section 4.1.52(2) of the IPA, the court may give weight to any planning instruments or policies which have come into effect after those which were in effect at the time of the development application. In 2005, a new planning scheme was introduced which somewhat altered the development entitlements with respect to the site. However, this was replaced by the *Cairns Plan 2009* (**2009 planning scheme**) at 1 March 2009. Furthermore, the *Far North Queensland Regional Plan 2009-2031* (**FNQRP**) also came into force on 13 February 2009.

Decision

Principles of law

His Honour Everson DCJ helpfully elucidated the principles in respect of section 4.4(5A) (Assessment of proposed planning scheme amendment) of the PEA outlined above. His Honour noted that Williamson SC DCJ in *Palyaris v Gold Coast City Council* [2004] QPELR 162 placed emphasis on the word 'sufficient' preceding the term 'planning grounds' in the provision as an indication that it requires grounds which establish 'positive betterment in terms of planning outcomes'. Williamson noted that these grounds would be capable of justifying a departure from the planning scheme (in supporting the approval despite a conflict) where they could not otherwise be achieved through the provisions of the planning scheme.

His Honour also noted the comments of Atkinson J in *Weightman v Gold Coast City Council* [2003] 2 Qd R 441 in relation to the discretion associated with the test. The wording of the provision is couched in negative terms insofar as the application must be refused in a situation where there are not sufficient planning grounds to justify approval despite the conflict. Where there is not sufficient planning grounds, then refusal is deemed a mandatory requirement.

Conflict with the relevant planning instruments

By virtue of the fact that the subject site was not included in the following categories in the strategic plan contained in the 1996 planning scheme, Everson DCJ found that it was clear that residential housing was not contemplated on the subject site:

- Low Density Residential Preferred Dominant land Use designation;
- Urban Preferred Dominant Land Use designation; or the
- Urban Residential Housing Strategy Diagram A5.

Instead, the site was included in categorisations which did not support the type of development contemplated by the development application such as the Rural Constrained Preferred Dominant Land Use designation, and Major Future Tourist Accommodation.

In respect of the DCP the site was designated category B, therefore attracting the need for compliance with three major performance standards relating to the development of the site. On the evidence heard, Everson DCJ found that none of these standards were complied with, therefore demonstrating a conflict whose nature and extent could be classified as 'flagrant'.

Furthermore, it was found that the provisions of both the 2009 planning scheme and the FNQRP did not lend support to the development application as submitted for the site.

Sufficient planning grounds despite the conflict?

Everson DCJ focused upon three primary arguments put forward by the appellant as supporting the approval of the development despite conflicts with the 1996 planning scheme.

The first assertion by the appellant was that the zoning of the site in the Tourist and Residential, Residential 1 Planning Areas, and Special Facilities Zone was sufficient justification for the development despite conflicts with the strategic plan and the DCP. His Honour however found that this zoning which may have otherwise justified residential development, never in fact encompassed the entire site, and was subsequently extinguished by the 2009 planning scheme. His Honour found it appropriate that significant weight be given to the 2009 planning scheme as well as the FNQRP.

The second ground asserted by the appellant involved the securing of public access to the beach as well as the dedication of land for beach protection. This was due to the fact that on the evidence, his Honour was persuaded that for almost any development on the site, both access and land dedicated for beach protection would be provided.

Thirdly, the appellant submitted that the site would benefit from improved environmental management as a result of the development. While recognising that in certain circumstances such a ground is relevant to determining if the conflict can be justified, there was a clear intent in the 1996 planning scheme, supported by the 2009 planning scheme and the FNQRP which strongly preclude the development. In rejecting these grounds as sufficient, his Honour Everson DCJ relied upon the judgement of Quirk DCJ in *Elan Capital Corporation Pty Ltd & Anor v Brisbane City Council & Ors* [1990] QPLR 209 who highlighted the fact that as the court was not the planning authority, it is not its function to substitute planning strategies (in approving the development) for "*those which a Planning Authority in a careful and proper manner has chosen to adopt*".

His Honour held that on balance, the planning grounds were not sufficient to justify approving the development application despite the conflict.

Held

The appeal was dismissed.

Compensation, interest and delay

Samantha Hall | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Formosa & Anor v Maroochy Shire Council (No. 2)* [2012] QPEC 21 heard before Robertson DCJ

June 2012

Executive Summary

This case concerned land owned by the appellants (**Formosa**) at 92 Memorial Drive, Eumundi (more particularly described as Lots 201 and 203 on RP80220), which was used as the site of a commercial flea market that operated on Wednesdays and Saturdays (**land**).

A claim against the former Maroochy Shire Council (now the Sunshine Coast Regional Council) (**council**) for interest on an amount of compensation for reduction in value of land as a result of an amendment to the *Maroochy Plan 2000* (**planning scheme**) was successful, despite being opposed on the basis that the time for which interest is be paid ought to be reduced because there was delay in the progress of the original appeal to establish a right to compensation.

Further, the issue of delay and the appropriate interest rate to be applied were discussed and decided by the Planning and Environment Court (**PEC**).

Facts

Previously to this case, following an amendment to the planning scheme in 2002, a development application by Formosa for a material change of use under the superseded planning scheme to operate commercial flea markets on Sundays had been refused. The appeal against that refusal (**appeal**) was dismissed.

Formosa subsequently made an application to the council for compensation under section 5.4.2 (Compensation for reduced value of interest in land) of the *Integrated Planning Act 1997*, now repealed, which was the source of the right to compensation for an owner of land who asserted that a change to a planning scheme affecting the land had reduced the value of the owner's interest in the land.

A previous proceeding in *Formosa & Formosa v Maroochydore Shire Council (Now Sunshine Coast Regional Council)* [2011] QPEC 146 (**previous proceeding**) was an appeal against the decision of the council to refuse to pay to Formosa the compensation claimed. The previous proceeding was begun in 2006 but remained dormant until 2010 when the PEC's file review process prompted the parties to progress the matter.

The outcome of the previous proceeding was that the amount of $350,000 was awarded to Formosa by way of compensation.

Case

This case was a claim for interest pursuant to the *Supreme Court Act 1995* on the compensation awarded in the previous proceeding.

The PEC accepted that interest ought to be paid from the time Formosa's cause of action arose, which was held to be the time that the appeal was dismissed.

Delay

The council contended that interest should not be awarded for the full time since the cause of action arose, on the basis that Formosa unreasonably delayed in the previous proceeding. The PEC noted that the common law provides it is not delay alone, but rather unreasonable delay, that allows the court to exercise a discretion to reduce the time for which interest is payable on an amount of compensation.

In the circumstances, the court did not accept that the delay was unreasonable. The relevant circumstances included that a certain length of time passed in which valuation advice was being prepared, there was some difficulty in obtaining the council's reasons for refusal of the claim for compensation, the death of Formosa's consulting town planner, the occurrence of without prejudice meetings from 2008 onwards, no complaint from the council throughout that time about delay, and the council did not oppose the application for leave to proceed with the previous proceedings once they had become dormant, and no evidence had been led to challenge the facts in the affidavit material presented by Formosa. For this reason interest was payable for the full length of time since the cause of action arose.

Interest rate

The question whether the default judgment rate or a commercial rate of interest ought to be applied was considered by the court. Formosa argued for the default judgment rate, which was higher than the commercial rate, on the basis that interest should be seen as a part of the 'reasonable compensation' to which Formosa was entitled. It was also noted that this was the usual practice of the courts. The council argued for a lower rate calculated with reference to the ten year Government Bond Rate.

The court referred to authorities which confirmed that the purpose of compensation is restitution, that interest is necessary to preserve the full benefit of the judgment, and that in other cases concerning the selection of an interest rate, a 'fair and just' rate in the circumstances was selected.

The court had little evidence to suggest what Formosa would have done with the monies in the intervening period to influence the selection of a rate, so fixed a rate that compromised between the default interest rate and commercial rate that was considered to be fair and just in the circumstances.

Decision

Interest was awarded at a rate of 7.5% per annum to be calculated over a six-year period.

Held

The respondent was to pay by way of compensation to the appellants (including interest) the sum of $515,626.71 in respect of the reduction in the value of the appellants' interest in land at 92 Memorial Drive, Eumundi (properly described as Lots 201 and 203 on RP80220), arising from the change in the respondent's planning scheme on 7 May 2002.

Court confirms no power to extend appeal period

Anthony Perkins

This article discusses the decision of the NSW Land and Environment Court in the matter of *Simmons v Marrickville Council; Kababy Pty Limited v Marrickville Council* [2012] NSWLEC 133 heard before Biscoe J

June 2012

In brief – Court will not grant extensions to statutory time limits

In the recent decision of *Simmons v Marrickville Council; Kababy Pty Limited v Marrickville Council* [2012] NSWLEC 133, handed down on 6 June 2012, the NSW Land & Environment Court confirmed that it had no power to extend the statutory six month period within which to commence a merit appeal against the determination of a consent authority.

Applicants have six months to appeal decisions

Section 97 of the *Environmental Planning and Assessment Act 1979* provides that an applicant who is dissatisfied with the determination of a consent authority with respect to the applicant's development application (including a determination on a review under section 82A) may appeal to the court within six months after:

- the date on which the applicant received notice, given in accordance with the regulations, of the determination of that application or review, or
- the date on which that application is taken to have been determined under section 82(1) (otherwise referred to as a "deemed refusal").

Applicants argue that court has power to extend time limits

The applicants, who had filed their respective appeals outside of the six month time limitation, contended that rule 7.4 of the *Land and Environment Court Rules 2007* (**LECR**) empowered the court to extend the time prescribed by section 97(1) of the EP&A Act because rule 7.4 allows the court to fix the time for "*the doing of any thing... in connection with any proceedings*" and the filing of a planning appeal is one of the many things in connection with proceedings that fall within rule 7.4.

Varying the time periods prescribed by statute beyond the power of the court

In a relatively short judgment, Justice Biscoe held that the *Land and Environment Court Act 1979* does not expressly confer power to make rules of court varying the time periods prescribed by statute for making an appeal. Nor does it do so implicitly.

It followed, therefore, that if rule 7.4 of the LECR did empower the court to do this – which his Honour rejected – it would be invalid as beyond power.

The court noted that a right of appeal is a creature of statute. It cited with approval the authority of *Re Western Australia v Wardley Australia Ltd* [1991] FCA 314, in which it was held that:

> *A rule-making power may not be relied upon as authorising variation of limitation periods prescribed by statute, except where the power to do so has been conferred by the legislature in express terms.* (At [72])

As there was no power to extend the statutory time limitation, the appeals were accordingly dismissed for want of competency.

Development applications can be re-lodged if appeals are time barred

The message is a simple one. The court will not grant extensions to the statutory time limits set out in section 97. The only recourse open to land owners and developers time barred from appealing their respective applications is to re-lodge the development applications. That process, often enough, is a relatively straightforward one, though not without considerable cost implications.

However, in circumstances where amendments to local environmental plans have ensued in the interim, land owners and developers often find themselves in a situation where what was formerly permissible is no longer the case, requiring the preparation of an entirely new development proposal.

Riparian corridors to be determined by Strahler stream ordering methodology

Anthony Perkins

This article discusses the implications of replacing the former Riparian Corridor Objective Setting approach with the Strahler system. It further highlights the benefits of the Strahler system

June 2012

In brief – Strahler system to replace Riparian Corridor Objective Setting (RCOS)

The NSW Department of Planning and Infrastructure has announced that from 1 July 2012, the former RCOS approach to riparian corridors is to be replaced by the more objective Strahler stream ordering methodology.

Traditional disagreement on riparian corridors between developers and consent authorities

Disputes over the extent of riparian corridors and the permissible uses within these corridors continue to bedevil greenfield development projects.

Part of the tension lay in the often arbitrary nature of what consent authorities have considered to be environmentally appropriate to protect the integrity of the watercourse on the one hand, and the often substantial loss of developable land – and the associated impact on profitability – resulting from the imposition of riparian corridors on the other hand.

"Stream order hierarchy" approach for determining riparian corridors

In a bid to alleviate some of the problems associated with these tensions, and in recognition of the often inappropriate scale of corridors imposed on greenfield development projects, the NSW Department of Planning and Infrastructure has announced a new approach or methodology for determining riparian corridors.

In summary, the former Riparian Corridor Objective Setting (**RCOS**) approach is to be replaced by the so-called Strahler stream ordering methodology. This methodology, which is essentially a "stream order hierarchy", was officially proposed in the early 1950s by Arthur Newell Strahler, a geoscience professor at Columbia University in New York City.

According to the Department, the methodology provides a more objective approach which includes set riparian corridor widths, as opposed to the more discretionary RCOS regime.

Advantages of Strahler approach to riparian corridors

According the Department, the adoption of the new methodology and the related reforms are anticipated to:

- establish clear and appropriate rules on the width of riparian corridors;
- provide greater flexibility in urban design by allowing a broader range of uses in riparian corridors, including detention basins, cycleways, roads and recreational areas;
- enable works and activities to be offset along the length of a riparian corridor;
- provide greater flexibility with watercourse crossing design;
- remove the need for vegetated buffers in addition to a riparian zone;
- introduce a streamlined assessment approach so that compliant proposals can be assessed more quickly.

NSW Office of Water to manage new methodology

The new methodology will be managed and implemented by the NSW Office of Water, to which local councils and developers will need to refer. It is also anticipated that much of the work associated with determining the scale and extent of riparian corridors will be addressed as part of the rezoning process.

The Department of Planning and Infrastructure has announced that the reforms will apply across the State from 1 July 2012.

Clarifying the role of consent authorities in bushfire prone land

Anthony Perkins

This article discusses the NSW State government's objective of streamlining the assessment of development applications. The article specifically mentions one of the government's targets, the NSW Rural Fire Service

June 2012

In brief – NSW Rural Fire Service (RFS) to assess only non-compliant or integrated development applications

A recent amendment to the *Environmental Planning and Assessment Act 1979* means that if a local council or other consent authority is satisfied that a development application meets the requirements of *Planning for Bush Fire Protection 2006*, or receives a certificate to that effect, the consent authority must determine the application without referring it to the RFS.

State government aims to streamline assessment of development applications

One of the perennial objectives of planning reform in NSW is to reduce the number of government authorities and agencies involved in the assessment of development applications.

The State government's latest target is the NSW Rural Fire Service and its involvement in development carried out on bushfire prone land.

Local councils tended to refer development applications to the RFS

Until recently, the assessment regime for development carried out in bushfire prone land required the consent authority – typically the relevant local council – to satisfy itself that the development proposal met with the requirements of *Planning for Bush Fire Protection 2006*, or to rely on a certificate provided by a qualified consultant in bushfire risk assessment.

Irrespective of this process, consent authorities were nevertheless permitted to refer proposals to the RFS for its assessment and comment. That in turn triggered further delays and, often enough, conflicting opinions on the suitability of the development. More often than not, the discretion to refer applications to the RFS was exercised by consent authorities.

Amendment removes discretion to refer complying applications to the RFS

A recent amendment to section 79BA of the *Environmental Planning and Assessment Act 1979* has now removed that discretion. In summary, if a consent authority is satisfied that the requirements of *Planning for Bushfire Protection 2006* have been met, or receives a certificate to that effect, the consent authority must determine the application without referral to the RFS.

Proposals that do not meet the requirements of *Planning for Bush Fire Protection 2006* will continue to be referred to the RFS for assessment under section 79BA, subject to some exceptions.

Council officers exempted from liability for decisions on bushfire prone land

To alleviate one of the more obvious concerns of local councils arising out of this latest amendment, the government has also seen fit to amend section 733 of the *Local Government Act 1993*, the effect of which is that council officers making decisions in relation to development on bushfire prone land will be exempt from liability, provided those decisions were made in good faith.

Private certifiers not exempted from liability

Somewhat inconsistently, this statutory exemption does not extend to private certifiers issuing certificates of compliance under section 79BA. That, in turn, may ultimately have an impact on whether developers choose private certifiers or rely upon the assessment of council officers in determining compliance (the former with professional indemnity insurance; the latter with statutory immunity).

Rural Fire Service will continue to assess integrated development applications

The RFS will continue to assess integrated development applications under section 91 of the *Environmental Planning and Assessment Act 1979*, including the subdivision of land for residential or rural residential purposes, the development of land for special fire protection purposes, the assessment of draft Local Environment Plans (**LEPs**) and the certification of bushfire prone land maps.

Compulsory land acquisition and costs orders: an evolving landscape

Anthony Perkins

This article discusses the Court of Appeal's decision to reinstate its previous position of allowing cost orders to be awarded in favour of the dispossessed landowner. It refers to the case of *Dillon v Gosford City Council* [2011] NSWCA 328

June 2012

In brief – Court of Appeal reinstates previous position with regard to costs orders

The Court of Appeal has recently confirmed that when dispossessed landowners in NSW challenge the compensation paid by acquiring authorities via class 3 proceedings in the Land and Environment Court, costs are usually awarded in favour of the dispossessed landowner, provided they act reasonably in pursuing the proceedings.

Courts have adopted a cautious approach to costs

The power to compulsorily acquire a person's land is one of the more substantive powers available to all levels of government and numerous statutory agencies.

Unsurprisingly, when dispossessed landowners in NSW elect to challenge the compensation paid by acquiring authorities, via class 3 of the NSW Land and Environment Court's jurisdiction, the court has adopted a somewhat cautious approach to the question of who should pay the costs of such proceedings, particularly in circumstances where the sum awarded by the court is not significantly different to that determined by the acquiring authority in the first instance.

Compulsory acquisition cases are not "ordinary litigation"

The general principles to be applied in compensation cases associated with compulsory acquisitions have been addressed in numerous judgments over many years, which may be summarised as follows:

- compulsory acquisition cases are not "ordinary litigation", concerning as they do a unilateral exercise of executive power against the property rights of citizens: *Banno v Commonwealth* (1993) 45 FCR 32;
- "there needs to be a strong justification for awarding costs against an applicant": *Pastrello v RTA of New South Wales* [2000] NSWLEC 209;
- "different principles" were justified in apportioning costs in acquisition cases by reason of the interference with an individual's rights, the "confiscating nature" of such acquisitions and the "statutory entitlement to just compensation": *Taylor v Port Macquarie-Hastings Council* [2010] NSWLEC 153.

Usual presumption that costs do not follow the event

Until quite recently, the usual presumption had been that costs do not generally follow the event. (When "costs follow the event", this means that the unsuccessful party pays the costs of the successful party.)

That general presumption was shattered abruptly and somewhat controversially by the decision of Justice Pepper in *Halley v Minister Administering the Environmental Planning and Assessment Act 1979 (No. 3)* [2011] NSWLEC 94, in which her Honour held that the so-called "general principles" relating to costs orders in cases concerning compulsory acquisitions, developed over many years, could no longer be maintained, particularly in light of the enactment in more recent times of the *Civil Procedure Act 2005* (**CPA**), the *Uniform Civil Procedure Rules 2005* (**UCPR**) and the *Land and Environment Court Rules 2007* (**2007 Rules**), none of which, in her Honour's view, distinguish or exempt compulsory acquisition cases from "the usual rule" that costs follow the event.

It follows, her Honour held, that rule 42.1 of the UCPR applies, and becomes the starting point for any consideration regarding the question of costs. That rule provides, unambiguously, that the appropriate order is that costs follow the event unless it appears to the court that "some other order should be made as to the whole or any part of the costs".

Her Honour acknowledged the departure:

> *[49] I accept that this position does not sit comfortably with a considerable body of opinion of this Court. But many of these cases were decided before the enactment of the CPA, the UCPR or the 2007 Rules. They must now be viewed through a different prism and approached with caution. Judicial comity alone is no answer to this altered legal landscape…*

Court of Appeal decision in Dillon v Gosford City Council

Since the decision of *Halley No. 3*, the Court of Appeal has weighed in on the controversial debate. In the judgment *Dillon v Gosford City Council* [2011] NSWCA 328, the Court of Appeal held, in a unanimous verdict, that "there is no presumption that costs follow the event" in class 3 proceedings, in stark contrast to the decision in *Halley No. 3* and somewhat fortuitously for dispossessed landowners wishing to have their statutory valuations reviewed by the Land and Environment Court.

In part, the decision was predicated on clause 1.5 and Schedule 1 of the UCPR, which expressly exclude the operation of the UCPR from classes 1, 2 and 3 of the Land and Environment Court's jurisdiction. This appears not to have been addressed in the decision *Halley No. 3*.

Dispossessed landowners should usually be entitled to recover costs

The Court of Appeal in *Dillon* made two further important observations regarding the award of costs in compensation cases of this nature:

- a claimant for compensation in respect of a compulsory acquisition should usually be entitled to recover the costs of the proceedings, having acted reasonably in pursuing the proceedings and not having conducted them in a manner which gives rise to unnecessary delay or expense [at para. 70];
- the owner who has been compulsorily dispossessed is entitled to take reasonable steps to seek the judgment of the court in respect of the adequacy of any compensation offered [at para. 71].

The decision of the Court of Appeal in *Dillon* embraces, in substantial part, the "usual principles" traditionally relied upon by the judges of the Land and Environment Court in dealing with compensation disputes arising from compulsory acquisitions. A number of decisions handed down this year have, as a consequence, adopted the reinstated position on costs.

In the decision of *Prasad v Minister Administering the Environmental Planning and Assessment Act 1979 (No. 2)* [2012] NSWLEC 59, for example, the applicant obtained only a marginally better result on compensation than originally offered, but was awarded his costs of the proceedings.

Applicants for compensation obliged to act reasonably

What has not changed, however, is the obligation imposed on applicants to act reasonably and diligently in the conduct of litigation challenging statutory valuations, lest they dislodge the presumption of a favourable costs order.

Disentitling conduct on the part of an applicant can take many forms:

- excessive and unsupportable compensation claims;
- delay in the conduct of the proceedings;
- the rejection, in limited circumstances, of offers of compromise and Calderbank offers made by the acquiring authority.

Parties may be ordered to pay their own costs

Importantly, costs will not always be awarded in favour of dispossessed landowners, particularly in circumstances where the court awards a sum which is, on any view, substantially less than the original statutory offer.

In the recent decision of *Brock v RTA of New South Wales (No. 2)* [2012] NSWLEC 114, handed down in May 2012, the court ordered each party to pay their own costs of the class 3 proceedings. Briefly stated, the applicant's land was acquired by the RTA (the forerunner to Roads and Maritime Services) in October 2008. The statutory offer made by the RTA at the time was $724,828 (comprising market value and disturbance entitlements). As the hearing approached the applicant was claiming approximately $1.5 million.

The applicant was ultimately awarded a total of $480,020.25 in compensation, plus a relatively small amount in statutory interest, representing a significant shortfall on the original statutory offer and substantially less than what was being claimed by the applicant in the lead up to the hearing. In the circumstances, the court felt compelled to order each party to pay their own costs of the proceedings.

The final word on costs in class 3 proceedings, for the time being at least, belongs to Justice Sheahan in the decision of *Brock*:

> *[19] While minds may continue to differ on the principles which the Court should apply, the Court of Appeal has spoken, and no relevant amendments have since been made to applicable statutes or rules. Each case will continue to be decided on its individual facts. As Jagot J, when a judge of this Court, pithily observed in Serbian Cultural Club 'St Sava' Inc & Serbian Cultural Club Limited v RTA of New South Wales (No. 2) [2008] NSWLEC 78, there are "no hard and fast rules" or "automatic results" in class 3 costs matters.*

Development consents and extraneous documents: the devil is in the detail

Anthony Perkins | Claire Parsons

This article discusses the implications of referring to extra material not included in the development consent if the development consent is unclear or ambiguous. It specifically mentions the case of *Quarry Products (Newcastle) Pty Limited and Allandale Blue Metal Limited v Roads & Maritime Services (No. 3)* [2012] NSWLEC 57

June 2012

In brief – It may be necessary to consider the source material on which a development consent was granted

If the terms of a development consent are unclear or ambiguous, a government authority or the court on appeal may take into account reference material which is not identified in the development consent itself. This can have significant impacts on the commercial value of the consent.

Consent granted for a quarry

In 1979 a development consent was granted by Cessnock City Council for a quarry and associated infrastructure at a property at Allandale, NSW. The consent provided no conditions defining the precise size and location of the quarry within the confines of the property, although it did provide detailed conditions regulating the operation and construction of the quarry and the associated buildings and infrastructure.

Accompanying the original development application was a letter with further details – specifically, that the proposed maximum area for quarrying activities would be 40 hectares "as indicated in the diagram". The accompanying diagram contained a circle, with a notation stating a proposed quarrying area of 40 hectares.

Compulsory acquisition of the property by NSW Roads and Maritime Services

The NSW Roads and Maritime Services (**RMS**) subsequently acquired the property via compulsory acquisition. The applicants – the dispossessed land owner and the lessee – argued for a property valuation based on an entitlement to relatively unlimited quarrying activities. RMS argued for a valuation based on quarrying activities limited to 40 hectares.

Should the development consent be considered on its own?

The primary issue for the court in *Quarry Products (Newcastle) Pty Limited and Allandale Blue Metal Pty Limited v Roads & Maritime Services (No. 3)* [2012] NSWLEC 57 was whether, in the absence of specific conditions dealing with scale, geographic location and volumetric limits of the quarry, it was possible to be guided by the documents accompanying the original development application, lodged 33 years earlier.

The applicants argued that the consent was complete and must be read and interpreted on its face. RMS argued that it was not possible to understand what development was approved by the terms of the consent alone and that it was necessary to consider the development application documents.

Decision of the Land and Environment Court

The decision may be summarised as follows:

- When determining what has been approved, you primarily interpret the document constituting the approval. If the terms of the consent are clear, you may not look at extraneous documents to qualify or contradict the consent.
- Where a development consent incorporates the development application or other documents expressly or by necessary implication, these documents may be relied upon to interpret the consent. This reliance extends only to the extent that these documents are actually incorporated into the consent.
- The express incorporation of extraneous documents into a consent requires more than mere passing reference, but instead the use of words that would inform a "reasonable reader" that the other documents form part of the consent.
- The incorporation of extraneous documents by way of "necessary implication" arises where the terms of the consent are not clear and are ambiguous.

Development consent could not be interpreted on its own

The court found that the consent could not properly be construed alone, as it did not include "necessary and important details", such as the size and location of the quarry. These details were contained in the original development application documents, specifically the letter and the indicative plan.

The court was satisfied that these documents were incorporated into the consent expressly (by virtue of the planning regime at the time) and also by "necessary implication" in order to rectify the ambiguity.

Implications of the Quarry Products decision

This decision raises two important issues. First, a development consent which is unclear or ambiguous in its terms or scope will not necessarily be construed liberally or expansively to the benefit of the landowner by government authorities or the court on appeal.

Secondly, if there is any uncertainty in the terms of a development consent, it is necessary to consider the source material on which the consent was granted, irrespective of how many years the consent has been operational.

Reinvigorating planning and the planning system in Queensland – A neoliberal perspective

Ian Wright

This article explores ideological and planning theories and planning models and identifies the potential for reinvigoration of Queensland's planning system via a neoliberal perspective

September 2012

Abstract

The modernist perspective of planning has been concerned with making public and political decisions in respect of the planning of our places more rationally and consistent with an overarching public interest.

However, the modernist perspective of rational planning action has been challenged by a post-modernist perspective, and more recently by a neoliberal perspective, rooted in the political ideals of liberalism which holds that a liberal market supportive style of planning will produce more environmentally sustainable outcomes.

The paper considers how the modernist, postmodernist and neoliberal perspectives of planning have been applied in the context of the planning system particularly in relation to matters such as the following:

- the planning of master planned areas contrasting the top down approaches of some structure plans with the bottom up approaches of others;
- the role of development assessment managers contrasting planners as managing planning decisions and facilitating action to realise publicly agreed goals on the one hand or alternatively realising market sensitive individuals' goals on the other;
- the planning, funding/financing and delivery of infrastructure contrasting rationally planned methods based on cost/benefit analyses of efficiency and equity on the one hand with the politically market driven methods on the other;
- the planning system contrasting the top down State directed model of planning provided by the *Sustainable Planning Act 2009* (Qld) on the one hand with community based planning from the ground up geared to community empowerment on the other.

The paper considers the modernist, postmodernist and neoliberal perspectives of planning for the purpose of identifying how the recently elected Liberal National Party government may seek to reinvigorate planning and the planning system in Queensland.

Introduction

Queensland Government reform

In March 2012, Queensland elected a Liberal National Party (**LNP**) government with an overwhelming mandate for change.

Central to that mandate is the promotion of a four pillar economy involving the resources, agriculture, construction and tourism sectors, as well as the empowerment of local government.

The LNP government intends to move quickly to implement its reform agenda, which because of the government's majority, is likely to have significant implications for the public, private and third sectors for decades to come.

Neoliberal reform agenda

The full scope of the LNP's planning reform agenda is yet unclear. However what is apparent is that neoliberalism is the dominant ideological rationalisation for the LNP's reform agenda of the Queensland government.

Neoliberalism is an ideology that involves a commitment to the rolling out of market mechanisms and competitiveness and the rolling back of governmental intervention (Peck and Tickell 2002).

From a neoliberal perspective much of urban public planning is seen as a distortion of land markets which increases transaction costs through bureaucratisation of the urban economy. Neoliberalism holds that this should be rolled back by contracting the domain of planning (de-regulation) and then privatising segments of the residual sphere of regulation (outsourcing). As such, the raison d'etre of planning as a tool of correcting and avoiding market failure is dismissed and planning is subsumed as a minimalist form of spatial regulation whose chief purpose is to provide certainty to the market and to facilitate economic growth (Gleeson and Low 2000).

Ideology, theory, practice and policy

While it is unclear how ideology influences planning and in turn how planning theory affects planning practice, a consideration of ideology and planning theory does provide an opportunity to understand the evolving processes that planning practice may face as a result of the LNP's neoliberal planning reform agenda.

As Forester (1989:12) observes:

> *Theories can help alert us to problems, point us towards strategies of response, remind us of what we care about, or prompt our practical insights into the particular cases we confront.*

Themes of paper

This paper therefore has 5 themes:

- First, it establishes a model of urban change, that seeks to show the relationship of ideological and planning theories and models to the components of urban change and the institutions responsible for that change.
- Second, it seeks to flesh out the debate on premodernism, modernism, postmodernism and neoliberalism, to provide an ideological context to both the broad policy settings of a neoliberal government and the use of planning theory in a neoliberal state.
- Third, it seeks to flesh out the debate on planning theory to provide a theoretical context for the consideration of planning models, in particular the postmodernist collaborative planning model and the neoliberal strategic planning model.
- Fourth, it discusses the key characteristics of the neoliberal strategic planning model to provide context for the consideration of the potential planning practice implications of the use of this model.
- Finally, it seeks to identify the planning policy outcomes which are likely to be associated with a neoliberal government, to provide context to the potential scope of the LNP planning reform agenda in Queensland.

Urban change model

Components and institutions of urban change

Urban change occurs as a result of the interplay of three institutional components (Newman 2000:1):

- the market represented by the private sector;
- the government represented by the public sector; and
- the community comprising civil society or the so called third sector.

The characteristics of the institutional components and associated institutions of urban change are described in Table 1.

Table 1 Components and institutions of urban change

Market – private sector	Government – public sector	Civil society – third sector
Stakeholders of institution		
Consumers, producers, employers, employees, trade associations and unions	National, State and local government – including public sector entities	Communities including media, churches, educational bodies, associations, community groups
Role of institution		
Provision of wealth for development	Protection of rights and public realm	Guardian of culture and ethics
Instituted outputs		
Goods and services	Laws and regulations; Infrastructure and services	Values and vision

Market – private sector	Government – public sector	Civil society – third sector
Conception of the public interest		
Focussed on an aggregated criteria of choice based on the notions of utility or satisfaction	Focussed on an overall idea such as 'the spirit of history' or the 'essence of the soul'	Focussed on the community as the first ethical subject and consequently on a common conception of the good life
Institutional horizons		
Short term	Medium term (based on the term of office)	Long term

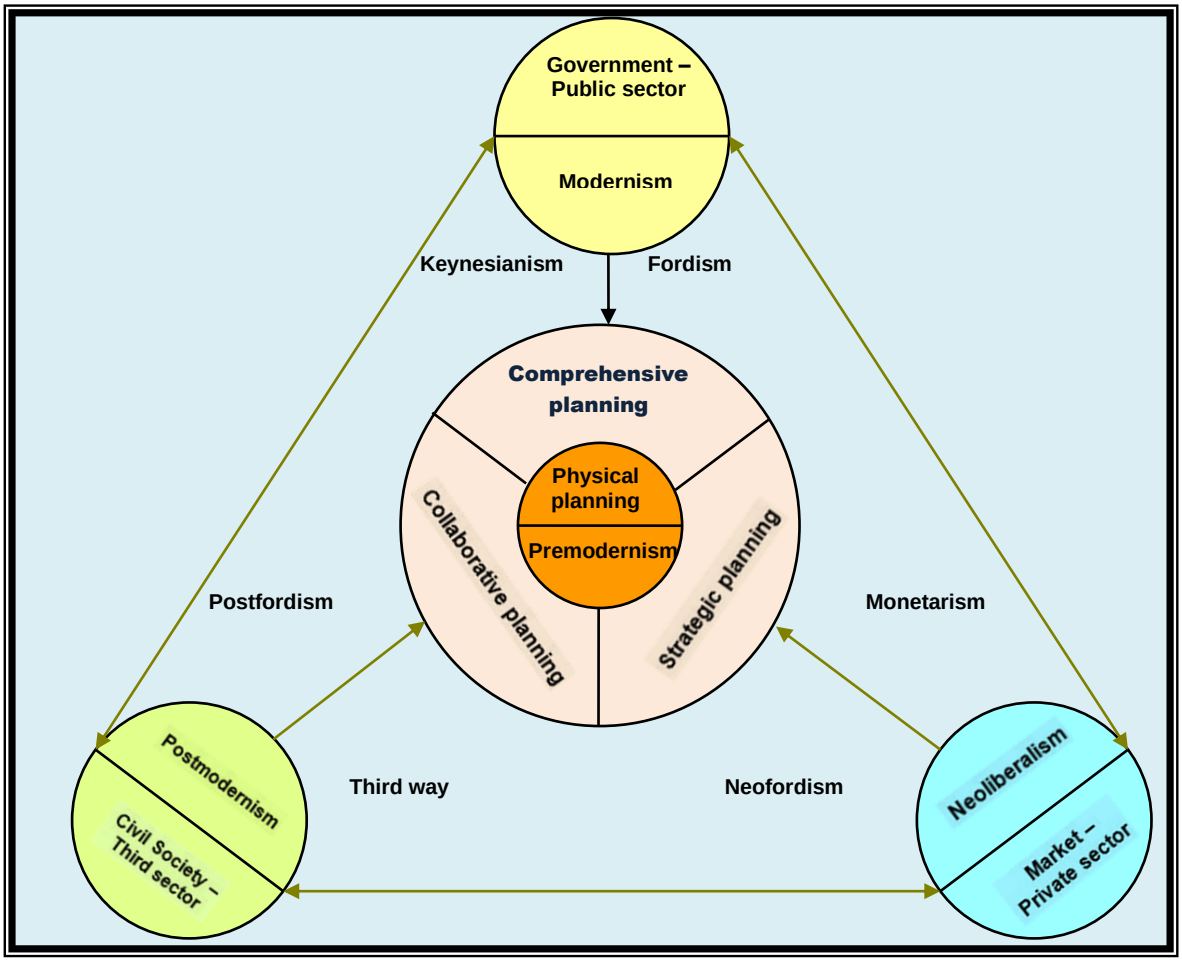
Source: Newman 2000:2; Moroni 2004:155; Alexander 2012:75

Planners influence all components of urban change: the market, government and civil society. They work through the private, public and third sectors using a collection of planning theories and practices to influence urban change, or on some occasions to prevent urban change.

Relationship of planning theory and practice for urban change

The interrelationship between the planning theories and practices used by planners and the components and institutions of urban change is shown in Figure 1.

Figure 1 Urban change model



It is clear that planning and the capacity to effect urban change is critically influenced by planning theory and practice.

An understanding of planning theory requires it to be placed within the context of broader cultural, socio-economic and political change; being the historic shift from premodernism to modernism, and then to postmodernism and more recently to neoliberalism.

Premodernism, modernism, postmodernism, neoliberalism

Neoliberalism in a historic context

The broad cultural, socioeconomic and political changes that have influenced western societies such as Australia have had a profound effect on planning theory and practice.

These changes exist in a historic century-long linear process of transition from premodernism to modernism to postmodernism and finally to neoliberalism.

The cultural, socioeconomic and political conditions of modern, postmodern and neoliberal societies are described in Table 2.

Table 2 Cultural socio-economic and political conditions of ideological theories

Modern	Postmodern	Neoliberal
Period of era		
Modernity – The period of modern thought from the Enlightenment to the present	*Postmodernity* – The period of postmodern thought from the 1960s to the present	*Late capitalism* – The period of neoliberal thought from the late 1980s and early 1990s to the present
Cultural conditions		
Modernism – The cultural conditions which accompany a method of thought in which human reason is able to identify objectively existent and knowable laws of reality that can be used to effect change to achieve a unitary common public good or truth (Hirt 2002:3)	*Postmodernism* – The cultural conditions which accompany a method of thought in which human reason is able to identify the subjectively constructed views of groups that can be used to effect change to achieve a good as defined by these groups	*Neoliberalism* – Has little to say about the cultural conditions of society
Social conditions		
Fordism – The social conditions which accompany industrial mass production using repetition and simplicity of standardised products for mass consumption by a mass market (Goodchild 1990:126)	*Postfordism* – The social conditions which accompany flexible small batch production of specialised products for consumption by different groups in niche markets (Goodchild 1990:126)	*Neofordism* – The social conditions which accompany the provision of services using information technologies to niche markets that predominates over manufacturing which is de-industrialising
Economic conditions		
Keynesianism welfarism – The economic conditions of a mixed economy involving predominately the private sector but a significant role for the public sector involving monetary policy by central banks and fiscal policy by governments to stabilise output over the business cycle	*Third way* – The economic conditions of a market economy involving the private sector where the role of the public sector is limited to macro-economic stability, investment in infrastructure and education, containing inequality and guaranteeing opportunities for self-realisation (Giddens 2000:164)	*Monetarism* – The economic conditions of a market economy involving the private sector where the role of the public sector is limited to monetary policy by central banks

Modern	Postmodern	Neoliberal
Political conditions		
Social democracy – The political conditions involving: ▪ a universal society existing as a structure ▪ the collective good of the society ▪ welfare services that are delivered to ensure equality of opportunity and removal of differences within society	*Deliberative democracy* – The political conditions involving: ▪ multiple societies existing as networks and flows ▪ the good of each society ▪ welfare services that are delivered to ensure personalised integrated services to reflect the differences of society	*Liberal democracy* – The political conditions involving: ▪ individuals – there being no society or societies ▪ the good of the individual ▪ welfare services that are delivered by the market with limited targeted welfare services

Neoliberal cultural socioeconomic and political conditions

In the context of the current LNP government it is important to understand the potential political, cultural and social conditions of a neoliberal society:

- *Cultural conditions* – Neoliberalism has little to say about the cultural conditions of society as it is a theory derived from economics.
- *Social conditions* – Neoliberalism is premised on the social conditions of a service based economy where the provision of services using information technologies to niche markets predominates over a declining industrial sector.
- *Economic conditions* – Neoliberalism is premised on the economic conditions of a market based economy involving the private sector, where the role of the public sector is limited to monetary policy by central banks. Neoliberalism rejects the use of fiscal policy by government to stabilise output over the business cycle.
- *Political conditions* – Neoliberalism is also premised on the political conditions of a liberal democracy that involves the following:
  - individuals have the right to pursue a good life that does not harm others;
  - services are delivered by the market;
  - the role of the government is limited to providing information and guidelines as well as targeted welfare services for limited social exclusion areas.

These broad socioeconomic and political conditions provide the ideological context which will influence the broad policy settings of a neoliberal government.

Policy settings of a neoliberal government

The broad policy settings which are generally associated with modern, postmodern and neoliberal theory are described in Table 3.

Table 3 Institutional characteristics of ideological theories

Modern	Postmodern	Neoliberal
Government size		
Big government	Smaller but better integrated government	Small government
State and local government relationship		
Centralised local governments address the public interest	Centralised local governments address group interests, in particular areas of social exclusion. Secondly, local governments are well funded but are also more accountable	Governments (politicians and public servants) are to demonstrate entrepreneurial spirit (risk-taking, investment and profit motivated) Central government solicits growth whilst local governments facilitate growth. Further, State government

Modern	Postmodern	Neoliberal
		downloads unfunded central government risks and responsibilities to local governments which are to compete against each other for economic growth
Government and civil society relationship		
Government help	Community self-help with government help for social exclusion	Individual self-reliance and entrepreneurship Customer focus
Government and private sector relationship		
Government provision, commercialisation and corporatisation	Public-private partnerships	Facilitate the private sector by privatisation and outsourcing
Government financial management		
Higher taxes and spending	Lower but better targeted taxes and higher spending on socially excluded areas	Lower taxes and lower spending (fiscal conservatism and austerity)
Government regulation		
Regulation	Further regulation	Deregulation Less importance on rules, processes and expert jurisdictions

Source: Jackson 1990:405

In the context of neoliberal theory the following broad policy settings are likely to be adopted by a neoliberal government:

- Small government – witness the dramatic downsizing of the public service by some 14,000 jobs announced in the 2012 Queensland budget.
- The downloading of unfunded State government risks and responsibilities to local governments which are forced to compete against each other for economic growth – witness the State government's transition of financial liabilities for urban development areas under the *Urban Land Development Authority Act 2007* to local governments, and the Brisbane City Council's 2031 Strategic Vision which envisions Brisbane as 'Australia's New World City' which is competing globally against other world cities.
- Individual self-reliance and entrepreneurship with little or no government help.
- The outsourcing of government functions and privatisation of government assets.
- Lower taxes – witness the cost of living reductions in electricity, water and public transport charges announced in the 2012 Queensland budget.
- Deregulation – witness green tape reduction, reforms to the *Environmental Protection Act 1994*, referral agency reforms under the *Sustainable Planning Act 2009* and local government reforms under the *Local Government Act 2009*.

These broad policy settings together with the broader socioeconomic and political conditions of neoliberal theory provide the context for the consideration of the use of planning theories by planners.

Planning theory in a neoliberal state

Neoliberal planning theory

Given the neoliberal socioeconomic and political conditions and broad policy settings which are expected to develop in Queensland under the LNP government, it is likely that the use of neoliberal planning theory will become more dominant amongst planners.

The approaches to planning theory that are embodied in premodern, modern, postmodern and neoliberal ideologies are described in Table 4.

Table 4 Ideological approaches to planning theory

Premodern	Modern	Postmodern	Neoliberal
Humanistic premise of planning (ie ends of planning)			
Utopia – An end state in which individuals are emancipated towards an ideal society	*Collective public interest* – An end state in which society en masse is emancipated towards a common good for the society	*Group interest* – An end state in which groups within society are emancipated towards a good defined by those groups	*Individual interest* – There is no end state for society but rather the right of each individual to pursue a good life that does not harm others
Epistemological premise of planning (ie the means of planning)			
Artistic design method – Universal laws of physical and aesthetic design principles can be objectively defined by human reason	*Rational scientific method* – Universal laws of planning principles can be defined through value free scientific reason (positivist knowledge)	*Participatory method* – There are non-universal laws but the subjective value laden principles of individuals can be determined through a participative process	*Managerialist method* – There are no universal laws and personal goods can be pursued through a managerial process determining goals, objectives and strategies and implementing them
Planning theories			
▪ Physical planning (Unwin 1909; Triggs 1909)	▪ Rational planning (Sharp 1940; Abercrombie 1959; Keeble 1969) ▪ Systems planning (McLoughlin 1969) ▪ Procedural planning (Faludi 1973)	▪ Advocacy planning (Davidoff 1965) ▪ Incremental planning (Lindblom 1959) ▪ Radical (action) planning (Friedmann 1987) ▪ Participatory planning (Arnstein 1969) ▪ Communicative planning (Habermas 1984; Healey 1997)	▪ Strategic spatial planning (Kaufman and Jacob 2007; Healey 2007)
Planning models			
Physical planning	Comprehensive master planning	Collaborative planning	Strategic planning
Planning era			
Before First World War	▪ Interwar period – avant-garde movement ▪ Post war – adopted by government	▪ 1960-1980 – part of counter culture ▪ 1980 onwards – adopted by government	1990s onwards

Source: Goodchild 1990:126; Hirt 2002

Planning theory is based on two different premises. The first is that planning has a humanistic or social emancipation end. The second is that planning theory has an epistemological premise being the means by which planning delivers the end (namely social emancipation).

Humanistic premise of planning theory

In neoliberal planning theory the planning end is not an end state for society such as the collective public interest (for modern planning) or group public interest (in the case of postmodern planning theory).

Rather it is individual interest; the right of each individual to pursue a good life that does not harm others.

Epistemological premise of planning theory

Neoliberal planning theory postulates that the end of an individual good life is not pursued through the rational scientific method of value free scientific reason (in the case of modern planning theory) or a participative process to define group values (in the case of postmodern planning theory).

Rather, the neoliberal end of an individual good life is to be achieved through a management process of defining goals, objectives and strategies and by implementing them.

In neoliberal planning theory, the managerialist method, which is embodied in the planning model of strategic planning, is the predominant planning model.

Strategic planning model in a neoliberal state

Strategic planning is a planning process that is focussed on the implementation of specific and attainable goals, objectives and strategies. It differs from comprehensive master planning which aspires to an abstract common public good or interest. It also differs from collaborative planning which focuses on the group good or interest as defined by groups within society.

It is anticipated that the strategic planning model will become the predominant planning model among planners in Queensland.

The characteristic of the strategic planning model are described in Table 5.

Table 5 Key characteristics of planning models

Physical planning	Comprehensive master planning	Collaborative planning	Strategic planning
Institutional arrangements			
Limited uncoordinated community and government initiatives	Government lead with limited community involvement	Government lead with significant community involvement	Private sector lead through market
Institutional decision making			
Top down with no bottom up community involvement	Top down with limited bottom up community involvement	Top down and bottom up	Bottom up through market
Planning scales			
City and district level planning	City and district level planning with limited local and site level planning	City and district level planning with emphasis on local and site planning	Emphasis on local and site level planning
Planning horizon			
Long term	Medium term	Medium term at strategic and district levels and short term at local and site levels	Short term
Planning focus			
Physical and aesthetic design based (place based planning)	Spatial based planning	Spatial based planning at strategic and district levels and place based planning at local and site levels	Place branding, marketing, promotion and competition (European cities, capital cities, world cities, cool cities and creative cities) Attraction of the creative class (IT, arts, biotechnology, science)

Physical planning	Comprehensive master planning	Collaborative planning	Strategic planning
			Attraction of corporate investment (free land or buildings, lower infrastructure charges, grants, tax relief such as stamp duty and payroll tax)
Concepts of the city			
City Beautiful – Cities are a symptom of social order and disorder	*Mechanistic City* – Cities are economic objects that can be rationally ordered and mass produced	*Just City* – Cities are an expression of the social diversity of its citizens and the ecological diversity of its environment	*Competitive and productive City* – Cities are economic objects that are competing against each other for economic growth
Strategic and district level planning themes			
▪ Promotion of massed suburban expansion ▪ Promotion of garden cities ▪ City beautiful movement ▪ Parks movement	▪ Redevelopment of slums with high rise buildings in open space ▪ Controlled low density suburban expansion ▪ New towns within green belts ▪ Urban neighbourhoods criss-crossed by freeways	▪ Renewal and regeneration of central cities and infill sites ▪ Increased urban density within compact urban space ▪ Containment to minimise land consumption, preserve open space and reduce infrastructure costs	▪ Promote urban branding, imagery and advertising ▪ Promote redevelopment of central cities and adjoining suburbs as residual places ▪ Urban expansion not containment ▪ Mega projects are seen as strategic economic assets (exhibition centres, science parks, sport stadiums, waterfront developments, cultural districts)
Local and site level planning themes			
▪ More daylight and sunlight for canyon streets ▪ Public health and sanitary reform ▪ Settlement house and reform movement	▪ Zoning of urban space into self-contained single land use or functional districts ▪ Reduction of urban density ▪ Mixed flats and houses ▪ Demolition of dilapidated buildings	▪ Integration of land uses and functions into mixed-use districts of urban space ▪ Increased urban density ▪ Mixed land uses ▪ Emphasis on local context ▪ Preservation of historic buildings and local cultural heritage	▪ Performance zoning (flexible zones, urban enterprise zones, business improvement districts) ▪ Flexible building standards ▪ Integrated development control ▪ Reduced standards of services for infrastructure, roads and open space ▪ Reduced government space for houses

Source: Goodchild 1990:126; Jackson 2009:405

A strategic planning model operating in a neoliberal state is anticipated to have the following significant characteristics:

- *Institutional arrangements* – Planning is market led by private sector developers.
- *Institutional decision making* – Planning is a bottom up through the market rather than the top down/bottom up approach characteristic of the comprehensive master planning model (associated with modern planning theory) and the collaborative planning (associated with postmodern planning theory).
- *Planning scales* – Planning is focused on local and site level planning rather than the strategic and district level planning and local and site level planning associated with comprehensive master planning and collaborative planning.
- *Planning horizon* – Planning has a short term horizon reflecting the reality that planning is intended to be capable of continual revision in response to the market.
- *Planning focus* – Planning is focussed on place marketing, rather than the spatial based planning and place based planning approaches associated with comprehensive master planning and collaborative planning.
- *Concept of the city* – Planning is focussed on ensuring that the city is an economic growth object which can effectively compete against other cities for economic growth.
- Strategic and district level planning themes.
- Local and State level planning themes.

The increased use by planners of a strategic planning model in Queensland will have a significant influence on the state of planning practice in Queensland.

Planning practice in a neoliberal state

Neoliberal planning practice

The broad neoliberal socioeconomic and political conditions and associated policy settings which are expected to develop under an LNP government will encourage the use of neoliberal planning theory and models that will have an increasing influence on planning practice.

The anticipated implications for planning practice of the increased use by planners of neoliberal planning theory and models are described in Table 6.

Table 6 Implications for planning practice of neoliberal planning theory and models

Neoliberal response	Implications
Government size	
Small government	▪ Reduced State government planning ▪ Contracting out of planning functions
Central and local government relationship	
State government solicits growth and local government facilitates growth State government downloads unfunded State government risks and responsibilities to local governments Governance to mimic corporate style and logic	▪ Local governments contract out selected services ▪ Limited government control of local government plans ▪ Local governments forced to compete with each other for economic growth ▪ Greater focus on place marketing and competition than place making ▪ Planners gain financial acumen and act as urban entrepreneurs ▪ Local governments focus on economic growth projects generally in central city locations at the expense of investment elsewhere

Neoliberal response	Implications
Government and civil society relationship	
Individual self-help and entrepreneurship	▪ Corporate style advisory boards replace community based consultative groups ▪ Focus on owner occupied housing rather than public housing ▪ Focus on private schools rather than public, TAFE and other public educational facilities ▪ Limited investment in social infrastructure ▪ Focus on private hospitals and private health insurance rather than public hospitals ▪ Less community houses and housing associations ▪ Areas of social exclusion not linked to the market economy are the subject of targeted welfare spending
Government and private sector relationship	
Outsourcing, privatisation; facilitation of private sector activity	▪ Rise of the intermediate service sector (such as professional advisers) ▪ Developer led development rather than plan led development ▪ Developers are stakeholders in major public infrastructure projects ▪ Public assets privatised ▪ Privatise regulations (certification) ▪ Limited public review of public infrastructure projects (sell not evaluate a project) ▪ Private sector involvement in financing and operating infrastructure ▪ Competitive bidding for urban renewal and infrastructure projects ▪ Private sector provision of rental housing rather than public housing ▪ Privatisation of public spaces (shopping centres and city centre plazas, centre malls, pavements and urban parks) ▪ Privately governed as secured neighbourhoods through management (gated communities) and passive design (master planned residential estates)
Government financial management	
Lower taxes and lower spending	▪ Less maintenance of existing public services ▪ Limited provision of public services in growth areas ▪ Greater private sector provision ▪ Reduced developer contributions in new growth areas ▪ Reduced focus on urban renewal projects such as Boggo Road, Kelvin Grove, Roma Street Parklands

Neoliberal response	Implications
Government regulation	
Deregulate	▪ Simplified planning regulations ▪ Plans that give less direction to local government ▪ Plans that give more certainty and predictability to developers ▪ Plans with fewer directives and more negative regulation ▪ Plans that specifically integrate State government priorities ▪ Removal of comprehensive master planning and collaborative planning models ▪ State enabling regulation for major or mega projects ▪ Revised planning powers (Ministerial call-ins) to facilitate projects ▪ Plans that are more flexible ▪ Speeding up of development assessment, public inquiry procedures and plan preparation

Source: Jackson 1990:405

Generally speaking it is expected that the comprehensive master planning model (associated with modern planning theory) and collaborative planning model (associated with postmodern planning theory) will be curtailed as the strategic planning model (associated with neoliberal planning theory) is implemented in public policy and legislative reform.

Role of the planner

The anticipated emergence of neoliberal planning theory and its associated strategic planning model and consequential implications for planning practice will inevitably result in a re-evaluation of the role of planners.

The role of a planner under the physical planning, comprehensive master planning, collaborative planning and strategic planning models is described in Table 7.

Table 7 Planner's role under planning models

Physical planning	Comprehensive master planning	Collaborative planning	Strategic planning
Knowledge and skills			
Specialist knowledge of utopian ideals and planning principles	Specialist knowledge of planning principles and specialist skills to manage the planning process to define the public interest and planning principles	Specialist knowledge and skills to manage the planning process to facilitate consensus of social, environmental and economic outcomes	Specialist knowledge and skills to manage the planning process to facilitate economic outcomes
Ethical position			
***Technician* – Value neutral adviser to decision maker**	*Technician* – Value neutral adviser to decision maker	*Politician* – Value committed activist that advocates policies	*Hybrid* – Hybrid of a technician and a politician

Source: Steele 2009:4

In a neoliberal environment it is expected that planners will be required to develop specialist knowledge and skills to manage the planning process to facilitate economic outcomes in preference to social and environmental outcomes.

This will require planners to gain greater financial acumen and act as urban entrepreneurs.

This will inevitably require the planner to adopt a hybrid role involving the following:

- First, as a technician that seeks to be a value neutral adviser to decision makers; but
- Secondly, and more significantly, as a politician who is a value committed activist that advocates economic growth.

It is this second political role that is likely to cause significant ethical dilemmas in the planning profession for the following reasons:

- First, there is currently a strong professional and in some cases personal commitment, to sustainable development and its goal of balanced economic, social and environmental outcomes.
- Second, to actively facilitate development could be seen to co-opt planning to the private sector which is only one of the sectorial interests involved in urban planning, and whose concern is profit.

Conclusions - Neoliberalism rules?

The planner plays a critical role in influencing and sometimes preventing urban change through their work for the private, public and third sectors; which are the institutions responsible for urban change in our society.

The traditional modern and postmodern perspectives of planning that have underpinned the planners' use of planning theory and practice in Queensland are being challenged by an energised neoliberal perspective.

The neoliberal approach rejects planning's role as a tool to correct and avoid market failure and seeks to subsume planning as a minimalist form of spatial regulation to provide certainty to the market and facilitate economic growth.

Planners must understand that neoliberalism is but a process; it is not an end state of history or geography. The neoliberal project is neither universal, monolithic or inevitable; it is contestable (Peck and Tickell 2002:383).

Neoliberalism is simply the process of restructuring the relationships between the public, private and third sectors, to rationalise and promote a growth first approach to urban change.

As such, each planner must personally and professionally determine where they stand in relation to the restructuring of the institutions of urban change that is being heralded by the reform of planning and the planning system in Queensland.

Planners, if they are to avoid political irrelevancy, must take an active and positive part in the forthcoming contest of ideas.

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Green Paper on planning reform in NSW released by government

Anthony Perkins

This article explores the NSW Government's Green Paper for overhauling the State's planning system through the identification of four key areas for planning reforms: community participation, strategic focus, streamlined assessment and provision of infrastructure

July 2012

Green Paper responds to independent review of NSW planning system

On 14 July 2012, the NSW government released its long awaited blueprint for planning reform in NSW: *A New Planning System for New South Wales – Green Paper*. The document sets out a comprehensive agenda for overhauling the NSW planning system which, according to the government, is mired in complexity, overly regulated, unacceptably politicised and focused on process rather than outcome.

The Green Paper is the government's initial response to the recommendations of the *Independent Review of the NSW Planning System* that commenced in July 2011 and was led by The Hon Tim Moore and The Hon Ron Dyer.

At a broad level, the Green Paper focuses on four key areas of reform – community participation, strategic focus, streamlined assessment and provision of infrastructure. The Green Paper goes on to introduce some 23 "transformative changes" which, through further consultation, will form the basis of the new draft legislation, due out in early 2013.

Some of the key transformative changes are summarised below.

Greater emphasis on community consultation and participation

There will be greater emphasis on community consultation and participation during the strategic planning stage of the process, with the aim of reducing community consultation (and disputation) at the assessment stage.

This policy initiative will be supported by the adoption of a "Public Participation Charter" which, when implemented, will require that community consultation occurs in the early stages of the plan-making process. The charter will set minimum standards and also encourage innovation and best practice in consultation techniques.

Abolition of Local Environmental Plans and Development Control Plans

These will be replaced over time by various planning hierarchies, including the introduction of "Local Use Plans". LUPs will be structured differently to LEPs.

In short, LUPs will comprise four key parts, including a strategic section, a statutory spatial land use plan, a section on infrastructure and services and a section on development guidelines and performance monitoring requirements. The statutory spatial land use plan will contain the bulk of what is currently found in the comprehensive LEPs, including zonings.

Scrapping of State Environmental Planning Policies and Section 117 Directions

These will be replaced by around 10 Ministerial Directives. The Green Paper also proposes switching off concurrences and referrals. The government has, in part, commenced the process of eliminating concurrent authorities and has pledged to continue this process.

Expanding the scope of complying development

The government will look at expanding the codes to new industrial buildings on industrial land, additions to industrial buildings, additions to existing commercial buildings, townhouses, terrace housing and villas and housing on smaller lots. The government is also considering introducing a new mechanism that would allow for the consideration of variations from the standards for an otherwise compliant house.

Creation of new suburban character zones

The creation of new suburban character zones will enable local councils to decide to limit development in specific areas.

Creation of new enterprise zones

These will be zones where a range of development can take place. While it is principally designed to stimulate employment-generating development, there will be some flexibility to allow for other compatible uses.

Planning Assessment Commission (PAC) and Joint Regional Planning Panels (JRPPs)

The role of the PAC and the JRPPs will be maintained in decisions on developments that are State and regionally significant.

At a local level, the Green Paper is contemplating a requirement that councils appoint expert panels (such as Independent Hearing and Assessment Panels) and delegate local decision making to those panels, with the aim of depoliticising the assessment process.

Expanding the review roles of the PAC and JRPPs

The Green Paper proposes to expand the review roles of the PAC and JRPPs to include pre-gateway reviews where a consent authority refuses or delays the preparation of a planning proposal; gateway reviews where the council or the proponent do not agree with the gateway determination and, significantly, rezoning proposals that have not been approved.

Introduction of an "amber light" notification regime

The effect of an "amber light" notification regime would be to permit a consent authority which has determined to refuse a development application to allow the developer to make certain modifications to the development prior to the determination, which would render the application acceptable for approval.

Need for fundamental change in delivery culture

The initiatives proposed by the NSW government are unquestionably bold in their aims and, when implemented, will significantly change the way that development is procured in NSW.

What is even more important than the government's transformative proposals, as outlined in the Green Paper, is a fundamental change in the "delivery culture" related to the implementation of development in NSW. Only this will facilitate true reform in the four key areas of community participation, strategic focus, streamlined assessment and provision of infrastructure that the Green Paper has identified.

The government has acknowledged that significant further work needs to be carried out before the publication of the White Paper and the release of the accompanying Exposure Bill early next year. The devil, of course, will be in the detail.

NSW Land and Environment Court has power to permit the "regranting" of development consents which have been declared invalid

Anthony Perkins

This article discusses the powers of the NSW Land and Environment Court to permit the readvertising and regranting of a deemed invalid development consent

July 2012

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In limited circumstances, the Land and Environment Court will exercise its power under the *Land and Environment Court Act 1979* to permit the original consent authority - typically the local council - to readvertise and "regrant" a development consent that has been found to be invalid.

Csillag v Woollahra Council [2011] NSWLEC 17

The case of *Csillag v Woollahra Council* [2011] NSWLEC 17 involved a challenge to a decision made by Woollahra Municipal Council to grant a development consent to carry out alterations and additions to a penthouse apartment known as 15/335 New South Head Road, Double Bay.

The building in which the penthouse apartment was located, however, also had an address known as 353 Edgecliff Road, Double Bay. Council proceeded to notify the development publicly with reference to its New South Head Road address, without reference to its Edgecliff Road address.

Failure by council to identify the property properly

The court held that, though the error was technical in nature, the failure to identify the property properly by its alternative address constituted a failure by the council to notify the development application in accordance with the *Woollahra Development Control Plan for Advertising and Notification of Development Applications*. As a consequence, the court found that the development consent was invalid.

Before making any final determination in relation to the development consent, the court referred to the provisions set out in Division 3 of Part 3 of the *Land and Environment Court Act 1979*.

Invalid consents remitted back to consent authority for reassessment

Essentially, the provisions set out in Division 3 of Part 3 provide a statutory mechanism which enables the court to suspend the operation of the defective consent and have the consent remitted back to the original consent authority for reassessment and redetermination, or what the Court Act refers to as "regranting" (provided, of course, the original consent authority is satisfied with the merits of the application).

As the court observed, these provisions must be considered in all cases where the determination of invalidity of a development consent would otherwise be made.

As discussed in the Court of Appeal decision of *Kindimindi Investments Pty Ltd v Lane Cove Council* [2007] NSWCA 38, the legislative intent behind the operation of the regranting provisions "emphasises the legislative concern that development consents not be frustrated by potential invalidities in respect of which the court may, as a matter of discretion, consider making a s.25B order."

Court suspends the development consent

Without embarking on a detailed assessment of the merits of the current application, his Honour held that it was appropriate in the circumstances to exercise the court's discretion under Division 3 of Part 3 of the Court Act:

> *[59] Without suggesting that alterations and additions proposed for apartment 15 can have no external impact, given the existence and location of the tower building it would appear that impacts, if any, would be limited to relatively few people. Moreover, the development is, by any objective standard, relatively small in its scope of work and cost. In these circumstances, I consider it appropriate to suspend the operation of the consent granted on 6 July 2009 in accordance with s 25B(1) of the Court Act. Otherwise, the processes provided for in Div 3 of Pt 3 of the Court Act should take their course.*

In the current case the court:

- suspended the development consent pending further order of the court;
- remitted the development consent (now effectively treated as a development application) back to the council for re-notification and advertising in accordance with council's development control plan for advertising and notification;
- directed the council to give further consideration to the development application in accordance with section 103 of the *Environmental Planning and Assessment Act 1979* following receipt of any submissions or objections received in consequence of notification and advertisement;
- directed the council to re-determine the application, having regard to the merits of the development; and
- relisted the matter for further hearing.

Court finds that its earlier orders have been complied with

The matter came back before the Land & Environment Court for consequential orders in June 2012, *Csillag v Woollahra Council (No 2)* [2012] NSWLEC 135. The court was satisfied that its earlier orders had generally been complied with and that, on this occasion, the regranting of the consent had been validly made.

As the court noted, it was not the role of the court to consider the merits of the application, but merely to consider whether its orders had been complied with and that due process had been followed.

> *[14] In exercising the function of the Court under Div 3 of Pt 3 of the Court Act, I am not called upon to determine, as a matter of merit, whether the amended development application should be the subject of the Council's approval. Rather, the function that I am performing is to determine whether the orders that I made on 25 February 2011 for advertising, notification and reconsideration have been observed.*

Regranting of development consent took more than 18 months

Despite the beneficial nature of the relief granted, the process of regranting can be far from satisfactory for affected property owners. In the present case, for a multiplicity of reasons, the regranting process took in excess of 18 months to complete (from the date on which the consent was suspended by the court to the date on which the regranted consent was declared valid) and involved three rounds of significant amendments to the original approval. Overall, the exercise was a frustrating and costly one for the affected land owners.

Local councils and their officers and staff exempted from liability

Added to the burden of a land owner faced with a defective consent – requiring the land owner to pursue the regranting process or lodge a new development application – is the realisation that there is only very limited recourse against the consent authority for financial losses incurred as a result of the defective consent.

Tucked away in the back of the *Local Government Act 1993* is section 731, which effectively exempts local councils from any liability arising from the consequences of their actions, provided those actions were in the furtherance of their obligations and were made in good faith. That exemption extends to officers and staff working for a local council.

When does a jurisdictional error materially affect the outcome of a decision?

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Towers v Building and Dispute Resolution Committee & Ors* [2012] QPEC 28 heard before Searles DCJ

August 2012

Executive Summary

This case involved an appeal by Brenton Towers pursuant to section 479 (Appeals from Building and Development Committees) of the *Sustainable Planning Act 2009* (**SPA**) against a decision of the Development Dispute Resolution Committee. The committee upheld a decision originally made by Burnett Country Certifiers as Assessment Manager, at the direction of the Bundaberg Regional Council as Concurrence Agency. The decision involved the refusal of a development application for a Building Code of Australia Class 10a structure referred to as a Bali Hut, an open sided shade structure with thatched roof.

In dismissing the appeal, the Planning and Environment Court (**P&E Court**) rejected the assertion that the committee took into account an irrelevant consideration by considering the availability of an alternative location for the Bali Hut on the property without contravening the Queensland Development Code (**QDC**). The P&E Court held that if he was wrong on this point, the appeal should still be dismissed as the irrelevant consideration would not have materially affected the decision arrived at by the committee.

Facts

In March 2011 the council became aware that the Bali Hut appeared to infringe the six metre setback requirement of the QDC. The council considered that such apparent infringement would require a siting concession from the council as Concurrence Agency pursuant to section 57(2) (Building Certifier's or Concurrence agency's discretion) of the *Building Act 1975*.

On 20 May 2012, the applicant lodged a Request for Concurrence Agency Assessment - Building with the council requesting assessment of the design and siting of the Bali Hut (**application**). In the application, the applicant outlined a number of features of the Bali Hut which sought to justify the granting of the concession and also relevantly, a number of constraints which would make the relocation of the Bali Hut impractical or non-viable.

On or about 27 May 2011, the council refused the application on the basis that the bulk and road setback of the Bali Hut in its current position was not in compliance with Performance criteria P1 of MP1.2 (Design and Siting Standards for Single Detached Housing – on Lots 450m^2 and over) of the QDC. Further, it was noted that there was sufficient area available within the applicant's land to relocate the Bali Hut to a position which would comply with the requirements of the acceptable solutions of Performance criteria P1 of MP1.2 (Design and Siting Standards for Single Detached Housing On Lots 450m^2 and over) of the QDC.

Subsequently, the Private Certifier, appointed by the applicant, refused the application at the direction of the council as Concurrence Agency. The applicant appealed the decision of the Private Certifier to the committee.

The committee dismissed the appeal on 17 October 2011 on similar grounds as the council's refusal. In particular, one of its reasons was that the structure could be relocated onto available space within the property without contravening MP1.2 (Design and Siting Standards for Single Detached Housing - on Lots 450m^2 and over) of the QDC.

The applicant appealed the decision of the Committee to the P&E Court under section 479 (Appeals from Building and Development Committees) of the SPA. In essence, the applicant contended that the decision of the committee involved an error of law in that it rested its decision on the findings that there was available space on the property to which the Bali Hut could be moved, but the question of availability of other available space on the property was not a consideration in the QDC.

Decision

The P&E Court noted that the question of law raised by the applicant was not clearly stated. In agreement with the council's interpretation, further noted that the applicant's contention appeared to be that the committee had taken into account an irrelevant consideration by considering the availability of an alternative acceptable location for the Bali Hut on the property.

The court, by reference to *Minister for Immigration and Multicultural Affairs v Yusef* (2001) 206 CLR 323 at 351, noted that any decision involving taking into account of an irrelevant consideration was more correctly categorised as an excess of jurisdiction rather than an error of law.

The council submitted that the issue of acceptable relocation of the Bali Hut was a relevant consideration in that it was an issue raised by the applicant in his request for Concurrence Agency Assessment. The court held that as the committee was considering a relevant matter raised by the applicant, it did not take into account an irrelevant consideration. His Honour noted however, that if he was wrong in that regard, it was not such as to have materially affected the decision of the committee.

As to what materially affected a decision, the court referred to the decision of *House v Defence Force Retirement Invest Benefits Authority* [2011] 193 FCR 112 which stated (with reference to the decisions of *Lu v Minister for Immigration and Multicultural & Indigenous Affairs* (2004) 141 FCR 346 and *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82) that:

> *…when the court is considering whether an applicant should be denied relief on the ground that a demonstrated error of law could not have materially affected the tribunal's decision, the court must be satisfied that the error of law did not deny the aggrieved applicant of the possibility of a successful outcome (Lu) or, put another way, the error of law (ultimately relevant to the tribunal's findings of fact) could make no difference (Gleeson CJ, ex parte Aala) to the result already reached….*

Having regard to the relevant principles, the court was satisfied that, other than the (assumed) irrelevant consideration of relocation, the applicant had no possibility of a successful outcome in light of the committee's reasons for decision.

Whilst the applicant submitted that each party should pay their own expenses, the court considered it appropriate that the applicant paid the council's costs to be assessed on a standard basis.

Held

The court ordered that:

- The appeal be dismissed.
- The council's costs be paid by the applicant to be assessed on a standard basis.

Encroachment on rural land by residential development

Ronald Yuen | Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MacAdam v Moreton Bay Regional Council & Anor* [2012] QPEC 38 heard before Jones DCJ

August 2012

Executive Summary

This case concerned an appeal by an orchard operator, Mr MacAdam, against the decision of the Moreton Bay Regional Council to approve the development application lodged by Task Development Corporation No. 6 Pty Ltd for a residential subdivision. The appeal involved numerous issues including public notification, adequate provision for a park, the need to provide for koala habitat, conflicts with the council's planning scheme, and the need for and impact on good quality agricultural land (**GQAL**). Whilst His Honour Judge Jones accepted that the council had failed to fully comply with the public scrutiny requirements under section 3.2.8 (Public scrutiny of applications and related material) of the repealed *Integrated Planning Act 1997* (**IPA**), as the orchard operator nor any other interested member of the public had not been materially prejudiced by such failure, His Honour excused the noncompliance. As to the remaining issues raised by the orchard operator, His Honour believed that the proposed buffer along the northern boundary was inadequate but did not consider that the other issues raised by the orchard operator warranted a refusal of the development application.

Facts

On or about 11 December 2007, the Task Development Corporation No. 6 Pty Ltd lodged a development application with the council to subdivide land located on the north-eastern corner of Paradise Road and Lagoon Road, Burpengary, to create 36 residential allotments. The developer requested that the development application be assessed against the council's superseded planning scheme. The orchard operator and his wife were the registered proprietors of two rural residential blocks located to the north of the land the subject of the development application. To the east of the proposed development that fronted Paradise Road, the southern boundary of the orchard operator's land adjoined three smaller rural residential allotments. To the west of the proposed development, on the opposite side of Lagoon Road, was a residential subdivision known as "Lagoon Road West". Adjoining the northern-most of the orchard operator's rural residential blocks was another proposed residential subdivision known as "Grape Farm" on which no meaningful work had occurred.

For over two decades the orchard operator and his wife had operated an orchard on the land. While the orchard trees were predominately located on the northern block of the orchard operator's land, some were scattered throughout the western section of the southern block. The orchard operator's residence, nursery and machinery shed were also located on the southern block. The orchard operator's main concern was that the proposed development would threaten the long-term future of the orchard and the ongoing use of GQAL for farming purposes.

Decision

Public notification

Mr MacAdam contended that the council had failed to comply with the public scrutiny requirements under section 3.2.8 (Public scrutiny of applications and related material) of the IPA in that it failed to display the adverse response of the then Environmental Protection Agency (**EPA**) in respect of the development land, and that he and other interested parties were prejudiced by not having the EPA's response available to them when making submissions to the council. While the Judge accepted that there was a failure on the part of the council to fully comply with the public scrutiny requirements, he excused the council's non compliance. The Judge determined that given that Mr MacAdam was able to identify certain environmental characteristics of the development land and to articulate clearly his environmental concerns, no material prejudice had been suffered by him or any other interested member of the public. Further, the Judge also excused the council's non compliance on the grounds that the proposed development was consistent with the council's planning scheme, that it was supported by a detailed ecological assessment report and that it was not opposed by the EPA (subject to suitable buffers and stormwater management).

Park area

The orchard operator submitted that the majority of the park identified within the proposed development would be utilised for storm water detention and as such would be unlikely to be suitable for any meaningful recreational activities. The orchard operator further submitted that 10% of fair-average land should be dedicated as park. The council in its assessment concluded that a full land dedication was not appropriate in this instance given the extensive open space and recreational opportunities available in proximity to the development land and therefore accepted a financial contribution instead. Whilst the orchard operator acknowledged that the council had the discretion to accept a financial contribution in lieu of park dedication, he submitted that the council had failed to appreciate that those areas identified for open space and recreational opportunities provided no opportunity for sporting activities. The town planners for the respective parties agreed that there was sufficient parkland planned for the locality and that a condition requiring a monetary contribution was a reasonable and relevant requirement for the proposed development. In light of this, the court held that there was no basis for concluding that the council should not have accepted a monetary contribution in lieu of more park area.

Environmental issues

The orchard operator submitted that if the court were to reject his argument for a 10% dedication of fair-average land then, alternatively, a condition, identical to the one imposed on the Grape Farm development, requiring the co-respondent to retain as much native vegetation as possible should be imposed. The EPA in its advice indicated that the proposed development was within an area dominated by various flora species and was close to wetland areas of significance and recommended that an approval would require a 20 metre buffer between the proposed development and the designated and preserved habitat area opposite the development land to the south of Paradise Road. The council, after having regard to the ecological assessment report provided by the developer and other material, determined that environmental concerns, and in particular, clearing of the land were not sufficient grounds for refusing the application and recommended conditions such as that fauna spotter/catchers be employed during the clearing of vegetation and temporary exclusion fencing be utilised to delineate the removal of vegetation. The court accepted that the vegetation over the development land was capable of providing habitat for koalas from time to time but found that there was no reason to conclude that the conditions imposed were not adequate, despite them not being on identical terms to those imposed on the Grape Farm development.

Conflict with the council's planning scheme

The court considered the alleged conflicts with the council's planning scheme and noted that the relevant planning instruments made it sufficiently clear that the development land and its immediate environs were earmarked for future small residential, which was recognised by all parties' respective town planners. The court endorsed the town planners' conclusion that the proposed development was not in conflict with the council's planning scheme and noted that for there to be a genuine conflict there must be some real and identifiable variance or disagreement, which was not present in this instance.

Need

The council's planning scheme was a transitional scheme within the meaning of section 6.1.3 (What are transitional planning schemes) of the IPA and therefore the proposed development required assessment under the regime prescribed by the *Local Government (Planning and Environment) Act 1990* (**LGPEA**). Section 4.11 (Combined applications) of the LGPEA required a development application to be refused if it conflicted with any relevant strategic plan or development control plan and there were no sufficient planning grounds to justify approving the development application despite the conflict. As the court had found that the proposed development was not in conflict with any relevant strategic plan or development control plan, it concluded that the question of need did not arise.

Appropriate buffers and good quality agricultural land

At the time of the hearing the required buffer along the northern boundary of the proposed development was to be a 3 metre wide buffer (to be heavily vegetated) and a 1.8 metre high solid timber fence. The orchard operator contended that a buffer in the order of 30-40 metres was required to provide sufficient separation between his orchard activities and residential development. The orchard operator was concerned with the width of the proposed buffer and that complaints would be made about his farming activities causing pressure on him and his wife to close down their orchard business.

The orchard operator, in support of his argument, submitted that the appellant's land was GQAL for the purposes of *State Planning Policy 1/92* (**SPP1/92**) and its associated guidelines, in particular the *Planning Guidelines: Separating Agricultural and Residential Land Uses* (**Separation Guidelines**) which recommended a minimum buffer of 40 metres. The court noted that, prima facie, SPP1/92 and its associated guidelines provided support to his argument. However, the guidelines recognised circumstances where future development of land should be assessed on its town planning merits without reference to agricultural issues such as in instances where a parcel of land was effectively committed for development. To that end, given the appellant's land and surrounding smaller parcels of land, including the development land, had been earmarked for higher density residential development for a number of years, the court held that the operation and effect of the Separation Guidelines were not directly relevant to the appeal.

Although the Separation Guidelines did not apply, the court considered it necessary to determine the appropriate buffer between the orchard operator's land and the proposed development, in particular, given the orchard operator's activities could create a nuisance from time to time for the residents of those lots closest to the southern boundary of the orchard operator's land and that the use of the orchard operator's land was a lawful one which could be expanded or intensified. The court did not consider it to be reasonable that the developer be required to designate the whole of the area occupied by the four lots proposed along the northern boundary as a buffer or effectively freeze the sale of those lots until the orchard operator's land was developed for residential purposes. Whilst the court was unable to readily determine the appropriate buffer width as there was insufficient evidence on this issue, the court held that the proposed buffer along the northern boundary of the proposed development was inadequate, particularly having regard to the fact that the orchard operator (or anyone else) could exercise their lawful right to expand the existing use or introduce a more intensive use of the orchard operator's land.

The court was of the view that the uncertainty surrounding the adequacy of the proposed buffer could be readily resolved and held that, apart from its concerns about the proposed buffer, there were no grounds for refusing the development application. The court invited the parties to approach the court in the future to resolve the remaining issue of the buffer along the northern boundary of the proposed development but if no consensus was reached, the court would hear from the parties as to the future conduct of the appeal.

Held

The court ordered that:

- The co-respondent's failure to comply with the public notification requirements of the IPA be excused.
- It would hear from the parties as to the future conduct of the appeal.

Incorrect consideration of amenity amounting to jurisdictional error

Samantha Hall

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32 heard before Searles DCJ

August 2012

Executive Summary

This case involved an application to the Planning and Environment Court (**P&E Court**) for a declaration that the Brisbane City Council's decision of 15 March 2011 and subsequent negotiated decision of 14 July 2011 were invalid and of no legal effect. Both decisions approved a development application for a material change of use for multi-unit dwellings and for a preliminary approval to carry out building work on land located in Albion. The P&E Court held that the council's decision and subsequent negotiated decision were invalid and of no legal effect.

Case

This case involved an application seeking declaratory relief from the P&E Court for the council's decisions in respect of the development on land located at 35 Burdett Street, Albion, Brisbane and more particularly described as lot 2 on RP801651.

Facts

Holcim (Australia) Pty Ltd, Lida Ambroselli, Desiree Coroneo, Ross James Johnston, Nicholas Karaloukas and Mark Trevor Warnock (**applicants**) relied on two grounds to challenge the council's decisions which, for convenience, are described as the Amenity ground and the Height ground.

Amenity ground

The applicants submitted that the council erred in its decision to approve the development due to the following five jurisdictional errors (**JE**):

- JE1 – the amenity of the development was affected by Holcim's concrete batching plant, therefore, there was non-compliance with the *Albion Neighbourhood Plan*, performance criteria P16;
- JE2 – given the non-compliance with P16, the council was obligated to apply the test under section 3.5.13(3) and (4) (Decision if application requires code assessment) of the *Integrated Planning Act 1997* (**IPA**). Compliance with the test involved consideration of whether there were sufficient grounds to justify the approval despite the conflict with P16;
- JE3 – the council failed to take into account the recent aspects of amenity as contemplated in P16 including: nuisance, character, visual appearance, way of life, perception, feeling of the area, traffic amenity issues and standard of the neighbourhood and reasonable expectations of the future residents;
- JE4 – the council misdirected itself in a number of respects in relation to the critical aspects of P16 including:
  - applying the wrong test under P16 in concluding that the development would not affect the amenity of the surrounding area. The correct test which should have been applied was the effects the concrete batching plant would have on the development;
  - adopting a report of the council's committee which stated that the development complied with the *Albion Neighbourhood Plan*, when it did not comply;
- JE5 – the council approving the development was so unreasonable that no reasonable authority could have ever come to the same decision as:
  - the concrete batching plant was directly across the road;
  - future residents would have to drive past the concrete batching plant and manoeuvre heavy vehicles;
  - there was no way the future residents could avoid the concrete batching plant's operations;
  - there would be amenity issues of traffic and heavy vehicles, visual appearance of an intense industrial use, perception, character, noise, dust air quality, nuisance and reasonable expectations of residents;
  - the development was premised on the basis that the residents would act like hermits in their units with windows and doors shut and air-conditioning on.

Height ground

The applicants asserted that the development would exceed the maximum height limit of RL 33m AHD prescribed in Acceptable Solution 4.1 of the *Albion Neighbourhood Plan*, in which event the Development should have been impact assessable and not code assessable.

Decision

Amenity

Looking at P16, the P&E Court reiterated the purpose of P16 in that the amenity of the development must not be affected by the operation of the existing concrete batching plant. The P&E Court went further in saying that when P16 and section 3.3 (Compliance with Precinct intent) of the *Albion Neighbourhood Plan* are read together P16 was clearly designed to guard against any adverse effect on the amenity of any new residential development which results from the concrete batching plant operations.

Acceptable Solution A16 provided a way in which the developer, Arden Management Group Pty Ltd, could comply with P16, being to delay construction until the concrete batching plant ceased operation. However, as Holcim had no intention of ceasing operation, it was necessary for Arden to find an alternative method to satisfy P16.

The *Albion Neighbourhood Plan* expressly recognises the concrete batching plant and states that any new residential development in the relevant area must take into account the importance of the effects of amenity. The court held that there was no doubt, based on the council's documents, that the council confined its focus to the question of P16 amenity to air quality, noise and traffic.

The court held that the council was obligated to properly address the entire concept of amenity. It did not do so. Therefore, the council miscarried as a result of this failure. It could not be said that the omission was insignificant so as not to have materially affected the decision; it was at the core of council's considerations. That failure constituted a jurisdictional error so as to invalidate the council's decision.

Further, given the above conflict with P16, the council had a statutory obligation to identify sufficient grounds to justify approval of the development application despite the conflict pursuant to section 3.5.13 (Decision if application requires code assessment) of the IPA. It did not do so, but rather, granted the development approval which constituted another jurisdictional error leading to invalidity.

Height

As the P&E Court had established a jurisdictional error, no decision was made in respect of the height issue.

Held

The P&E Court declared that the council's decisions were of no legal effect and were set aside.

Subpoena issued to Gold Coast City Council – confirmed fishing exercise

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Braudmont Pty Ltd & Ors v Gold Coast City Council* [2012] QCA 140 heard before Muir and Fraser JJA and Martin J

October 2012

Executive Summary

The Court of Appeal refused an application for leave to appeal against a decision of the Planning and Environment Court (**P&E Court**) setting aside a subpoena to the Chief Executive Officer of the Gold Coast City Council, issued in the context of an application seeking declarations that the council had unlawfully constructed a path.

Case

This case concerned an application for leave to appeal brought by landowners of residential property fronting Pacific Parade at Currumbin (**the applicants**) in the Court of Appeal in respect of a path constructed by the council on land contiguous with the eastern boundaries of the applicants' properties.

The application related to a decision of the P&E Court setting aside a subpoena to the Chief Executive Officer of the council and ordering the applicants to pay the council's costs of and incidental to the application to set aside the subpoena.

Facts

The applicants brought an application in the P&E Court seeking a declaration that the council had unlawfully constructed a path on the landward side of, and partly on, misaligned, discontinuous boulder walls buried under a coastal dune which resulted in serious environmental harm and sought consequential orders including an injunction requiring the council to remove the path. In the course of the appeal in the P&E Court the applicants issued subpoenas to the Chief Executive Officer and other members of the council which sought documents relating to the boulder walls in the vicinity of the path. The council applied to set aside the subpoenas and towards the end of the hearing of the council's application, the applicants abandoned their reliance upon all of the subpoenas other than the subpoena directed to the Chief Executive Officer. The primary judge found that the issue of the subpoena was an abuse of process and ordered that it be set aside.

The applicants sought leave to appeal against the decision of the primary judge and an order that the applicants be at liberty to issue a further subpoena to the Chief Executive Officer of the council seeking the same documents set out in the original subpoena.

Decision

His Honour Justice Fraser, in the Court of Appeal considered three arguments presented by the applicants and gave his findings, with which Justices Muir and Martin agreed.

First, His Honour Justice Fraser considered whether the documents described in the subpoena were relevant to the issues in the application seeking declarations that the path had been constructed unlawfully.

His Honour Justice Fraser pointed to the following relevant aspects of the schedule to the subpoena:

- each of the specified subjects to which the required documents related concerned the boulder walls;
- the subpoena did not appear to limit the required documents by reference to any of the specified subjects, but merely required the production of documents relating to the boulder walls;
- to the extent that the subpoena required the production of documents relating to the specified subjects, the nature of that relationship was expressed in very wide terms.

The applicants argued that the documents sought by the subpoena might have disclosed a policy position adopted by the council in another part of the coast that a pathway should not be constructed until the alignment of a boulder wall was corrected.

However, His Honour Justice Fraser found that such an argument was not capable of justifying a subpoena which required the production of documents relating to the boulder walls and the specified subjects in any way. The subpoena did not limit the required documents by reference to any council policy and most of the described documents could not have influenced the question whether any such policy existed.

Furthermore, the applicants had abandoned an allegation that the boulder walls were related to the alleged environmental harm caused by the construction of the path. Notwithstanding that the applicants sought to supply particulars which had not been requested to reintroduce an issue in respect of the boulder walls, His Honour Justice Fraser found that there was no justification for requiring the production of documents which referred to or related in any way to the boulder walls.

Second, His Honour Justice Fraser considered the applicants' argument that the primary judge had not made a finding that the subpoena was oppressive, but rather the primary judge's statement merely amounted to a recitation of the evidence. His Honour Justice Fraser indicated that since there was no challenge to that evidence, the absence of an explicit finding was immaterial and there was no error in the primary judge's conclusion that the issue of the subpoena in the terms in which it was issued was an abuse of process.

Third, His Honour Justice Fraser considered a submission made by the applicants' counsel that if the subpoena was too wide, it should be saved by appropriate variation. The applicants did not apply to amend the subpoena nor did they describe any narrower class of documents which might legitimately be sought. As such, His Honour Justice Fraser found that it was not appropriate to grant leave to appeal to permit the applicants to seek to re-draft their subpoena on appeal.

Ultimately, His Honour Justice Fraser found that the applicants' application for leave to appeal should be refused because there was no prospect that the Court of Appeal would make an order that the subpoena be reissued in the same terms as it was originally sought. Furthermore, the applicants were required to pay the costs of the application.

Held

The application for leave to appeal to the Court of Appeal was refused, with costs.

COLIN BIGGERS & PAISLEY LAWYERS

Wednesbury unreasonableness

Samantha Hall

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Christian Outreach Centre v Toowoomba Regional Council & HSBG Pty Ltd* [2012] QPEC 29 heard before Searles DCJ

October 2012

Executive Summary

In proceedings brought against government authorities which are in the nature of judicial review, one of the grounds often alleged is that the decision of the authority was so unreasonable that no reasonable decision maker could have ever made that decision. This is commonly known as the Wednesbury test of unreasonableness and it is a ground of review that it is not often raised in proceedings brought before the Planning and Environment Court (**P&E Court**) as the test of unreasonableness is high and usually requires overwhelming proof of the unreasonableness of the decision. However, this application brought by the Christian Outreach Centre, is one of the few examples of the Wednesbury test of unreasonableness being successfully raised in the P&E Court.

Case

This case concerned an application by the Christian Outreach Centre (**applicant**) against the decision of the Toowoomba Regional Council (**respondent**) to approve a change to a development approval for a material change of use for a retail showroom, indoor recreational facility (gym) and food outlet (café/restaurant) granted to HSBG Pty Ltd (**co-respondent**).

Facts

In July 2009, the respondent granted to the co-respondent a development permit for a material change of use for a retail showroom, indoor recreational facility (gym) and food outlet (café/restaurant) in respect of land situated at 471-493, Hume Street, Toowoomba.

In July 2011, the co-respondent lodged with the respondent a request to make a permissible change to the Development Approval pursuant to section 369 (Request to change development approval) of the *Sustainable Planning Act 2009* (**SPA**). The proposed changes included:

- deleting the indoor recreational facility (gym);
- varying the approved building envelope by housing the proposed development in a single building rather than three separate buildings; and
- relocating the approved access from approximately half way along the Hume Street frontage to a position approximately 140m south at a common boundary between the land and the applicant's land.

In October 2011, the applicant met with the respondent, in which the applicant conveyed its concerns about part of the co-respondent's proposed changes to the development approval, that being the shifting of the approved access point and the potential queuing of traffic past the applicant's land resulting therefrom. At that meeting, the applicant also conveyed that it would definitely look at making a submission against the proposed changes to the development approval.

In assessing a proposed change to a development approval, the responsible entity must be satisfied that the proposed change is a "permissible change". Relevantly, amongst other matters, a permissible change to a development approval is a change (for an approval that previously required impact assessment) that would not be likely, in the responsible entity's opinion, to cause a person to make a properly made submission objecting to the proposed change, if the circumstances allowed (see section 367(1)(c) (What is a permissible change for a development approval) of the SPA).

In November 2011, the applicant's solicitors wrote to the respondent advising that it was concerned about the adverse impacts of the proposed changes to the development approval and it requested the respondent to not decide the request to change the development approval until the applicant provided its formal position within 10 business days.

Later that month, the respondent approved the co-respondent's request to change the development approval and the applicant subsequently lodged an originating application in the P&E Court pursuant to section 456 (Court may make declarations or orders) of the SPA, seeking the following orders:

- a declaration that the proposed changes were not a "permissible change"; and
- a declaration that the decision of the respondent to approve the proposed changes was of no force or effect.

The issue to be determined by the P&E Court was, by reference to section 367(1)(c) (What is a permissible change for a development approval) of the SPA, whether the respondent's decision to approve the proposed changes to the development approval was so unreasonable that no reasonable local government could have made that decision.

Decision

His Honour Judge Searles, determined, referring to *KT Corporation Pty Ltd v Logan City Council and State of Queensland* [2005] QPEC 119, that the respondent, acting reasonably in the execution of its statutory role, could not have formed any opinion other than that there was a "substantial chance, a real not remote chance regardless of whether it was more or less fifty percent", that the applicant would have made a properly made submission as envisaged by section 367(1)(c) (What is a permissible change for a development approval) of the SPA.[127]

In coming to this conclusion, His Honour identified that the representations made by the applicant in October 2011 and the subsequent letter from its solicitors in November 2011 should have made it clear to the respondent that had the applicant had a legal right to do so, it would have made a submission detailing its concerns with the proposed changes to the development approval.

His Honour ultimately concluded that the test espoused by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 had been satisfied and that the decision of the respondent was so unreasonable that no reasonable authority could have ever come to it.[128] Accordingly, the decision to approve the proposed changes to the development approval was thereby invalid.

Held

- That the proposed change was not a permissible change.
- The decision of the respondent was of no force or effect.

[127] *Christian Outreach Centre v Toowoomba Regional Council & HSBG Pty Ltd* [2012] QPEC 29 [30].
[128] Ibid [37].

COLIN BIGGERS & PAISLEY LAWYERS

Defining an extractive industry – local planning instruments to be subordinate

Samantha Hall | Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2012] QPEC 33 heard before RS Jones DCJ

October 2012

Executive Summary

This case concerned a preliminary point on whether the subject development application was required to be referred to the Chief Executive administering the *Transport Infrastructure Act 1994* (**TIA**), which would occur if it fell within the meaning of "extractive industry" in the *Sustainable Planning Regulation 2009* (**SPR**). The Planning and Environment Court (**P&E Court**) concluded that the term "extractive industry" should not be read down or given a more narrow meaning simply because it was used in a local government's planning scheme to describe a more specific or different use. The P&E Court found that the proposed development for a material change of use of land for the extraction of groundwater for commercial purposes did fall within the meaning of "extractive industry" for the purposes of the SPR and therefore the development application should have been referred to the Chief Executive, Department of Transport and Main Roads (**DTMR**). Pursuant to section 440 (How Court may deal with matters involving noncompliance) of the *Sustainable Planning Act 2009* (**SPA**), however, the court exercised its discretion to excuse the non-compliance.

Case

The issue before the P&E Court was whether a proposed use of land for the extraction of groundwater for commercial purposes fell within the definition of "extractive industry" under the SPR, and therefore whether it should have been referred to the Chief Executive of the DTMR.

Facts

The substantive proceeding involved an appeal by Gillion Pty Ltd against the decision of the respondent, the Scenic Rim Regional Council to refuse its development application for a material change of use of land situated in the Mount Tamborine region. The proposed use of that land by Gillion was the extraction of groundwater for commercial purposes, namely the selling of bottled drinking water. Under the relevant planning scheme, the proposed use was impact assessable and fell within the definition of "commercial groundwater extraction".

Under schedule 11 of the SPR, development for the purpose of an "extractive industry" with a threshold of 10,000 tonnes per annum must be referred to the Chief Executive administering the TIA. While it was accepted by all parties that the proposed use met the threshold of 10,000 tonnes per annum, the parties disagreed as to whether the extraction of water fell within the meaning of "extractive industry" in the SPR. This term was not defined in the SPA or SPR.

The applicants of the preliminary point, who were co-respondent's by election in the appeal, argued that the term "extractive industry" in the SPR should not be read down or made subordinate to the meaning of "commercial groundwater extraction" in the planning scheme. They argued that the words "extractive" and "industry" should be looked at objectively and given their natural and ordinary meaning and that accordingly the proposed use was an extractive industry for the purposes of the SPA and SPR.

In contrast, Gillion argued that where the proposed use was clearly identified under the planning scheme as commercial groundwater extraction not as extractive industry, there was no scope for the operation of schedule 11 of the SPR. The council's position was that it would abide the order of the court, however its submissions were generally supportive of Gillion.

In March 2012, in compliance with an order of Judge Rackemann, Gillion notified the Chief Executive of the DTMR of the substance of the development application and asked for the DTMR's position on whether the application should have been referred to it pursuant to the SPR. The DTMR responded stating that it was satisfied that it was not triggered as a referral agency under the SPR.

Decision

The P&E Court noted that historically the term "extractive industry" was used to catch the activity of extracting from the ground resources such as sand, gravel, rock and clay and that this theme tended to be repeated by the SPR by stating "…including mineral processing, refinery and smelter". The P&E Court further acknowledged that the terminology used in the State Planning Policy 02/07 (**SPP**), which defined an extractive industry as one involving the extraction and processing of extractive resources which are defined as "natural deposits of sand, gravel, quarry rock, clay and soil extracted from the earth's crust…", tended to support Gillion's cause. However, the P&E Court pointed out that the SPP, the SPA and the SPR were "concerned about materially different matters", and concluded that the definitions given in the SPP were not of any real assistance in determining the meaning of the words "extractive industry" where used in schedule 11 of the SPR.

The P&E Court then considered the statements of the High Court on statutory construction in the case of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. In that case the High Court stated that "the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute".[129] In line with this approach, the P&E Court in this case found that:

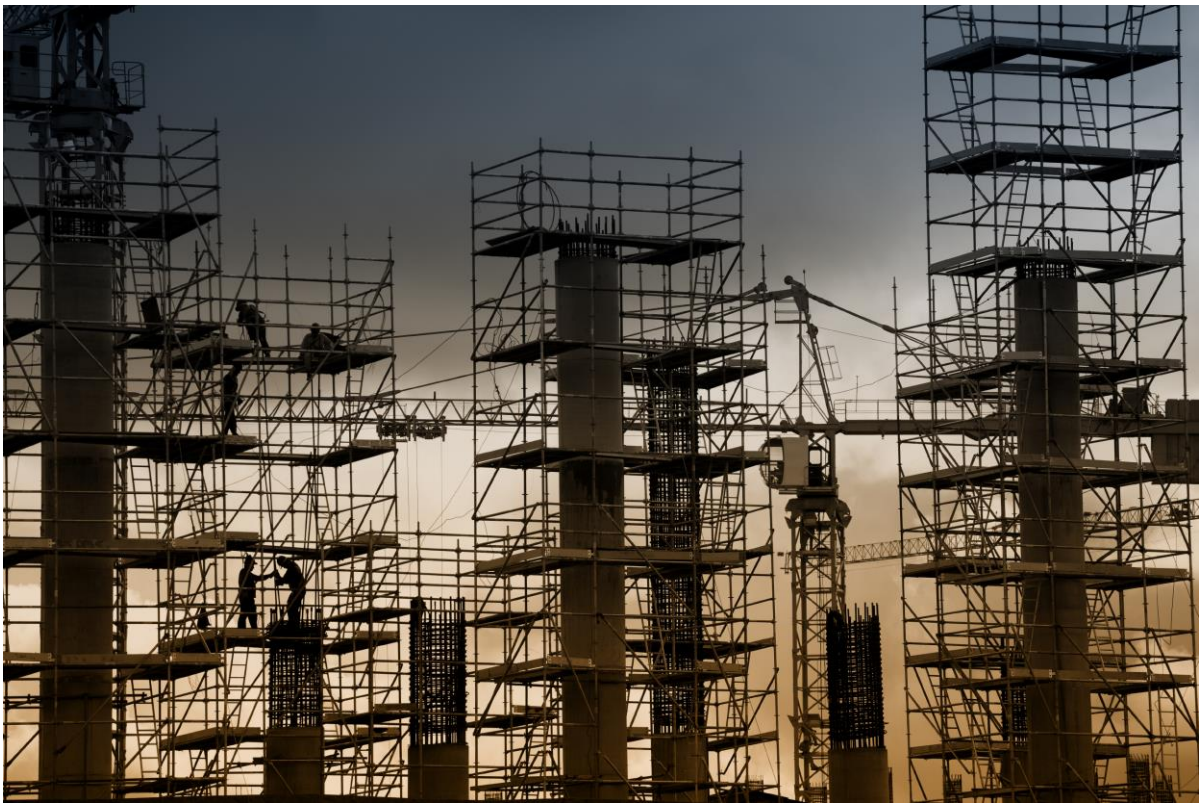
> *[w]hen read in context with the other relevant provisions of the SPA and the SPR and the words are given their ordinary meaning, an extractive industry for the purposes of Schedule 11 is one concerned with the extensive extraction of a natural resource. Groundwater is a natural resource. The words should not be read down or given a more narrow meaning because that term is used in a local authority's planning scheme to describe a more specific or different use.*[130]

The P&E Court concluded that the policy, purpose and real intentions of the legislature were best met by the construction of schedule 11 of the SPR contended for by the applicants.

Held

The application was allowed and the court ordered that:

- The proposed development was an extractive industry for the purposes of schedule 11 of the SPR.
- The subject development application was required to be referred to the Chief Executive of the DTMR.
- The failure to refer the development application to the DTMR was excused.
- It would hear from the parties (if necessary) as to any further consequential orders.



129 [1998] 194 CLR 355 [69].
130 [2012] QPEC 33 [27].

Continuing approvals under predecessor legislation

Samantha Hall | Jamon Phelan-Badgery | Phoebe Bishop

This article discusses the decision of the Queensland Court of Appeal in the matter of *Wirkus & Anor v Wilson Lawyers* [2012] QCS 261 heard before Fraser JA, Philip McMurdo and McMeekin JJ

November 2012

Executive Summary

This case was an appeal to the Queensland Court of Appeal concerning whether the conditions of a 1987 development approval assessed against the 1978 Town Plan (**the 1987 approval**) under the *Building Units and Group Titles Act 1980* (**BUGTA**) remained attached to the land through the transitional provisions of subsequent legislation and therefore bound the body corporate of that land. In the primary case, it was determined that the conditions of the 1987 approval did not attach to the land. On appeal, the Court of Appeal held that there was no basis for disturbing the conclusion of the primary judge and dismissed the appeal.

Case

The issue for the appellants (**the Wirkuses**), whose property was adjacent to the body corporate (**Goldieslie Park**) subject to the 1987 approval, was an access easement which benefited their land. The respondents (**Wilson Lawyers**) had advised the Wirkuses in relation to a dispute with Goldieslie Park, which had been settled with an easement being granted. However, it was contended by the Wirkuses that a requirement to grant an easement on more favourable terms was contained in the 1987 approval, that the 1987 approval attached to the land, and that Wilson Lawyers ought to have identified this in the course of the dispute and advised the Wirkuses accordingly.

Facts

The 1987 approval in respect of Goldieslie Park was subject to a condition that access easement rights be granted benefiting the Wirkuses' land in the form of a "single common accessway to Lots 1 and 2 on registered Plan 202855 generally as indicated on drawing no 367/2 dated 9th June 1987".

Pursuant to the condition, an easement was prepared and executed by the developer of Goldieslie Park, but never actually registered. The plan of subdivision was registered after the local government issued the necessary certification, indicating under section 24(5) (Approval of subdivision) of the BUGTA "that all other conditions of approval…have been complied with in every respect". The subdivision made the easement instrument unregistrable.

Prior to the enactment of the *Local Government (Planning and Environment) Act 1990* (**LGPEA**) and the *Integrated Planning Act 1997* (**IPA**) there was no legislation which attached conditions of a development approval to land and made them binding upon successors in title. The Wirkuses' argument was that certain transitional provisions ought to be interpreted such that the 1987 approval was attached to the land and could have been enforced by the Wirkuses against Goldieslie Park if Wilson Lawyers had so advised. The provisions argued to be relevant and the court's findings in each case are set out below.

Decision

Section 8.10(8) of the LGPEA

Section 8.10(8) (Savings and transitional) of the LGPEA relevantly provided that an approval (but not associated conditions) granted prior to the commencement of the LGPEA will *"continue to have force and effect as if it were an approval, consent or permission, as the case may be, made pursuant to this Act (but any conditions attaching to the approval, consent or permission are still to apply as if this Act had not commenced)"*.

The court held that the evident intention of that provision was that conditions of such prior approvals should not attach to the land and bind successors in title, so that their effect should be unchanged by the LGPEA. For this reason, the LGPEA had no effect on the body corporate's position.

Sections 6.1.23 and 6.1.24 of the IPA

Sections 6.1.23 (Continuing effect of approvals issued before commencement) and 6.1.24 (Certain conditions attach to land) of the IPA contained the concept of "continuing approvals" which were approvals given effect as if they were granted under the IPA.

Section 6.1.24(1) (Certain conditions attach to land) of the IPA provided that where conditions were imposed in relation to a continuing approval, those conditions attached to the land and were binding on successors in title. The court therefore had to determine whether the 1987 approval was a "continuing approval" within section 6.1.24(1) (Certain condition attach to land) of the IPA.

Section 6.1.1 (Definitions for pt 1) of the IPA defined "continuing approval" for the purposes of part 1 of the IPA as *"…a condition, certificate, permit or approval mentioned in section 6.1.23(1)"*. It was common ground that the 1987 approval did not fall within subparagraphs (a), (b), (c) or (e) of section 6.1.23(1) (Continuing effect of approvals issued before commencement) of the IPA. The Wirkuses, however, argued that the 1987 approval fell within subparagraph (d) in that it was given under a "former planning scheme".

A definition of "former planning scheme" was provided in section 6.1.1 (Definitions for pt 1) of the IPA, with an alternative definition given in section 6.1.24(4) (Certain conditions attach to land) which applied only to that section. The alternative definition, unlike the definition in section 6.1.1 (Definitions for pt 1), included a planning scheme which was made under an Act repealed by the LGPEA, and would therefore include the 1978 Town Plan. The Wirkuses sought to apply the alternative definition of a "former planning scheme" within section 6.1.24(1) (Certain conditions attach to land) of the IPA, notwithstanding that the term "former planning scheme" did not expressly appear in that subsection. In order to do this the Wirkuses argued that section 6.1.24(1) (Certain conditions attach to land) should be read as if the term "continuing approval" did not appear, but that in its place were the words of section 6.1.23(1)(d) on the basis that *"wherever the [defined] term appears, the text must be read as if the full definition were substituted for it"* (as stated in *Bennion on Statutory Interpretation*, 5th ed, at page 562, citing *Thomas v Marshall* [1953] AC 543 per Lord Morton at 556 and *Suffolk County Council v Mason* [1979] AC 705 per Lord Diplock at 713).

The court rejected this argument and stated that the alternative definition of "former planning scheme" given in section 6.1.24(4) (Certain conditions attach to land) applied only where the term "former planning scheme" itself was used in that section. Furthermore, the court found that if the Wirkuses approach was accepted it would have to be consistently employed, which would have self-defeating and absurd results.

Section 32A of the Acts Interpretation Act 1954

The Wirkuses also argued that the alternative definition of "former planning scheme" should be preferred because section 32A (Definitions to be read in context) of the *Acts Interpretation Act 1954* provided that *"Definitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires"*.

The argument advanced was as follows:

- the IPA's purpose was to provide for the continued operation for various planning schemes which were current as at the introduction of the IPA;
- a further purpose of the IPA was to preserve the operation of approvals in force immediately before its commencement;
- it was illogical to discard current approvals by reason of the planning scheme under which they were given;
- therefore, the expression "*a former planning scheme*" should be given its ordinary meaning which is *"any previous scheme"*.

The court again did not accept this argument as it did not consider that there was anything in the context or the subject matter which suggested that the definition of "former planning scheme" in section 6.1.1 (Definitions for pt 1) of the IPA, which was expressed to apply for that part, should not apply to paragraph (d) of section 6.1.23(1) (Continuing effect of approvals issued before commencement) of the IPA. Furthermore, the court stated that no example had been demonstrated of a particular anomaly that would be caused by the application of the definition in section 6.1.1 of the IPA. Rather, it was noted that application of the alternative definition would cause an anomaly, because the conditions would only attach to the land a decade after they were imposed and after the completion of the development the subject of the approval.

The court concluded that Goldieslie Park could not have been compelled to grant an easement over the accessway identified in the 1987 approval. This was an essential element of the Wirkuses' pleaded case and as such the case had no prospect of success.

The unpleaded case

For the first time in their oral submissions, the Wirkuses raised an alternative case which did not depend upon the condition having become binding upon the body corporate. They argued that the respondent's failure to discover the unsatisfied condition for an easement caused them to suffer a loss, because the existence of the unsatisfied condition, along with the fact of the unregistered instrument by which it was to be granted, would have been relevant to a court determining what relief should have been given to the appellants under section 180 (Imposition of statutory rights of user in respect of land) of the *Property Law Act 1974*.

The court asked whether this new case, which was never argued before the primary judge, ought to have the consequence of defeating a judgment which was correctly given upon the case as pleaded. The court held that it should not have that result and rejected this alternative case for the following reasons:

- the respondent had had no means of preparing an answer to that case;

- a response to such a case was made more difficult by the fact that the proposed case had not been reduced to a draft pleading;
- there was no explanation for why such a case was raised so late; and
- the proposed case seemed hardly compelling.

Held

- The appeal be dismissed.
- The appellants pay the respondent the costs of the appeal.

Compensation for error in a planning and development certificate

Samantha Hall | Edith Graveson

This article discusses the decision of the Queensland Court of Appeal in the matter of *Raftopoulos v Brisbane City Council* [2012] QCA 84 heard before Muir and Chesterman JJA and P Lyons J

November 2012

Executive Summary

The *Integrated Planning Act 1997* (**IPA**) provides a mechanism for compensation where a person has suffered financial loss because of an error or omission in a planning and development certificate issued by a local government. In this case the Court of Appeal considered an application for leave to appeal where a claim for compensation had been summarily dismissed in the Planning and Environment Court (**P&E Court**).

The Court of Appeal upheld the P&E Court's decision and dismissed the application on the grounds that the statutory right to compensation had not arisen because a planning and development certificate was not in existence, and the alleged loss of profit was not caused by any error in information that was provided by the Brisbane City Council (**respondent**).

Case

This case concerned an application for leave to appeal by Robert Raftopoulos (**applicant**) to the Court of Appeal against a summary dismissal of a matter before the P&E Court.

The applicant lodged an application to the P&E Court seeking compensation under section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA.

Section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA provides for reasonable compensation to be paid by a local government where a person has suffered financial loss because of an error or omission in a planning and development certificate. The applicant's claim had two basic premises:

1. that a decision notice and a Planning and Development Certificate were identical in content and function; and
2. the conditions of approval the applicant objected to in the decision notice (particularly condition 30) were "errors".

The applicant also raised a number of miscellaneous complaints about the P&E Court hearing associated with procedural fairness.

Facts

The applicant owned land at 11 Ampthill Street, Highgate Hill. In November 2006, George Pascucci lodged a development application for a development permit for multi-unit dwellings in respect of the property of which the applicant signed as land owner. The respondent gave a decision notice approving the development subject to conditions. Mr Pascucci subsequently wrote to the respondent, notifying his acceptance of the decision notice and indicating that he would not exercise any right of appeal to the P&E Court.

Conditions and compensation

However, several conditions in the decision notice gave rise to concern to the applicant, namely, the conditions in relation to the provision of a pedestrian pathway from the street frontage to the front door of each unit, retention of the "existing Poinciana" and certification of existing retaining walls on the south eastern side of the existing road reserve (including impact of development). The applicant did not proceed with the development as, apparently, he found the conditions too onerous to comply with and argued with the respondent about them.

In early July 2009, the applicant purportedly made a claim for compensation of $2.2 million pursuant to section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA. The respondent refused the claim on the ground that it did not relate to an error in a Planning and Development Certificate issued by the respondent.

In February 2011, the applicant renewed his purported claim for compensation on the ground that conditions in the decision notice were erroneous and the respondent failed to amend the conditions causing major losses. The respondent rejected the applicant's renewed claim again noting that amongst other things the applicant received a development approval not a development certificate.

In July 2011, the applicant commenced an appeal in the P&E Court (**the P&E Court appeal**) against the respondent's decision to deny his claim for compensation and sought relief from the P&E Court to uphold his claim.

Summary dismissal

The respondent applied to have the applicant's appeal in the P&E Court dismissed summarily on the ground that an essential pre-condition to the right to claim compensation did not exist.

His Honour Judge Griffin held that the statutory remedy provided for in section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA would only be available in circumstances where there was in existence a planning and development certificate. However, on the evidence available, there was a development approval given subject to conditions and there was no and there had never been in existence, a certificate of the type contemplated by section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA. His Honour therefore accepted the respondent's arguments and dismissed the applicant's appeal.

Decision

In the Court of Appeal, His Honour Justice Chesterman (with which Justices Muir and Lyons agreed), refused the applicant's application for leave to appeal against the summary dismissal of the P&E Court appeal.

His Honour noted that a claim for compensation under section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA arose where:

- a local government had issued one of the three types of certificate identified in Chapter 5 (Miscellaneous) Part 7C Division 3 (Planning and development certificates) of the IPA;
- the certificate contained a wrong statement of fact, or omitted something the IPA required it to state; and
- the applicant for the certificate had suffered financial loss because of the error or omission.

With respect to the first prerequisite the Court of Appeal considered whether the decision notice issued to the applicant constituted a Planning and Development Certificate under the IPA. The court noted that although certain types of planning certificates were required to reproduce the decision notice, limited certificates required only a summary of relevant planning scheme and infrastructure charges provisions. The court also placed emphasis on the different functions of decision notices and planning certificates noting that the former authorises the applicant to undertake development while the latter provides information about the planning status of the land. On the basis of this reasoning the court concluded that the applicant had not been issued a planning certificate.

In relation to the second prerequisite, the court noted that the conditions complained of did not contain any inaccurate information aside from a minor error in the decision notice incorrectly describing a Jacaranda tree as a Poinciana. The approval accurately set out the conditions upon which the respondent was willing to allow the development to proceed. Irrespective of whether the conditions may have been amenable to challenge they did not constitute an error or omission.

Similarly the Court of Appeal held that the alleged loss of profits was not caused by any error in the information but was caused by the inability to proceed with the proposed development, because he could not comply with the identified conditions.

The Court of Appeal also dismissed the applicant's contention that he had been denied a fair hearing.

Held

Leave to appeal was refused.

To be legally effective does a development application have to be properly made?

Samantha Hall | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mahaside Pty Ltd v Sunshine Coast Regional Council & Anor* [2012] QPEC 41 heard before Long SC DCJ

November 2012

Executive Summary

Mahaside Pty Ltd (**applicant**) lodged an application with the Planning and Environment Court (**P&E Court**), seeking declarations and orders that the development application it lodged with the Sunshine Coast Regional Council (**first respondent**) for a reconfiguration of land at Collins and Waterfall Road, Yandina and subsequently changed to remove the requirement to provide evidence of a State resource entitlement as required by section 3.2.1(5) (Applying for development approval) of the now repealed *Integrated Planning Act 1997* (**IPA**), was a properly made application, and could therefore be changed pursuant to section 802 (Development applications under repealed IPA) of the *Sustainable Planning Act 2009* (**SPA**).

Ultimately, the P&E Court found that since the development application was not one that was capable of being dealt with in some legally effective way at the commencement of the SPA and the repeal of the IPA, it could not be changed pursuant to section 802 (Development applications under repealed IPA) of the SPA to remove the requirement to provide evidence of a State resource entitlement as required by section 3.2.1(5) (Applying for development approval) of the IPA. Accordingly, the application was dismissed by the P&E Court.

Case

This was an application for declarations that the applicant's development application was one made under the IPA, but not decided, before the commencement of the SPA for the purposes of section 802 (Development applications under repealed IPA) of the SPA and that the development application as amended was a properly made application under the IPA.

The applicant also applied to the P&E Court for orders that the first respondent receive and accept the development application as a properly made application under the IPA and deal with and decide the application under the IPA as though the SPA had not commenced, pursuant to section 802 (Development applications under the repealed IPA) of the SPA.

Facts

The declarations and orders sought by the applicant are in respect of the same development application which was the subject of a previous decision of the P&E Court in *Mahaside Pty Ltd v Sunshine Coast Regional Council & Ors* (2010) QPELR 43 (**prior application**), which has been summarised in a prior case note entitled "No excusal for non-compliance with IPA".

Previous Application

On 11 October 2004 the applicant applied to the former Maroochy Shire Council, now the first respondent, for a reconfiguration of land at Collins and Waterfall Road, Yandina. The development application was impact assessable and sought approval for a 74 lot, 3 residential sub-division and park.

The first respondent accepted the application as properly made but then subsequently refused it on 11 April 2007. The former Department of Natural Resources and Mines, as a concurrence agency, directed the first respondent to refuse the application, although the first respondent had also formulated its own independent reasons for refusal. The applicant subsequently lodged an appeal against the refusal.

However, before the appeal could be heard, the prior application was heard in the P&E Court to decide whether the applicant had failed to comply with section 3.2.1(5) (Applying for development approval) of the IPA and accordingly whether the development application was a properly made application within the meaning of section 3.2.1(7)(e) (Applying for development approval) of the IPA.

The prior application proceeded on the basis that the development application involved unallocated State land, which was a "State resource prescribed under a regulation", pursuant to item 12 of schedule 10 of the *Integrated Planning Regulation 1998* and that the specifically prescribed evidence had not been obtained in order to satisfy section 3.2.1(5) (Applying for development approval) of the IPA.

Due to the non-compliance with section 3.2.1(5) (Applying for development approval) of the IPA, the applicant applied to the P&E Court for declarations that the applicant's development application was a properly made application for the purposes of section 3.2.1 (Applying for development approval) of the IPA and that the first respondent's decision notice dated 11 April 2007 was valid and in the alternative, orders under section 820 (Proceedings for particular declarations and appeals) of the SPA excusing the non-compliance, if any, with section 3.2.1 (applying for development approvals) of the IPA.

Ultimately, the declarations and orders sought by the applicant were refused and the prior application and the appeal were accordingly dismissed.

Current Application

On 20 May 2011, the applicant gave notice to the first respondent of a change to the applicant's development application pursuant to section 3.2.9 (Changing an application) of the IPA. The applicant sought to remove the road connection through the unallocated State land, therefore eliminating any issue of taking or interfering with any State resource and thereby changing the development application, the subject of the prior application to one that was "properly made".

Decision

His Honour Judge Long SC DCJ, noted that the success of the current application depended on a conclusion that it was open to the applicant to amend the existing development application and therefore convert it into a properly made application.

The applicant relied on section 3.2.9 (Changing an application) of the IPA and the decision in *Stockland Property Management Pty Ltd v Cairns City Council* (2011) 1 Qd R 77, to show that section 3.2.9 (Changing an application) of the IPA may be engaged so as to rectify deficiency or non-compliance which may not be excused by acceptance of an application pursuant to section 3.2.1(9) (Applying for development approval) of the IPA and thereby change an application which was not properly made, into a properly made one.

The applicant acknowledged that Stockland was decided before the repeal of the IPA and the commencement of the SPA and that because, in this case, the problem which is sought to be remedied was not exposed until after that occurred, it must bring the application in reliance upon section 802(1) (Development applications under repealed IPA) of the SPA.

The applicant's argument was that as the development application was made but not decided under the IPA and before the commencement of the SPA, it was therefore a development application within the contemplation of section 802(1) (Development applications under repealed IPA) of the SPA. To support this contention the applicant submitted that for a development application to be "made" before the commencement of the SPA it need not be a properly made one under the IPA, provided that it had been lodged and was capable of being dealt with in some legally effective way.

The first respondent, however, contended that the development application was not "made" before the commencement of the SPA pursuant to section 802(1) (Development applications under repealed IPA) of the SPA and relied particularly on the decision in *Metricon Innisfail Pty Ltd v Cassowary Coast Regional Council* (2011) 1 QD R 226.

The decision in Metricon was concerned with whether a development application submitted to an assessment manager, but which was not supported by the evidence required under section 3.2.1(5) (Applying for development approval) of the IPA, was a development application that was made before the commencement of the draft State Planning Regulatory provisions.

Relevantly, the P&E Court observed the Court of Appeal in Metricon indicated that due to the non-compliance with section 3.2.1(5) (Applying for development approval) of the IPA of failing to include the necessary resource entitlement evidence, the development application was incapable of being the subject of any approval under the IPA and as such the development application could not be viewed as a properly made application. The P&E Court also observed the Court of Appeal's finding that the failure to provide the necessary resource entitlement evidence was one of a number of limited flaws that pursuant to section 3.2.1(10) (Applying for development approval) of the IPA had a "stultifying effect" not afforded to any other non-compliance which might render an application as "not properly made" but nevertheless capable of being deemed so by acceptance pursuant to section 3.2.1(9) (Applying for development approval) of the IPA.

In line with this reasoning, His Honour found that the applicant's failure to comply with section 3.2.1(5) (Applying for development approval) of the IPA was fundamentally critical and that having regard to section 3.2.1(10) (Applying for development approval) of the IPA, the development application was not one that could have been accepted under section 3.2.1(9) (Applying for development approval) of the IPA. His Honour also found that the development application was not, up to and including the commencement of the SPA and repeal of the IPA, in a State where it was capable of being dealt with in some legally effective way.

Ultimately, the P&E Court decided that in accordance with his finding that the development application was not capable of being dealt with in some legally effective way at the commencement of the SPA and repeal of the IPA, section 802(1) (Development applications under repealed IPA) of the SPA was not available to the applicant to allow it to change the development application pursuant to section 3.2.1(9) (Applying for development approval) of the IPA.

Held

The application was refused.

COLIN BIGGERS & PAISLEY LAWYERS

Changed costs provisions reframe strategic considerations for development applications

Samantha Hall | Jamon Phelan-Badgery

This article discusses the amendments that were made to the cost provisions under the *Sustainable Planning Act 2009* by the *Sustainable Planning & Other Legislation Amendment Act 2012* passed on 13 November 2013

November 2012

Executive Summary

The *Sustainable Planning and Other Legislation Amendment Bill 2012* (Qld) (**SPOLAB**) was introduced to the Queensland Parliament on 13 September 2012, proposing changes to a number of provisions within the *Sustainable Planning Act 2009* (**SPA**), including those with respect to the costs of a proceeding in the Planning and Environment Court.

Previously, the SPA provided that each party bore its own costs of a proceeding except in limited circumstances relating to frivolous or vexatious conduct. It was proposed in the SPOLAB that costs be at the discretion of the court, but follow the event unless the court orders otherwise. This compensatory approach would mean that generally the unsuccessful party would be required to compensate the successful party in relation to costs.

Amendments

After public consultation, Report No 13 of the State Development Infrastructure and Industry Committee recommended (among other recommendations) that further work would be done to clarify the issue of costs and to address the legitimate concerns raised in public submissions in respect of the SPOLAB.

Consequently, the costs provisions were amended and the *Sustainable Planning and Other Legislation Amendment Act 2012* (**SPOLAA**) was passed on 13 November 2012, with an amended approach to costs. The amended approach provides that costs are at the discretion of the court (removing the proposed default position that costs follow the event) and section 457(2) of the SPA sets out numerous matters the court may have regard to in making an order for costs (without limiting the matters to which the court may have regard).

The following provisions of section 457(2) of the SPA are notable as they will require consideration by parties of a number of matters when commencing or participating in court proceedings:

Section 457(2)(a)

The relative success of the parties in the proceeding.

Comment: The court has the discretion to decide that costs ought to follow the event, with an unsuccessful party bearing the costs burden.

Section 457(2)(b)

The commercial interests of the parties in the proceeding.

Comment: Where a party engages in litigation against a commercial competitor it may be vulnerable to an adverse costs order.

Section 457(2)(c)

Whether a party commenced or participated in the proceeding for an improper purpose.

Comment: A party participating in a proceeding for an improper purpose may be penalised with an adverse costs order.

Section 457(2)(d)

Whether a party commenced or participated in the proceeding without reasonable prospects of success.

Comment: If a party has no reasonable prospects of success in a proceeding it may be penalised with an adverse costs order.

Section 457(2)(e)

If the proceeding is an appeal against a decision on a development application and the court decides the decision conflicts with a relevant instrument as defined under section 326(2) or 329(2), whether the matters mentioned in section 326(1) or 329(1) have been satisfied.

Comment: A party may be subject to an adverse costs order if it appeals against a decision on a development application and the court decides the decision conflicts with a relevant instrument and the matters in sections 326(1) or 329(1) are not satisfied.

Section 457(2)(f)

If the proceeding is an appeal to which section 495(2) applies and there is a change to the application on which the decision being appealed was made, the circumstances relating to making the change and its effect on the proceeding.

Comment: The court may consider that the circumstances of the change or its effect on the proceeding warrant a particular costs order. For example, if the parties negotiate a change to the development application which satisfies both their concerns, it may be appropriate to order that each party bear its own costs.

Section 457(2)(g)

Whether the proceeding involves an issue that affects, or may affect, a matter of public interest, in addition to any personal right or interest of a party to the proceeding.

Comment: If an issue in the public interest is to be affected, the court may consider it appropriate to ensure one or more parties are not penalised through an adverse costs order, to encourage litigants to pursue matters for the benefit of the public.

Section 457(2)(h)

Whether a party has acted unreasonably leading up to the proceeding, including, for example, if the proceeding is an appeal against a decision on a development application, the party did not, in responding to an information request, give all the information reasonably requested before the decision was made.

Comment: If an applicant for a development application, an assessment manager or another stakeholder can be shown to have acted unreasonably, that party may be subject to an adverse costs order. Therefore all parties will need to carefully consider their conduct and that of other stakeholders to try to avoid a costs disadvantage if the matter proceeds to appeal.

Section 457(2)(i)

Whether a party has acted unreasonably in the conduct of the proceeding, including, for example:

- by not giving another party reasonable notice of the party's intention to apply for an adjournment of the proceeding; or
- by causing an adjournment of the proceeding because of the conduct of the party.

Comment: This provision requires parties to take a diligent approach to the conduct of their proceedings, with the risk being that unreasonable conduct will be penalised with an adverse costs order.

Section 457(2)(j)

Whether a party has incurred costs because another party has introduced, or sought to introduce, new material.

Comment: This provision also requires parties to take a diligent approach to the conduct of their proceedings, identifying material early and transparently and without imposing a financial burden on other parties.

Section 457(2)(k)

Whether a party has incurred costs because another party has not complied with, or has not fully complied with, a provision of this Act or another Act relating to a matter the subject of the proceeding.

Comment: If a party's development is the subject of an enforcement order under the SPA, or some other noncompliance with an Act, thereby imposing a financial burden on other parties, there may be costs consequences.

Section 457(2)(l)

Whether a party has incurred costs because another party has defaulted in the court's procedural requirements.

Comment: If a party's default in procedural requirements, such as failing to comply with a timeframe in a practice direction or directions order, causes a financial burden on another party, costs consequences may result.

Section 457(2)(m)

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

Comment: This provision suggests that a party whose input would increase the efficiency of a proceeding is required to participate as fully as is appropriate at the risk of an adverse costs order.

Summary

The provisions of section 457(4) (Costs) of the SPA preserve the position that each party bears its own costs, unless the court orders otherwise, if early resolution is achieved through a dispute resolution process under the ADR provisions of the SPA or the *Planning and Environment Court Rules 2010*. This provides further encouragement to parties to negotiate in good faith and resolve disputes where possible.

For the parties to a proceeding, strategies to avoid adverse costs orders and pursue beneficial costs orders will now need to be employed, even during the early stages of the IDAS process, far before the matter has even reached the court.

Given that the application of the provisions of section 457(2) of the SPA covers a broad range of circumstances, and such provisions have not been traditionally tested in the Planning and Environment Court, we foresee that a period of adjustment will ensue, with parties being careful to obtain legal advice as to the potential costs consequences of the conduct of proceedings.

In our view, the opportunity exists for parties to make aggressive arguments for adverse costs orders against their opponents. The court's response to such a strategy will be of interest given the long history of the Planning and Environment Court's role as a public interest court, and this new broad costs discretion introduced by the SPOLAB to impose costs orders.

Reform of directors' and managers' liability for environmental offences in NSW

Maysaa Parrino

This article explores the reform of directors' and managers' liability for environmental offences being introduced in all Australian jurisdictions, in particular the NSW reforms

November 2012

Executive Summary

Following the introduction of the *Miscellaneous Acts Amendment (Directors' Liability) Bill 2012* (NSW), directors and managers are no longer automatically taken to be criminally liable for an offence committed by a corporation under most environmental legislation in NSW, unless they are an accessory to a criminal offence. Similar reforms are progressively being made in all jurisdictions in Australia following guidelines received from the Council of Australian Governments.

Former reverse burden of proof on directors and managers for environmental offences

A reverse onus of proof used to apply to directors and managers under most environmental legislation. Accordingly, by default, if a corporation had committed an offence, they had also personally committed an offence, unless they could prove their innocence by showing that they were not in a position to influence the corporation, or they had used all due diligence to prevent an offence from occurring. This resulted in undue complexity and a lack of clarity about what measures were required to be implemented by directors and managers.

New directors' and managers' accessorial liability for environmental offences

The following new concepts have been introduced by the bill:

- a director or manager of a corporation is not criminally responsible for an offence committed by a corporation, unless a separate statutory provision exists establishing liability; and
- a person (including a director or manager) can be prosecuted as an accessory to the commission of an offence by a corporation (for example, by aiding and abetting its commission).

Most environmental legislation in NSW will now incorporate these concepts. For most offences, this will mean that a prosecuting authority will be required to prove that a director or manager has aided, abetted, induced, conspired in, or is knowingly concerned in the commission of an offence by a corporation.

New directors' and managers' executive liability for environmental offences

Despite the above, changes have been made to particular acts imposing "executive liability" for directors and managers for certain offences committed by a corporation. "Executive liability" is tied to the concept of directors and managers being required to take "reasonable steps" (previously referred to as due diligence) to prevent these types of offences occurring.

There are three types of executive liability:

- **Type 1 executive liability:** For this type of liability, a prosecuting authority must prove every element of the offence alleged, including that a director or manager failed to take all reasonable steps to stop the commission of the offence by the corporation (known as the "responsibility element.") The onus associated with the offence has therefore shifted from directors and managers to the prosecution. Type 1 executive liability has been introduced in the *Contaminated Land Management Act 1997* (NSW), the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) and in other legislation for certain types of offences.
- **Type 2 executive liability:** For this type of liability, the responsibility element is presumed without the need for further proof, unless a director or manager can show evidence that suggests a reasonable possibility that there was no such failure to take reasonable steps. Type 2 executive liability has not yet been introduced by the bill, but we expect it will be for some offences.

- **Type 3 executive liability:** This is the most serious type of liability. The responsibility element is presumed without the need for further proof, and the director or manager bears the onus of proving, on the balance of probabilities, that there was no failure to take reasonable steps to prevent or stop the commission of the offence by the corporation. Type 3 executive liability has not yet been introduced by the bill, but former provisions in the POEO Act establishing similar liability have been preserved by the bill for more serious environmental offences. Again, we expect to see more Type 3 executive liability offences in future.

Environmental legislation that will be amended

Offences in the following legislation have been amended:

- *Contaminated Land Management Act 1997* (NSW)
- *Environmentally Hazardous Chemicals Act 1985* (NSW)
- *Forestry Act 1916* (NSW)
- *Heritage Act 1977* (NSW)
- *Mining Act 1992* (NSW)
- *National Parks and Wildlife Act 1974* (NSW)
- *Native Vegetation Act 2003* (NSW)
- *Pesticides Act 1999* (NSW)
- *Protection of the Environment Operations Act 1997* (NSW)
- *Sydney Water Catchment Management Act 1998* (NSW)
- *Threatened Species Conservation Act 1995* (NSW)
- *Water Industry Competition Act 2006* (NSW)

Directors and managers should be aware of legislative changes related to environmental offences

Directors and managers should be aware of the following:

- There will now be differing grades of personal liability, and onuses of proof, for directors and managers under environmental legislation for offences that are also committed by corporations, depending upon the type of legislation that applies. As a result, directors and managers will need to pay closer attention to the legislative changes and differing types of liability.
- The introduction of accessorial liability offences is good news for directors and managers who will no longer have automatic liability for failing to perform due diligence.
- For Type 1 executive liability offences, a prosecuting authority will now bear the burden of proving the elements of the offence. We expect that this will result in changes in the way that matters are run in the Local Court and in the Land and Environment Court by prosecuting authorities, as more evidence will be required to be provided to directors and managers and to the court prior to such offences being established.
- More serious executive liability offences have been retained under the POEO Act (for example, failing to comply with a condition of an environmental protection licence). It is important for directors and managers therefore to be familiar with the more serious offences under the POEO Act and their potential personal liability under that Act.

Proposed changes to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP)

Maysaa Parrino

This article discusses the proposed changes to the NSW State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 to allow a wider range of development to be deemed exempt or complying development

November 2012

Executive Summary

The NSW government is proposing to allow a wider range of commercial, retail, industrial and residential development to be considered as either exempt or complying development under the Codes SEPP, to enable home and business owners to obtain faster and more cost effective approvals. The proposed changes are a significant step forward to a code based system of planning in NSW.

Covenants, environmentally sensitive areas and heritage items

Exempt and complying development will now be permitted regardless of most covenants registered on title that may restrict development at a site. Exempt development will also be permitted in environmentally sensitive areas where it is ancillary to other buildings or uses already on a site. Some limited changes are proposed to allow exempt and complying development on certain sites that contain heritage items.

Proposed exempt development changes

New types of exempt development have been introduced including advertising and signage, temporary uses and structures, expanded changes of use, outdoor footpath dining, mobile food and drink outlets and waterways structures. Changes have also been made regarding extension of hours during the Christmas period for commercial premises and for licensed premises at specified times.

New approvals required prior to issue of complying development certificates (CDCs)

The following new approvals are now required prior to the issue of CDCs:

- by Roads and Maritime Services where a new building or additions over 5000m^2 are proposed on, or adjacent to, a classified road;
- by a qualified person where a new building or change of use is proposed on land requiring remediation;
- an independent report on fire safety upgrades of existing commercial and industrial buildings, for alterations and additions to buildings constructed before 1993.

Changes for retail, industrial and commercial premises

Businesses will be able to change the use of some commercial, retail and industrial buildings and spaces as complying development. For example, a change from an accountant's office to a medical office, or a light industrial building to a self storage building, will be considered complying development, provided that certain development standards are met.

Additionally, individual shops and offices in a commercial building shell that have already been approved by council without any specific tenant types may be approved as complying development, provided that the new use meets the conditions in an original council approval.

The following development types are proposed as complying development:

- new industrial buildings up to 20,000m^2 in size on industrial zoned land (excluding heavy or hazardous industry);
- additions to existing shops of up to 50% of the existing floor area or 1000m^2, whichever is the lesser, subject to certain development standards;
- additions to commercial offices of up to 50% of the existing floor area or 2,500m^2, whichever is the lesser, subject to certain development standards.

Development standards for residential buildings

Upgrades for safety and disability access to most residential buildings, including strata buildings, will be permitted as complying development. Internal refurbishments to residential premises will also be permitted as complying development (including common areas in strata buildings).

Changes have also been made to construction of dwelling houses on boundaries, and detached studios of either $20m^2$ or $40m^2$ in back yards, depending on the size of the lot. Further changes have been made to refine development standards for basements, excavation depths, setbacks for corner blocks and privacy screens on some windows as complying development.

Notification requirements to neighbours for complying development

Feedback is being sought from the Department of Planning and Infrastructure regarding a proposal that residential neighbours within 50m be notified five days before an application for a CDC is approved, if the development is:

- a new dwelling house being demolished or built, or an addition is made to an existing dwelling, or
- the demolition and building of industrial buildings or extensions to existing commercial and industrial buildings.

Proposed new fire safety code as complying development

A new fire safety code allows changes to some building fire safety systems as complying development, including alterations to hydraulic safety systems and changes to fire alarm communications links such as fire hose reels, sprinkler systems and water tanks.

Radical changes to the role of Development Control Plans (DCPs) in NSW

Maysaa Parrino

This article discusses the role of Development Control Plans in the assessment process in NSW as a result of legislative reform

November 2012

Executive Summary

On 24 October 2012 the NSW Government introduced the *Environmental Planning and Assessment Amendment Bill 2012* (NSW), which will result in sweeping reforms across the state to the role of DCPs in the development assessment process. The bill was passed by both houses of parliament on 15 November 2012. The effect on all new development applications in NSW will be significant. DCPs will be given less weight and significance and will be applied flexibly.

What is a Development Control Plan?

DCPs are detailed planning documents that set out a consent authority's expectations for local government areas. Typically the consent authority is a local council. DCPs must presently be taken into consideration in the development assessment process, but they are not an "environmental planning instrument" (**EPI**). An EPI is a planning instrument that is legally binding under the *Environmental Planning and Assessment Act 1979* (NSW), such as a State environmental planning policy or a local environment plan.

However, the courts have traditionally held that where DCPs set out standards that are directly relevant to a development application, they may be given significant weight during the development assessment process.

Less weight and significance to be given to DCPs

There has been a considerable amount of controversy over DCPs for some time, as they can be quite detailed, impracticable and onerous. They are also usually not subject to the direct scrutiny of the NSW Department of Planning when they are made. In some instances they have been known to be at odds with the nature and intention of other EPIs that apply to the same land.

The new role of DCPs

The bill introduces the following amendments.

Facilitating the objectives of existing EPIs

The principal purpose of a DCP will now be to provide guidance on the following matters:

- giving effect to the aims of an EPI that applies to development;
- facilitating development that is permissible under any such EPI;
- achieving the objectives of land use zones under any such EPI.

The bill also states that the provisions of a DCP made for that purpose are not statutory requirements.

Where DCPs have no force or effect

Additionally, DCP provisions will have no force or effect to the extent that they:

- are the same, or substantially the same, as a provision of an EPI applying to the same land; or
- are inconsistent or incompatible with a provision of any such EPI; or
- have the practical effect of preventing or unreasonably restricting development that is otherwise permissible under any such EPI and that complies with the development standards in any such EPI.

Interestingly, the words "preventing" or "unreasonably restricting" have not been defined by parliament in the new bill, so it will be up to the courts to interpret and determine what those words mean.

How consent authorities will be required to apply DCPs

A new section in the bill will provide that if a DCP contains provisions that relate to the development that is the subject of a development application, a consent authority is to give those provisions less weight and significance than is given to EPIs.

If an application complies with DCP provisions relating to an aspect of development, the consent authority cannot require more onerous standards. Where the application does not comply, the consent authority is required to be flexible in applying those provisions and to allow alternative solutions to deal with those aspects of the development.

The consent authority may consider DCP provisions only in connection with the assessment of that development application. It is not to have regard to how those provisions have been applied previously or might be applied in future.

New flexibility is good news for property developers and owners

One of the most important changes is the "flexibility" provision. This mandates that consent authorities are required to have a softer approach and to move away from rigidly applying DCPs, which is excellent news for property owners and developers. It will mean that there will be more options in terms of how, and the extent to which, DCP provisions are applied.

Also, consent authorities can no longer rely upon the application of DCP provisions to previous determinations for similar development applications when undertaking individual merit assessment of any development application.

Should you consider delaying your development application?

If you have a development application on foot, you may want to consider withdrawing your application and re-lodging it at the time the statutory amendments have been made.

That way the consent authority will be required to flexibly apply any DCP provisions in the assessment process, and to allow DCPs to be given less weight during the development assessment process. We anticipate that the legislation will be passed shortly.

DCPs which "prevent" or "unreasonably restrict" development in future

It will remain to be seen, and up to the court to determine, in what scenarios DCP provisions will have no force or effect, as a result of "preventing" or "unreasonably restricting" development.

Based on previous case law, we expect that the courts will have a practical interpretation of this new terminology.

New proposed standards for the Building Code of Australia (BCA) 2013

Maysaa Parrino

This article discusses the proposed changes to the Building Code of Australia designed to prevent tragic incidents

November 2012

Executive Summary

The *Australian Building Codes Board* has released the draft of the BCA proposed to commence in May 2013. The amendments relate to safe access and movement. BCA 2013 includes new provisions for openable windows and horizontal balustrades to reduce the risk of slips, trips and falls.

The proposed changes are in response to several tragic incidents in Sydney where children have fallen from windows.

Openable windows to be fitted with screens or locks

Barriers or locks are required to be fitted on openable windows in early childhood centres and in habitable rooms of residential buildings (including apartments and multi-storey homes) where windows are more than two metres above the ground.

Openable windows will be required to be fitted with a screen, or the window opening will be required to be limited to 125 millimetres to prevent children from falling from heights. The Australian Building Codes Board estimates that 80 per cent of windows will be fitted with locks and the remaining 20 per cent with screens.

Balustrades designed to prevent children from climbing

Where the floor of a veranda, mezzanine or the like is more than two metres above the ground (rather than the current standard of four metres), balustrades are required to be non-climbable. Therefore, any horizontal elements between 150 millimetres and 760 millimetres above the floor must not facilitate climbing.

A concession is proposed to be given for balustrades between two and four metres above the floor so that the handrail may be kinked inwards by not less than 150 millimetres, making it difficult for children to climb the balustrade.

Degree of slip resistance of pedestrian surfaces to be specified

Presently the BCA requires stair treads to have a slip resistant finish or a non-skid strip near edges, however, the level of slip resistance required is not specified. Slip resistance values in AS/NZS 4586 *Slip resistance classification of new pedestrian surface materials* are proposed to be adopted.

Buildings constructed in flood prone areas must resist flotation, collapse and movement

New standards are proposed in the BCA 2013 for construction of new buildings and alterations and additions to existing buildings in flood prone areas. The changes are specific to classes of buildings where people may sleep, reflecting the life safety purpose of the changes.

There is a new BCA 2013 standard entitled "Standard for Construction of Buildings in Flood Hazard Areas" together with an explanatory book. Buildings must be designed and constructed to resist flotation, collapse or significant permanent movement as a result of flooding. There are also new BCA definitions for defined flood events and flood levels, flood hazard areas and flood hazard levels.

This article is only short summary of the proposed BCA changes and further changes are proposed.

New proposals for changes can be submitted by 1 February 2013 for consideration as part of future BCA editions.

Independent review of rezoning decisions and powers given to councils to make Local Environmental Plans (LEPs)

Maysaa Parrino

This article discusses the new review mechanisms to be introduced in NSW for developers and landowners to seek a review of a rezoning decision in a local government

November 2012

Executive Summary

From 2 November 2012, if you are a developer or landowner and you have made a request for rezoning to council, you now have the right to request a review of council's decision at an independent level. Two review mechanisms have been introduced, known as "pre-gateway reviews" and "post-gateway reviews".

The changes are a significant step forward and will introduce more transparency and accountability in the rezoning process in NSW. Councils also now have powers to make some LEPs.

Reviews of proposed amendments to LEPs

If you are a developer or landowner and you have requested that council prepares a planning proposal for amending a LEP, you may ask for a review if:

- Council has notified you that your request is not supported. Councils are now required to notify you when they have determined this. You then have 40 days to make an application for review.
- Council has failed to indicate its support for your request 90 days after you have submitted the request. You may then make an application for review any time after the 90 days has elapsed.

How do you request a review of a planning proposal for amending a LEP?

A review application will be required to be made in writing to the NSW Department of Planning and Infrastructure (**DoP**). DoP will then undertake an assessment as to whether the review application has "strategic merit" or has "site-specific merit and is compatible with surrounding land uses" based on certain criteria set out in *A guide to preparing local environmental plans*, an online publication issued by DoP.

If your planning proposal meets the relevant criteria, it will be referred on to a Joint Regional Planning Panel (**JRPP**) or the Planning Assessment Commission (**PAC**). The JRPP or PAC will advise on whether it recommends to the Minister that the proposed LEP should proceed to a gateway determination. The Minister's final decision on the matter is based on the JRPP or PAC's advice.

For planning proposals submitted prior to November 2012, you may seek a review if the supporting documentation for your planning proposal is still current, but the request will generally need to be less than two years old to be considered.

Gateway reviews of proposed amendments to LEPs

If you are a council, developer or landowner and a gateway decision has been made in relation to a proposed LEP that you are not happy with, you may request that the Minister alters that determination when a decision is made that:

- it should not proceed. You have 40 days after notification by DoP to request a review; or
- it should be resubmitted. You have 40 days after notification by DoP to request a review; or
- requirements are imposed or variations are made that you think should be reconsidered. You have 14 days from being notified to indicate your intent to request a review, and then 40 days to apply formally for a gateway review.

These reviews only apply to original determinations made by a delegate of the Minister (and not councils).

Powers given to councils to amend certain types of LEPs

The making of some LEPs will now be delegated to councils, including LEPs which make mapping alterations, reclassifications of land, amendments to specific heritage items and spot rezoning consistent with an endorsed strategy and/or surrounding zones, and other matters of local significance. In turn, councils will be required to report to DoP on processing times for making those delegated LEPs.

Positive changes for developers and landowners

Overall, we expect that the removal of multiple stages in the making of some LEPs, and the right for developers or landowners to request a review of rezoning decisions, is a significant step forward in providing more certainty and transparency for development in NSW.

Meaning of "commercial fishing operators"

Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Falzon v Gladstone Ports Corporation & Anor* [2012] QPEC 50 heard before Searles DCJ

December 2012

Executive Summary

This case concerned an application in pending proceeding by Gladstone Ports Corporation (**GPC**) to strike out the applicant's further amended originating application. The further amended application sought declarations and orders on the basis that the applicant and the parties represented by the applicant were class members under the term "commercial fishing operators". The applicant argued an expansive interpretation of that term which extended, for example, to seafood wholesalers and retailers of fishing equipment. The respondent argued that the term was unambiguous and referred to an existing commercial operator who actually engaged in the activity of fishing, including crabbing.

The Planning and Environment Court (**P&E Court**) found that the GPC's definition was to be preferred based on the plain meaning of the term. Furthermore, as the relief sought by the applicant rested squarely on a meaning of the term "commercial fishing operators" which had been rejected, the pleading was to be struck out for not disclosing a cause of action, having a tendency to prejudice or delay a fair trial and being frivolous and vexatious.

Case

On 30 January 2012 the applicant filed an originating application seeking various declarations and orders on the basis that the applicant and the parties represented by the applicant were class members under the term "commercial fishing operators". On 3 April 2012 the applicant filed an amended originating application. By an application in pending proceeding, GPC sought to have the amended application struck out. The second respondent, the former Department of Employment, Economic Development and Innovation (**DEEDI**) also filed an application seeking an order that the proceedings commenced against it by the applicant be dismissed. GPC filed a further application seeking its costs thrown away on the amendments to the original application. Subsequently the amended application was further amended so that all applications before the court proceeded on the basis that the pleading under attack was the further amended application filed 26 April 2012.

Facts

Background

The respondent to the main proceedings, GPC, was the proponent of the Western Basin Dredging Project, which under section 26 (Declaration of significant project) of the *State Development and Public Works Organisation Act 1971* (**Act**) had been declared a significant project with the result that an environmental impact statement (**EIS**) was required. Pursuant to section 35(3) (Coordinator-General evaluates EIS, submissions, other material and prepares report) of the Act, the Coordinator-General prepared a report evaluating the EIS and imposing conditions on the proponent. Two such conditions were relevant, Conditions 20 and 21, which provided:

Condition 20 — "GPC 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. That is to cover temporary and permanent loss of access to fishing areas and marine fish habitat".

Condition 21 — "GPC must meet any costs associated with the investigation, negotiation and administration of any compensation package, including all costs incurred by DEEDI in the management of development or (sic) any compensation package".

The Chief Executive Officer of DEEDI was the nominated entity with jurisdiction for these conditions.

Main proceedings

In the main proceedings, the applicant, Falzon, represented himself and 58 individuals, some of which were said to be class members. Those classes were said to exist on the basis that the term "commercial fishing operators" in Condition 20 at all material times included:

- Commercial fishermen, including trawlers and live trout fishermen;
- Commercial crab netters;
- Seafood wholesalers and processors;

- Suppliers of bait, tackle, parts, services and marine craft;
- Retailers and suppliers of marine craft, bait, tackle and parts; and/or
- Charter boat operators,

who operated a business that was engaged in, was reliant upon other businesses engaged in, or enabled other business to engage in, the catching of fish or other seafood from the Gladstone Harbour.

The applicant sought a declaration pursuant to section 54G(3) (Declaration-making powers) of the Act that there had not been substantial compliance by GPC with Condition 20, in that it had failed to mitigate the reasonable financial losses to existing commercial fishing operators attributed to dredging in the western basin by failing to investigate whether signs or symptoms of disease in fish and other seafood was attributable to the dredging activities of the project and also for failing to negotiate with some of the classes listed above. The applicant sought orders, pursuant to section 54G(4) (Declaration-making powers) of the Act, that GPC:

- conduct a monitoring programme to monitor the levels of pH, acid sulphate soils, organic chemicals, mercury and tributyltin, heavy metals and oxygen in the waters within 100 metres of all dredging activities;
- take any other steps necessary to determine as conclusively as possible whether the emergence of signs or symptoms of disease in fish, crabs, prawns and sharks fished in the waterways of the Gladstone Harbour were attributable to the dredging activities;
- provide the results of the above monitoring programme and any other investigations to the applicant and the above class members within two business days of the receipt of those results; and
- pay the legal fees and outlays incurred by the applicant and the class members incurred to obtain the above orders.

Finally, the applicant sought an order that GPC and DEEDI negotiate a compensation package with Falzon and the class members.

Application in Pending Proceeding

GPC relied upon four grounds to support its application to strike out the pleading in that it:

- was founded on an erroneous construction of the term "existing commercial fishing operators" in Condition 20;
- failed to properly plead necessary standing of Falzon and the 58 parties he purported to represent;
- was not a proceeding about whether there had been substantial compliance with an imposed condition within section 54G(2) (Declaration-making powers) of the Act; and
- was premature because, even assuming the interpretation argued by Falzon, the time for compliance with Condition 20 had not yet arrived.

In relation to the first ground, GPC submitted that the term "existing commercial fishing operators" was neither ambiguous nor uncertain and referred to an existing commercial operator who actually engages in the activity of fishing, including crabbing. Further, GPC submitted that to expand the term to all the other categories contended for by Falzon would involve the term extending to people not engaged in the activity of fishing, would create difficulties in determining the parameters of the classes of such persons and would lead to uncertainty in its operation and absurdity in its consequences.

Falzon, in response, argued that the term "commercial fishing operators" referred to all operators of businesses that form part of the fishing industry or the fishery at Gladstone Harbour. Falzon argued his wider interpretation of the term should be accepted because it was consistent with the plain meaning of all sentences in Condition 20 and the context in which Condition 20 was imposed, and because two principles of interpretation favoured it, namely, the principle that a development consent is to be construed liberally (*Weston Aluminium Pty Ltd v Environment Protection Authority* (2007) 82 ALJR 74 relied upon) and the principle that, where two interpretations of the term "commercial fishing operators" are open, the court should interpret Condition 20 favourably to the businesses that in the fishing industry at Gladstone Harbour had a vested right that the fishing zones in the Harbour would be maintained prior to the commencement of the Project (paragraph 28 of *Newman v Brisbane City Council* [2001] QPEC 287 relied upon).

Decision

Meaning of existing commercial fishing operators

The P&E Court found that the meaning of existing commercial fishing operators argued by GPC was to be preferred to that argued by Falzon. This was based on the plain meaning of commercial fishing operators, which refers to fishers who carry out that occupation to derive income as opposed to recreational fishers. The P&E Court referred to the Oxford English Dictionary meaning of the term "fishery" as "the business, occupation or industry of catching fish, or of taking other products of the sea or rivers from the water." The P&E Court further cited the individual definitions of "commercial", "fishing" and "operator" and came to the conclusion that the combination of those definitions disclosed the common sense definition of a "commercial fishing operator" as one who engages in the business of catching fish.

The P&E Court found that the relief sought rested squarely on the meaning of existing commercial fishing operators, which he had rejected and therefore the pleading was one which satisfied subcategories (a), (b) and (d) of rule 171(1) (Striking out pleadings) of the *Uniform Civil Procedure Rules 1999* in that it did not disclose a cause of action by the applicants, had a tendency to prejudice or delay a fair trial and was frivolous and vexatious.

Costs

In considering the costs of GPC thrown away by reason of the amendment of the original application, the P&E Court noted that the solicitors for GPC wrote to Falzon's solicitors in February 2012 detailing its concerns in relation to the original application including the meaning of commercial fishing operators in Condition 20. That letter told Falzon of the risk of a strike out application and notified him that GPC reserved its right to make such an application.

The P&E Court concluded that it had power under section 457 (Costs) of the *Sustainable Planning Act 2009* to order costs in circumstances where it considered the proceedings to be frivolous or vexatious, which in this case it considered to be so. Although DEEDI did not seek a similar order as GPC for costs, he believed they were equally entitled to costs if they so sought.

Held

The P&E Court ordered that:

- The further amended application be struck out.
- The applicant (Falzon) pay the costs of GPC in relation to amendments to the original application.
- The second respondent (DEEDI) have liberty to apply for costs in relation to the amendments to the original application.

Perils of related approvals to prevent original approvals lapsing

Samatha Hall

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Maher & Anor v Fraser Coast Regional Council* [2012] QPEC 67 heard before Andrews SC DCJ

December 2012

Executive Summary

The Planning and Environment Court (**P&E Court**) considered an application seeking relief to revive a lapsed development approval where a subsequent development application was made 24 days too late to convert the relevant approval into a "related approval" in order to avoid the original approval lapsing. In this case, the failure to make a subsequent development application on time significantly impacted on the feasibility of the project where planning controls had changed the desired planning outcome in the area.

Case

This case concerned an application brought by Peter Maher and Sofia Maher to the court to seek an order to treat a development application for operational work for vegetation clearing as if it were made within 2 years of a development permit for a material change of use (**MCU approval**) taking effect such that the development approval for the operational work for vegetation clearing was a 'related approval', which would result in the MCU approval not lapsing.

The Fraser Coast Regional Council was the respondent for the application.

Facts

Circumstances surrounding lapse of MCU approval

On 24 November 2006, the Mahers obtained a judgment in their favour in respect of an appeal against the council's refusal of a development application for a development permit for a material change of use for multiple units in excess of two storeys, which led to the MCU approval taking effect. The MCU approval lapsed, as the Mahers failed to commence a change of use prior to 24 November 2010.

The date on which the MCU approval lapsed could have been extended if a related approval had been applied for in accordance with section 3.5.21(4) (When approval lapses if development not started) of the repealed *Integrated Planning Act 1997* (**IPA**) by 24 November 2008.

On 16 December 2008, the Mahers' town planning consultant made a development application for operational work for vegetation clearing to the council, which was approved on 18 March 2009. If that development application had been made by 24 November 2008, it would have fallen within the definition of a 'related approval' for the MCU approval under section 3.5.21(7) (When approval lapses if development not started) of the repealed IPA.

Alternatively, the Mahers could have applied to the council for an extension of the four year period for the MCU approval prior to the lapse occurring on 24 November 2010.

Mahers' application to the court

The Mahers sought to revive the lapsed MCU approval by changing the status of the development application for operational work so that it would become a "related approval" for the MCU approval such that the MCU approval would not lapse by applying to the court to exercise its discretion under section 820 (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009* (**SPA**) to grant the following:

- a finding or declaration that there was a failure to comply with section 3.5.21(7) (When approval lapses if development not started) of the repealed IPA;
- an order that the time for making the first development application for a "related approval" be extended to 16 December 2008.

The Mahers argued that the power in section 820 of the SPA was enlivened as approval lapses if development not started) of the repealed IPA.

The council argued that the Mahers had not identified a non-compliance with section 3.5.21(7) (When approval lapses if development not started) of the repealed IPA; rather the Mahers had identified that the operational work approval did not satisfy the definition of a "related approval".

Decision

It was necessary for the court to consider the following:

- first, whether section 820(1) (Proceedings for particular declarations and appeals) of the SPA was enlivened in the circumstances; and
- second, whether the circumstances warranted the exercise of discretion to grant the relief sought.

Was there non-compliance such that section 820 was enlivened?

The issue turned on the meaning of the words in section 820 of the SPA, *"a provision of repealed IPA … has not been complied with or has not been fully complied with"*. The court found that the words of section 820 were not "ambiguous or obscure" and section 14B(1)(b) (Use of extrinsic material in interpretation) of the *Acts Interpretation Act 1954* did not operate to allow the use of extrinsic material in the proceeding. As such, the question was whether section 3.5.21(7) of the repealed IPA had not been complied with or had not been fully complied with by the Mahers.

The Mahers relied on three cases where development approvals lapsed and the court granted relief using the broad powers of section 820(1) of the SPA: *Tremellen v Southern Downs Regional Council* (2011) QPELR 56; *Devy v Logan City Council* (2011) QPELR 207; and *Larrell Pty Ltd v Brisbane City Council* (2012) QPELR 66.

Considering the factual circumstances and relief sought in those cases as compared to the circumstances surrounding the Mahers' approvals, the court rejected the Mahers' submission that by failing to lodge a development application for operational work by 24 November 2008 they failed to comply with section 3.5.21(7) (When approval lapses if development not started) of repealed IPA.

Exercise of discretion to grant relief

As a consequence of the finding that the Mahers had not failed to comply with section 3.5.21(7), the court did not accept that it had a power to consider the exercise of the court's discretion to grant relief, however it did proceed to consider the factors relevant to its exercising its discretion in favour of the Mahers.

Significantly, a relevant reason for refusing relief was the fact that having regard to planning controls at the time the appeal was decided, any new development application would have been limited to 2-3 storeys as opposed to 6 storeys, creating a loss in yield and impacting on the viability of the project. Whilst the impact on the Mahers' interests were relevant, the interests of the council and the community were also relevant given the current planning controls had changed the desired planning outcome for the area.

Furthermore, if the Mahers had applied to the council to extend the life of the MCU approval, the matters the council would have been obliged to consider under section 388 (Deciding request) of the SPA would have created significant obstacles to success, particularly given the change in planning controls, the lack of community awareness about the MCU approval in light of its age and the fact that if a new application were made it would be likely to draw submissions.

Held

The court held that there were not sufficient reasons to grant the relief sought and in the event that the court did have a power to exercise its discretion, it would refuse to exercise it.

Lost opportunity to impose condition

Samantha Hall | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Transpacific Industries Group (ACN 105 155 221) v Ipswich City Council* [2012] QPEC 69 heard before Robin QC DCJ

December 2012

Executive Summary

This case was an application to the Planning and Environment Court for a declaration as to the interpretation of a development approval for a waste disposal facility, for which operations had increased over time with consequent effects upon the Ipswich City Council's road networks.

The court held that the proper construction of the development approval was that it incorporated certain documents comprising the development application; however, there was nothing in the development application which confined the quantities of waste able to be disposed.

Case

The issues for the court's determination were, in the absence of a stated limit to the rate of waste disposal in the development approval, whether documents comprising the development application were incorporated into the approval and if they were, whether the development application indicated that the consent limited the permitted rate of waste to 50,000 tonnes per annum.

Facts

The applicant, Transpacific Industries Group, operated the waste disposal facility pursuant to a town planning consent permit issued on 4 February 1999 under the repealed *Local Government (Planning and Environment) Act 1990*.

This approval was subject to conditions, but none of the conditions expressly limited the rate per annum of waste able to be disposed of as part of the use. The conditions did however, restrict the types of waste which could be received at the facility.

The approval did refer to other documents such as correspondence and reports contained in the development application, which in various ways gave the impression that the facility was expected to operate at a rate of 20,000 to 50,000 tonnes per annum, at least for a time.

The use was also an environmentally relevant activity (**ERA**) under the *Environmental Protection Act 1994* for operating a facility for disposing of general waste for which a licence was obtained. The town planning report comprising the development application expressed the intention that the proposed development would align the operation of the landfill with the ERA licence in effect at the time. However, the ERA licence did not specify a limitation on the rate of waste able to be disposed at the facility.

A further development application was made in or about late 2000 or early 2001 for a development permit for a material change of use (**MCU**) relating to the upgrade of the relevant ERA licence to encompass a higher rate of waste receival. Correspondence at that time suggested that the council had determined that a MCU approval was not required to increase the operating capacity of the facility under the ERA licence from the State. Before the court, the council contended that the approval capped the disposal rate to 50,000 tonnes per annum. Whilst the parties had both taken inconsistent positions in the history of the matter, it was not contended that either was estopped from arguing a changed position before the court.

Decision

The court accepted that a development approval may incorporate other documents by reference, and that certain documents had been incorporated in this case.

Reasoning in the case of *Ryde Municipal Council v The Royal Ryde Homes* (1970) 19 LGRA 321 at [323-324] was applied in the circumstances, namely that *"the mere approval of an application does not…necessarily have the effect of incorporating all the matters stated in the application"*. And rather, because a planning approval attaches to the land and binds future owners and occupiers, *"the legal qualities a consent possesses, or which flow from a consent, are so important that care should be taken to ensure that consents are framed in clear terms and conditions are specified with certainty"*.

Given these points, the court was not convinced that any of the references to the rate of waste disposal in the documents that were incorporated into the development approval placed a clear limitation on the rate of waste to be received by the facility.

It was noted that the council could have imposed an explicit condition on the approval which limited the rate of waste to be received by the facility, but did not do so. Further, the court stated that if it was *"established that the Council lacks any ability to regulate quantities, the best it can do is to persuade the State authorities licensing the ERA that their brief extends to imposing conditions of the kind the Council may think necessary to protect the public interest*".

Held

The declaration sought should be made, that is, that the approval is not subject to an annual limit on the amount of waste received per year.

Development in a flood plain: the importance of alternative solutions

Edith Graveson

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Arora Construction Pty Ltd & Anor v Gold Coast City Council & Anor* [2012] WPEC 052 heard before Rackemann DCJ

December 2012

Executive Summary

In this case, the Planning and Environment Court heard an appeal against the refusal of a development permit for a material change of use by the Gold Coast City Council. The key issue in dispute was whether the proposed development, which was located within a flood plain was in conflict with the planning scheme and if so, whether there were sufficient grounds to overcome any such conflict.

The court held that whilst any development within the boundary of a flood plain carries some inherent risk, the proposal did not conflict with the higher-order provisions of the planning scheme. Further, the court was satisfied that even where there was a conflict or potential conflicts, there were sufficient grounds to justify approval.

Case

This case involved an appeal by Arora Construction Pty Ltd and Jans Construction Pty Ltd against the decision of the Gold Coast City Council to refuse a development permit for a material change of use.

On appeal the issues were narrowed to focus on conflicts between the appellants' development and the provisions of the relevant planning instruments restricting development in flood affected areas.

Facts

The development application related to land situated on Nerang-Broadbeach Road, Carrara, within the boundary of the Guragunbah flood plain.

The appellants applied for a development approval for the construction of 7 buildings, ranging from 3 to 7 stories in height that would house 270 apartments, together with a 220m^2 restaurant. The built portion of the development was to be restricted to 30 per cent of the site towards its southern end with the balance to be used for recreation and ephemeral wetlands flood storage.

The council's planning scheme contemplated residential development in the flood plain but required inter alia that:

- the hydraulic function of the flood plain is maintained;
- people and property in the flood plain are not exposed to an unreasonable level of risk; and
- the openness of the flood plain is maintained.

The court noted that the proposed development would not impact the hydraulic function or openness of the flood plain and would not cause any risk to property.

Thus, the issue to be determined by the court was whether the appellants' development ought to be refused because it would expose occupants to an unreasonable level of risk particularly because of the extent to which access to the property via Nerang-Broadbeach Road would be affected by flood.

The planning scheme provisions

Reference was made to the Guragunbah Local Area Plan (**LAP**) statement of intent that:

> *The development will need to ensure that the level of risk to occupants is acceptable during flood events and that appropriate emergency response can be facilitated*.

Performance Criteria 20 for the LAP requires that users of the land should reasonably expect to be able to evacuate to a place of refuge. Moreover, the Acceptable Solution for the Performance Criteria contemplates road access during a Q100 flood event. The proposed development, however could not achieve this.

In addition, the applicable Flood Affected Constraint Code (**FACC**), which was also relevant to the site stated that development proposals will be fully evaluated against:

> *Whether the risks associated with the development are fully known, quantifiable and capable of being dealt with to Council's satisfaction, without any uncertainties*.

Performance Criteria 10 for the FACC requires that all proposed development must demonstrate that sufficient access will be available to enable evacuation during a range of floods. The proposed development however, cannot achieve Acceptable Solution AS10.1 because the development must rely on Broadbeach-Nerang Road, a road which is below the level of the designated flood and is the sole access route to the site.

Alternative solutions

Despite the fact that its proposal departed from the Acceptable Solutions of the relevant Performance Criteria, the appellants asserted that:

- its alternative solutions would satisfy the performance criteria; and/or
- there were sufficient grounds to warrant approval notwithstanding any conflict.

The appellants proposed a number of alternative solutions that would obviate reliance on access via Nerang-Broadbeach Road access during floods beyond a Q20 event.

The appellants' primary alternative solution proposed a number of measures to convert the site into a safe haven so that occupants could safely reside on the site during a flood event. Measures included building specifications, which would provide a greater than ARI 500 year flood immunity, internal access roads trafficable in a ARI 1000 year event, temporary flood barriers, an onsite emergency centre, submersible pumps to remove seepage, an onsite safe water supply, onsite generated power, emergency food rations, provision for satellite communications and a pharmaceutical notification supply scheme. The appellants' alternative solution also incorporated measures for individual emergency evacuations.

The appellants' subsidiary alternative solution was a voluntary early evacuation system wherein residents could safely evacuate while the Nerang-Broadbeach Road remained trafficable by sedan. The early evacuation would be triggered by an onsite automatic water level monitoring station and managed by the body corporate to avoid diverting resources from emergency services.

Decision

With respect to the safe haven Alternative Solution, the court held that the measures proposed would reduce risk to an acceptable level and provide viable alternatives to the council's Acceptable Solutions.

With respect to the early evacuation system, the court noted that a safe haven was recognised as a viable alternative to evacuation in both the Gold Coast City Local Disaster Management Plan and the Queensland Evacuation Guidelines for Disaster Management Groups. The court held that it was was satisfied that the system would provide sufficient opportunity for safe evacuation and for residents outside the area to return home before the road became untrafficable.

On the basis of the above, the court noted that the development substantially satisfied the requirements of the planning scheme provisions. The court also noted that the proposal had substantial overall merit in advancing the goal of optimising opportunities for urban development while minimising flooding concerns.

Held

Appeal allowed subject to the finalisation of an appropriate management plan and the imposition of appropriate conditions.

The perils of inadequate searches when purchasing property

Samantha Hall | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Montrose Creek Pty Ltd and Manningtree (Qld) Pty Ltd v Brisbane City Council; Brisbane City Council v Manningtree (Qld) Pty Ltd and Montrose Creek Pty Ltd* [2012] QPEC 65 heard before Durward SC DCJ

December 2012

Executive Summary

The Planning and Environment Court was required to consider whether the non-payment of infrastructure contributions for water supply and sewerage under a development approval by the subsequent owners of land subject to the approval was a development offence contrary to section 580 (Compliance with development approval) of the *Sustainable Planning Act 2009* (**SPA**) and whether the subsequent owners were required to pay the unpaid infrastructure contributions.

Case

This case concerned four separate proceedings which were dealt with together. Two were appeals by Manningtree (Qld) Pty Ltd and Montrose Creek Pty Ltd against enforcement notices issued by the Brisbane City Council with respect to the non-payment of infrastructure contributions. The other two were originating applications for declarations made by the council against Manningtree and Montrose alleging that a development offence had been committed and seeking enforcement orders against each of them for payment of the infrastructure contributions.

Facts

On 24 October 2005 the council issued a development permit for a material change of use–modification (retail, restaurant and child care facility) and a preliminary approval for carrying out building work for land at 3/161 and 4/161 Dawson Parade, Keperra more particularly described as Lots 3 and 4 on SP197357, Parish of Enoggera. Opal Wing was the original owner of the land.

The approval was subject to conditions requiring the payment of infrastructure contributions for parks, water supply and sewerage. The original owner paid the parks contributions in full but only partly paid the other contributions. On 7 February 2008, a Community Management Statement was endorsed by the council.

On 19 December 2008, Manningtree and Montrose entered into contracts for the purchase of the land from the original owner. Prior to the settlement of the contracts for purchase, the lawyers for Manningtree and Montrose obtained a limited planning and development certificate and indicated that their instructions were not to obtain a full planning and development certificate.

Around September 2010 the council realised that some of the infrastructure contributions in relation to the land had not been paid. The council pursued the original owner for payment but before the council could obtain payment the original owner entered into voluntary liquidation.

On 31 August 2011, the council issued a show cause notice pursuant to section 588 (Giving show cause notice) of the SPA to Manningtree and Montrose asserting that both companies had committed a development offence contrary to section 580 (Compliance with development approval) of the SPA. Then on 6 October 2011, the council issued an enforcement notice pursuant to section 590 (Giving enforcement notice) of the SPA, requiring Manningtree and Montrose to pay to it $304,665.90 for sewerage headworks and $119,058.84 for water supply headworks.

Submissions

Manningtree and Montrose submitted that since the timing requirement specified in the relevant conditions of the approval stated that the payment must be made "Prior to the commencement of the use or prior to endorsement of a community management statement, whichever is sooner" no development offence was committed because the non-payment of infrastructure contributions was properly categorised as a 'once and for all' breach as opposed to a 'continuing breach' which meant that the breach occurred when the land was owned by the original owner and therefore the only avenue left to the council was to pursue the original owner for the unpaid infrastructure contributions.

On the other hand, the council submitted that the requirement to pay the unpaid infrastructure contributions was a continuing obligation and therefore the breach of those conditions was a continuing offence. The council also submitted that the timing specified in the condition simply crystallised the date from which an offence had been committed, as to construe the condition otherwise would permit a use that contravened the conditions of the approval.

Decision

The court made reference to *Sunshine Coast Regional Council v Recora P/L & Anor* [2012] QPEC 8 where Robertson DCJ in a case regarding unpaid infrastructure contributions under a development approval wrote:

> *… The condition sets a deadline to pay which had passed by the time Recora assumed the benefit of the approval. The failure to pay in a timely way does not discharge the responsibility to pay the contributions nor does it sever the condition from the approval… The condition still binds Recora and is one that was, and still is, breached by non-performance.*

As to whether the non-payment of the infrastructure contributions required under the conditions of the approval constituted a continuing offence, the court in the present case agreed with the statement of Smart JA in *Environment Protection Authority v Alkem Drums Pty Ltd* (2000) 113 LGERA 130 where it was decided that *"the absence of a provision for a daily penalty does not mean that the offence is not a continuing one"*.

The court agreed with the council in that the non-payment by Manningtree and Montrose by the time specified in the Approval crystallised the date from which a development offence had been committed and not the date of the cessation of a liability. The court pointed out that to contend otherwise would result in an unsustainable situation where the person benefitting from a development approval would not pay its share of the demand on infrastructure created by the development.

In a bid to convince the court not to grant the declaratory relief and orders sought by the council, Manningtree and Montrose made submissions to the court that the limited planning and development certificate they obtained before settlement did not indicate that there were any outstanding infrastructure contributions applicable to the land and therefore they had no knowledge of the unpaid infrastructure contributions. In reply the court noted that whilst a limited planning and development certificate would specify any infrastructure charges schedule or regulated infrastructure charges schedule applicable to the land it would not specify infrastructure contributions payable under the conditions of a development approval. To obtain this information, Manningtree and Montrose were required to obtain a full planning and development certificate, which they chose not to do.

Ultimately the court agreed with the views expressed by Judge Robertson in *Recora* and stated that the obligation to pay infrastructure charges attaches to the land pursuant to section 245 (Development approval attaches to land) of the SPA and binds the owner and any successors in title which included Manningtree and Montrose. The court went on to add that the failure by Manningtree and Montrose to pay the infrastructure charges required under the conditions of the approval constituted a development offence contrary to section 580 (Compliance with development approval) of the SPA.

Held

The court held that the appeals by Manningtree and Montrose should be dismissed and the applications by the council should be granted. The court made the declarations and orders sought by the council which included the payment of the outstanding infrastructure contributions for water supply and sewerage at the rate prevailing at the time of making the order.

EPA unsuccessful in prosecution for transport of building materials as "waste"

Maysaa Parrino

This article discusses the common sense approach to defining "waste" as a result of a recent NSW court decision

December 2012

Executive Summary

In the recent decision of *Environment Protection Authority v Terrace Earthmoving Pty Ltd & Page* [2012] NSWLEC 216, the Land and Environment Court has taken a common sense approach to the interpretation of the definition of "waste" under the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

Terrace Earthmoving engaged to excavate and place fill material for road

In approximately November 2005, the owner of land at Williamtown NSW engaged the services of Terrace to construct a road at his property, which involved excavation and placement of fill material into the proposed road area. Fill material was obtained from sites at which Terrace was carrying out demolition or excavation works and was generally comprised of broken concrete, bricks, tiles, soil and rock.

Terrace was charged by the Environment Protection Authority (**EPA**) with two offences under section 143(1)(a) of the POEO Act for the alleged unlawful transport of waste to the property. The director of Terrace was also charged with an identical offence under the POEO Act. Each of the parties pleaded not guilty to the charges.

Two different definitions of "waste" due to legislative amendment

The court held that "transport" of waste in section 143 of the POEO Act means to take or carry from one place to another. The first element of the offence, being the transportation of a substance is complete when is it transported to and arrives at a "place". Secondly, the substance transported must be categorised as "waste" within the POEO Act at the time of transportation.

Section 143 of the POEO Act was amended on 1 May 2006 which meant that there were two different definitions of "waste" before and after 1 May 2006 which applied to Terrace.

Was the material categorised as waste before 1 May 2006?

Up until 1 May 2006,"waste" had two different meanings in section 143 and the Dictionary of the POEO Act. The court found that the definition within section 143 applied, which meant that waste included "any unwanted or surplus substance (whether solid, liquid or gaseous)" and that "a substance is not precluded from being waste merely because it may be reprocessed, reused or recycled".

Having regard to this definition, and the definition in the Macquarie Dictionary of "waste", the factors relevant for consideration were:

- the nature of the substance;
- whether there is an identified demand for that substance;
- circumstances in which the substance is obtained and removed from its source;
- whether the substance is being transported to a place at which it is intended to be used for the purpose for which demand for the substance has been shown;
- the period of time that elapses or is expected to elapse after the substance is transported to the place of its intended use before it is put to that use.

Applying the above, the court was not satisfied on the facts that the material at the time of transportation was "waste" within the meaning of the POEO Act. This was for various reasons, including that the materials were identified as having a construction function and were set aside at their site of origin, loaded separately for transport, were wanted and used for the purpose for which they were in fact used, they were good and reusable sale items and excellent for a road base.

Was the transported material waste after 2 May 2006?

After 1 May 2006,"waste" was defined differently in the Dictionary of the POEO Act, including:

> *(a) any substance (whether solid, liquid or gaseous) that is discharged, emitted or deposited in the environment in such volume, consistency or manner as to cause an alteration in the environment, or (b) any discarded, rejected, unwanted, surplus or abandoned substance.*

The court found that an "alteration to the environment" was directed at an action taken in respect of material, such as discharge or emission. As the offence involved the transportation of "waste" from its source to its destination, it did not involve the discharge, emission or deposition of material at the property. Secondly, as there were similarities in the definition at (b) above with the former definition of waste in the POEO Act, the court confirmed its view that the material was not waste.

EPA did not prove beyond reasonable doubt that the transported material was waste

As the EPA did not prove beyond reasonable doubt that the material transported during each charge period was "waste" within the POEO Act, a verdict of not guilty was required. The EPA requested that the court refrain from entering formal verdicts in the proceedings, so that it could exercise its right to submit any question of law to the New South Wales Court of Criminal Appeal.

As a result, the proceedings have been stood over to enable the prosecutor to make any such application, failing which, the court held that verdicts of not guilty would be required to be entered in all four proceedings. No formal orders have yet been made, but the court's interpretation of the events and the appropriate consequences would appear to represent a triumph of logic over legalism.

EPA less likely to succeed in prosecutions for transport waste offences involving common building materials

The case is significant as it clarifies that not all materials will be considered as "waste".

This is important for land owners, business and industry because it means that depending upon the factors relevant for consideration listed above, the EPA is less likely to be able to charge parties for waste offences involving common building materials including broken concrete, bricks, tiles, soil and rock, particularly if those materials are used for a purpose such as fill in a road.

If you are potentially liable under the POEO Act for any offences involving "waste" and there is ambiguity as to whether the materials involved constitute "waste", then we recommend that you seek legal advice.

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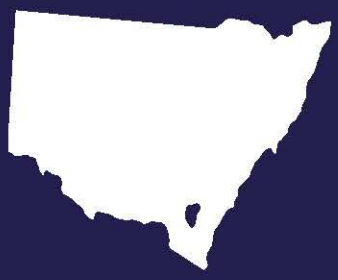

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