Colin Biggers & Paisley

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Planning Government Infrastructure and Environment group

Colin Biggers & Paisley

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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.

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Jurisdictional limits of the building and development committee

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Building and Development Committee in the matter of *Fraser Coast Regional Council v Lawton* [2010] QPEC 149 heard before Robin QC DCJ

January 2011

Case

This case concerned an appeal by the Fraser Coast Regional Council (**appellant**) against a decision of the Queensland Building and Development Committee (**B&DC**) to set aside a decision of the appellant, which prohibited the construction of a shed on land owned by Mr & Mrs Lawton (**respondents**).

Facts

On 17 March 2010, the respondents lodged a development application with the appellant for a preliminary approval for building work for a proposed garage to be sited on their land at Livistonia Drive, Poona. The appellant approved the application subject to conditions, one of those being a condition not to commence construction of the garage until obtaining building works approval for a "detached house". The appellant's primary justification for imposing such a condition was based upon the concern about the proliferation of large garages of the kind proposed. The proposed garage was of a size which would permit use for accommodation and the appellant considered that it did not satisfy its vision for residential development and would be unwelcome to residents of conventional detached dwellings.

The respondents successfully appealed the appellant's decision to the B&DC on the basis that the condition was inappropriate and unreasonable. The B&DC held that the proposed garage did not impact on the neighbourhood as its intent was for storage of maintenance equipment, not for habitation. Furthermore, it was held the existing planning scheme did not support such a condition and that there were a number of sheds of similar size and location already in existence within the immediate neighbourhood which had received approval.

Appeals to the B&DC are available for members of the public not satisfied with decisions made by local government and private certifiers. Appeals can be heard about matters such as sitting requirements, inspections of building work, swimming pool fencing, fire safety, pluming and drainage, compliance assessment, limited development approvals and errors in infrastructure charges notices. The B&DC has limited jurisdiction to decide certain matters defined in legislation such as the *Sustainable Planning Act 2009* (**SPA**).

On 16 August 2010, the appellant appealed to the Planning and Environment Court of Queensland (**P&E Court**) arguing that the respondent's appeal to the B&DC was not within jurisdiction of the B&DC under either the SPA or the *Sustainable Planning Regulations 2009* (**SPR**). Appeals against decisions of the B&DC are made pursuant to section 479 (Appeals from building and development committees) of the SPA, which provide grounds where there was an error or mistake in law on the part of the committee, or that the committee had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

Decision

His Honour Robin allowed the appellant's appeal on the basis that the B&DC had no jurisdiction to make the decision. His Honour assessed the appeal provisions in chapter 7, part 2, division 4 (Appeals to committees about development applications and approvals), division 5 (Appeals to committees about compliance assessment), and division 6 (Appeals to committees about building, plumbing and drainage and other matters) of the SPA and found no section which identified jurisdiction upon the B&DC to hear the respondent's appeal.

His Honour noted at p.15 that:

> *As things stand there is no basis emerging on which the court might take issue with Mr Connor's submission which is essentially that he's identified the full extent of the committee's appeal jurisdiction which leads to the conclusion that it doesn't extend so far as to letting the Lawton's appeal.*

Held

The appellant's appeal was allowed and the B&DC's determination was set aside.

No standing means no proceeding

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Court of Appeal in the matter of *Crowther v Brisbane City Council* [2010] QCA 348 heard before Margaret McMurdo P, Holmes JA and Chesterman JA

February 2011

Case

This was an appeal to the Queensland Court of Appeal against the decision of the Queensland Planning and Environment Court (**P&E Court**) to strike out the appellant's application to restrain the Brisbane City Council (**council**) from carrying out works in the Yeronga Memorial Park for want of jurisdiction.

Facts

The council proposed to carry out works by way of removal and replacement of trees in the Yeronga Memorial Park pursuant to an exemption certificate under part 6 (Development in Registered Places) division 2 (Exemption Certificates) of the *Queensland Heritage Act 1992*.

The appellant made an application to the P&E Court and sought an injunction against the council from removing the trees, in reliance of provisions of the *Nature Conservation Act 1992* (**NCA**) and the *Environmental Protection Act 1994* (**EPA**). The P&E Court held that the appellant had not established that the P&E Court had jurisdiction to deal with the application and it was therefore struck out for want of jurisdiction.

The appellant sought leave to the Court of Appeal to appeal the decision of the P&E Court.

On appeal, the appellant did not rely on provisions of the NCA but continued to rely on section 505 (Restraint of contraventions of Act etc) of the EPA as a source of jurisdiction. It was contended that the appellant was "*a person whose interests were affected by the tree removal*" for the purpose of section 505(1)(c) (Restraint of contraventions of Act etc) of the EPA or alternatively, the appellant was someone who could bring the proceedings with leave of the court under section 505(1)(d) (Restraint of contraventions of Act etc) of the EPA.

Decision

Justice Holmes gave the leading judgment which was supported by Justice McMurdo and Justice Chesterman.

Standing

The court noted that, even if there were offence provisions under the EPA which might be favourable to the appellant and relevant to the application (a point on which the Court did not make a final determination), the question as to whether the appellant was entitled to commence a proceeding to restrain such an offence still remained.

The court considered section 505(1)(c) (Restraint of contraventions of Act etc) and section 505(1)(d) (Restraint of contraventions of Act etc) of the EPA and also their operation as a whole. The court observed that, persons with interests in the nature of "*proprietary, material, financial or special interest*" which were affected by the activities in question, might proceed under section 505(1)(c) (Restraint of contraventions of Act etc) of the EPA or otherwise, leave of the court must be sought under section 505(1)(d) (Restraint of contraventions of Act etc) of the EPA.

In the court's view, if an individual whose interests in the subject matter were limited to "*a mere intellectual or emotional concern with the only advantage to be gained*" being "*the satisfaction of righting a wrong, upholding a principle or winning a contest*", such an individual would not be "*someone whose interests are affected*" for the purpose of section 505(1)(c) (Restraint of contraventions of Act etc) of the EPA.

The court did not believe the appellant would fall within section 505(1)(c) (Restraint of contraventions of Act etc) of the EPA as the appellant's interests were not affected by the removal of the trees, although the appellant was "*interested in the fate of the trees*".

The court noted that the appellant could have sought leave of the court under section 505(1)(d) (Restraint of contraventions of Act etc) of the EPA but the appellant did not do so. Nonetheless, the court noted that the appellant had not given written notice to the Minister or relevant authority asking the Minister or the authority to bring a proceeding under section 505(2) (Restraint of contraventions of Act etc) of the EPA, which, amongst other things, the court must be satisfied with prior to deciding to grant leave.

The court dismissed the appellant's allegation that as the appellant was not given the opportunity to submit further material in respect of the appellant's standing there was a breach of natural justice. The appellant's request to tender such further material was rejected on the obvious basis that it was "*immaterial to the correctness*" of the decision of the P&E Court.

The appellant's application for leave to appeal was dismissed.

Costs

In light of the dismissal of the appellant's application for leave to appeal, the respondent sought its costs of the application. The appellant contended that costs should not be awarded to the respondent as the application was in the public interest. The court disagreed with the appellant's contention that the application had a public interest element and concluded that costs be awarded to the council but only limited to the costs of one junior counsel in respect of counsel's costs, as the court did not believe the appellant's application warranted the council briefing two counsel.

Held

Orders were made that:

- the appellant's application to adduce further evidence was refused;
- the appellant's application for leave to appeal was dismissed; and
- costs were awarded to the respondent but restricted in respect of counsel's costs to the costs of one junior counsel.

Change to proposal not substantially different

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Minamarc Pty Ltd v Gold Coast City Council & Anor* [2010] QPEC 146 heard before Robin QC DCJ

February 2011

Case

This was an application by the parties to resolve an appeal, made by Minamarc Pty Ltd (**appellant**) against a decision of the Gold Coast City Council to refuse the appellant's development application, by allowing the appeal and granting an approval on conditions.

The issue for the court was whether changes to the proposed development arising from negotiations between the parties represented a minor change.

Facts

The changes to the proposed development included the following:

- an increase in number of dwellings from 96 to 125;
- an increase in number of bedrooms from 272 to 319;
- an increase in maximum building height from two storeys to four storeys;
- a reduction in site coverage from 19.9 percent to 13.1 percent;
- a reduction in car parking spaces from 260 to 243.

The changes would result in a 17 percent increase in bedrooms compared with an approximately 30 percent increase in dwellings. The appellant focussed on the increase in bedroom numbers arising from the change as a fair indicator of increasing impacts of proposed development on local services and infrastructure.

Decision

By virtue of section 819(2) (Appeals to court − generally) of the *Sustainable Planning Act 2009* (**SPA**), the court was required to decide the appeal as if the SPA had not commenced. However, section 821 (Application of repealed IPA, section 4.1.52) of the SPA relevantly provided that minor change issues were to be dealt with by reference to the definition of minor change in section 350 (Meaning of minor change) of the SPA.

The relevant consideration for the court was that referred to in section 350(1)(d)(i) (Meaning of minor change) of the SPA which provided that a minor change was a change that "*does not result in a substantially different development*".

The court also had regard to the Department of Infrastructure and Planning's *Statutory Guideline 06/09 Substantially different development when changing applications and approvals*. The guideline referred to whether the changes would increase the severity of known impacts and have "*impacts on infrastructure provision from a location or demand*". Having regard to the 17 percent increase in intensity of bedrooms, the court held that the change would not have a significant impact on infrastructure provision or demand.

The other issue for consideration was whether the variation would dramatically change the built form of the development in terms of scale. It was held that the impact of the change would not dramatically change the built form of the proposed development.

His Honour Judge Robin also referred to the similar case of *Auspacific Engineers Pty Ltd v Scenic Rim Regional Council & Ors* [2010] QPEC 117 wherein a one-third increase in the number of residential lots proposed was held to be a minor change.

Held

The court held that the changes proposed did not result in a substantially different development and accordingly, the appeal was approved.

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What is in a definition? Everything!

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Court of Appeal in the matter of *Sunshine Coast Regional Council v EBIS Enterprises Pty Ltd* [2010] QCA 379 heard before McMurdo P, Chesterman JA and Philippides J

February 2011

Case

This case was an application to the Court of Appeal by EBIS Enterprises Pty Ltd (**EBIS**) for leave to appeal the Planning and Environment Court's (**P&E Court**) decision to uphold the Sunshine Coast Regional Council's (**council**) originating application which sought an enforcement order pursuant to section 4.3.26 (Effect of orders) of the *Integrated Planning Act 1997* (**IPA**) directing EBIS to cease the use of land at 26 Ascot Way, Little Mountain for the purpose of an 'accommodation building' as defined in the *Caloundra City Plan 2004* (**plan**) until an effective development permit authorising such use was obtained.

Facts

The premises at 26 Ascot Way which was located in the Rural Residential Settlement precinct, consisted of a large house set on 4,000m^2 of land. The premises had 6 bedrooms, 4 bathrooms and a large theatre/entertaining room as well as separate living and dining areas. The property was owned by EBIS whose directors, Mr and Mrs Stanfield, sometimes live in it but frequently let it to groups of people not exceeding 20 people. The average length of tenancy was short, usually only 2 or 3 days but on occasion the letting period was for a week or two.

The council's originating application set out the grounds on which the council relied for its enforcement order as follows:

> 2. *For the purposes of Caloundra City Plan 2004:*
>
> (a) *the land is ... in the Rural Residential Settlement precinct …;*
>
> (b) *an accommodation building', as defined, constitutes assessable development in the … precinct.*
>
> 3. *The (applicant) has, or caused to permit, (sic) the land to be used for the purpose of an 'accommodation building' ... without an effective development permit. ...*
>
> 4. *The use of the land ... for the purpose of an 'accommodation building':*
>
> (a) *constitutes assessable development for the purposes of (IPA); and*
>
> (b) *undertaken in the absence of an effective development constitutes a development offence ... .*

In the plan, 'accommodation building' was defined to mean "*a use of premises for residential accommodation which does not comprise dwelling units*". The plan also defined 'dwelling unit' to mean "*any building or part of a building comprising a self contained unit designed, adapted or used for the exclusive use of one household*". There was no doubt that the premises were used for residential accommodation but EBIS contended that the premises did not satisfy the definition of 'accommodation building' because the house was a 'dwelling unit'.

EBIS also contended that its premises came within the plan's definition of 'detached house'. The use of premises as 'accommodation building' constitutes assessable development in the Rural Residential Settlement and as such required a development permit which EBIS did not have. However, if the premises fit the definition of 'dwelling unit' it would be a detached house and would not be an accommodation building.

The P&E Court judge held that the premises was not a dwelling unit stating that contained within the definition of dwelling unit is a "*use*" notion that the dwelling unit is to be 'used' by a household. The P&E Court judge also found that the combined effect of the definition of 'detached house' together with the categorisation of properties in section 3.2.2 of the plan meant that the premises could not be described as a 'detached house' because of the short term nature of the accommodation. The P&E Court judge finally found that the premises were an 'accommodation building' because the building was not used for the exclusive use of one household.

Decision

Chesterman JA, with whom McMurdo P and Philippides J agreed, stated that the question for the P&E Court was whether the premises comprised a dwelling unit. In coming to the decision that the P&E Court judge did, Chesterman JA noted that there were 2 errors in the approach taken by the P&E Court judge to interpret the plan.

The first error was to rely on a flowchart in section 3.2.2 of the plan to alter the definition of 'detached house'. Chesterman JA stated that there was nothing in the explicit definition of 'detached house' which made premises a detached house only if used for long term accommodation. There was, with respect to the P&E Court judge, no warrant for altering the express terms of the definition by reference to the flowchart in section 3.2.2 of the plan. Chesterman JA stated that if the words used in the definition in the plan were not to mean what they say, the manner in which, and the means by which, they depart from their ordinary meaning should appear with unambiguous clarity in the plan itself. Chesterman JA further stated that there was no indication that the definitions were not to be read as they were written.

The second error was to disregard the terms of the definition of 'dwelling unit', being a building comprising a "*self contained unit designed, adapted or used for the exclusive use of one household*". The P&E Court judge held that the premises were not used for the requisite exclusive use of one household but did not consider whether the house was designed or adapted for the exclusive use of one household. Chesterman JA found that the premises appeared to have been designed as a large family residence and noted that it was common ground between the parties that the building was designed for the exclusive use of one household. In Chesterman JA's opinion the words of the definition of 'dwelling unit' should be given their ordinary meaning and that a building will be a dwelling unit if it was designed, or adapted or used for the exclusive use of one household. The premises in question was designed for the requisite use.

Held

It was held that:

- leave granted to appeal;
- appeal allowed;
- order of the P&E Court set aside and instead ordered that the council's originating application be dismissed;
- council to pay EBIS's costs of the application for leave to appeal to be assessed on the standard basis;
- parties to provide written submissions on the question of costs of the P&E Court proceeding.

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Proposed development exceeds scope of existing easement

Samantha Hall | Katherine McGree

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MC Property Investments Pty Ltd v Sunshine Coast Regional Council & Ors* [2010] QPEC 145 heard before Robertson DCJ

February 2011

Case

This was an interlocutory application by MC Property Investments Pty Ltd (**MC Property**) to the Planning and Environment Court (**P&E Court**) to determine whether a development application for a material change of use was a "properly made application" within the meaning of section 3.2.1(7) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**). The proposed development involved the construction of ramps within an existing easement over adjoining land owned by BP Australia Limited (**BP**). The written consent of BP did not accompany the development application.

Facts

MC Property proposed to develop a new building structure at 7172 Bruce Highway, Forest Glen, involving ramps for vehicular movement to be accommodated within an existing easement over the adjoining BP site. Within the existing easement there was a suitably formed concrete driveway providing access to MC Property's site.

BP's land was included in the description of the relevant land in the development application (as was required). However, BP's consent was not provided on the basis that MC Property's town planner, in a letter which accompanied the application, had referred to the easement and relied on section 3.2.1(12) (Applying for development approval) of the IPA as justification for the absence of BP's consent on the basis that "*the development is not inconsistent with the easement*".

The purpose of the registered easement was as a "Right of Way". Its scope included:

> *Full and free right and liberty for (MC Property) … to enter leave go pass re-pass along through over and across (BP's site) … for all lawful purposes connected with the use and enjoyment of the (MC Property's site) … for what sort of a purpose as (MC Property's site) … may from time to time be used and enjoyed.*

The terms of the easement did not include any express right to construct a structure in the easement although did contain a limited right to construct for the purposes of providing utilities and services to MC Property's site.

The questions before the court were:

- whether the easement was an all purposes easement within which the construction of the ramps for the purpose of access to the proposed development was permitted; and
- whether the construction of the ramps was contemplated as part of the ancillary rights necessary for the enjoyment of the rights expressly granted by the easement.

Decision

His Honour Judge Robertson referred to the well established legal principle that "*the scope of rights granted by a registered easement does not extent further than those rights granted by reference to the plain meaning of the words used in the easement itself*". Applying that principle his Honour held that the easement, being qualified by the words "*for all lawful purposes connected with the use and enjoyment of the (MC Property's site) … for what sort of a purpose as (MC Property's site) … may from time to time be used and enjoyed*", was not for all purposes.

His Honour considered that the easement would include a right to construct improvements on BP's site where necessary and convenient for the exercise of the rights conferred by the easement but that the ramps were not needed for access from the Bruce Highway off ramp across BP's land to MC Property's site. Instead the ramps were needed because MP Property proposed a multi level building which had as part of its design external ramps over BP's site. His Honour held that the construction of the proposed ramps would impose a burden on BP's site not intended by the original grant of easement.

Held

Finding that the construction of the ramps was inconsistent with the terms of the easement, his Honour ordered that the parties were to be heard as to the appropriate orders.

Permissible change for increase in accommodation units

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *RSA (Moorvale Station) Pty Ltd v Isaac Regional Council* [2010] QPEC 147 heard before Robin QC DCJ

February 2011

Case

This was an application to the Planning and Environment Court (**P&E Court**) for a "permissible change" under the *Sustainable Planning Act 2009* (**SPA**) to an existing development approval for a new use to accommodate 400 accommodation units for miners.

Facts

The application to the P&E Court proposed that the number of accommodation units be increased from 400 to 440, an increase of 10 percent of the approved amount.

The application for the proposed change was supported by the Isaac Regional Council and the Department of Environment and Resource Management.

The interesting point to arise in this case was that the development was already fully constructed and operating and rather than lodging a fresh development application for the increase in accommodation units, the applicant relied on the SPA provisions to allow the expansion. His Honour in reference to this described it as "an intriguing concept".

Decision

The question before his Honour was whether the change resulted in a substantially different development. His Honour decided that the proposed change did not and provided as follows:

> *… I think that the court's obligations under section 4 and 5 of the SPA to promote efficiency, accountability, coordination and the like in respect of decision making processes indicates that the court ought to grant the relief sought. I don't find anything in the SPA which would stand in the way of the relief sought being granted, especially in circumstances where all concerned are supportive.*

Held

The proposed change, the subject of the application, was held to be a "permissible change" under the SPA.

Frivolous or vexatious proceedings

Samantha Hall | Aaron Madden

This article discusses the decision of the Queensland Court of Appeal in the matter of *EBIS Enterprises Pty Ltd v Sunshine Coast Regional Council* [2011] QCA 15 heard before McMurdo P, Chesterman JA and Philippides J

March 2011

Case

This case was an application to the Court of Appeal by EBIS Enterprises Pty Ltd (**EBIS**) to seek an order that the respondent, Sunshine Coast Regional Council (**council**), should pay its costs of a proceeding in the Planning and Environment Court (**P&E Court**).

Facts

The P&E Court decision upheld the council's originating application seeking an enforcement order pursuant to section 4.3.26 (Effect of orders) of the *Integrated Planning Act 1997* (**IPA**). The effect of the P&E Court's orders was to direct EBIS to cease the use of land at 26 Ascot Way, Little Mountain for the purpose of an 'accommodation building' as defined in the *Caloundra City Plan 2004*.

The land was deemed to be an 'accommodation building by the council as it was frequently let to groups of not more than 20 people. The orders were first sought after the matter was brought to the attention of the council by way of various noise complaints from neighbouring properties.

This decision was overturned however, upon application to the Court of Appeal with costs being awarded to EBIS for the application for leave to appeal and the Court of Appeal inviting the parties to make written submissions on the question of costs of the P&E Court proceeding.

To this end, EBIS sought to bring an action in the present case under section 4.1.23 (Effect of Orders) of the IPA, which under section 832(1) (Enforcement Orders of the Court) of the *Sustainable Planning Act 2009* remains the relevant section. Section 4.1.23 (Costs) of the IPA provided that each party to a proceeding must bear its own costs, however EBIS sought to rely on subsection (2)(b) which provided an exception to this rule with the court able to make awards of costs if the proceeding was deemed *'to have been frivolous or vexatious*'.

Decision

Justice Chesterman gave the leading judgement which was supported by Justice McMurdo, and Justice Philippides.

Chesterman JA initially recognised the inherent limitations of the present court in hearing the application in the absence of an investigation of the surrounding facts of the case, particularly as there was no earlier intimation to the P&E Court that such an application would be sought if successful. This was however, not deemed to preclude the action from success.

The judgement drew heavily on the previous P&E Court decision of *Mudie v Gainriver Pty Ltd (No. 2)* [2003] 2 Qd R 271 which dealt with the meaning of 'frivolous' and 'vexatious' in the context of section 4.1.23(2)(b)(Costs) of the IPA. Relevantly it was found that in regard to the section, the ordinary dictionary meaning should apply, as distinct from the meaning of the words commonly applied in the context of striking out a claim which is groundless or an abuse of purpose. In light of the analysis of the section in *Mudie*, Chesterman J stated that a proceeding may be deemed frivolous "*if it lacked substance, so there was no reasonable basis for starting it so that its prosecution produced unjustified trouble for the other party*". His Honour also elucidated a common meaning of 'vexatious' as a proceeding brought "*without sufficient grounds for winning purely to cause trouble or annoyance*".

Given this definition, the mere fact that the P&E Court initially found for the council in making the enforcement order provided an immediately significant impediment to showing that the proceeding was vexatious in nature.

In support of its application, EBIS submitted email correspondence between council officers which sought to highlight a difference of opinion in regard to initiating proceedings for an enforcement order. Chesterman JA sought to highlight the fact that for the emails to be relevant to determining whether the proceeding was '*frivolous or vexatious*' they would need to provide evidence that the officers who supported the institution of proceedings believed that the use of the building was not in contravention of the planning scheme, or that the noise complaints giving rise to the initial investigation were not genuine. Furthermore, while the legal advice the council received was deemed privileged, it was found that in order for proceedings to be found to be '*frivolous or vexatious*' the council must have been found to have received advice that the use of the premises was lawful, which it had ignored in instituting the proceedings.

EBIS additionally contended that the proceedings initiated by the council's application merely constituted a politically convenient method of dealing with complaints about noise, and would have given rise to inconsistencies in the operation of the planning scheme over the long term. However Chesterman JA found that regardless of the outcome of the council's construction of the planning scheme, in order to establish the necessary grounds, the applicant needed to again show that the council did not believe that the letting of the building as an 'accommodation building' was unlawful.

In the absence of clear evidence that the council had instituted proceedings despite a genuine belief that its legal position was not correct, it was decided by the court that a '*frivolous or vexatious*' proceeding could not be established under section 4.1.23(2)(b) (Costs) of the IPA.

Held

It was held that:

- Application for an order of costs should be dismissed.
- Council to be awarded costs for responding to the application.

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Green-light for beachfront apartment building three times "maximum height"

Samantha Hall | Katherine McGree

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *K Page Main Beach Pty Ltd v Gold Coast City Council & Ors* [2011] QPEC 1 heard before Rackemann DCJ

March 2011

Case

This was an appeal by K Page Main Beach Pty Ltd (**applicant**) against the Gold Coast City Council's (**council**) refusal of an application for a development permit, for a material change of use, to facilitate the development of a high rise apartment building on a vacant beachfront allotment on Main Beach Parade, Main Beach. The co-respondents by election were some of the submitters who objected to the proposal. The issues in dispute centred upon the height, bulk and scale of the proposal and the alleged consequent character and amenity impacts.

Facts

This case, in which a central allegation was that the proposed high rise apartment building was too tall and bulky for its location and site area, was essentially determined by matters of fact and degree.

The site of the proposed development was about 20 meters wide and 44 meters deep, rising from the Main Beach Parade frontage to the beach frontage (that is, the eastern side of Main Beach Parade). The proposed building was to cover 35% of the site with landscaping proposed in the remainder. The proposed building was seven stories with a partial eighth storey, although the generous floor to ceiling heights resulted in the building technically being 10 storeys for the purposes of the council's planning scheme. The relevant experts agreed the proposed building was of a high architectural quality.

The relevant overlay map of the planning scheme depicted a maximum building height of three stories for the site. The result was that the development application was impact assessable.

The site fell within the Residential Choice Domain under the planning scheme. That domain included two identically worded performance criteria (**PC1** and **PC6**), the acceptable solution to which stated that:

> *All buildings must be of a height which is in keeping with the predominant residential character of the surrounding area. Building height must not result in a significant loss of residential amenity.*

The proposed building was not as tall as the development to the western side of Main Beach Parade and marginally shorter than the shortest of the tall high rise buildings on the eastern side of Main Beach Parade.

The council submitted that the proposal was not in keeping with the prevailing residential character on the basis of its site area among other grounds. The prevailing residential character being a combination of tall buildings with relatively small footprints in substantial allotments or relatively low buildings occupying a greater proportion of allotments.

In relation to whether there was any loss of visual amenity, the focus was on the impact of the higher stories of the proposal on units in the mid-levels of buildings to the west. The proposal would result in some interference for non-beach front properties but the views and vistas would remain both reasonable and substantial.

The proposed development's compliance with the applicable codes, being the Residential Choice Place Code and the Highrise Residential and Tourist Accommodation Code, was also considered.

Decision

His Honour Judge Rackemann held that whether the proposal conflicted with the planning scheme by virtue of its height could not be determined simply by looking at the overlay map in isolation. The maximum height was not an absolute maximum to which the planning scheme required rigid adherence but a maximum beyond which an impact assessable development application was required. The overlay map was relevant but not necessarily determinative and the ultimate test was not whether the proposal approximated the acceptable solution but whether it met the performance criterion.

The proposal was held to be to be appropriate in terms of building height for the following reasons:

- the proposal's height sat comfortably and was in keeping with the residential character of the surrounding area;

- even if site area was assumed to be relevant to PC1 and PC6 of the Residential Choice Domain, the site area in this case did not render the height of the building out of keeping with the predominant residential character of the surrounding area; and
- the height of the proposal was held not to adversely affect the character of the area, and the likely loss of visual amenity was not, as a matter of fact and degree, found to be significant.

In respect of the other development requirements of the Residential Choice Place Code the proposal was held to comply with the relevant acceptable solutions for density and site coverage and be consistent with the relevant performance criteria for building setback, sitting, appearance, landscaping and amenity.

In respect of the other development requirements of the Highrise Residential and Tourist Accommodation Code, the proposal was held to be consistent with the relevant performance criteria for plot ratio, shadowing and minimum site area.

Held

Appeal allowed; development application approved subject to conditions.

The hearing was adjourned to allow the parties to consider the conditions.

Colin Biggers & Paisley

Court of Appeal considers liability of directors in the context of the Queensland Building Services Authority Act 1991

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Court of Appeal in the matter of *Younan v Queensland Building Services Authority* [2011] QCA 1 heard before McMurdo P, Fraser JA and Cullinane J

March 2011

Case

This was an application for leave to appeal by the Queensland Building Services Authority (**authority**) against a decision of the District Court which held that the Commercial and Consumer Tribunal of Queensland (**tribunal**), which affirmed a decision of the authority, had made an error of law, set aside the tribunal's decision and directed a rehearing in the Queensland Civil and Administrative Tribunal.

Facts

The circumstances which led to the authority's decision were as follows:

- Mr Younan was a shareholder in and the sole director of Cavalier Homes (Gold Coast) Pty Ltd (**Cavalier**), a building company that traded from about December 2002.
- The major shareholder in Cavalier was T & T Building Pty Ltd (**T & T**), a company of which Mr Younan was the sole director and building licence nominee.
- On 18 June 2007, it was ordered on the application of a creditor that Cavalier be wound up and liquidators appointed to that company.
- The winding up order and the appointment of the liquidator were both "relevant company event" for the purpose of section 56AC (Excluded individuals and excluded companies) of *Queensland Building Services Authority Act 1991* (**Act**), the effect of which was that Mr Younan became an "excluded individual" and T & T became an "excluded company" for each event.
- Section 56AF (Procedure if licensee is excluded individual) of the Act required the authority to cancel Mr Younan's licence if he did not apply to be categorised as a "permitted individual".
- Mr Younan made an application to the authority to become a "permitted individual" under section 56AD (Becoming a permitted individual) of the Act.

In accordance with the relevant test under section 56AD(8) (Becoming a permitted individual) of the Act, the authority could categorise Mr Younan as a permitted individual if it was satisfied that he had taken all reasonable steps to avoid the coming into existence of the circumstances that resulted in the order to wind up Cavalier and the appointment of the liquidator to that company.

The authority refused Mr Younan's application. Mr Younan applied for review of the authority's decision to the former tribunal. The tribunal affirmed the authority's decision. Mr Younan then applied for leave to appeal from the tribunal's decision to the District Court. A judge of the District Court held that the tribunal had made an error of law and set aside the tribunal's decision. The authority then applied for leave to appeal against the decision in the District Court.

Factual background to the tribunal's finding

On 20 July 2004, after Mr Younan had decided to wind down Cavalier's business, one of the owner's with whom Cavalier had contracted served a claim in the New South Wales Trader and Tenancy Tribunal (**NSW tribunal**). The claimant contended that Cavalier constructed his house so badly that it should be demolished and rebuilt. The NSW tribunal did not accept the claimant's argument that the house should be demolished but ordered Cavalier to pay the claimant rectification costs. Cavalier did not have any means of satisfying the order and the claimant issued a statutory demand. Mr Younan offered to buy the claimant's property but the claimant was not satisfied with the offered price and was not prepared to compromise on the ordered amount. Mr Younan was not prepared to pay the ordered amount with his own money or cause T & T to pay it. On the claimant's application, Cavalier was wound up and a liquidator was appointed.

Tribunal's reasons

The tribunal considered that Mr Younan's offer to settle the claim was not a reasonable step because the amount he offered was too small and Cavalier did not appeal against the decision of the NSW tribunal. The tribunal indicated that the offer "effectively ignored" the NSW tribunal's decision, was neither measured nor appropriate and that Mr Younan was willing to withdraw the financial support provided by T & T to the company and thereby let the company fall.

Primary judge's reasons

The primary judge considered that the fundamental flaw in the tribunal's reasoning was that it assumed that where a company becomes insolvent the shareholders are obliged to pay the company's debts. The primary judge held that the implication in the tribunal's decision, that any failure of directors or others to put in extra money to meet an insolvent company's obligations was unreasonable, unless the relevant individual lacked the financial capacity to do so, would render section 56AD (Becoming a permitted individual) of the Act futile.

Moreover, the primary judge considered that the terms of section 56AD(8A) (Becoming a permitted individual) of the Act, which specifies the matters that the authority is to have regard to in deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event, were concerned with the prudent management of a company as an ongoing business so that the focus was on prevention rather than dealing with the problems that had arisen.

Accordingly, the primary judge sent the matter back to the Queensland Civil and Administrative Tribunal to hear and determine the review of the authority's decision afresh.

Decision

The question for the Court of Appeal was the proper construction and application of the facts to the requirement in section 56AD(8) (Becoming a permitted individual) of the Act "*that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event*".

His Honour Justice Fraser stated that, to determine what are "reasonable steps" for the purpose of section 56AD(8) (Becoming a permitted individual) of the Act, it was necessary to take into account the principle of limited liability enshrined in the *Corporations Act 2001* (Cth). That principle required rejection of the view that the mere fact that T & T owned most of the shares in Cavalier justified the conclusion that Mr Younan's failure to cause T & T to lend money to Cavalier was an omission to take a reasonable step to avoid the liquidation of Cavalier.

His Honour Justice Fraser went on to state, consistent with the decision of the primary judge, that there was no indication in the Act that this "fundamental and pervasive principle" was to be disregarded.

His Honour Justice Fraser, President McMurdo and His Honour Justice Cullinane agreeing, affirmed the primary judge's decision to set aside the decision made by the tribunal.

Held

The Court of Appeal allowed the appeal, set aside the order made in the District Court and ordered that Mr Younan was categorised as a permitted individual for the relevant events of the order to wind up Cavalier and the appointment of liquidators to that company. The appeal was otherwise dismissed, with the authority to repay Mr Younan's costs of and incidental to the application for leave to appeal and the appeal.

Colin Biggers & Paisley

When an approval takes effect

Samantha Hall | Aaron Madden

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *CEO Department of Main Roads v Club Cavill Pty Ltd (ACN 099 023 711)* [2011] QPEC 15 heard before Robin QC DCJ

March 2011

Case

This case was an originating application in the Planning and Environment Court seeking a declaration that a preliminary approval had not lapsed. The applicant sought to show that a claim for compensation under a deed entered into by the parties was premature, as it was not payable under the terms of the deed until the preliminary approval had lapsed under section 3.5.21 (When approval lapses if development not started) of the *Integrated Planning Act 1997* (**IPA**).

Facts

The relevant approval was granted by the Gold Coast City Council on 4 August 2006 and related to Lot 3 on Survey Plan 180847, County of Ward, Parish of Gilston (the owner of which was the applicant), as well as Lot 4 which was owned by Sunrise Water Pty Ltd (Receivers and Managers Appointed). Given that the decision affected their land, Sunrise Water Pty Ltd ultimately also made submissions to the court in support of the applicant.

The determination regarding when the approval had lapsed under section 3.5.21 (When approval lapses if development not started) of the IPA, ultimately rested with the following section of IPA, which set out when an approval has effect:

> ***Section 3.5.19 (When approval takes effect)***
>
> *1. If the application is approved, or approved subject to conditions, the decision notice, or if a negotiated decision notice is given, the negotiated decision notice, is taken to be the development approval and has effect:*
>
> *a) if there is no submitter and the applicant does not appeal the decision to the court, from the time–*
>
> *i) the decision notice is given;*
>
> *ii) if a negotiated decision notice is given - the negotiated decision notice is given; or*
>
> *b) if there is a submitter and the applicant does not appeal the decision to the court, the earlier of the following–*
>
> *i) when the submitter's appeal period ends;*
>
> *ii) the day the last submitter will not be appealing the decision; or*
>
> *c) if an appeal is made to the court, subject to section 4.1.47(2) and the decision of the court under section 4.1.54 - when the appeal is finally decided.*

There was a submitter appeal commenced on 13 September 2006, which was discontinued by notice of discontinuance filed on 29 October 2007. The applicant contended that the lapsing date for the approval under section 3.5.21 (When approval lapses if development not started) of the IPA would not occur until October 2011, on the basis that the approval took effect upon the discontinuance or withdrawal of the submitter's appeal (and ran for the standard 4 years under the section). The respondent however, contended that the phrase '*when the appeal is finally decided*' in section 3.5.19(1)(c) (When approval takes effect) of the IPA did not apply in the current situation as it only contemplated situations in which a determination by a court ends a matter. As such, the respondent argued that the current case fell within section 3.5.19(1)(b) (When approval takes effect) of the IPA. As there was no notice under section 3.5.19(1)(b)(ii), it was contended that the approval would lapse 20 business days after the council's decision was given to the submitter (in accordance with section 4.1.28(4) (Appeals by submitters - general)) of the IPA.

Decision

In order to ensure the proper construction of section 3.5.19(1)(c) (When approval takes effect) of the IPA, much of the decision was concerned with the proper meaning of the phrase 'finally decided'. Robin QC DCJ firstly considered the word 'decide'. By examining it in light of its ordinary meaning, his Honour demonstrated that the word had a broader application than in the context of a determination by a court, as posited by the respondent. Robin QC DCJ stated that in fact, an appeal is 'finally decided' at the point where the "*outcome of the appeal is known, and the effects (if any) of the proceeding on the relevant development approval are known*". His Honour then stated that if he was wrong, and the above 'literal or grammatical' interpretation of 'finally decided' should lead to the view that it only applied to a decision of the court, the literal interpretation should give way to one which examines the phrase in light of the overall purpose of the statute. The construction of the provision in the context of the IPA supported his Honour's interpretation.

Robin QC DCJ then went on to examine the effect of the words 'or withdrawn', which were added after 'finally decided' in the later incarnation of section 3.5.19(1)(c) (When approval takes effect) in the form of section 339 (When approval takes effect) of the *Sustainable Planning Act 2009*, Robin QC DCJ considered various cases dealing with the use of later statutes in giving meaning to an earlier statute. This case law was clear in suggesting that the first statute must be sufficiently ambiguous or obscure to justify interpreting it in light of a later amendment. His Honour found that section 3.5.19(1)(c) (When approval takes effect) of the IPA was not sufficiently ambiguous for this purpose, and that it in fact, the section implicitly referred to situations which contemplated an appeal being withdrawn. This of course, supported the applicant's overall submission, but rendered its preferred interpretation of the later statute moot.

His Honour went on to further support the applicant's claim by reference to arguments elucidated by counsel for Sunrise Waters Pty Ltd (the owners of Lot 4), Mr D Gore QC. The submission included an illuminating hypothetical regarding the respondent's interpretation of section 3.5.19(1)(c) (When approval takes effect) of the IPA. Mr Gore QC submitted (a), (b), and (c) are all discrete scenarios which are intended to be mutually exclusive. He gave the example of an appeal by a submitter which was later dismissed by the court. Under the argument of the respondent, the approval would seem to have effect firstly under (b) and then later under (c). This had the effect of creating a high level of uncertainty between the periods where the approval changed from having effect under (b) to (c), as it may not be clear whether the development was authorised to start. Further if the appeal remained on foot for the entire period of the approval, the submitter could merely discontinue after the approval lapsed, thus never allowing development to begin. Pertinently Mr Gore QC pointed out that the respondent contended that the present case fell within section 3.5.19(1)(b) (When approval takes effect) of the IPA, however he submitted that this was incorrect as this interpretation failed to address the fact than an appeal had been undertaken, and that the appeal was discontinued.

These submissions ultimately found favour with Robin QC DCJ, who used them to further justify his finding for the applicant.

Held

That the declaration sought be allowed.

Colin Biggers & Paisley

Excusal of errors in IDAS forms

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mount Isa Developments Pty Ltd v Cloncurry Shire Council* [2011] QPEC 25 heard before Robin QC DCJ

May 2011

Case

This was an application to the Planning and Environment Court (**court**) to hear preliminary points in respect of an appeal against the conditions of the development approval.

The preliminary points involved matters of minor change and whether the development application was properly made on account of several errors contained in the IDAS Forms accompanying a development application.

Facts

The changes to be determined by the court were to a significant extent to satisfy concerns of the council. The changes included providing a further road connection, changing access arrangements for a lot, amendment to the internal design and an increase in the number of rural residential lots from 26 to 29.

However, the key issue in this case was whether the application was properly made on account of certain errors contained in the IDAS forms.

The first error involved the ticking of the "development permit" box instead of the "preliminary approval" box for question 1 in IDAS Form 1. Item 2.1.13 in the IDAS assessment checklist was also incorrectly completed, by ticking the "no" box instead of the "yes" box for whether the development application was one made pursuant to section 3.1.6 (Preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997* (**IPA**).

A further error involved the general explanation of the proposed use as "re-zoning from low impact business and industry to rural, residential, and general business and industry".

Decision

His Honour Judge Robin QC held that the changes were minor and did not change the nature of the development or make it a substantially different one.

In respect of the errors, including the incorrect ticking of boxes on the IDAS forms, his Honour said that they were embarrassing discrepancies, but that's all they were. His Honour also referred to the fact that the former Department of Natural Resources and Water understood the development application to be for a preliminary approval for material change of use to vary the planning scheme. His Honour provided that in some of the authorities, the understanding of the development application by such entities has been afforded some significance.

In considering the description of the development application, his Honour said at [50] that:

> *development applicants have run into strife in apply for re-zoning, which is an outdated concept, and indeed, inappropriate, given that a re-zoning is not 'development', and since the Integrated Planning Act came into force, what is regulated and facilitated is development rather than re-zonings as in former times. An instance is the decision in Lagoon Gardens Pty Ltd v Whitsunday Shire Council [2009] QPEC 66.*

In distinguishing this case from Lagoon Gardens, his Honour said that:

> *the proposal here is clearly identified. There's no mystery as to what development might actually occur as there would be if no more were sought than bare 're-zoning' which would be likely to facilitate the potential adoption of a whole range of uses.*

Accordingly, his Honour excused any non-compliance with section 3.1.6 (Preliminary approval may override a local planning instrument) and section 3.2.1 (Applying for development approval) of the IPA.

Held

- The proposed changes were held to be minor changes.
- Any non-compliance with section 3.1.6 (Preliminary approval may override a local planning instrument) and section 3.2.1 (Applying for development approval) of the IPA was excused.

Colin Biggers & Paisley

Dust! An environmental nuisance

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Department of Environment & Resource Management v Clark* [2011] QPEC 20 heard before Wall QC

May 2011

Case

This case concerned an application by the Department of Environment and Resource Management (**applicant**) for orders under section 505(5) (Restraint of contraventions of Act etc) of the *Environmental Protection Act 1994* (**EPA**) to remedy environmental offences committed by Barry Clark (**respondent**).

Facts

The respondent owned land situated at 22 Rudman Parade, Burleigh Heads (**site**). The majority of the site was unsealed and un-vegetated. He leased this site out to other persons for the purpose of carrying out various environmentally relevant activities including, operating a waste transfer station, crushing concrete, screening material extracted from the earth, and stockpiling sand, soil and gravel. He was at all material times responsible for the environmental management of any activities carried out on the site's 'common areas', including traffic movement along shared internal access roads and the release of stormwater runoff from the common areas of the site.

From September 2003 through to July 2010, the applicant had been receiving complaints from various members of the public and neighbouring businesses about dust emissions coming from the site. This included dust being blown from the site to neighbouring areas, dust being blown by vehicles driving over unsealed areas of the site and dirt being deposited on Rudman Parade by vehicles after existing the site which then turned to dust as other vehicles drove over it. It was argued that the respondent, by allowing these activities to occur, was causing an environmental nuisance pursuant to section 15 (Environmental nuisance) of the EPA. This section provided that an:

> *Environmental nuisance is unreasonable interference or likely interference with an environmental value caused by –*
>
> *(a) aerosols, fumes, light, noise, odour, particles or smoke; or*
>
> *(b) an unhealthy, offensive or unsightly condition because of contamination; or*
>
> *(c) another way prescribed by a regulation.*

The persistent refusal by the respondent to take any steps to prevent the escape of dust or dust generating from the site, and to remove the mud and dirt from Rudman Parade, led to environmental protection orders (**EPO**) being issued by the applicant, pursuant to section 358 (When order may be issued) of the EPA. These were issued on 26 September 2003, 15 August 2008 and 14 October 2008. The EPOs ordered the respondent to stop and remedy the activities which were causing the environmental nuisance, namely the movement of traffic along the unsealed common areas of the site. In each of those instances, the respondent paid the fines attached to the EPOs, but continued to ignore the notices imposed under them and persisted with the usual management of the site.

In May 2009, the applicant applied to the Planning and Environment Court (**court**) to seek orders to stop vehicles traversing over the common unsealed areas of the site until those areas had been sealed and further orders that the respondent install and operate a vehicle wheel wash. The applicant contended that the respondent's continual dismissal of the EPOs issued to him amounted to an offence pursuant to section 361 (Offence not to comply with order) of the EPA. This provision carried a maximum fine of $165,000 for a contravention of an EPO and a maximum fine of $200,000 or 2 years imprisonment if a person 'wilfully' contravened an EPO. To act wilfully in defying an EPO was defined in schedule 4 (Dictionary) of the EPA to mean to act 'intentionally, recklessly or with gross negligence'. The applicant also contended that the respondent had committed and would continue to commit offences against the EPA, pursuant to section 440 (Offence of causing environmental nuisance) of the EPA, unless he was restrained.

Decision

His Honour, Judge Wall QC, agreed with the applicant that the roads on the site should be sealed and a vehicle wheel wash should be installed. His Honour was satisfied that the respondent had committed offences against the EPA and would continue to do so unless he was ordered otherwise. His Honour went on to say that until these practices had been remedied, the respondent should be ordered to stop or prevent vehicles traversing the common areas of the site.

In respect of the damage caused to the environment and the considerations that were taken into account, his Honour noted at [19] that:

> *There can be little doubt that, as far as it can be achieved, clean air, dust free air, is an environmental value in the sense that is a quality or desirable physical characteristic of the environment that is conducive to the public amenity or safety and, depending on the circumstances, also ecological health. We would all like the air to be clear and clean as possible all of the time. The environment includes people and communities living and working in a particular location or place or area and the contribution of clean, dust free air to the amenity and harmony of those locations, places and areas. It also includes the effect on those locations, places and areas and the people living and working in them of unclean air and dust laden air such as is complained of here. Taking into account the nature, frequency, intensity and regularity with which it is generated, the number of people and business affected, their proximity to the activities generating the dust and the character of the neighbourhood, the dust here complained of clearly amounts to an unreasonable interference with an environmental value.*

In his judgment, Judge Wall QC also made note of the respondent's general lack of care for the environment and the damage he had been causing to it and to other members of the public. This was evident in the respondent's conduct towards the applicant's environmental officers and his general behaviour and attitude towards the claims made against him. His Honour went so far as to say at [28] that:

> *The respondent is aged 77 and appears to be a successful businessman but as a person and a witness he was difficult, demanding, unrealistic, rude, unco-operative, self-centred, uncompromising, rigid, untruthful, selective in what he said he could and could not remember, selfish, mean grossly irresponsible, uncaring for the rights of others and dismissive of the case against him despite compelling evidence to the contrary. He couldn't care less that the activities he allows to be conducted on his land have caused and are causing significant environmental nuisance problems for others in the near neighbourhood. He is dismissive of any regulatory attempts to limit or control his activities and is unwilling to consider any suggestion that he may have some responsibility for what is happening.*

Held

The application was upheld and orders were to be determined at a later date.

Colin Biggers & Paisley

Failure to address requirements for State resource entitlement and no exercise of power to excuse non-compliance

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Vidler v Fraser Coast Regional Council & Anor* [2011] QPEC 18 heard before Robin QC DCJ

May 2011

Case

Following on from a number of decisions of the courts in late 2010, including *Northeast Business Park Pty Ltd v Moreton Bay Regional Council & Anor* [2010] QPEC 112, *Mahaside Pty Ltd v Sunshine Coast Regional Council* [2010] QPEC 70 and *Qld Construction Materials Pty Ltd v Redland City Council & Ors* [2010] QCA 182, in respect of the requirement in section 3.2.1(5) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**) that a development application be supported by evidence of a State resource entitlement, the Planning and Environment Court considered yet another appeal in which a State resource entitlement was raised as a preliminary legal issue.

Facts

Background

The underlying appeal was by Vidler (**appellant**) against a decision of the Fraser Coast Regional Council (**council**) to refuse a development application for a preliminary approval for a material change of use of rural land for a residential low density development, park and commercial precinct (shops, supermarket and hotel) and a development permit for reconfiguring the site into two lots to accommodate the commercial development (**development application**).

Preliminary legal issues

The first preliminary legal issue raised by the council concerned public notification of the development application. The appellant conceded that public notification of the development application was inadequate and that it must be returned to the notification stage.

Second, the council suggested that the appellant's development application was not supported by evidence required by section 3.2.1(5) (Applying for development approval) of the IPA for taking or interfering with a State resource.

The appellant argued that the proposed development the subject of the development application did not involve a State resource prescribed under a regulation which required the development application to be supported by relevant evidence.

Decision

The relevant State resource concerned was "water" as defined under the *Water Act 2000*, specifically, water in a watercourse and overland flow water.

It was suggested by the appellant that given that the development application was for a preliminary approval, which by its nature does not authorise any actual development, it could not be said to involve taking or interfering with the resource of water.

The court held that the proposed development involved interference with water, given that substantial works were involved in the proposal, including excavation of an existing artificial channel and filling of the proposed residential areas in the south and north east of the site. Moreover, substantial filling was necessary on the site.

Both parties accepted the approach taken to the concept of interference in *Stockland Property Management Proprietary Limited v Cairns City Council & Ors* [2009] QCA 311, wherein the court stated that:

> *…the legislature's intention is that the occasion for the engagement of the requirements in s 3.2.1(5)(b) is indeed a clash with, or a hampering or hindering of, the State's enjoyment of ownership or stewardship of the State resource which is related to the allocation of, or entitlement to, the enjoyment of those rights in the applicant.* [40]

The issue for the court was whether a development application for a preliminary approval could result in a "*concrete effect in the nature of a clash…hampering or hindering of the State's ownership or stewardship of the resource*".

The court considered the decision of Judge Pack in *Herberton Land Corporation Pty Ltd v Tablelands Regional Council* (Unreported, Appeal No 3100 of 2009, 20 July 2010), where the information provided at the time of the making of the development application indicated that a creek crossing was likely to be required at a later date, which would involve interference with a State resource. However, given that the application did not seek approval for a crossing, road or bridge over the creek, it was held that the development the subject of the application did not "involve" a State resource.

Ultimately, the court adopted the approach approved in *Northeast Business Park Pty Ltd v Moreton Bay Regional Council & Anor* [2010] QPEC 112. There, an analogy was drawn between the mandatory requirement that the owner of land consent to any development application concerning its land and the relevant emanation of the State as owner of a particular State resource.

Given that there is no relevant distinction drawn in section 3.2.1 (Applying for development approval) of the IPA between a preliminary approval and a development permit in respect of obtaining owner's consent and the evidence required by subsection (5), an application for a preliminary approval may involve taking or interference with a State resource entitlement.

Exercise of the Court's discretion

The question for the court was whether the excusatory power in section 820 (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009* (**SPA**) was available to excuse the appellant's failure to provide the evidence required by section 3.2.1(5) (Applying for development approval) of the IPA.

There was no material before the court which indicated the position of the relevant State department in respect of the development application and the necessary State resource entitlement. As a consequence, the court held that it was not appropriate to further process the development application, as there was no indication as to whether the State resource issue would defeat it and make the consideration of the development application a costly, pointless exercise.

Accordingly, the court did not make an order under section 820 (Proceedings for particular declarations and appeals) of the SPA to excuse the appellant's failure to comply with the requirements of section 3.2.1(5) (Applying for development approval) of the IPA.

Held

The appeal was dismissed, however, the parties were given an opportunity to make submissions.

Colin Biggers & Paisley

Building and Construction Industry Payments Act 2004 (Qld)

Paul Muscat | Mick Patrick

This article relates to the *Building and Construction Industry Payments Act 2004* (BCIPA) which considers the issue of submitting identical payment claims and abuse of process – *David Spankie v James Trowse Constructions Pty Ltd* [2010] QSC 336

May 2011

Background

The case concerned a payment claim dated 31 August 2009, made under the BCIPA. An adjudication took place for that claim but it was later declared void by the Supreme Court of Queensland.

A subsequent payment claim dated 31 May 2010 was served. The claim was for identical amounts and the same work as the previous 31 August 2009 claim.

David Spankie argued that:

- firstly, the Act does not permit the making of successive payment claims for identical amounts for the same work, regardless of whether another reference date has passed; and
- secondly, under the contract, there is not a second reference date because the expression "for work under the contract done to the end of the month" means that a claim may only be made if work is done in that month.

Peter Lyons J held that:

- as to the first argument: looking at s17 in context, to state that a payment claim may include an amount the subject of a previous claim does not inevitably mean that can only occur if some other amount is also claimed. The natural reading of the Act favours the view that a payment claim may be made for any amount that has been the subject of a previous claim and only for that amount (see pages 5 and 6 of the judgement); and
- as to the second argument: the contract provisions do not limit the entitlement to make a progress claim for work done within the month. Rather, it permits a progress claim to be made simply for work done under the contract. It is difficult to see why the contractual entitlement does not extend to work done in respect of earlier periods. Therefore, on a correct construction of the contract, a progress claim may be made whether or not work was done in that month.

This decision:

- is not consistent with the Queensland Supreme Court decisions of *Doolan v Rubikcon (Qld) Pty Ltd* [2008] 2 Qd R 117 (**Doolan**); *Northside Projects Pty Ltd v Trad* [2009] QSC 264; and *Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC 162; and
- distinguishes or attempts to limit the ambit of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] 74 NSWLR 190 (NSW Court of Appeal particularly per Allsop P); and *The University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635.

Key provisions of the Act

- S 17(5): A claimant cannot serve more than one payment claim in relation to each reference date under the construction contract.
- S 17(6): However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

Summary of the reasoning of Peter Lyons J regarding identical successive payment claims

The natural reading of the Act favours the view that a payment claim may be made for any amount that has been the subject of a previous claim and only for that amount (see pages 5 and 6 of the judgement).

In *Dualcorp*, the court held that the Act as a whole generally manifests an intention to prevent the repetitious re-agitation of the same issues that had been earlier determined. However, in *Dualcorp* there had been a binding adjudication of the first claim. That is not the case here (see pages 7 and 8 of the judgment).

Hammerschlag J in *Cadence* referred to the single statutory opportunity being both availed of and exhausted (ie the opportunity being to make a payment claim and to have that payment claim adjudicated). That is not the case here (see pages 9 and 10).

There is an additional reason for adopting the above construction of s17:

- if a second payment claim can be made on a later reference date, it can include the amount which has been the subject of a previous claim only if additional work is done after the first reference date;
- if that is correct, it is difficult to see why the statutory intention is to permit the making of such a claim but prevent a claim which relates only to an amount that has been the subject of a previous claim (ie the second claim makes an identical claim to the first claim); and
- to take an extreme example, if the first claim relates to a very substantial amount of work and results in a very large claim and, thereafter, a very small amount of work is done with a very small additional claim, that would be permitted as a result of s17(6). It is difficult to see why the legislature would intend to permit the making of such a claim, but preclude the making of a claim which related only to an amount the subject of a previous claim. This is an unlikely intention and is inconsistent with the objects of the Act.

On appeal

David Spankie appealed the decision and on 14 December 2010 the Court of Appeal delivered its decision which unanimously upheld Justice Lyons' decision. Accordingly, the Court of Appeal has now overturned Justice Freiburg's decision in Doolan and the "identical successive payment claim" argument that could previously be raised by respondents.

What does this mean for the industry?

The impacts of the decision are as follows:

- respondents should ensure that they properly address payment claims that appear to be resubmissions of earlier payment claims, given the defence in the Doolan case has now been overturned;
- claimants will be able to reissue previously issued payment claims;
- claimants will not have to find additional work to claim to reissue a payment claim;
- the decision makes sense and reflects the objects of the BCIPA Act; and
- parties need to consider the terms of the BCIPA Act when drafting contracts to ensure consistency between the contract terms and the BCIPA Act.

Commencing a building dispute in Queensland: QCAT v Court

Paul Muscat | Mick Patrick

This article relates to building disputes, in particular domestic building disputes, which can be commenced and heard in either the Queensland Civil and Administrative Tribunal (QCAT) or any court of competent jurisdiction, for example the Magistrates, District or Supreme Court. The correct court will usually depend on the monetary value of the claim

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Commercial building disputes may also be heard in QCAT, however, commercial building disputes of a monetary value greater than $50,000 may only be heard by QCAT if there is consent between the parties.

Features of the Tribunal v Court

Outlined below are some comparisons of the two jurisdictions that should be considered when deciding which jurisdiction to commence your proceedings.

- QCAT deals with a very wide range of matters that come before it, not only building disputes, and as a result is not a specialist building tribunal as it once was.
- Some courts, for example the District Court now has a commercial list under which building matters are expressly included, so such matters can be dealt with under the commercial list in that court.
- Both jurisdictions encourage and provide alternative dispute resolution processes. QCAT will generally list a matter for a compulsory conference, which is presided over by a member of QCAT, and which may proceed as a mediation.
- The court can make an order for mediation, but would ordinarily only do so in circumstances where both parties are interested in participating in it.
- It is important to consider that if one party is determined not to resolve the dispute, a court would be reluctant to order mediation, and a compulsory conference or mediation in either jurisdiction is unlikely to achieve a resolution, whether compulsory or not.
- QCAT is a less formal jurisdiction. Parties are generally required to represent themselves except in very limited circumstances. Also, the rules of evidence do not apply in QCAT proceedings. This may or may not suit the parties depending on the nature of the dispute.

In court the parties are entitled to be legally represented, and the rules of evidence apply. In addition there are rules relating to procedure that apply, including the process discovery (disclosure of documents), which in many situations is of significant assistance to prosecuting or defending a claim.

In QCAT parties generally pays their own costs, even if legally represented. As a result, if a party wants to be legally represented, it is important to consider that QCAT may not allow legal representation, and further, even if it does, you may not recover your costs.

The court system however entitles parties to recover legal costs if they are successful.

Transferring proceedings

Pursuant to section 53 of the *Queensland Civil and Administrative Tribunal Act 2009* (**Act**) a party to a building dispute commenced in a court can apply to the court to have the matter transferred to QCAT. In these circumstances the Court has the discretion to make an order for the transfer of the proceeding to QCAT.

In the matter of *Randall Wayne March & Anor v Metrotek Constructions Pty Ltd* [2011] QDC 376 (**Metrotek**), an application was brought by the defendant, Metrotek, pursuant to section 53 of the Act seeking a transfer of the proceeding, which had been commenced by the plaintiffs in the District Court, to QCAT.

The defendant filed a conditional notice of intention to defend on the basis that the proceeding was commenced in the incorrect jurisdiction. No defence responding to the plaintiff's claim was filed before the hearing of the application.

The application failed on essentially the following grounds:

- despite QCAT having jurisdiction to hear the dispute, the plaintiffs had commenced their proceeding in the District Court which was a court of competent jurisdiction to hear the proceeding;

- the plaintiffs wished to be legally represented and, accordingly, were comfortable with the structure provided by the District Court in relation to the conduct of the proceeding; and
- the arguments advanced by Metrotek, which included submissions such as the informal approach by QCAT, compulsory ADR and streamlined costs were not accepted as sound reasons on their own for the proceeding to be transferred to QCAT.

What does this mean for the industry?

Prior to commencing proceedings it is important to consider the jurisdiction in which you would like to commence your action. Considerations may include:

- the complexity of the dispute;
- the value of the claim;
- whether you wish to be represented by a lawyer;
- the extent to which you wish to be exposed to legal costs, noting that the court provides for the awarding of legal costs to the successful party; and
- in a court proceeding, the *Uniform Civil Procedure Rules 1999* (**rules**) allow for a much more strict approach to pursue your proceeding should you wish to progress it quickly by having the matter set down for an early trial date, which may agitate early attempts at alternative dispute resolution techniques to have the proceeding settled;
- in a court proceeding, the rules of evidence apply to ensure that the court only act only on evidence that is relevant, reliable and probative;
- in a court proceeding, the rules also ensure parties plead their case properly and completely, disclose all relevant documents, and prosecute, or defend, claims expeditiously and without unreasonable delay;
- applications by a party to transfer a proceeding from a court to QCAT may be resisted as it was, successfully, in Metrotek.

Colin Biggers & Paisley

The removal of an important feature: Minor change?

Samantha Hall | Aaron Madden

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wroxall Investments Pty Ltd v Cairns Regional Council* [2011] QPEC 58 heard before Robin QC DCJ

May 2011

Executive Summary

This case concerned an analysis of what constitutes a 'minor change' in relation to a code assessable development application for a 50 lot subdivision in Cairns.

The court found that if the alterations to the development proposal could be considered a 'minor change' in the context of section 821(2)(b) (Application of repealed IPA, s 4.1.52) of the *Sustainable Planning Act 2009* (**SPA**), it could endorse an order sought by both parties to the appeal to allow the development application.

The changes of note were as follows:

- the replacement of a condition proposing a vehicular link through the development site linking two sections of the town; and
- the removal of a 5000 square metre lot.

The court found that the changes were considered to be 'minor changes' under section 350 (Meaning of minor change) of the SPA, and it was held that the court should not be deterred from finding a minor change on the basis that some important feature of a proposal was being removed.

Case

This case concerned an application for an order seeking the finalisation of an appeal originally heard in *Wroxall Investments Pty Ltd v Cairns Regional Council* [2010] QPEC 092.

Facts

The developer originally appealed against a refusal of a code assessable development application for a 50 lot subdivision on a site separating the two areas of North and South Wonga Beach. Ultimately the appeal resolved into one concerning conditions, with the council supporting the development with the relevant exception of the proposed construction of a vehicular link through the development site joining the northern and southern sections of a town.

The original appeal was adjourned to allow finalisation of conditions and layout of the subdivision. Having reached a consensus on the form of these changes, the parties sought to have the appeal finalised by way of the proposed order.

Decision

His Honour Judge Robin QC DCJ considered that the order could be endorsed if the changes made to the development proposal could be considered a 'minor change'. His Honour stated that by operation of section 821(2)(b) (Application of repealed IPA, s 4.1.52) of the *Sustainable Planning Act 2009* (**SPA**), 'minor change' was to be determined by reference to section 350 (Meaning of minor change) of the SPA. The key consideration was whether the changes would constitute a 'substantially different development'.

His Honour noted that when the appeal was heard, the development proposal had been changed from that which was publicly notified. In determining whether the further changes could be considered minor, his Honour stated that comparison should be made to the proposal which was originally publicly notified.

In resolving the issue concerning the connecting road, the parties agreed upon a condition which required the installation of bollards to block vehicular traffic from moving beyond each constructed stage of development (thus preventing through-traffic between North and South Wonga Beach). Further significant changes to the proposal included the removal of a 5000 square metre lot which was to face the opening of a street on the development (Marlin Drive). His Honour Judge Robin DCJ noted that during the original hearing of the trial there was some suggestion that the large allotment may be utilised as a site for shops to service the subdivision.

His Honour ultimately found these changes to be minor and thus not a 'substantially different development' under section 350 (Meaning of minor change) of the SPA. In arriving at these conclusions, his Honour stated that the court should not be deterred from finding a minor change on the basis that some important feature of a proposal was being removed. In making this statement, his Honour appeared to distance himself somewhat from previous judgements which have made this a possibility. In this regard particular mention was made of *Carillon Developments Ltd v Maroochy Shire Council* [2000] QPELR 216.

Held

That the order be made as per the initialled draft.

Colin Biggers & Paisley

Sufficient planning reasons justify approval

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Heritage Properties & Anor v Redland Shire Council & Ors* [2011] QPEC 56 heard before Searles DCJ

May 2011

Executive Summary

The Planning and Environment Court, considering an appeal against a deemed refusal by the Redland City Council of a development application to allow a residential development at Thornlands, gave determinative weight to the council's IPA planning scheme provisions to allow the development to proceed, despite the development application being made under the provisions of the council's transitional planning scheme.

The evidence of the parties' town planning experts was critical to the court's determination that there were sufficient planning grounds to approve the development application despite conflict with the provisions of the transitional planning scheme and the IPA planning scheme.

The decision also gives further guidance to applicants and assessment managers as to what constitutes a 'minor change' under the *Sustainable Planning Act 2009* and when the court can approve part of an application.

Case

This was an appeal against a deemed refusal by the Redland City Council (**council**) of a development application for a preliminary approval for a material change of use and development permits for reconfiguring a lot for two stages (**development application**).

Facts

The original appellants were Heritage Properties Pty Ltd (**Heritage**) and Ausbuild Pty Ltd, the owners of the land the subject of the development application. However, on the first day of the hearing, Heritage advised the court that it sought a partial approval of the development application, which excluded the two lots owned by Ausbuild Pty Ltd. Accordingly the land owned by Ausbuild Pty Ltd was not a part of the appeal before the court and Ausbuild Pty Ltd took no part in the appeal.

The Chief Executive of the Department of Transport and Main Roads joined the appeal, along with local residents Mr and Mrs Nahrung (**fourth co-respondents**) and Mr and Mrs Turk (**fifth co-respondents**). The first, second and third co-respondents by election withdrew from the appeal before the hearing.

The development application was lodged under the provisions of the council's transitional planning scheme and the land was identified in that scheme as being within the Rural/Non-Urban Zone and partly within the Special Planning Intent No. 4 Area in the 1998 Strategic Plan.

The land the subject of the development application was identified in the council's IPA planning scheme, which commenced in March 2006, as being within the Emerging Urban Community Zone. The IPA planning scheme was amended on 31 March 2010 to include the South East Thornlands Structure Plan (**structure plan**) which allocated the subject land to a number of precincts including housing, green space and district park.

Preliminary legal issues

The court considered two preliminary legal issues regarding whether the changes in the development proposal before the court constituted a minor change from the development application as lodged and whether the court was empowered to approve part of an application.

The changes to the proposed development involved the following:

- the reduction of the number of lots to the west of the dam from 18 or 19 lots to 9 lots;
- in stage 1a, the reduction of the number of lots from 34 to 33;
- the identification of land in the north-west corner of the site as a district park rather than being subdivided;
- a change of access to the fourth and fifth co-respondents' properties;
- the provision of a new rear access from the proposed development to the fifth co-respondent's property.

The court held that having regard to the definition of "minor change" in section 350 (Meaning of Minor change) of the *Sustainable Planning Act 2009* (**SPA**) and Statutory Guideline 06/09 Substantially different development when changing applications and approvals issued by the Department of Infrastructure and Planning, the change was a minor change.

On the issue of whether the court could approve part of an application, the court held that having regard to sections 3.5.11 (Decision generally) and 3.5.14A (Decision if application under s 3.1.6 requires assessment) of the *Integrated Planning Act 1997* (**IPA**) and the decisions of *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QCA 333 and *SLS Property Group v Townsville City Council* [2009] 175 LGERA 136, the court had power to approve part of an application.

Merits issues

The critical planning issues considered by the court concerned the weight to be given to the council's IPA planning scheme and the conflicts between the proposed development and the relevant planning scheme provisions.

Section 4.1.52(2)(a) (Appeal by way of hearing anew) of the IPA provides that an appeal is to be determined based on the laws and policies applying when the development application was made but with appropriate weight given to any new laws and policies the court considers appropriate. Given that the structure plan had been in force for 12 months prior to the appeal being heard, the court held that the IPA planning scheme should be given determinative weight, considering it reflected the current planning for the land the subject of the appeal. Adopting the words of His Honour Judge Wilson SC in *Ross Nielson Properties Pty Ltd v Brisbane City Council & Anor* [2007] QPELR 323, his Honour Judge Searles indicated that it would be illogical not to afford the current scheme determinative weight.

The court considered whether the proposed development conflicted with the transitional planning scheme and the IPA planning scheme. The court accepted the evidence of the parties' town planning experts that the proposed development conflicted with the transitional planning scheme in respect of the provisions relating to the Special Planning Intent No. 4 Area in the 1998 Strategic Plan, the Rural Zone and the Rural/Non-Urban Zone. Heritage submitted that any conflict with the transitional planning scheme was of little significance, given the weight to be afforded to the content of the IPA planning scheme.

The court also considered the conflict with the IPA planning scheme in respect of the development around the existing dam within the green space network land use precinct. The town planning and environmental experts who gave evidence in the appeal agreed that some form of urban development on the dam land was appropriate and that the nine lot proposal was acceptable.

The court went on to consider the issues raised by the fourth co-respondents and fifth co-respondents regarding traffic, amenity and environmental impacts and held there was nothing in any of the issues raised which would prevent an approval being given to the development application, as changed, if it warranted approval in all other respects.

Decision

The ultimate question for the court was whether there were sufficient planning grounds to approve the development application despite the conflict with the provisions of the transitional planning scheme and the IPA planning scheme. The court held that on the basis of the improved environmental and planning outcome and need for housing in the local and wider area, sufficient planning reasons existed to justify approval despite the conflicts.

Held

Appeal allowed.

Colin Biggers & Paisley

Applying a "best fit" approach

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *AAD Design Pty Ltd v Brisbane City Council* [2011] QPEC 54 heard before Jones DCJ

May 2011

Executive Summary

The Planning and Environment Court (**court**) has confirmed a decision of the Development Dispute Resolution Committee (**committee**) in respect of a determination that a proposed use of premises, being a house comprising numerous bedrooms which were to be separately leased out to unrelated persons for the purpose of student accommodation, is properly defined as "Multi-unit dwelling" and not "House" under the *Brisbane City Plan 2000*. In making its decision, the Planning and Environment Court confirmed its support for the "best fit" approach where there are two or more defined purposes which cover a particular proposal.

Case

This case involved three appeals to the Planning and Environment Court from the Building and Development Dispute Resolution Committee in respect of a determination that a proposed use of premises the subject of the proceedings was for "Multi-unit dwelling" and not "House" under the *Brisbane City Plan 2000* (**planning scheme**).

Facts

AAD Design Pty Ltd (**applicant**) made three separate development applicants to the Brisbane City Council (**council**) for a material change of use respectively described as follows:

- Residence not complying with House Code (10 bedrooms);
- Residence not complying with House Code (11 bedrooms);
- Residence not complying with House Code (9 bedrooms).

The proposed developments included a house comprising bedrooms which were to be separately leased out to unrelated persons for the purpose of student accommodation.

Between 9 and 12 July 2010, the council advised the applicant that the development applications were not properly made for the following reasons:

- the use applied for was defined as a "Multi-unit dwelling (boarding house)";
- the level of assessment was impact assessment;
- the IDAS forms required amendment;
- payment of further fees in excess of $16,000 was required.

On or about 14 July 2010, the applicant applied to the committee seeking declarations that the development applications were properly made on the basis that the use applied for was "House".

The Committee dismissed the application stating the following:

> *Based on an assessment of the facts, it is the Committee's decision that the proposed use is a 'multi-unit dwelling' as that term is defined in the planning scheme, and as a result the development application was not properly made because the correct fee was not provided with the development application.*

On appeal to the court, the applicant alleged the committee erred in its decision as follows:

- failing to give effect to the natural and ordinary meaning of the words used in the definition of "House" where used within the City Plan 2000;
- failing to give effect to the final sentence of the definition of "Multi-unit dwelling" in the City Plan 2000;
- using performance criteria P8 and acceptable solution A8 of the House Code to exclude the application of the definition of "House";
- taking into account the tenancy agreements in construing the competing definitions.

Decision

The court held that the use of the proposed developments was better defined as "Multi-unit dwellings" rather than "House" and dismissed the applicant's appeal.

In reaching this determination the court held the following:

- given that non-compliance with an acceptable solution does not necessarily involve conflict with a planning scheme, the Committee probably erred in having regard to A8 in reaching its conclusions about the proper categorisation of the subject proposals, however, that does not mean that the Appellant succeeds;
- the Committee did not err in bringing into account the commercial aspects of the proposal, that is, the tenancy arrangements, as the characterisation of a use naturally involves an analysis of the factual circumstances surrounding the proposal;
- it was clear that the proposed developments could fit within both the definition of “Multi-unit dwelling” and “House”;
- where there are two or more defined purposes which cover a particular proposal, a “best fit” approach is appropriate;
- the best fit for the proposed developments is a multi-unit dwelling and not a house. While some of the features usually associated with a “boarding house” or "hostel" are absent, for example the provision of services such as meals, room cleaning and/or washing, there are a number of significant similarities;
- it seems tolerably clear that the emphasis of the definition of “House” is more focused on the entity of a domestic group whereas the emphasis of the definition of “Multi-unit dwelling” is more directed to the existence of multiple independent “individuals”, “domestic groups” and “discrete households”. The proposed use falls more comfortably under the latter descriptions than the former;
- the principle of resolving ambiguity in the circumstances in favour of the landowner could only be used as a last resort, if it is available at all, concerning the construction of a planning scheme. That was not the situation in this case.

Held

The court held that the decision reached by the committee was correct and no determinative error of law was shown.

Accordingly, the appeal was dismissed.

Colin Biggers & Paisley

Applying laws and policies after an application has been made

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Waverly Road Developments Pty Ltd v Gold Coast City Council* [2011] QPEC 59 heard before Andrews SC

June 2011

Executive Summary

When courts assess decisions made by local governments they must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies that the court considers appropriate. This invariably means that developers are often required to comply with planning controls introduced years after a development application is submitted. This was the case for a developer applying for a residential subdivision in 2004, who was ultimately required to comply with the Gold Coast City Council's Priority Infrastructure Plan that was introduced three years later.

Case

This case concerned an appeal by Waverly Road Developments Pty Ltd (**appellant**) against a decision of the Gold Coast City Council (**respondent**) to grant a preliminary approval subject to conditions for a development permit for reconfiguring 2 lots into 78. This case also concerned separate originating applications filed by the appellant and respondent in respect of the infrastructure charges associated with the preliminary approval. All three matters were heard and decided together by the Planning and Environment Court (**court**).

Facts

History of the site

In June 2004, Australian Agricultural and Property Management Ltd (**AAPM**) applied to the respondent for a development application for a development permit for reconfiguring 2 lots into 78 for residential purposes with respect to land situated at 41 and 55 Waverly Drive, Pimpama (**site**). Prior to this development application, the respondent had resolved to adopt the East Coomera Sewerage Infrastructure Strategy (**ECSIS**) as a basis for the assessment of development applications within the East Coomera catchment area. The site was located in Zone F for the purposes of the ECSIS. At the relevant time there were issues associated with the ECSIS in respect of the allocation of the number of equivalent tenements that could connect to the sewerage infrastructure within the East Coomera catchment area. As a result of this, in August 2005, the respondent indicated to AAPM that it did not support a development permit for the site as there was not the necessary sewer infrastructure in the relevant Zone to support AAPM's development. The respondent indicated that amendment to the ECSIS would be required and until that time, only a preliminary approval of the development application would be considered.

In May 2006, Harridan Pty Ltd purchased the site from AAPM. In August 2006, the respondent issued a decision notice in respect of the site granting a preliminary approval subject to conditions. A condition of the approval provided:

> *This Preliminary Approval cannot be superseded by a Development Permit for Reconfiguring a Lot until such time as the applicant can demonstrate a suitable and achievable point of connection to the Council's sewerage network to the satisfaction of Gold Coast Water. Connection to any permanent or temporary sewerage infrastructure system can only be achieved if the capacity required to service the proposed development is available.*

In September 2006, the appellant appealed to the court against the decision of the respondent and sought the issue of a development permit. Importantly, in January 2007, the respondent's Priority Infrastructure Plan (**PIP**) and infrastructure charges schedule (**ICS**) came into effect. This gave the respondent power to issue an infrastructure charges notice (**ICN**) on any approval given to the appellant, as the development application was lodged prior to the commencement of the PIP, but would be decided after the PIP had come into force.

In March 2009, the appellant changed its application pursuant to section 4.1.52(2)(b) (Appeal by way of hearing anew) of the *Integrated Planning Act 1997* (**IPA**). In April 2009, the respondent notified the appellant that it would support the issue by the court of a development permit for reconfiguring a lot (subdivision to create 83 residential lots, public open space and internal road) subject to conditions and to also issue an ICN in respect of the recreational facilities, transport and stormwater networks.

Current proceedings

The current proceedings concerned the appellant's appeal against the decision of the respondent in 2006 to grant a preliminary approval subject to conditions. The proceedings also concerned an application by the appellant seeking, amongst other things, declarations that the respondent was not entitled to issue an ICN as a result of the development approval. Finally, the proceedings also dealt with an application sought by the respondent for a declaration that the respondent was entitled to issue an ICN to levy charges for the recreational facilities, transport and stormwater networks of the development.

All three proceedings related primarily to the appropriate legal mechanism for the imposition of infrastructure charges on the proposed development and the quantum of charges that ought to be imposed. In this context, the main issue to be determined by the court was whether the laws and policies applying at the time the appellant's development application was lodged should be applied or whether the court should give weight to later laws and policies.

Decision

His Honour, Judge Andrews SC, rejected the appellant's declarations and found that the respondent, upon the court deciding to approve the development application, would be entitled to levy charges for the recreational facilities, transport and stormwater networks under the ICS by giving an ICN.

Referring to section 4.1.52(2) (Appeal by way of hearing anew) of the IPA and also section 821 (Application of repealed IPA, s 4.1.52) of the *Sustainable Planning Act 2009* (**SPA**), his Honour identified that the court must decide the appeal based on the laws and policies applying when the appellant's application was made, but may also give weight to any new laws and policies which the court considered appropriate. Even though the council's PIP and ICS came into force after the appellant's development application was lodged, the respondent was authorised to consider these instruments in its assessment.

Based on this finding, his Honour noted that pursuant to section 629 (Funding trunk infrastructure plans for trunk infrastructure) and section 633 (Infrastructure charges notice) of the SPA, the respondent would be entitled to levy a charge for supplying recreation facilities, transport and stormwater trunk infrastructure under the ICS and would be authorised to issue an ICN if the court were to grant a development permit for the site subject to conditions.

His Honour further noted that the respondent was correct in its decision in August 2006 to refuse to grant a development permit, as the appellant's development application did not demonstrate compliance with the respondent's Reconfiguring a Lot Code nor its Works for Infrastructure Code. His Honour mentioned at [93]:

> *It was not appropriate to condition the applicant at the time to construct its own reticulation system and all the more so without knowing what that condition involved. Such a condition might not achieve compliance with: PC 23 of the Reconfiguration of a Lot Code in that such a system might not be cost effective; or PC5 or the purpose of the Works for Infrastructure Code, it would result in sewerage infrastructure provided with best management land development principles in accordance with Planning Scheme Policy 11 – Land Development Guidelines.*

On the issue of the respondent's use of the ECSIS, his Honour was satisfied that a lawful application of the ECSIS was used in respect of the assessment of the appellant's development application. His Honour noted that because sewage treatment capacity in the East Coomera area was less than required for urban development, the ECSIS, as a source of sewerage infrastructure capacity requirements, was essential to the assessment of the appellant's development application.

Held

The declarations sought by the appellant were refused. The court deciding to approve the development application, the respondent is entitled to levy charges for the recreational facilities, transport and stormwater networks under the ICS by giving an ICN.

Colin Biggers & Paisley

Early resolution of infrastructure charges and development approval conditions disputes

Samantha Hall | Jonathan Evans

On 9 May 2011, Chief Judge PM Wolfe issued Practice Direction 1 of 2011 for the Planning and Environment Court (P&E Court). Its purpose is to ensure that a proceeding involving infrastructure charges or conditions of a development approval are subject to an alternative dispute resolution (ADR) process at an early stage, preferably without the need for an order or direction of the P&E Court

June 2011

What is ADR?

ADR provides parties in civil matters with an alternative to a trial. The two most common forms of ADR are:

- mediation – where an independent person or mediator helps the parties to negotiate an agreement to resolve the dispute, or part of it; and
- case appraisal – where an independent person or case appraiser assesses the merits of the case and makes a decision similar to a judgment of a court.

The benefits of ADR include:

- reducing the case load in the courts and helping prevent delays;
- avoiding the expense of a trial;
- helping the parties reach a settlement at an early stage;
- being a lot less formal than court proceedings; and
- sessions being confidential so agreements reached do not need to be made publicly available.

What does the practice direction require?

The practice direction requires that parties to a proceeding involving infrastructure charges or conditions of approval should, **within one month after commencement** of the proceeding, by agreement, participate in or fix a date and time with the Alternative Dispute Resolution Registrar (**ADR registrar**) to participate in:

- a mediation conducted by the ADR registrar;
- a without prejudice conference chaired by the ADR registrar; or
- a case management conference chaired by the ADR registrar.

These services are free to parties involved in P&E Court matters.

If the parties do not comply with this direction, the ADR registrar shall immediately list the proceeding for review by a judge, so that the judge may make orders for a dispute resolution plan. The aim of such a plan being directed towards the narrowing and if possible, resolution by agreement of the issues in dispute.

Consultant convicted for clearing of koala habitat

Samantha Hall | Jamon Phelan-Badgery

This article relates to the matter of *Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd* [2010] NSWLEC 144 heard before Pain J

June 2011

Executive Summary

This New South Wales case is the first instance of a consultant (rather than a developer) being prosecuted for offences arising from the development process which were committed because of advice received from the consultant. The case demonstrates that consultants should be aware that accepting an obligation to "ensure legal compliance" as part of a development approval imposes a very high standard which may require legal input. If this obligation is accepted then a failure to provide advice that an offence may be committed may be taken to be the direct cause of an offence. Subsequently, consultants should be careful to say that legal advice is not being provided and should wherever possible limit their scope to the provision of necessary factual and technical information not legal advice.

Case

This was a prosecution by Gordon Plath of the New South Wales Department of Environment and Climate Change (**prosecutor**) of planning and environment consultants Anthony Fish and Orogen Pty Ltd (**defendants**). The defendants pleaded guilty to offences pursuant to the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**), *Native Vegetation Act 2003* (NSW) (**NVA Act**), and *Threatened Species Conservation Act 1995* (NSW) (**TSC Act**) which occurred as a result of unlicensed clearing of native vegetation on the subject site which was the habitat of koalas, a threatened species.

Facts

Buildev Group (**developer**) relied on advice from the defendants for their professional guidance on planning and ecology matters for a 21 lot industrial subdivision of a property at Taylors Beach, New South Wales.

The defendants were aware from their involvement in the matter that the development site contained koala habitat and movement corridors.

The development site was comprised of two differently-zoned areas pursuant to the Port Stephens Local Environment Plan 2000 (**LEP**): The zones were "1(a) Rural" and "4(a) Industrial". The treatment of clearing of vegetation in each zone differs under the LEP and under some of the other legislative instruments cited in the case. Therefore, under each piece of legislation it was possible that a portion of the total clearing works were unlawful while the balance was not.

Orogen Pty Ltd's fee proposal contained an acceptance of responsibility for ensuring 'legislative compliance' in respect of the vegetation clearing works involved. At the time the relevant clearing occurred, Orogen Pty Ltd, along with the developer and clearing contractors, was party to a contract to provide advice on legislative requirements related to the clearing of vegetation and to check for threatened species prior to commencement of works.

The defendants advised the developer that no consent was required to clear vegetation on the 4(a) Industrial land. This advice was either incorrect or only limited to the issue of development consent (as no consent or permission was required under the LEP).

The defendants failed to advise the developer that:

- Section 118D of the NPW Act makes it an offence to "…damage any habitat of a threatened species, endangered population, or an endangered ecological community if the person knows that the habitat concerned is habitat of that kind…In this section, damage includes cause or permit damage."
- In order to lawfully clear threatened species habitat, it was necessary to obtain a licence or certificate under the NPW Act or TSC Act, or another form of authorisation such as a development approval, property management plan or joint management agreement under one of various other legislative provisions.

The clearing works were not undertaken by the defendants, but by contractors engaged by the developer. The decision to clear the vegetation was not the decision of the defendants but the decision of the developer.

Decision

The judge considered the overall culpability of the defendants to be of low to medium significance because while the defendants were responsible for ensuring legislative compliance, the defendants did not make the decision to clear the vegetation nor carry out the clearing. Similarly, the degree of environmental harm caused was on the lower end of the spectrum, as the illegal clearing caused a loss of habitat sufficient to support up to a pair of adult koalas and a narrowing of a significant movement corridor.

Interestingly, the court made use of the provisions of the NPW Act which allow for additional orders to be made, such as:

- ordering the offender to take specified action to publicise the offence and its environmental and other consequences; or
- ordering the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit.

Pursuant to these provisions and other general sentencing principles, the defendants were required to:

- pay $15,000 in fines; and
- undertake an environmental service order being the preparation of part of a koala mapping project (the value of this project is estimated to be more than $160,000); and
- publish a notice of their offence in the Sydney Morning Herald and the Newsletter of the Ecological Consultants Association of NSW; and
- pay the prosecutor's costs of $105,000.

Submitter's rights in a conditions appeal

Samantha Hall | Aaron Madden

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Morgan v Toowoomba Regional Council & Ors (No. 2)* [2011] QPEC 61 heard before Robin QC DCJ

June 2011

Executive Summary

The case involved a submitter application to be joined as an additional co-respondent by election to an appeal. In addition to addressing this application, Robin QC DCJ also considered a number of issues relating to co-respondents and submitters in the proceeding upon which judgement had been reserved at an earlier hearing.

These issues included the following:

- the possibility of an extension of time to elect to become co-respondents;
- what constituted a 'properly made submission' as defined under schedule 10 (Dictionary) of the *Integrated Planning Act 1997*;
- the scope of the conditions which may be appealed by submitters and co-respondents in a conditions appeal;
- the power of the court to extend time for making a submission.

Case

This case involved a submitter application to be joined as an additional co-respondent by election to an appeal. In an earlier hearing (1 March 2011) judgement was reserved on certain issues relating to co-respondents and submitters. This judgement sought to deal with these various issues prior to the next scheduled mention of the matter.

Facts

The appeal had been commenced by the developer against certain conditions imposed by the council on its development approval in relation to an extension of a feedlot. During the course of the substantive proceedings, questions arose as to whether an extension of time was available for submitters to elect to become co-respondents.

Further questions arose as to whether a submission made by a would-be submitter, a Mr Newson, would be 'properly made' under the definition in schedule 10 (Dictionary) of the *Integrated Planning Act 1997*:

> ***Properly made submission*** *means a submission that –*
>
> *(a) is in writing and unless the submission is made electronically under this Act, is signed by each person who made the submission.*

The scope of the conditions which may be appealed by submitters and co-respondents was also required to be considered by Robin QC DCJ ahead of the subsequent hearing of the matter, due to uncertainty surrounding these issues.

Decision

For the majority of the judgement, Robin QC DCJ dealt with the primary application as to the possibility of an extension of time for the third and fourth respondents by election (Damien & Leah McInnerney) to elect to become co-respondents (thereby initiating their own appeal). In considering the analogous case of *King v Charters Towers City Council* [2004] QPELR 51.

His Honour pointed to the fact that adding further co-respondents significantly weakened the appellant's position in terms of gaining a development approval. As such his Honour found that the decision to grant submitters, such as the McInnerney's, additional time to initiate their own appeal should not be taken lightly. This was the case even in the current instance where the McInnerney's had received legal advice which suggested that they would not be able to challenge the development approval unless they instituted their own appeal.

In taking this approach, Robin QC DCJ referenced the case of *Kangaroo Point Residents Association v Brisbane City Council* [2006] QPELR 471, in which incorrect advice by the council to the submitters as to the appeal period was not sufficient justification to grant an extension of time. Furthermore the case of *Bradshaw v Beaudesert Shire Council* [2006] QPEC 71 was also raised in which Rackemann J was willing to grant an extension of one day. This extension however was only granted due to the fact that it was the omission of the respondent's solicitors which resulted in the relevant delay.

In regards to whether the submissions made by Mr Newson were 'properly made' under schedule 10 (Dictionary) of the *Integrated Planning Act 1997*, Robin QC DCJ noted that it was for the would-be submitter to satisfy this requirement. The document itself was submitted by email, and it was contended by the appellant's counsel that because it was not signed, it was not a properly made submission. Robin QC DCJ did not elucidate a great deal on this point, however he agreed with the appellant's contention. In doing so his Honour seemingly rejected the argument of the would-be submitter that an electronic signature on the cover email sufficed for the purposes of the definition in schedule 10 (Dictionary) of the *Integrated Planning Act 1997*, Robin QC DCJ also reaffirmed the principles in *Adco Construction v Brisbane City Council* [2009] QPELR 349 which suggested that there was no power for the court to extend the time for making a submission.

Finally, in addressing the scope of conditions which may argued by parties to the appeal, Robin QC DCJ stated that in a conditions appeal, the parties are not limited to arguing about conditions which the appellant complained of. Indeed, any submitter co-respondent is entitled to raise any issues in regard to the conditions including any which the council may raise. However his Honour stated that the conditions which were to be appealed should be made known to the other parties prior to the hearing.

Held

- That the application for an extension of time for the applicant to elect to be joined as co-respondent to the appeal be refused.
- That the application to be joined as an additional co-respondent by election to the appeal be refused.

Easing the easement: A conditions appeal

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Parsons v Redland City Council* [2011] QPEC 62 heard before Robin QC DCJ

June 2011

Executive Summary

In this case, the Planning and Environment Court (**court**) heard an appeal against certain conditions of approval imposed on a development permit for material change of use (dwelling house and carport) by the Redland City Council. The key condition in dispute was a condition requiring a drainage easement which in effect sterilised 90% of one of the two lots the subject of the development approval. The court held that whilst such easements were appropriate, the drainage purposes could be achieved by way of an easement with more modest dimensions and ordered the conditions of approval be amended.

Case

This case involved an appeal to the court against certain conditions of approval imposed on a development permit for a material change of use (dwelling house and carport) (**development approval**) by the Redland City Council (**council**).

Facts

The development approval related to land situated at 65 Coondooroopa Drive, Macleay Island and more particularly described as Lots 268 and 269 on RP31213.

Lot 268 was wholly located in the conservation zone in the council's planning scheme, as was most of Lot 269, with a small portion being located in the residential zone.

What was applied for was a two level, one bedroom house within the residential zone with no development in the conservation zone. The reason the house was restricted to just one bedroom was because of the amount of land above the storm surge line at AHD 2.4 metres available for trenches for waste water treatment.

The council imposed various conditions on the development approval, which included the following conditions which were appealed by the appellant:

- **Condition 6:** "A drainage easement is required over the subject allotment to provide drainage for a Q100 (1 in 100 year) storm and/or flooding event. The easement shall be as indicated on Council's Drawing Number A2-C316-2(B) attached. Written agreement of the owner of the allotment must be received prior to the commencement of building works, to allow Council to survey and register the easement at the Titles Office (see attached easement consent form)."
- **Condition 18:** "Due to the limited area available for effluent disposal, this approval is for a one (1) bedroom dwelling house only. No further bedrooms will be permitted on this allotment, unless it can be demonstrated that such a proposal can comply with the requirements of the relevant Australian Standards, Council's Household Wastewater Treatment/Disposal Policy (ENBS006) and the Plumbing and Drainage Act 2002 (Qld)."
- **Condition 31:** "No building works, cutting or filling or plumbing and drainage works are permitted below the 2.4 metre AHD level (Australian Height Datum) contour level or below the 100 Year ARI (Average Recurrence Interval) flood level."
- **Condition 37:** "This development permit for a Material Change of Use will remain current until 30 January 2011 starting the day the approval takes effect, as per sections 3.5.21(1) and 3.5.19 of the Integrated Planning Act 1997 (Qld)."

The appellant argued that he should not have to suffer from works done or permitted by the council and predecessor authorities which exacerbated the drainage problem on his land by diverting and concentrating overland flows of stormwater to the disadvantage of Lot 269.

Decision

The court observed that the effect of condition 6 was that the easement related to 90% of Lot 269 and in practical terms the appellant and his successors could do nothing with it, yet retained legal responsibility for it including the obligations of maintenance and paying rates.

In considering whether condition 6 was reasonable or relevant, the court held as follows:

> *The relevance of the conditions still in dispute may be accepted, whether or not that are strictly necessary. But it is a serious question whether it is reasonable to impose a condition which requires the owner of Lot 269 to accept storm water run-off collected and concentrated in Cross Street in a way effectively sterilising most of the parcel in order to accommodate a wide path for overland flow of that run-off, with the possibility of works in the Cross Street reserve (not ever likely to be used as a road) described by Mr Rogers not taken up.*

In respect of condition 6 the court held as follows:

> *The court accepts the principle of easements in such circumstances. Mr Collins' observations are in line with the court's experience. Without the right to enter as necessary to preserve the integrity of drainage systems, a council with responsibility to protect the community interest is left having to implement unwieldy, complicated, time-consuming and costly processes to gain access, and may be frustrated in situations of some urgency.*

However, the court held that the easement was a serious fetter on potential development of the land and held that the purpose of securing the path for overland flow in very high volume events could be achieved by an easement of more modest dimensions and ordered that condition 6 be amended accordingly.

In respect of condition 18, the court held that only the first sentence should stand and held that the remaining condition represented an unjustifiable restriction.

The court also held that condition 31 was appropriate even if it simply repeated what is required under present planning arrangements.

Finally, the court held that the currency period for the development approval would run from the date of the court's order rather than as provided in condition 37.

Held

The court allowed the appeal and ordered that conditions 6, 18 and 37 be amended or removed as described above.

Apprehension of bias in exercise of judicial discretion

Samantha Hall | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Court of Appeal in the matter of *Elsafty Enterprises Pty Ltd & Anor v Gold Coast City Council* [2011] QCA 84 heard before Chesterman and White JJA and Martin J

June 2011

Executive Summary

The principles of natural justice provide grounds to appeal a decision where there is a reasonable apprehension of bias in the decision maker. This principle is echoed in the appeal rights in the *Sustainable Planning Act 2009*.

In this instance, the self-represented applicants contended the primary judge had predetermined his decision and that this was reflected in the proceedings, for example in interjections by the judge and his refusal to allow extra witnesses to give evidence. On review of the primary judge's decision and the transcript of the hearing, it was decided that the applicants had no reasonable prospects of success if given leave to appeal.

Case

This was an application pursuant to section 498 of the *Sustainable Planning Act 2009* in which the applicants sought leave to appeal a decision of Robin QC DCJ in the Planning and Environment Court (**P&E Court**).

The original action in the P & E Court involved an application by the Gold Coast City Council (**GCCC**) for the court to issue an enforcement order. The court's order prohibited Elsafty Enterprises Pty Ltd (**Elsafty**) and Sustainable International Property Pty Ltd (**SIP**) from using the roof top terrace of the premises known as 'Burleigh Beach House' in Burleigh Heads to serve food and drink. Town Planning Permit No. 9/225 had been granted in 1986 to operate a restaurant in the premises (**existing permit**). Elsafty and SIP contended that their intended use of the roof top was encompassed in the existing permit.

The grounds on which the applicants, Elsafty and SIP, relied are summarised as follows:

- apprehension of bias arising from the conduct of the judge in dealing with the self-represented litigants, specifically "in refusing the application for an adjournment, interjecting, limiting cross-examination and refusing to allow further witnesses to give evidence in the applicant's case, the applicants contend the primary judge demonstrated a determination not to be persuaded to the applicants' cause";
- miscarriage of the exercise of the judge's discretion whether to issue an enforcement order, from failing to consider the hardship that would be suffered by Elsafty and SIP and the representations made by the GCCC that the intended use was acceptable;
- error in law of the construction of the relevant planning legislation.

Facts

Essentially, the GCCC contended that there was no planning permission in place for the intended use of the roof by Elsafty and SIP as a 'Restaurant', 'Café', 'Reception Room', or 'Tavern' as defined in the relevant planning scheme.

Elsafty and SIP asserted that there was no need for further approval, as their intended use was included in the existing permit. Additionally, and unfortunately for Elsafty and SIP, some communications with and actions of the GCCC in the intervening years between the existing permit and the enforcement order gave the impression there was no need for further approval. However, these communications, even where they may have contradicted the legal position, were not sufficient to displace the duty of the local government to uphold the legislative and planning scheme provisions in place.

A show cause notice was issued to Elsafty dated 14 August 2009. Work being conducted by Elsafty and SIP to improve the roof top terrace was ordered to be ceased and the show cause notice was lifted on 4 November 2009. In March 2010, the council wrote to Elsafty confirming its position that any use of the roof top terrace was unlawful without a planning permit.

During the hearing, the directors of Elsafty and SIP were self-represented by their directors (Mr El Safty and Mr Youssef respectively).

At the first day of the hearing on Thursday, 9 December 2010, it became clear that there was not enough time to hear all the evidence. The primary judge indicated that he would adjourn the matter until the following Tuesday, with a written statement to be filed of Mr Youssef's evidence on the Monday.

A further adjournment was then denied on the Tuesday, on the basis that Elsafty and SIP had been aware of the GCCC's position since March 2010. Mr Youssef had not prepared a statement, and was reluctant to give evidence without legal counsel. The primary judge disallowed evidence to be given by Mrs Elsafty as no statement had been filed.

Decision

Leave to appeal was refused because there were no prospects of the applicants' succeeding on any of the grounds which they raised.

With respect to the ground of apprehension of bias, the court held that "*A fair minded lay observer would not, at any point in the proceedings, have thought that the primary judge did not bring an impartial and unprejudiced mind to the resolution of the question which he was required to decide.*"

The court noted among other points that the primary judge:

- considered the relevant provisions in the legislation and concluded that the proposed use was not a minor change in the scale or intensity of an existing use;
- paid due regard to the money spent by Elsafty and SIP in preparing the premises for their intended use;
- concluded that Elsafty and SIP were determined to press ahead with their intended use and that there was no prospect of the parties reaching accommodation, that is there was a high likelihood of a development offence occurring; and
- had not predetermined his decision by the close of the hearing on Tuesday, 14 December 2010.

The court also noted that interventions by the primary judge where they did occur "*were directed to exposing the issues which had to be decided. His Honour was plainly drawing out the facts and circumstances of relevance with Mr El Safty and seeking to probe the construction point.*"

With respect to the ground that the primary judge failed to exercise his discretion in a balanced manner, the court held that the primary judge "*did engage in weighing the relative arguments advanced by the parties and, indeed, gave particular prominence to those of the applicants.*"

With respect to the ground that the primary judge's construction of the relevant legislation and planning scheme was incorrect, the court conducted a detailed review of each of the material terms that required construction by the primary judge. The outcome of this review included the following conclusions:

- The applicants were correct in their construction argument that pursuant to the planning scheme "the roof area does not exceed the allowable margin of total use area. But that is not the true issue."
- The true issue was that Elsafty and SIP proposed to start a new use of the premises.
- The court noted that had a reasonable apprehension of bias been established by the applicants, the matter would have been remitted to the P&E Court for consideration anew by another judge, so as to preserve the appearance of neutrality which is so fundamental to the legal system.

Held

Application for leave to appeal refused.

General authority to use State resources

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Court of Appeal in the matter of *WAW Developments Pty Ltd v Brisbane City Council* [2011] QCA 47 heard before Muir and Chesterman JJA and Ann Lyons J

June 2011

Executive Summary

When applying for a development approval that involves or interferes with a State resource, such as building a deck over a public footpath, a 'General Authority' from the Department of Environment and Resource Management (**DERM**) is usually required in support of that application as evidence of the Department's satisfaction that the development can proceed in the absence of an allocation of, or an entitlement to, the State resource. It is the interpretation of this authority that can sometimes lead to confusion, as was the case for the Planning and Environment Court in late 2010, which ultimately lead to its decision being set aside by the Queensland Court of Appeal this year.

Case

This case concerned an appeal to the Queensland Court of Appeal (**court**) by WAW Developments Pty Ltd (**appellant**) against a decision of the Planning and Environment Court (**P&E Court**) to strike out its appeal against the Brisbane City Council's (**respondent**) refusal of its development application to extend an existing approved restaurant use.

Facts

In August 2009, the appellant applied to the respondent for a development approval for a material change of use to extend an existing approved restaurant use with respect to land situated at 68 Commercial Road, Newstead. The approval that was sought can be more particularly described as an approval to use a 40m² deck area that was constructed over the existing footpath adjoining the restaurant for outdoor dining and to form part of the restaurant premises. The respondent subsequently refused the appellant's development application and in December 2009, the appellant appealed the respondent's refusal to the P&E Court.

In those proceedings, the respondent subsequently made its own application to the P&E Court for a declaration pursuant to section 4.2.21 (Court may make declarations) of *Integrated Planning Act 1997* (**IPA**) that the appellant's development application was not a properly made application. The respondent argued that pursuant to section 3.2.1(5) (Applying for a development approval) of the IPA, the development application was not a properly made application because the development involved a State resource prescribed under a regulation and it was not accompanied by evidence that the Chief Executive of the department administering the resource was satisfied either that the development was consistent with an allocation of, or entitlement to, the resource, or that the development application may proceed in the absence of an allocation of, or entitlement to, the resource.

The State resource in question was the road reserve adjoining the appellant's land and the application involved the use of the resource because the appellant's deck was built on and over part of the existing public footpath, thereby providing an alternative means of pedestrian access along the footpath. Prior to the development application being lodged with the respondent, the appellant had applied to the relevant department with responsibility for administration of the road, the Department of Environment and Resource Management requesting evidence of resource entitlement and also for tenure approval for the existing outdoor dining and footpath entitlement over the State resource. The DERM responded by way of a letter to the appellant identifying that it did not require tenure over the subject area but it would give a General Authority that the activity of outdoor dining was 'traditionally consistent with the use of a road'.

In the initial appeal in the P&E Court, the issue to be determined was whether this 'General Authority' issued by DERM satisfied the requirement of section 3.2.1(5)(c) (Applying for a development approval) of the IPA.[1] Namely, whether it was in fact evidence of the Chief Executive of the department administering the State resource being satisfied that the development application would proceed in the absence of an allocation of, or an entitlement to, a State resource. In that appeal his Honour Everson DCJ, did not agree that the letter issued by DERM constituted such evidence, rather that it was only 'referring to a General Authority' and that such authority only included outdoor dining to which the public has unrestricted access where there were no 'fixed improvements unless they form part of the streetscape'.[2] His Honour did not consider that the appellant's deck formed part of the streetscape and summarily dismissed the appeal on the ground that the development application was not a properly made one.

1 *WAW Developments Pty Ltd v Brisbane City Council* [2010] QPEC 69 at [2].
2 Ibid at [16].

In September 2010, the appellant applied to the Queensland Court of Appeal to appeal against the summary dismissal of its appeal arguing that the P&E Court had erred in its decision in respect of section 3.2.1(5) (Applying for a development approval) of the IPA.

Decision

His Honour, Chesterman JA, with Muir JA and Ann Lyons J agreeing, found that the P&E Court erred on a question of law by wrongly concluding that the DERM's letter did not provide the evidence required by section 3.2.1(5) (Applying for a development approval) of the IPA. His Honour noted that it would be impossible to read the letter provided by DERM as indicating anything other than the Chief Executive's satisfaction that the development might proceed and that the development did not adversely affect the State resource in question. As his Honour pointed out, the letter expressly noted that the DERM did not require the appellant to obtain tenure over the part of the footpath covered by its deck and the reference to the General Authority, and copy provided with the letter, clearly indicated that the DERM did not require the appellant to obtain entitlement to the State resource and was content for the development application to proceed without such an entitlement.

His Honour's interpretation of the General Authority was that it clearly indicated that the DERM regarded the use of the deck for outdoor dining as an acceptable use of the footpath. He went on to further note that the P&E Court's analysis of the use of the deck in respect of forming part of the streetscape of Commercial Road was inappropriate in this context, as his Honour noted at paragraph [20]:

> *This approach misses the point. Ms Dunn's letter did not say that the Chief Executive would be satisfied that the development might proceed in the absence of an allocation of or entitlement to the resource only if the application fell within one of the examples described in the General Authority. The clear tenor of her letter was that the department did not require the application to obtain an entitlement to the resource, and was content for the application to proceed without such an entitlement.*

Held

- The application for leave to appeal was granted.
- The appeal was allowed.
- The order of the Planning and Environment Court was set aside.
- The respondent was to pay the costs of the application and the appeal.

Determining the level of assessment: The meaning of 'building height'

Samantha Hall | Katelin Kennedy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *AO-TAI Cleveland Pty Ltd v Redland City Council* [2011] QPEC 63 heard before Andrews SC DCJ

June 2011

Executive Summary

In this case, the Planning and Environment Court gave extensive consideration to the interpretation of the meaning of 'building height' in a local government planning scheme, in order to determine whether a development application was code assessable or impact assessable.

This case indicates the significance of adopting the correct interpretation of planning scheme provisions during the initial stages of the development application process in order to avoid time and cost delays of progressing with a development application on the basis of an incorrect interpretation of words in a local government planning instrument.

Case

This was a determination of a preliminary point regarding whether a development application for a development permit for a material change of use (**development application**) was code assessable or impact assessable, based upon the interpretation of the phrase "building height" as used in the Redlands Planning Scheme (**planning scheme**).

Facts

The appellant, AO-TAI Cleveland Pty Ltd (**appellant**) made a development application on or about 18 February 2009. On 7 December 2010, following a number of information requests and discussions between the appellant and Redland City Council (**council**), the appellant filed an appeal against the deemed refusal of the development application.

The issue for determination in this case was the definition of the words "building height" in the planning scheme in terms of the impact this phrase had on the determination of whether the development application would be code assessable or impact assessable.

Under section 2.1.23 (Local planning instruments have force of law) of the *Integrated Planning Act 1997* (**IPA**), the planning scheme was a statutory instrument to be used in the identification of development that is exempt, self-assessable, or assessable. Particularly relevant to the matters at hand were sections 4.14.4 (Medium Density Residential Zone - Table of Assessment for the Material Change of Use of Premises) (**Table of Assessment**) and 4.14.8 (Specific Outcomes and Probably Solutions applicable to Assessable Development, Table 2 - Maximum Overall Building Height) (**Table 2**) of the planning scheme.

The Table of Assessment provided that a development application would be code assessable if the building height did not exceed that detailed in Table 2. Table 2 provided two criteria related to building height, "Maximum Overall Building Height" (19 metres) and "Maximum Height to the Top of the Floor Level of the Highest Habitable Room" (13 metres (5 storeys)).

The development application was for an apartment building with a building height that did not exceed the "Maximum Overall Building Height" as outlined in Table 2, but with a height to the top of the floor level of the highest habitable room that exceeded the maximum in Table 2 (that is, greater than 13 metres). The council argued that because the building height exceeded the "Maximum Height to the Top of the Floor Level of the Highest Habitable Room" specifications, that it was impact assessable. The appellant alleged that the words "building height" in the Table of Assessment should be interpreted consistently with the definition in schedule 3 of the planning scheme as "the vertical distance from ground level to the highest point of the building and structures", and as such that only the "Maximum Overall Building Height" in Table 2 was required to be complied with in order for the development application to be assessed as code assessable.

Decision

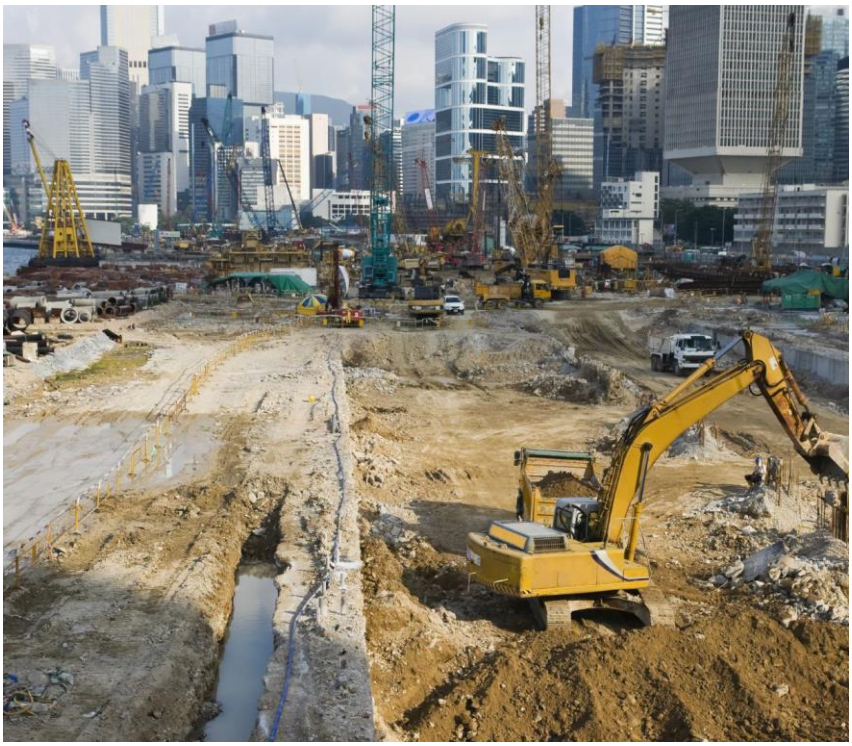
In deciding how the words "building height" should be interpreted and applied to the relevant provisions, his Honour Judge Andrews SC referred to sections 32A (Definitions to be read in content) and 32AA (Definitions generally apply to entire Act) of the *Acts Interpretation Act 1954*. He found that the definition of "building height" in the planning scheme, as outlined above, applied to the entire planning scheme, unless the context or subject matter indicated otherwise. Despite the council's demonstration that "building height" had not been used as defined in other sections of the planning scheme, his Honour found that unlike elsewhere, the words "building height" in the Table of Assessment did not indicate by context or subject matter that the definition of "building height" should not apply.

Furthermore, in reading the words in the Table of Assessment with the words in Table 2, his Honour determined that the Table of Assessment required a reference only to the "Maximum Overall Building Height" specification, rather than to both the "Maximum Overall Building Height" and "Maximum Height to the Top of the Floor Level of the Highest Habitable Room" specifications. His Honour came to this conclusion by virtue of the use of the words "building height" within the heading "Maximum Overall Building Height" and due to the fact that the specifications in the column entitled "Maximum Height to the Top of the Floor Level of the Highest Habitable Room" retained a purpose in setting a criterion for the assessment of an application (rather than for the determination of the level of that assessment).

As a result of these considerations, his Honour found that the planning scheme definition of "building height" should not be ignored when interpreting the Table of Assessment and the "Maximum Overall Building Height" column in Table 2.

Held

The development application was found to be code assessable, as it complied with the specifications for "building height" in the "Maximum Overall Building Height" column in Table 2 of the planning scheme.



Application of the Draft South-East Queensland Regional Plan – unusual circumstances

Samantha Hall | James Langham

This article discusses the decision of the Queensland Planning and Environment Court in the matter *Graeme Adrian Brown & Ors v Moreton Bay Regional Council* [2011] QPEC 71 of heard before Robin QC DCJ

June 2011

Executive Summary

This case involved unusual circumstances unlikely to ever be repeated. The Moreton Bay Regional Council (**respondent**) conceded it made an error in judging that two of development applications lodged by the Browns (**applicants**) fell foul of the draft South-East Queensland Regional Plan (**regional plan**) in force on the relevant day. The court ordered that the applications should be assessed as if the applications were properly made in the first instance, subject to the applicants paying the respondent the outstanding application fees for the applications and providing the original application documents.

Case

This case involved the respondent's refusal to receive related development applications for material change of use (**MCU**) from rural to rural residential and reconfiguring a lot (**ROL**) in the mistaken belief that draft regulatory provisions in the regional plan applied.

Facts

On 8 November 2004, the applicants attempted to lodge a development application for a MCU to carry out a rural residential use in a regional landscape and rural production area located at Clear Mountain. The land was identified as Lot 3 on RP126780 (Lot 3) and had an area of 6.69 hectares (**MCU application**). This application was accompanied by a concept plan which showed as, a new parcel, a block occupying the north-east part of Lot 3, being surrounded on the west and south by another L-shaped lot, that was also, being surrounded on its western and southern boundaries by another L-shaped lot.

On 2 June 2006, the applicant attempted to lodge development applications for a MCU and ROL. The ROL application referred not only to Lot 3 but also Lot 22 on SP112539 (**Lot 22**) as the relevant land. The proposed use was described as border alignment (to facilitate a future five lot rural residential subdivision) (**ROL application**). Lot 22 was owned by two gentlemen who were also applicants to the proceeding.

The respondent refused to accept the applications based on a misunderstanding of the regional plan, part G, which came into effect on 27 October 2004, which imposed requirements that the respondent asserted the applicants had not satisfied.

Decision

In deciding whether the MCU application should be allowed to proceed, his Honour Judge Robin QC referred to section 3.2.1 (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**) and, in particular, subsection (7)(f) which states "*An application is a properly made application if … the development would not be contrary to a State planning regulatory provision*". Applying this provision, his Honour then looked to the regional plan, concluding that is common ground that the MCU application did not comply with section 3 of division 2 of part G of the regional plan and it was on that basis that the respondent refused to accept the development application. However, his Honour confirmed that in concluding that the MCU application did not comply with the regional plan the respondent relied on requirements that the regional plan did not impose in the case of the MCU application.

His Honour, declared that the attempt to lodge the MCU application complied with the regional plan, therefore, the MCU application should be treated as though it was a properly made application, notwithstanding the following:

- the MCU application failed to contain a description of all the subject land in the lot;
- fees for the MCU application were not paid;
- the MCU application failed to include the consent of the owner of part of the subject land; and
- the MCU application referred to a different concept plan.

In deciding the ROL application, his Honour applied a ministerial exemption which was provided for the express purpose of enabling the ROL application to be lodged with the relevant authority in compliance with the IPA provisions within six months of 2 December 2005.

His Honour ordered as follows:

1. In relation to the MCU application, the applicants must by 25 May 2011:
   (i) pay the respondent the outstanding application fees;
   (ii) provide the respondent with the original application documents.
2. Upon receiving payment by 25 May 2011 and the original MCU application documents, the respondent must:
   (i) within 10 business days issue an acknowledgement notice for the MCU application; and
   (ii) assess the MCU application under the *Integrated Planning Act 1997*, as if it were properly made on 8 November 2004.
3. In relation to the ROL application, the applicants must by 25 May 2011:
   (i) pay to the respondent the outstanding application fees; and
   (ii) provide the respondent the original ROL application documents.
4. Upon receiving payment by 25 May 2011 and the original ROL application documents the respondent must:
   (i) within 10 business days, issue an acknowledgement notice for the ROL application; and
   (ii) assess the ROL application under the *Integrated Planning Act 1997*, as if it were properly made on 2 June 2006.

Held

The appeal was allowed.

Letting an appeal run stale

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hungerford v Maroochy Shire Council* [2011] QPEC 77 heard before Robertson DCJ

June 2011

Executive Summary

In civil proceedings parties have an overriding responsibility to the court and to each other to proceed with their matter as expeditiously as possible. This obligation is enshrined in court rules throughout Australia and is provided with the objective of ensuring that undue delay, expense and hardship are not burdened upon the courts and upon potential litigants. If a party allows an appeal to sit without any action taken to pursue the matter, then its proceeding may be dismissed by the court. This was the case for an appeal that was left to sit for eight years since the last substantive action was taken on the matter.

Case

This case concerned an application by Mr Donald Hungerford (**appellant**) to the Planning and Environment Court (**court**) to seek leave to proceed with his appeal against the former Maroochy Shire Council's (**respondent**) refusal of his development application for a development permit for a material change of use to establish a caretaker's residence, in which the last substantive step in the appeal had occurred over eight years ago.

Facts

In May 2002, the appellant applied to the respondent for a development application (**superseded planning scheme**) for a development permit for a material change of use to establish a caretaker's residence on land situated at 62-68 Parsons Road, Forest Glen. This development application was refused by the respondent on various planning grounds and the appellant subsequently lodged an appeal with the court in May 2003 appealing the refusal. At that time in May 2003 an entry of appearance was filed on behalf of the respondent and subsequently no action was taken in respect of the appeal until March 2011, when the respondent sought to have the matter mentioned in the court for review.

Despite the respondent's attempt to pursue the matter earlier in November 2009 and the overall lack of inactivity on the file, the appellant subsequently filed an application with the court seeking leave to proceed with the appeal pursuant to rule 389(2) (Delay) of the *Uniform Civil Procedure Rules 1999* (**UCPRs**). Under this rule if no step has been taken in a proceeding for two years from the time the last step was taken, a new step may not be taken without the order of the court.

In his evidence, the appellant outlined as reasons for his failure to proceed with the appeal in an expeditious manner is that he became involved in an unrelated planning appeal in relation to an adjoining property which took up most of his time and resources and he was also involved in a lengthy dispute with an electricity distributor regarding a proposal it had made to place power lines through his property. The respondent opposed the appellant's application to proceed with the appeal.

Decision

His Honour, Judge Robertson, refused the appellant's application, citing that the reasons submitted in response to the significant delay in continuing the proceedings were both unconvincing and unpersuasive.

His Honour referred to the case of *Zehnder Dezent JE Pty Ltd v Caloundra City Council* [2010] QPEC 68 and also to the general obligations provided under rule 5 (Philosophy—overriding obligations of parties and court) of the UCPRs which places an obligation on all parties to litigation, by way of an implied undertaking to the court, to proceed in an expeditious way. His Honour expressed the importance of this obligation and the appellant's quite obvious length of delay in continuing the appeal. His Honour also referred to the case of *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 which listed the factors that the court takes into account in determining whether the interests of justice require a case to be dismissed under rule 389 (Delay) of the UCPRs.

Judge Robertson indicated that the relevant factors which would support the refusal of the appellant's application included the length of the delay, the reasons for the delay, the explanation for the delay and the prospects of success. His Honour concluded that the eight year delay was an unacceptable time to allow the proceeding to continue without action, the explanation provided for the delay was unsatisfactory, the evidence submitted was unpersuasive and there was no real or substantial prospects of success were the appeal to proceed.

Held

- The application for leave to proceed with the appeal was refused.
- The appeal was dismissed.

Scope of an adverse submitter appeal

Samantha Hall | James Langham

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Barnes & Anor v Southern Downs Regional Council & Ors* [2011] QPEC 75 heard before Rackemann DCJ

June 2011

Executive Summary

The issue for the Planning and Environment Court (**P&E Court**) to determine was the permissible scope of an adverse submitter appeal against the decision of the respondent, Southern Downs Regional Council (**council**), to grant a development approval for the partial demolition of a building listed on the Queensland Heritage Register (**QHR**) and the council's register of cultural heritage places. The application was dismissed.

Case

This case was an application in respect of an adverse submitter appeal against the approval of a development application for the partial demolition of a building listed on the QHR and the council's register of cultural heritage places.

Facts

The second co-respondent, The McConaghy Group Pty Ltd (**developer**) had lodged a development application to partially demolish 84 Fitzroy Street, Warwick (**Number 84**) and to entirely demolish the neighbouring building at 82 Fitzroy Street, Warwick (**Number 82**). The demolition of Number 82 was self assessable under the relevant planning scheme. His Honour Rackemann DCJ (**Judge Rackemann**) had previously ruled that the appeal be limited to the partial demolition of Number 84 being the part of the development application that was impact assessable.

In the appeal, the appellants contended the following grounds:

- that the development application conflicted with the laws and policies administered by the first co-respondent, the Department of Environment and Resource Management (**DERM**); and
- that the partial demolition of Number 84 conflicted with the relevant planning scheme.

In this application, the developers asked the court to:

- determine that the appellants had no right of appeal with respect to that part of the decision notice that represents the response of the first co-respondent, DERM; and
- strike out the third ground of the appellants' appeal that the development application conflicted with the laws and policies administered by the DERM.

The scope of a submitter appeal was limited under *Integrated Planning Act 1997* (**IPA**). Section 4.1.28(1) (Appeal by submitters) of the IPA relevantly provided that a submitter for a development application may appeal to the court only against the part of the approval relating to the assessment manager's decision under section 3.5.14 (Decision if application requires impact assessment) of the IPA. Section 3.5.14 (Decision if impact assessment requires impact assessment) of the IPA applied to a decision on any development application which required impact assessment.

Section 4.1.28(2) (Appeals by submitters) of the IPA provided that an appeal under subsection (1) may be against 1 or more of the following:

> *(a) the giving of a development approval;*
>
> *(b) any provision of the approval including -*
>
> *(i) a condition of, or lack of a condition for, the approval; or*
>
> *(ii) the length of a period mentioned in section 3.5.21 for the approval.*

Decision

The developer contended that the grounds of appeal should be struck out in so far as they related to the laws administered by the DERM and submitted that such grounds fell outside the purview of section 4.1.28(1) (Appeals by submitters) of the IPA as they were not directed to that "part of the approval relating to the assessment managers decision under section 3.5.14 (Decision if impact assessment requires impact assessment) of the IPA".

Judge Rackemann found that the appeal was not, however, against the imposition of the DERM's conditions but rather it was an appeal of the kind referred to in section 4.1.28(2) (Appeals by submitters) of the IPA against the giving of a development approval. Accordingly, Judge Rackemann found that the relevant part of the Appellants' grounds of appeal sought not to overturn any part of the decision notice which was dictated by the DERM but rather to rely upon alleged conflict between the proposal and the laws administered by the DERM.

The developer also contended that the grounds of appeal should be limited to the matters referred to in section 3.5.14 (Decision if impact assessment requires impact assessment) of the IPA. Judge Rackemann found that if the permissible grounds of a submitter appeal were limited to whether the approval offended the subsections of 3.5.14 (Decision if impact assessment requires impact assessment) of the IPA, then the submitter appellants would not only be precluded from reliance on the laws administered by or policies applied by a concurrence agency, but would in so far as the assessment managers assessment was otherwise concerned, effectively be limited to arguing that the decision was beyond power and there would, in effect, be no right to contend for a different outcome by the exercise of discretion.

The developer finally contended that submitter appeal rights should be limited to matters concerning the planning scheme provisions since it was those provisions which triggered impact assessment. Judge Rackemann found that the question was not what triggered impact assessment but whether the appeal fell within section 4.1.28(1) (Appeals by submitters) of the IPA which he was satisfied it did.

Held

Application dismissed.

Protection of good quality agricultural land

Samantha Hall | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Caralan Pty Ltd & Anor v Caloundra City Council* [2011] QPEC 80 heard before Griffin SC DCJ

June 2011

Executive Summary

When deciding an appeal by way of hearing the matter anew, section 495 (Appeal by way of hearing anew) of the *Sustainable Planning Act 2009* (**SPA**) provides the Planning and Environment Court (**court**) must consider the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate. The judgment in this case is a good example of the court's process in interpreting various instruments with potential relevance and assigning weight to each accordingly. After this exercise, the court determined that the proposal conflicted with the relevant planning instruments which had a strong focus on the protection of Good Quality Agricultural Land (**GQAL**), and there were insufficient grounds to justify approving the development.

Case

This was an appeal against a refusal by the Caloundra City Council (**respondent**) of an application by Caralan Pty Ltd and Avilka Pty Ltd (**appellant**) for rezoning of the subject site from "Rural" to "Park Residential" under the relevant planning scheme and subdivision of the subject site into 79 park residential lots of 1,500 square metres in area and 2 balance lots.

Facts

The subject site was at 147-191 Railway Parade, Glasshouse Mountains and is properly described as part of Lot 96 on C311431 and part of Lot 97 on C311431.

The subject site was located approximately 1.3 kilometres from the township of Glasshouse Mountains and adjacent to an 'anomalous' residential subdivision (**Glasshouse Meadows Estate**) created in 1996.

The subject site was a part of a larger pineapple farm and had, along with surrounding parcels, been commercially farmed in the past by a tenant. Extensive farming areas were located to the south-west and north of the subject site, with other rural uses to the east.

The following planning instruments were considered by the court to have relevance to the application. Some salient points regarding the relevance of each instrument to the proposal are also detailed below:

1996 Caloundra City Planning Scheme (1996 scheme)

- This was the planning scheme in force at the time the application was made, and was a transitional planning scheme under the now-repealed *Integrated Planning Act 1997* (**IPA**).
- The Rural Zone designation, which much of the subject site was within, provided a minimum lot size of 40 hectares.

2004 Caloundra City Planning Scheme (2004 scheme)

- The 2004 scheme was able to be considered by the court pursuant to s4.1.52 (Appeal by way of hearing anew) of the IPA, which is in substantially the same terms as section 495 (Appeal by way of hearing anew) of the SPA.
- The Desired Environmental Outcomes of the 2004 scheme provide for:
  - GQAL to remain available for productive use, contribute to the City's scenic area and to be protected from incompatible development;
  - defined urban growth boundaries which create distinct urban and rural township communities;
  - the pattern of development to secure the inter-urban breaks which separate each hinterland township linked by the North Coast Railway. State Planning Policy 1/92 (**SPP 1/92**).
- SPP 1/92 provides for the conservation of GQAL.
- SPP 1/92 requires that GQAL should be protected from development unless there is an overriding need for the development in terms of public benefit.

South-East Queensland Regional Plan 2009-2031 (SEQRP)

- The SEQRP allocates the subject site to the Regional Landscape and Rural Production Area (**RLRPA**).
- With respect to rural land, the SEQRP provides the following:
  - rural production lands will be protected from further fragmentation and urban encroachment;
  - the RLRPA protects land from inappropriate development, particularly urban or rural residential development;
  - a desired regional outcome is the protection of agricultural lands and rural communities.

The following points summarise the points of conflict of the proposal with the relevant planning instruments:

- the introduction of urban development into the inter-urban break;
- the subsequent change in the intended rural character of the locality;
- the loss of GQAL in an area of commercial agricultural production; and
- the overall ineffective nature of the proposal in terms of a development with respect to the use of infrastructure and loss of agricultural land.

Decision

The court acknowledged that the Glasshouse Meadows Estate was anomalous in the area, however the existence of the Glasshouse Meadows Estate subdivision was not sufficient to allow the proposal on the nearby subject site.

The court decided the proposed development was substantially in conflict with the planning scheme in force, the 1996 scheme, and to varying extents with the other relevant instruments as identified, and that no sufficient grounds existed to justify approval of the proposal.

Held

The appeal be dismissed.

Consistency with planning schemes

Diane Coffin | James Langham

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Westlink Pty Ltd v Lockyer Valley Regional Council* [2011] QPEC 96 heard before Searles DCJ

July 2011

Executive Summary

This case involved an appeal against a council's decision to refuse a development application for a Natural Gas Fired Electricity Peaking Station (**natural gas station**) on the basis that it did not comply with the planning scheme and the visual amenity would be inconsistent with the rural nature of the local area.

Case

This case involved an appeal to the Planning and Environment Court (**P&E Court**) against a decision of the Lockyer Valley Regional Council (**council**) to refuse a development application lodged by Westlink Pty Ltd (**Westlink**) for a material change of use, an environmentally relevant activity and operational works in relation to a natural gas station (**application**).

Facts

Westlink applied to the council proposing to build a natural gas station on a 70 hectare block of land located approximately two kilometres north of Gatton (**subject land**).

The subject land was divided between two zones in the planning scheme, the rural general zone and the rural agricultural zone. Westlink proposed to develop the subject land over a 10 year period in three stages involving six natural gas fired turbines and other necessary ancillary equipment and facilities.

The application triggered referral to the Department of Environment and Resources Management (**DERM**) and the Department of Main Roads (**DMR**) as concurrence agencies. Both DERM and DMR approved the application subject to conditions. The application was also subjected to extensive community consultation.

On 11 August 2010, the council met to consider the application and resolved to refuse the application based on a number of provisions in the planning scheme including the following provisions of the Rural General Zone Code (**code**):

> *4.11 - Overall Outcomes for Rural General zone*
>
> *2. The overall outcomes sought for the Rural General zone are the following:*
>
> *a. The Zone is to provide for agricultural production, other rural activities and the maintenance of the Shire's landscape quality that is important to the overall character of the Shire.*
>
> *b. Closer settlement, particularly urban and rural residential development, is not inconsistent with the Zone, in accordance with the SEQ Regional Plan.*
>
> *4.12 - Specific Outcomes for Rural General zone*
>
> *The specific outcome sought for the Rural General zone are the following:*
>
> *a. Rural service industries may be appropriate where complying with the purpose of the code.*
>
> *b. A range of other recreational, educational or tourism related uses is supported in the zone, ...*
>
> *c. All other defined uses and other not defined uses, not specifically identified in Table 1 are not consistent with the purpose of the Zone.*

Council arguments

The council stated that the proposed development, when tested against each of the criteria in 4.11(2)(a) failed, because it was not agricultural production, was not rural activity and it did not maintain the Shire's landscape.

The council also pointed to the visual amenity. Evidence was provided by Mr Hassall and Mr McGowan, in the second joint expert report, which stated the proposed development was inconsistent with the predominantly rural nature of the local area. The council stated that this inconsistency went directly to the issue of visual amenity, but did not establish an absence of conflict with the planning scheme.

Finally, the council put forward the town planning evidence of Mr Caven that both the planning scheme and South East Queensland Regional Plan 2009 - 2031 (**SEQRP**) made strong statements about protecting rural landscapes and that the proposed development was inappropriate on the subject land.

Westlink's arguments

Westlink relied on the fact that if the development had been proposed by a public entity it would have fallen within the "special use definition" and would, therefore, have been self or code assessable.

Westlink also argued that the mere identification of a use as "non consistent" does not result in the use being in conflict with a planning scheme.

Westlink also argued that in reading the provisions relating to the rural zone it was clear that while the rural zone may have been intended to function as an area to support agriculture, the planning scheme recognised that the land within the rural zone may be developed for any number of purposes.

Decision

His Honour Searles DCJ determined that the issues that needed to be addressed were whether the proposed development was in conflict with the planning scheme regarding its appropriateness in the rural general zone and the visual impact the proposed development may have had.

In determining whether the application was in conflict with the planning scheme, his Honour stated that the code contained inconsistencies. The overall outcomes of the code, being the purpose of the code, were quite precise as to what the rural general zone provides for. However, the specific outcomes were at odds with the overall outcomes. His Honour found that when looking at the planning scheme as a whole that a proposal of the type before the court was not in theory in conflict with the purpose of the code or specific outcome 4.12(K).

Having determined the proposed development would not in theory be in conflict with the purpose of the code or specific outcome 4.12(k), His Honour looked to the evidence put forward by Mr Hassall and Mr McGowan regarding visual impact on amenity and concluded that in fact the proposed development did conflict with the planning scheme. His Honour was satisfied that, the natural typography, the proposed landscaping and the limited prism of visual amenity from the Warrego Highway would not significantly impact on the amenity and, at worst, only the tips of the stacks would be visible.

Held

The appeal was allowed and the application was approved subject to the resolution of the issue of suitable conditions.

Building works approvals must align with planning approvals

Diane Coffin | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bundaberg Regional Council v Bruce Desmond Loeskow & Ors* [2011] QPEC 95 heard before Searles DCJ

July 2011

Executive Summary

This article discusses the *Sustainable Planning Act 2009* (**SPA**) and the *Building Act 1975* (**BA**) which require building certifiers to ensure that any building approval issued conforms to an existing planning approval, or that a planning approval is obtained if required and not already in place. However, in cases where this does not occur through mistake or negligence, a developer will often be required to regularise their approvals through a fresh application or in extreme cases, demolish the building works.

Case

This was an application by the Bundaberg Regional Council (**council**) for declaratory relief and enforcement orders against a developer (**Loeskow**) and a building certifier (**Drew**) concerning the Loeskow's vacant land at 6 Seahorse Court, Innes Park (**land**). Among other grounds, the council contended that Drew's grant of a building works approval (**BW**) for a large shed on the land was not permitted where there was no valid material change of use approval (**MCU**) in place.

Facts

Loeskow owned the land and an adjoining lot on which a dwelling was constructed. On 14 January 2010, Loeskow applied to Drew for approval to construct a large shed on the land and, on 18 January 2010, a Request for Concurrence Agency Assessment Planning was lodged by Drew with the council.

There was some confusion about a subsequent amendment of the application. The council's records showed it had two versions of the application. One application was regarding 'Design and Siting' and the other application had neither of the relevant checkboxes completed to indicate whether it was an application relating to 'Design and Siting' or 'Amenity and Aesthetics'. Both applications were dated 18 January 2010, but Drew contended that the second application was lodged with the council on 21 January 2010 and was intended to replace the application lodged on 18 January 2010.

In any event the council resolved to refuse the application on 4 February 2010 on the basis that the gross floor area of the shed was more than double that which was prescribed in the planning scheme, the shed would be visually obtrusive, was incompatible with the locality and would not contribute to an attractive streetscape. A letter communicating the refusal was sent by the council on that day but was not received until 8 February 2011.

Drew wrote to the council on 10 February 2010 stating that the ten business day period for assessment of the application had expired on 2 February 2010. According to Drew, this meant that a deemed approval without conditions had been given. The letter gave the council five days to respond, failing which a building approval would be issued. No response was received and Drew proceeded to grant an approval for the shed on 25 March 2010.

However, if the building application was lodged on 21 January 2011, the council would not have been required to issue a referral agency response until 4 February 2010. Ultimately the court's decision did not rely on the factual issues regarding the time limit or whether there was a deemed approval.

The building approval allowed a gross floor area for the shed of 134m^2 contrary to the requirement in the planning scheme that a domestic storage shed have a maximum gross floor area of 60m^2. Drew contended that there was an interpretation of the planning scheme that allowed a shed of that size as long as it was used for domestic purposes.

The council contended that a MCU was required to use the land for a shed which exceeded the requirements for domestic storage. Section 83(1)(a) (General restrictions on granting building development approval) of the BA requires that a private certifier must not grant a building approval until all necessary planning approvals for the development are effective.

The court accepted the council's position in this regard and it was unnecessary to consider the further grounds raised by the council.

Decision

A MCU was required because the land was changing from vacant land to being used as a shed for domestic storage. No valid MCU had been granted by council. In this circumstance Drew had no power to grant the building approval and a development offence had occurred.

Held

Orders were made pursuant to section 604 (Making enforcement order) of SPA declaring the building approval invalid and requiring Loeskow and Drew to lodge development applications for the MCU and BW, thereby regularising the works.

The Personal Property Securities Act 2009

Paul Muscat | Chris Newby

This article discusses the *Personal Property Securities Act 2009* (Cth) (PPSA) which will commence in October 2011 and will affect all business' including those operating in the building and construction industry

July 2011

Background

The PPSA fundamentally changes the law and practice in relation to security interests. It replaces 70 Commonwealth, State and Territory Acts with a single comprehensive framework.

Accordingly, all business' will need to understand what is meant by terms like 'perfection', 'attachment', 'control' and 'possession'.

Under the PPSA, a new electronic 24/7 security interest register will be operated by ITSA (**PPSR**) to replace existing State and Commonwealth registers.

What does the PPSA apply to?

The PPSA applies to 'security interests' in 'personal property' granted by individuals, partnerships, corporations and other entities.

'Security interest' is defined 'functionally' to include all transactions that, in substance, secure payment of performance of an obligation. It also deems certain transactions (such as leases of goods for more than one year) to create security interests, even if they do not secure payment or performance of an obligation.

As a result, a range of 'ordinary course of business' transactions are treated as security interests. For example:

- conditional sale agreements including agreements to sell subject to retention of title;
- hire purchase agreements; and
- leases of goods.

How does this affect the construction industry?

Business' involved with construction or procurement contracts, ought to consider the following:

Retention of title or "Romalpa" clauses

Romalpa clauses are standard in the majority of construction contracts. The general rule with regards to Romalpa clauses is that property in goods does not pass to a buyer until the seller receives payment of the full price.

Traditionally, unless the drafting of a clause or statute states otherwise, a Romalpa clause will not be regarded as a security interest . However, under the PPSA, Romalpa clauses will be regarded as security interests no matter how one drafts a clause or statute. In future, to be legally protected, Romalpa clauses must be registered before the 10th business day after the delivery of the goods.

Contractor's rights over its temporary works

Temporary works are often integral in construction projects, for example scaffolding and temporary site fencing. Traditionally, construction contracts have not canvassed temporary works in detail.

Although temporary works are often left on a purchaser's or principal's site, no title or ownership passes and contractors have previously been protected by the nemo dat rule which in short means no one can give what they do not have.

Accordingly, in terms of construction projects, purchasers or principals cannot sell or grant security over temporary works since they do not have title.

Contractors must be aware that under the PPSA, the nemo dat rule may no longer apply and a contractor's title in temporary works may be at risk if left unregistered. For this reason, it is important that contractors take care to specifically incorporate temporary works into their construction contracts from the outset.

Principal's rights over construction plant on take out

Some construction contracts provide principal's with the right to:

- take over construction plant and equipment in circumstances for the completion of work where a contractor defaults; and
- sell such plant as a means of compensation.

Under the PPSA, it is probable that a principal's rights as mentioned above may qualify as a security interest and unless registered, such plant and equipment may be lost on insolvency.

What will happen in October 2011?

On the commencement of the PPSA:

- security interests entered in most, but not all, existing State or Commonwealth registers (such as the ASIC company charges register) are migrated to the new PPSR;
- security interests existing at the commencement of the PPSA (called 'transitional security interests'), but which are not on a register that is to be migrated, will need to be perfected. This includes security interests created under ordinary course of business transactions such as retention of title and leases of goods that are not currently registrable.

Although there is a two year grace period to register transitional security interests, there is a risk that unless the security interest has been registered during this period, the secured party's interest in the property could be lost if the relevant property is sold. Early registration is therefore critical.

All security interests created after October 2011 will need to be registered on the PPSR or otherwise 'perfected' in order to ensure they are effective. Depending on the property, 'perfection' can result from 'possession' or 'control' as an alternative to registration.

What should you do?

What you need to do will depend on your business. Some generally applicable suggestions include:

- review existing contracts and products:
  - ordinary course of business arrangements such as supplies on retention of title terms may now be registrable;
- **documents previously negotiated** may now be subject to overriding PPSA provisions such as those relating to enforcement of security interests:
  - the wide definition of security interest in the PPSA may result in an inadvertent breach of 'negative pledge' covenants to financiers;
- identify what 'transitional security interests' will be granted to you as at October 2011 and which of those are to be migrated to the PPSR and which ones are not;
- **review your policies and procedures** if your business involves entry into registrable transactions (such as the supply of goods on retention of title terms or leases of goods) as a matter of course you may need to:
  - understand the new registration procedures; and
  - develop policies to ensure that all interests are registered and that you have correct and up to date databases of such interests;
- **employee education** staff may need to be trained to understand the parts of the PPSA relevant to your business, any new or amended standard documentation and any changed policies and procedures.

Productivity Commission Report on Planning, Zoning and Development Assessment

Ben Caldwell | James Langham

This article provides an overview of the Performance Benchmarking of Australian Business Regulation: Planning Zoning and Development Assessment Report (Report) issued by the Commission in April 2011

August 2011

Executive Summary

In February 2006, the Council of Australia Governments (**COAG**) agreed to adopt a common framework to limit the regulatory burden across all levels of government relating to planning, zoning and development assessment. COAG enlisted the help of the Productivity Commission (**Commission**) to draft a report on the laws and practices that unjustifiably restrict competition, and the use of the appeals system to delay development applications.

Regulatory frameworks

The Report considered the regulatory frameworks of each State and Territory and noted that as the frameworks have evolved independently they differ in many respects. The Report made particular reference to the following:

- **Planning Acts and Regulations** – Although planning acts are regularly amended, and half have undergone re-enactment in the past 5 years some planning acts have been in force for many years (eg NSW for 31 years).
- **Strategic Plans** – COAG agreed in December 2009 that by 2012 all States and Territories will have capital city strategic plans in place. In 2010 all jurisdictions except Tasmania and the Northern Territory had capital city strategic plans to assist local governments in planning and development.
- **Planning instruments** – The number and structure of planning instruments varies greatly across jurisdictions.

The Report considered the hierarchy of planning instruments and the delay they were causing to development applications. The number of planning instruments varied greatly across the States and Territories.

The Report found Tasmania, with only one level of planning instruments lacked guidance from the State. While Western Australia with eight levels of planning instruments was extremely difficult to navigate.

Infrastructure

The Report categorised infrastructure as:

- economic infrastructure comprising of water and sewerage, transport, energy distribution and information and communication networks; and
- social infrastructure comprising of schools, police, hospitals and recreation facilities.

The Report focused on how different aspects of infrastructure interact with the planning, zoning and development systems of the States and Territories.

State and Territory frameworks for infrastructure provision

States and Territories have responsibility for certain areas of infrastructure (schools, hospitals and police services), however, State and Territories also provide infrastructure planning for their jurisdictions.

The report identified that Victoria, Queensland and South Australia as the States most likely to deliver on their infrastructure plans as they have detailed infrastructure plans with a level of committed funding and a timeframe for delivery.

Developer contributions for local infrastructure

Developer contributions for local infrastructure have been created so local governments can recover costs for infrastructure which directly benefit development. Development contributions are collected through levies or impact fees with payment becoming a condition of final approval.

Research conducted for the Report showed stakeholders had common concerns over increases in developer contributions in recent years and the potential for future increases. Some of the reasons advanced for the increases in developer contributions include:

- the rise of market instruments, such as user-pay charges, as an approach to levying charges on development;

- constraints on local governments, such as rate capping, leading to a greater reliance on other funding alternatives;
- urban expansion pushing development further from existing infrastructure networks; and
- community expectations of higher quality infrastructure.

Leading practices in levying developer contributions

The report outlined the following leading practices in levying developer contributions:

- infrastructure charges should be used to finance major shared infrastructure;
- infill development where system-wide components need upgrading or augmentation that provide comparable benefits to incumbents should be funded out of borrowings and recovered through rates or taxes;
- local roads, paving and drainage should be constructed by developers and then dedicated to local government with the full cost of the infrastructure passed on to residents in the final sale price;
- for social infrastructure which satisfies an identifiable demand related to a particular development the costs should be allocated to that development with upfront developer charges; and
- for social infrastructure where the services are dispersed more broadly, accurate cost allocation is difficult if not impossible and should be funded with general revenue.

Restriction on competition

The Report identified historically government involvement in infrastructure had been for the good of the public. However, the Report noted that while there is scope to increase private sector involvement in some areas of infrastructure, governments are making it difficult, even undesirable to privatise some infrastructure services which may benefit the broader community.

Governance of the planning system

The term "governance" in a planning sense refers to establishing policies and rules to allocate resources for implementation and to coordinate and control the resulting activities. Good governance is achieved through consistent, predictable and strong inter-government relationships.

As well as good governance a wide range of planning instruments that control the growth and development of cities are needed. For the planning instruments to be effective, they must be consistent, current and promote certainty of rules and outcomes.

COAG provides the prime means by which Commonwealth and State/Territory governments agree on broad policy objectives and coordinate their implementation. Improving coordination and cooperation amongst governments in regard to planning, zoning and development is crucial to ensuring that core policy objectives can be delivered smoothly and without creating bottlenecks.

Most States and Territories have a set of planning documents that includes a State level economic development strategy, strategic plans for cities and regions, and infrastructure plans for cities and regions.

The Commonwealth has generally kept a distance in the planning and zoning outcomes. However, it has created policies in numerous other fields such as heritage, health, environment, immigration and tourism.

There are currently a number of initiatives underway by the Commonwealth government that will influence the planning of cities including:

- the *National Ports Strategy* (released 7 January 2011);
- the *National Freight Strategy* (released 22 February 2011);
- the *National Aviation Strategy* (released 3 March 2011);
- the *Sustainable Population Strategy* (released 13 May 2011); and
- the *National Urban Policy* (released 18 May 2011).

Leading practices

The Report identified seven leading practices to achieve more efficient planning and zoning outcomes. The Report found that if the leading practices were adopted planning and development applications would be more efficient which would result in reduced costs and time for all parties involved.

The seven leading principles identifies by the report were as follows:

1. **Early resolution of land use and coordination issues** – determining as much planning policy as possible early in the approval process.

2. **Engaging the community early and in proportion to likely impacts** – increasing community engagement in developing strategic land use plans and subsequent changes can help to achieve better community buy in schemes.
3. **Broad and simplified development control instruments** – planning systems can suffer from planners who try to prescriptively determine how every square metre of land will be used and from developers who play a strategic game of buying relatively low-value land and attempting to rezone it to make a windfall gain.
4. **Rational and transparent allocation rules for infrastructure costs** – see leading practice under infrastructure above.
5. **Improving development assessment and rezoning criteria and processes** – the commission supports the following practices:
    - **Link development assessment requirements to their objectives** – Clearly link development assessment requirements with policy intentions that can be assessed against rules or decision criteria.
    - **Use a risk based approach** – Stream development and rezoning applications into assessment 'tracks' (exempt, prohibited, self assessable, code assessable, merit assessable and impact assessable) that correspond with the level of assessment required to make an appropriately informed decision. This both speeds up most development assessments and rezonings, and releases assessment resources.
    - **Facilitate the timely completion of referrals** – Develop memoranda of understanding between referral bodies and planning authorities regarding what advice will be provided by referral bodies and how that advice will be dealt with by planning authorities.
    - **Adopt practices to facilitate the timely assessment of applications** – Adopt electronic development assessment systems to reduce costs for businesses and residents but also to improve consistency, accountability, public reporting and information collection/benchmarking. Limit the range of reports that must accompany an application to those essential for planning assessment. Ensure the skill base of Council development assessment staff includes a good understanding of the commercial implications.
    - **Provide transparent and independent alternative assessment mechanisms** – Outline clear criteria on what triggers approval.
6. **Disciplines on timeframes** – More extensive use of timeframes for planning processes would ensure that agencies place more emphasis on efficiencies whilst giving developers more certainty. Statutory timeframes, with limited 'stop the clock' provisions, and deemed-to-comply provisions would be beneficial for development assessment and referrals.
7. **Transparency and accountability** – Transparency and accountability in planning decisions can be enhanced through:
    - ensuring that planning scheme amendments have at least as much public scrutiny as is given to development assessments; and
    - the appropriate availability of appeals for development assessment and planning scheme amendments.

Diligence in identifying the frustration

Diane Coffin | Matthew Soden-Taylor

This article discusses the decision of the Queensland Court of Appeal in the matter of *Hillcrown Pty Ltd & Anor v O'Brien & Anor* [2011] QCA 129 heard before Fraser and Chesterman JJA and Peter Lyons J

August 2011

Executive Summary

This case was an appeal to the Court of Appeal of a decision of the Supreme Court regarding a contractual dispute relating to the construction of a golf course on land at the Gold Coast. This case highlights the importance of being extremely diligent in detailing the circumstances where a commercial agreement will be frustrated. This is particularly relevant in the area of obtaining development approvals which can often experience delays and uncertainty.

Case

This case was an appeal to the Court of Appeal of a decision of the Supreme Court regarding a contractual dispute relating to the construction of a golf course on land at the Gold Coast. The key issue for the purpose of this article was whether the trial judge erred in his findings in respect of whether the contract was frustrated by the first appellant's failure to obtain the necessary development approvals from the Gold Coast City Council for the construction of the golf course.

Facts

By a written contract made on 30 June 2000, the respondents agreed to sell to the first appellant two separate areas of land, one of which was zoned as to permit construction of a golf course (**Area A**). The respondents retained ownership of an area of land (**Area C**) immediately adjacent to land (**Area B**).

On 30 June 2000, by a deed between the respondents and the appellants, the first appellant undertook to complete the construction of a golf course on Area B and the second appellant guaranteed the first appellant's performance of that obligation.

The first appellant failed to construct the golf course by the time specified in the deed or at all. The respondents claimed that the residential development in Area C was less valuable and accordingly, the respondents suffered damage.

The respondents relied on a clause in the deed which provided that the amount of such damage in this respect would be $1,500,000. The appellants argued that the deed was frustrated by the first appellant's failure to obtain the necessary development approvals from the Gold Coast City Council for the construction of the golf course.

Decision

There was no mention in the deed about the obtaining of the necessary development approvals, accordingly the Court of Appeal held as follows:

> *The mere fact that the parties knew that an approval was necessary to render the work lawful could not of itself justify construing clause 2 of the deed as though it provided that the first appellant's obligation was qualified by the assumption, not expressed or otherwise implied in the deed, that the necessary approval would be obtained. The failure to obtain the approval would render performance of the primary obligation illegal, but it would not preclude performance of the first appellant's 'secondary obligation' to pay damages, an obligation which was recognised in clause 3 of the deed.* [at 9 per Fraser JA]

On the matter of whether the trail judge erred in striking out the appellants' defence of frustration on the basis that it did not disclose a reasonable ground of defence, the court held as follows:

> *It is clear from Mason J's exposition of the nature of frustration that, where a contract does not address the consequences of a supervening event, whether it has become frustrated will seldom, if ever, depend only upon the terms of the contract, but will, as well, involve an investigation of what the parties knew or contemplated about the factual context in which the contract was to be performed. It follows that it will often not be possible to determine the question, frustration or not, with reference only to the terms of the contract.* [at 35 per Chesterman JA]

It is for this reason that Chesterman JA found that he would allow the appeal to the extent of enabling the appellants to supplement their pleadings to assert additional facts to support the plea of frustration.

His Honour Peter Lyons J in his minority judgement on this issue held as follows:

> *It is no answer to say that an implied obligation fell on the first appellant to take all steps necessary to obtain the approval; and that it failed to do so. That may preclude reliance by the appellants on the fact that the required approval was not obtained; but that is a matter for trial, and it does not have the consequence that the defence [of frustration] should be struck out.* [at 64 per Peter Lyons J]

Held

The court held that the appeal was allowed to the extent only of adding an order that the appellants have leave to deliver a further amended defence in respect of the circumstances of frustration within 21 days of the delivery of judgement.

The court also held that the appellants would pay the respondents' costs of the appeal.

Colin Biggers & Paisley

The essentials for a supermarket: sufficient economic and planning need

Diane Coffin | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fabcot Pty Ltd v Gold Coast City Council & Anor* [2011] QPEC 85 heard before Dorney QC DCJ

August 2011

Executive Summary

When the courts are deciding an appeal against a council's refusal of a retail or commercial development, such as a supermarket or shopping centre, one of the commonly raised issues is whether there is a sufficient economic and/or planning need to justify the proposed development. This was the issue for the court to consider in respect of a proposed supermarket and various speciality shops to be built in the Emerald Lakes development at the Gold Coast.

Case

This case concerned an appeal by Fabcot Pty Ltd, a wholly owned subsidiary of Woolworths Limited (**appellant**), against the decision of the Gold Coast City Council (**respondent**) to refuse a development application for a development permit for a material change of use for a shopping centre.

Facts

In December 2009, the appellant applied to the respondent for a development application for a development permit for a material change of use for a shopping centre and a development permit for operational works with respect to land situated at 1 Emerald Lakes Drive, Carrara (**proposed development**). The proposed development was situated within the Emerald Lakes development at the Gold Coast and was proposed to include a shopping area with a gross floor area of 4,070m² which would be made up of a full line Woolworth's supermarket, office and staff amenities and various speciality shops. Prior to the appellant's development application, various preliminary approvals were granted for the Emerald Lakes development which provided for a mixed use residential and tourist development, public and private open space, lake and recreation development.

In June 2010, the appellant's development application was refused by the respondent on the basis of conflicts with the prior preliminary approvals and also conflicts with the planning scheme, specifically in respect of the development principles in the Guragunbah Local Area Plan (**LAP**).

The appellant appealed the decision to the Planning and Environment Court (**court**) arguing that the proposed development would not compromise the achievement of the desired environmental outcomes for the planning scheme and would not conflict with the planning scheme itself. It was determined by the court that the major issues to be considered in determining whether the appeal should be allowed included whether there was sufficient economic and planning need for the proposed development and whether there was a conflict with the planning scheme and, if so, whether sufficient grounds had been established to refute such a conflict.

Decision

His Honour, Judge Dorney QC DCJ, allowed the appeal and approved the development application, subject to conditions.

On the issue of economic need, his Honour referred to the case of *Landel Pty Ltd & Anor v Ridgeland Shire Council* [2002] QPELR 402 and noted that economic need requires greater weight be given to the interests of the community than those of existing retail facilities. On this point he agreed with the submissions made by the appellant that economic need was established because the residents within the catchment areas would enjoy the benefit from the provision of a full-line supermarket, which presently was not provided closer than 4.5km away. His Honour found that the proposed development would provide substantial benefits to the future population growth of the Emerald Lakes development and the need for a supermarket of the size proposed was consistent with and had been previously recognised in the prior preliminary approvals.

His Honour also concluded that planning need for the proposed development was established because, whilst the permitted uses in the prior preliminary approvals for development of the kind proposed were for 'convenience shops', the 'template' for the Emerald Lakes development had changed since those preliminary approvals were granted. His Honour noted that the proposed development, of which its largest feature was a supermarket, would fit that template and would fit within the changed nature of the Town Centre of the Emerald Lakes development. His Honour specially noted at paragraph [76] that:

> *I have given significant weight to those Approvals, pursuant to s 3.5.5(2)(d) of the IPA, but the import of that weight is that the development shows flexibility in its evolution and that this Proposed Development fits well both in the continuing concepts and in that flexibility.*

In respect of the potential conflicts with the planning scheme, his Honour referred to the case of *Main Beach Progress Association v Gold Coast City Council & Ors* [2008] QPEC 37 and noted that whilst the table of assessment in the LAP did not provide for the use proposed, being a 'shopping centre', that did not demonstrate a substantial conflict with the planning scheme. His Honour reasoned that a 'shop' is not an undesirable or inappropriate form of development that would be envisaged in the LAP and that a 'supermarket' is itself a 'shop'. His Honour found that the extent that the proposed development was for a 'shopping centre' was limited as the development was largely taken up by the supermarket and the proposed development would also perform a 'local convenience function' which was envisaged by the LAP.

His Honour also dismissed other arguments in respect of conflicts with the planning scheme relating to 'clustering' of development and 'limited' development within the LAP. Additionally, his Honour also considered it appropriate to impose conditions on the appellant's development application relating to the movement of traffic coming in and out of the proposed development to account for a nearby school.

Held

- The appeal was allowed and the development application approved.
- The identified minor changes were excused.
- A number of identified conditions concerning traffic were imposed on the approval.
- The parties were to prepare such draft orders as were necessary to implement those decisions.

Costs in Federal Court environmental matters

Diane Coffin | Aaron Madden

This article discusses the decision of the Federal Court of Australia in the matter of *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No. 9)* [2011] FCA 661 heard before Logan J

August 2011

Executive Summary

This case involved an application for costs made after the resolution of a dispute relating to a condition requiring Burnett Water Pty Ltd (**Burnett Water**) to incorporate a fish transfer device into the operation of the Paradise Dam (**dam**) on the Burnett River. The condition was attached to an approval of the construction and operation of the dam which constituted a 'controlled action' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

Having defeated the claims of the Wide Bay Conservation Council (**WBCC**) in relation to their assertions that Burnett Water had not complied with the condition relating to the fish transfer device, Burnett Water not only sought costs under the general principle that costs follow the event, but also sought to be awarded costs on an indemnity basis and on a gross sum basis.

Case

This case involved an application by the respondent company Burnett Water for a costs order against the WBCC.

After defeating the claims in the *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No. 8)* [2011] FCA 175 judgement (**No. 8 judgmen**t), Burnett Water not only sought costs under the general principle outlined in section 43 (Costs) of the *Federal Court of Australia Act 1976* (Cth), that costs follow the event, they also sought to be awarded costs:

- on an indemnity basis, to the extent that these costs related to allegations of misconduct put forward by the applicant (which were subsequently abandoned at trial); and
- on a gross sum basis.

Facts

The consideration of the award of costs in the present case, stems from the previous litigation conducted by the WBCC over numerous years culminating in the No 8 judgment. That litigation involved the construction and operation of the dam on the Burnett River by Burnett Water. The construction and continued operation of the dam constituted a controlled action under the EPBC Act.

This classification is due, at least in part to the Burnett River being one of the few rivers in Australia which is inhabited by the Queensland Lungfish. As part of the approval of the dam, a condition was inserted requiring Burnett Water to install a fish transfer device suitable for the lungfish, which was to commence once the dam became operational. The WBCC alleged that Burnett Water had not complied with the condition, as the fishway as installed was not 'suitable' for the lungfish for a number of reasons. Due to this, the WBCC, as an 'interested person' under section 475(1) (Injunctions for contravention of Act) of the EPBC Act, sought an injunction requiring Burnett Water to comply with the condition.

In the No. 8 judgment, Logan J construed the relevant condition in such a way as to find that Burnett Water had, at all relevant times, ensured the fish transfer device was operational and 'suitable' for the lungfish. Importantly, in the context of the costs analysis of the current case, allegations of misconduct levelled at Burnett Water involving attempts to mislead government officers during audits of the operation were abandoned at trial during the hearing of the No. 8 judgment.

Decision

Costs follow event

Logan J began his decision by conducting an analysis into the circumstances in which a matter arising under the EPBC Act instituted by 'interested persons' could warrant a departure from the ordinary position that costs follow the event. His Honour found that for this to occur, an exception or a 'special feature' must be found in the particular circumstances of the case. His Honour concluded that Burnett Water should not be deprived of its rights to costs merely on the basis that the WBCC represented a public interest, or conducted activities concerned with conservation. His Honour found that while these factors may be relevant in considering a departure from a conventional costs order, they were not determinative in this context.

Partly on this basis, Logan J found that there were no special features of the No. 8 judgment that indicated that costs should not follow the event. To this end, his Honour found that costs should be awarded to Burnett Water on the conventional party-party basis, however, his Honour sought to offset these costs against indemnity costs which were previously ordered to be paid by Burnett Water to the WBCC.

Indemnity Costs

In relation to the indemnity costs sought by Burnett Water in respect of allegations of misconduct levelled by WBCC, Logan J undertook an analysis of the circumstances in which the recovery of this greater quantum of costs are generally awarded in lieu of ordinary party-party costs.

His Honour noted that the allegations of misconduct brought by the WBCC were neither relevant to the alleged contravention of conditions, nor was their basis supported by submissions or evidence. Given this, Logan J found that the requirements for securing indemnity costs were made out. His Honour limited the basis of these costs to the preparation and filing of an affidavit used to counter the allegations of the WBCC.

Gross Sum costs

In considering the application by Burnett Water to have costs awarded as a gross sum rather than undergoing the process of taxation of the various relevant items in the bills of cost, Logan J found that O 62 r 4(2)(c) of the Federal Court Rules was clear in providing a discretion to award costs as a gross sum.

In determining whether to exercise this discretion, his Honour considered Federal Court authority which indicates that the discretion to award a gross sum could be exercised in lengthy, complex litigation matters where the taxation of costs would cause unreasonable delay and expense.

His Honour considered that whilst the current case could satisfy these requirements, an exercise of the discretion will require an 'evidentiary foundation'. Burnett Water did lead evidence by way of affidavits of a cost assessor as to the suitability of the gross sum sought. Whilst various deficiencies of the affidavits were criticised by Logan J, a gross sum was ultimately allowed by his Honour, albeit a sum which was significantly reduced to reflect what his Honour saw as being reasonable in the circumstances of the case.

Held

- Burnett Water was entitled, as against the WBCC, in respect of its costs of and incidental to the proceedings, including those ordered to be paid on an indemnity basis, to a gross sum of $1,090,031.50 instead of taxed costs.
- The WBCC is entitled, as against Burnett Water in respect of its costs thrown away by the adjournment of the trial to a gross sum which, by consent, is fixed in the amount of $50,000 instead of taxed costs.
- Allowing for set-off the WBCC is to pay Burnett Water the amount of $1,040,031.50 in respect of its costs of the proceedings.

Colin Biggers & Paisley

Writing development approval conditions

Ian Wright | Matthew Soden-Taylor | James Langham

This article discusses the legal principles and legal drafting techniques in relation to development approval conditions

August 2011

Introduction

Effective written communication

Effective written communication is essential to the work of persons involved in the integrated development assessment system under the *Sustainable Planning Act 2009*; whether it be the drafting of development application documents on behalf of an applicant or the drafting of a decision notice on behalf of an assessment manager or referral agency.

Effective written communication is particularly important in relation to the writing of the conditions of a development approval.

Effective written communication in respect of the conditions of a development approval can be achieved through a clear understanding of the following:

- First, the legal principles applicable to the imposition of a condition of a development approval.
- Second, the following legal drafting techniques applicable to the writing of a legal document such as the conditions of a development approval:
  - Language of a condition – the condition should be drafted in plain English language.
  - Structure of a condition – the condition should have a logical, coherent structure.
  - Content of a condition – the context and content of a condition should be clear, concise and consistent.

Objectives of the workshop

The object of the workshop is to ensure local government officers gain an understanding of the following:

- First, the legal principles, both statutory and judicial , applicable to the imposition of a condition of a development approval.
- Second, the legal drafting techniques applicable to the writing of a condition of a development approval focussing particularly on the structure, language and content of the condition.
- Third, practical experience in the writing of a condition of a development approval using the applicable legal drafting techniques.

Structure of the workshop

The workshop is structured into the following parts:

- First, a discussion of the legal principles, both statutory and judicial, which are generally applicable to the imposition of a condition of a development approval.
- Second, a discussion of the legal principles which are specifically applicable to the imposition of a condition requiring an infrastructure contribution under the new infrastructure contributions regime under the *Sustainable Planning Act 2009* which commenced on 1 July 2011.
- Third, a discussion of the legal drafting techniques in respect of the structuring of a conditions package as a whole and each condition in particular.
- Fourth, a discussion of the legal drafting techniques in respect of language to be used in the writing of a condition.
- Fifth, a discussion of the legal drafting techniques in respect of the content to be used in the writing of a condition.
- Finally, practical drafting exercises involving conditions from Ipswich City Council's standard conditions package will be undertaken to demonstrate the use of the legal drafting techniques in relation to the structure , language and content of a condition.

Legal principles for the imposition of conditions

Types of legal principles

The *Sustainable Planning Act 2009* and the decisions of courts including the Queensland Planning and Environment Court and the Court of Appeal establish legal principles which are generally applicable to the imposition of a condition.

Statutory legal provisions

Determination of a development application

An assessment manager is to determine a development application, in one of the following ways:[3]

- approve all or part of the development application;
- approve all or part of the development application subject to conditions decided by the assessment manager;
- refuse the development application.

General conditions powers – Relevant or reasonable

A condition imposed on an approval of a development application is to accord with one of the following general legal principles:[4]

- First, the condition must be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development.
- Second, the condition must be reasonably required in relation to the development or use of premises as a consequence of the development.

It is relevant to note that the acceptance of a condition of a development approval by an applicant does not make the condition lawful for the purposes of the general conditions power. For example in the case of *Hammercall Pty Ltd v Gold Coast City Council & Anor* [2003] OPEC 046, the Court of Appeal relevantly stated that "*mere agreement of the parties does not make a 'manifestly unreasonable' condition permissible*".[5]

The general conditions power has been considered by the Planning and Environment Court and the Court of Appeal in terms of determining the scope of the following legal principles:

- relevance ;
- unreasonable imposition;
- reasonably required.

Relevance

The Court of Appeal has considered the meaning of relevance in the case of *Proctor v Brisbane City Council* [1993] QPLR 309, where it stated that relevance means "*falling within the proper limits of a local authority's functions under the Act, as imposed to maintain proper standards in local development or in some other legitimate sense*".[6]

Unreasonable imposition

The Court of Appeal in the case of *Hammercall Pty Ltd v Gold Coast City Council & Anor* [2005] QPELR 498 has held that a condition requiring the dedication of 2.39 hectares of land to provide for an extension linking the Pacific Highway and the Andrews Interchange and also a permanent service road was an unreasonable imposition on the development pursuant to section 3.5.30(1)(b) of the *Integrated Planning Act 1997*.[7] The Court of Appeal relevantly stated as follows:

> *the condition did not go far enough to achieve the provision of the preferred and planned access to the highway" and therefore the only achievement of the condition "would be to cheapen the future cost to either Respondent if and when the works were done*.[8]

The Planning and Environment Court in the case of *Neilson v Gold Coast City Council & Anor* [2005] QPELR 452, has held that a condition requiring an applicant to incur the full cost of the upgrade of a roundabout when its development would only create 9-12% of the demand was an unreasonable imposition on the development. The Planning and Environment Court relevantly stated:

> *under s3.5.30(1)(a), to make the creator of 9-12 percent of the demand responsible for the full amount of the upgrade cannot be anything but an unreasonable imposition on the development. And under section 3.5.30(1)(b), to require that cannot be said to be 'reasonably required in*

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3 See section 324 of the *Sustainable Planning Act 2009*.
4 See section 345 of the *Sustainable Planning Act 2009*.
5 See *Hammercall Pty Ltd v Gold Coast City Council & Anor* [2003] QPEC 046 at [35].
6 See *Proctor v Brisbane City Council* [1993] QPLR 309 at 313.
7 See section 345(1)(b) of the *Sustainable Planning Act 2009*.
8 See *Hammercall Pty Ltd v Gold Coast City Council & Anor* [2005] QPELR 498.

> *respect of the development or the use of the premises as a consequence of the development'. It is not reasonable that a minor user should be made to pay the whole*.[9]

However, by way of contrast, the Planning and Environment Court in the case of *Barooga Projects (Investments) Pty Ltd v Caboolture Shire Council* [2005] QPELR 91, held that a condition requiring the widening of a road at significant cost to the applicant was a reasonable imposition on the development given that the proposed development contributed to traffic volumes.

Reasonably required

The Planning and Environment Court in the case of *Hammond & Anor v Albert Shire Council* [1997] QPELR 314, identified the following test as to whether a condition is reasonably required:

- First, is there a nexus between the use of the site and the condition imposed.
- Second, is the condition a reasonable response to any change in affairs created by the development.

The Planning and Environment Court in the case of *Bryant v Caloundra City Council* [2006] QPELR 335, confirmed the test in *Hammond & Anor v Albert Shire Council* [1997] QPELR 314 and relevantly stated as follows:

> *whether a condition is reasonably required by a proposal requires a consideration of the proposal and what changes may result from its completion. The condition must be a reasonable response to the change in the existing state of things, which may result from the proposal*.[10]

Statutory permissible conditions

The *Sustainable Planning Act 2009* specifically identifies that an assessment manager may include a condition in a development approval which achieves the following:

- limits how long a lawful use may continue or works may remain in place;[11]
- limits the start of a development to the giving of other development permits or compliance permits or the starting or completion of other development on the site;[12]
- requires compliance with an infrastructure agreement relating to the land;[13]
- requires a document or work to be subject to compliance assessment;[14]
- requires development to be completed within a particular time;[15]
- requires a security to ensure performance;[16]
- requires a monetary payment or works to be carried out to protect or maintain the safety or efficiency of transport infrastructure under the *Transport Infrastructure Act 1994*;[17]
- requires a monetary payment or works to be carried out to ensure the efficiency of public passenger transport infrastructure within the meaning of the *Transport Planning and Coordination Act 1994*.[18]

Statutory prohibited conditions

The *Sustainable Planning Act 2009* specifically identifies that an assessment manager must not include a condition in a development approval which achieves the following:

- is inconsistent with a condition of an earlier development approval or compliance permit still in effect for the development;[19]
- requires a monetary payment for the establishment, operating or maintenance costs of infrastructure mentioned in Chapter 8, Part 1 of the *Sustainable Planning Act 2009* or works for the infrastructure;[20]
- requires an entity other than the applicant to carry out works for the development;[21]
- requires an access restriction strip;[22]

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9 See *Neilson v Gold Coast City Council & Anor* [2005] QPELR 452 at 455-456.
10 See *Bryant v Caloundra City Council* [2006] QPELR 335 at 337.
11 See section 346(1)(a) of the *Sustainable Planning Act 2009*.
12 See section 346(1)(b) of *Sustainable Planning Act 2009*.
13 See section 346(1}(c) of *Sustainable Planning Act 2009*.
14 See section 346(1)(d) of *Sustainable Planning Act 2009*.
15 See section 346(1)(e) of *Sustainable Planning Act 2009*.
16 See section 346(1)(f) of *Sustainable Planning Act 2009*.
17 See section 347(2)(a) of *Sustainable Planning Act 2009*.
18 See section 347(2)(b) of *Sustainable Planning Act 2009*.
19 See section 347(1)(a) of *Sustainable Planning Act 2009*.
20 See section 347(1)(b) of *Sustainable Planning Act 2009*.
21 See section 347(1)(c) of *Sustainable Planning Act 2009*.
22 See section 347(1)(d) of *Sustainable Planning Act 2009*.

- limits the time a development approval has effect for a use or work forming part of a network of community infrastructure, other than State owned or State controlled transport infrastructure.[23]

Judicial legal principles

Scope of judicial legal principles

The courts have also developed a number of legal principles applicable to the imposition of conditions in addition to the statutory legal principles under the *Sustainable Planning Act 2009*.

The list of judicial legal principles is not exhaustive as the courts continue to refine existing legal principles and establish further legal principles.

To date the courts have developed the following legal principles:

- **Improper planning purpose principle** – A condition is to be for a planning purpose.[24]
- **Nexus principle** – A condition is to fairly and reasonably relate to the application.[25]
- **Wednesbury unreasonableness principle** – A condition is not to be so unreasonable that no reasonable assessment manager could have imposed the condition.[26]
- **Certainty principle** – A condition is to be certain.[27]
- **Finality principle** – A condition is to be final.[28]
- **Supervision principle** – A condition is not to require constant supervision by an assessment manager.[29]

Improper planning purpose principle

A condition imposed on a development approval is required to be referable to the *Sustainable Planning Act 2009* or an applicable planning instrument such as a local planning instrument or a State planning instrument.

A condition cannot be imposed for the purpose of fulfilling another purpose which may be socially or morally acceptable but unconnected with the purpose of town planning.

For example in the case of *Hutchinson 3G Australia Pty Limited v Waverley Council* [2002] NSWLEC 151 it was held that a condition relating to the indemnification of the Council against any legal liability arising from health issues relating to the approved infrastructure did not relate to a planning purpose and was invalid.

Nexus principle

This is the most important of the judicial legal principles. A condition must be reasonably required by the development in terms of there being some nexus, identification or relationship between the development and the purpose for which the condition is to be imposed.

A nexus between the development and the condition is considered to exist in the following circumstances:

- First, the development will result in a change in the circumstances as they existed prior to the development application.
- Second, the relationship between the development and the alteration in existing circumstances is not too remote.
- Third, the development will benefit from the requirements of the condition.

Therefore, to determine whether a condition offends this principle, it is necessary to consider the changes that are likely to emerge from the development, and whether the conditions are related to those changes. It is also necessary to consider the provisions of the *Sustainable Planning Act 2009* and the relevant planning instruments which relate to the development.

Changed circumstances

The development must have a tangible impact. In order to prove that there would be a change in circumstances it is necessary to have knowledge of the state of affairs prior to the development, the potential changes caused by the development and the impact on the existing circumstances.

Remoteness

The easiest requirement to justify is one which impacts directly on the premises. The greater the distance a requirement such as works is to be undertaken from the premises the more difficult it is to prove that there is a nexus between the requirement and the development of the premises.

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23 See section 347(1)(e) of *Sustainable Planning Act 2009*.
24 See *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.
25 See *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.
26 See *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; *Provincial Picturebuses Ltd v Wednesbury Corporation* [1948] 1 KB 223
27 See *Shilling v Cairns City Council* [1988] QPLR 243.
28 See *Mison and Ors v Randwick Municipal Council* (1991) 73 LGRA 349.
29 See *Westfield Management Limited v Pine Rivers Shire Council & Anor* [2005] QPELR 534.

Proportion of benefit

The benefit to be obtained by an applicant from a requirement imposed by a condition will determine the proportion of the costs of the requirement to be met by the applicant. For example, if a requirement for proposed roadworks would benefit the public at large, it might be that the applicant should not make any contribution to the roadworks or that the cost of the roadworks should be shared by the local government and the applicant.

Wednesbury unreasonableness principle

The question of whether a condition is so unreasonable that it could not be imposed by any reasonable assessment manager is sometimes seen as a "catch all" or safety net requirement. The question of reasonableness is not related to nexus but is concerned with a condition being manifestly arbitrary, unjust or exhibiting partiality. A condition will not lightly be set aside on the basis of this legal principle.

Certainty principle

A condition cannot be expressed in vague or ambiguous language. Whilst it is important to use simple and plain English, the writer of a condition must be careful to ensure that the condition is certain.

Finality principle

An assessment manager is bound to dispose of an application fully and finally, and it may not defer its decision on an essential matter, or delegate its power to some other person or body for determination.

For example, in the case of *Mison and Ors v Randwick Municipal Council* (1991) 73 LGRA 349, the Council approved a two storey dwelling house and garage subject to several conditions, one of which was that the overall height of the dwelling house be reduced to the satisfaction of the Council's Chief Town Planner. The height of the building was of importance to the appellants and the Council was aware of this. The result of the condition was to leave unknown what the height of the building would turn out to be. The court held that the building height was an essential element of the development and could not be deferred for further judgment. Consequently the condition was unlawful.

Supervision principle

A condition must not require constant supervision from the local government to ensure that compliance is occurring.

Specific legal principles applicable to infrastructure contributions

Introduction

The Queensland government's introduction of the new infrastructure contributions regime has made significant changes to the infrastructure contributions powers of local governments and SEQ distributor-retailers. The new regime imposes limits on local government conditioning powers for infrastructure contributions for development infrastructure where in general terms, the powers of the local governments have been aligned with those of SEQ distributor-retailers (which are currently delegated to local governments) and gradually increase as 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 – this power has been removed;[30]
- 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 a State planning regulatory provision (adopted charges) (**Adopted Charges SPRP**);[31]
- conditioned payment for development inconsistent with the planning assumptions in a priority infrastructure plan (including an infrastructure charges plan).[32]

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 – this power has been removed;[33]

30 See sections 345, 347, 848 and 880 of *Sustainable Planning Act 2009*.
31 See sections 650 and 755R of *Sustainable Planning Act 2009*.
32 See sections 650 and 755R of *Sustainable Planning Act 2009*.
33 See sections 345, 347, 848 and 880 of *Sustainable Planning Act 2009*.

- 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;[34]
- 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;[35]
- 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.[36]

Dedication notice for land contributions

In addition to conditioning powers, local governments and 5EQ 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.[37]

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).

Specific condition powers

When determining a development application, local governments and SEQ distributor-retailers can only impose a condition for an infrastructure contribution far development infrastructure under the general conditioning powers in the *Sustainable Planning Act 2009*, where this is 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.[38]
- Second, it must otherwise be relevant or reasonable.[39]

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.

Under the previous infrastructure contributions regime, a condition requiring a land and works 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:[40]
  - 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.

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34 See sections 626A and 755J of *Sustainable Planning Act 2009*.
35 See sections 626 and 755J of *Sustainable Planning Act 2009*.
36 See sections 649, 755Q and 863 of *Sustainable Planning Act 2009*.
37 See sections 637, 755E and 863 of *Sustainable Planning Act 2009*.
38 See sections 347(1)(b) and 880 of *Sustainable Planning Act 2009*.
39 See sections 345 and 406 of *Sustainable Planning Act 2009*. cf: Section 649(8) which states the circumstances in which a condition under that section is reasonable and relevant.
40 See sections 649(1) of *Sustainable Planning Act 2009*.

- For other infrastructure – land and work contributions can only be required for the following:[41]
  - 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 works contributions for trunk infrastructure are further limited in that a condition requiring a land and works contribution for trunk infrastructure must meet certain requirements in order to satisfy the "relevant and reasonable" test.

- A condition requiring a land and works 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":[42]
  - 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 and works 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:[43]

- 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.[44]

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	Infrastructure charges plan (Noosa)	Priority infrastructure plan (Gold Coast)	Trunk infrastructure not included in resolution	Trunk infrastructure included in resolution	Trunk infrastructure 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)	✓	✓	✓	✓	✓	✓

41 See sections 626 and 626A of *Sustainable Planning Act 2009*.
42 See section 649(8)(a) of *Sustainable Planning Act 2009*.
43 See section 649(8)(b) of *Sustainable Planning Act 2009*.
44 See section 848 of *Sustainable Planning Act 2009*.

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

Structure of a condition

Planning a condition

The design of a condition is to be conceived and planned before it is written.

The planning of a condition is to be divided into two stages:

- First, the pre-writing stage in which the writer is to consider the following:
  - the audience of the condition;
  - the scope and purpose of the condition;
  - the consequences of the condition.
- Second, the writing stage in which the writer is to consider the following:
  - the structure of the condition package as a whole and the structure of each condition individually (as discussed in this section);
  - the language of the condition (as discussed in the "Language of a condition" section below};'
  - the content of the condition (as discussed in the "Content of a condition" section below).

Prewriting stage

Who is the audience of the condition?

One of the fundamental guidelines of good writing is to consider the reader of the condition. It is not enough for a condition to be technically correct. The condition must also be able to be understood by all its likely readers, including the applicant, existing and future owners and most importantly the courts.

Whilst the applicant is the most important and immediate reader, a condition is to be written for the least sophisticated audience, that is an ordinary person in the community.

What is the scope and purpose of the condition?

Thinking about the scope and purpose of a condition also helps the writer to determine the content of a condition. Once the purpose of the condition is identified, this should be made clear to the reader in the title of the condition.

What are the consequences of the condition?

It is important to establish and plan for all possible consequences that may arise out of the condition. This will help the writer to write the condition in a way that is specific to the relevant issues without resulting in any unforeseen complications.

Structure of the conditions package

When planning the structure of a conditions package, the following guidelines are to be adopted:

- Put the most important information first and the less important information later.
- The most important information is to be determined by the audience and the purpose of the conditions.
- Place the broadly applicable before the narrowly applicable.
- Place the general before the specific.
- Place rules before exceptions.
- Place principles before procedural detail.
- Group similar items or related material together and arrange ideas for different subject matter in a parallel order.
- Follow the chronological order of events.

Structure of a condition

Guidelines for structuring a condition

The structure of a condition can be broken down into the following:

- Overall structure – it is important to structure a condition in a logical order to avoid ambiguity.
- Paragraph structure – good paragraph structure provides good structure to the condition.

When planning the structure of a sentence within a condition, the following guidelines are to be adopted:

- An approval condition is to generally contain only one sentence where possible.
- A sentence is to deal with only one idea.
- An ideal average sentence length is to be between 20 and 25 words.
- A condition which is noticeably long is to be broken up into separate approval conditions.
- A sentence which contains for more than five lines of unbroken text is to be broken up into separate conditions or breaks in the text such as paragraphs are to be introduced.

Paragraphing as an aid to avoiding ambiguity

Paragraphing is a significant aid to avoiding ambiguity.

There are several rules of paragraphing that are to be followed:

- The condition must be capable of being divided into two or more parts.
- Where there are words after a paragraph (resuming words), they must be capable of being read with each preceding paragraph.
- Where there are paragraphs after the resuming words, the paragraphs are to be responsive to the resuming words.
- Paragraphing is not to be taken below the level of sub-sub-paragraphs. See the example below.

- Paragraphs are distinguished by letters in the alphabet in the lower case; subparagraphs by roman numerals and sub-sub-paragraphs by letters or the alphabet.

> **For example:**
>
> "The applicant must construct:
>
> (a) on the land:
>
> (i) the sewerage works; and
>
> (ii) the roadworks:
>
> (A) to the specified standard; and
>
> (B) in the manner specified; and
>
> (b) outside the land ...."

- Where there is further paragraphing after the resuming words, the paragraph, sub-paragraphs and sub-sub-paragraphs notation is continued not restarted.

> **For example:**
>
> "An owner who is:
>
> (a) over 70 years; and
>
> (b) a resident of Ipswich City;
>
> must contribute:
>
> (c) $20,000.00 to the Council; or
>
> (d) $10,000.00 to the RAPI".

- The penultimate paragraph should be concluded with the word "and" or "or" to show whether the paragraphs are cumulative or alternative. In no circumstances must both "and" and "or" be used between paragraphs of the same level of division. This is illustrated in the above examples.
- Unless the first word of a paragraph is a proper noun, it should not be capitalised but rather written in the lower case on the grounds that the first word of the paragraph is the middle of the sentence, as illustrated in the above examples.
- Paragraphs are to be indented and sub-paragraphs and sub-sub-paragraphs progressively indented, as illustrated in the above examples.
- Paragraphing is not to be used other than with punctuation, as illustrated in the above examples.

Numbering of conditions

When numbering a condition use the followings system:

- 1;
- 1.1;
- 1.1(a);
- 1.1(a)(i).

> **For example:**
>
> **6 BUILDING REQUIREMENTS**
>
> **6.1 Height limit for retaining walls**
>
> The applicant must ensure that all retaining walls within the proposed development:
>
> (a) are set back:
>
> (i) at least 2 metres from the side boundary; and
>
> (ii) at least 1 metre from the residential dwelling;
>
> (b) are terraced and landscaped.

Avoid further subdivisions, if possible. If they are unavoidable, continue with the following:

- 1(a)(i)(A);
- 1(a)(i)(A)(1).

Headings of conditions

A conditions package usually deals with a number of distinct issues or matters. Each condition is to be drafted or structured to deal intelligently and logically with the relevant issues to facilitate an understanding of the conditions package as a whole.

Headings help a reader to quickly grasp what a condition is about by using "keywords" to identify the substance of the condition.

A conditions package should use main headings and condition headings.

Conditions which deal with clearly distinct issues or topics should be grouped into separate main headings to aid structure and ease of understanding.

The main headings should be distinguished from the condition heading by for example making them upper case and bold. Do not put a full stop after the main heading number.

> **For example:**
>
> **1 BUILDING REQUIREMENTS**

Where several distinct conditions are grouped under a main heading, each condition is to have its own heading and number, such as 2.1, 2.2, 2.3 and so on.

Condition headings should be distinguished from main headings by for example making them lowercase and bold.

> **For example:**
>
> **1.1 Height limit for retaining walls**

Do not capitalise each word in a condition heading unless the word is a defined term.

> **For example:**
>
> **3 BUILDING REQUIREMENTS**
>
> **3.1 Height limit for retaining walls**
>
> …
>
> **3.2 Signage**
>
> …

Cross references between conditions

When referring to a condition elsewhere:

- refer to the condition simply by use of the word "condition" followed by the specific reference number in bold type; and
- the first letter of the word condition should not be capitalised unless it begins a sentence.

> **For example:**
>
> (a) Subject to **condition 4.2**, the applicant must …

Note that both the word condition and the specific reference number (eg 4.2) are in bold. This bolding assists in ensuring that all cross-references to other conditions in a development approval are correct, particularly when it may be necessary to amend condition references after moving conditions around. References to sections of other documents should also be in bold type.

> **For example:**
>
> … under **section 8.2** of the Planning Scheme

Capitalisation of a word in a condition

Initial capitals should only be used where:

- a defined term is being used; or
- a capital would be used in ordinary English usage.

Do not capitalise the first letter of "condition" or "section" unless they begin a sentence.

Initial capitals should not be used for legal terms like applicant or owner unless they begin a sentence.

Likewise, do not capitalise the first letter of "section" (as in section 24 of the *Sustainable Planning Act 2009*) or "regulation" (as in regulation 3 of the *Sustainable Planning Regulation 2009*) unless it begins a sentence.

> **For example:**
>
> (a) Subject to section 32 of the *Sustainable Planning Act 2009* …

Numbers used in a condition

Numbers can be expressed in figures or words. Numbers from zero to ten should be expressed in words. Numbers above ten should be expressed in figures.

> **For example:**
>
> (a) The applicant must plant six trees …
>
> (b) The applicant must plant 250 trees …

Numbers are not to be expressed in both figures and words.

Other than as above, there are no absolute rules and the chief guide is always context, common sense and consistency.

Figures are to be used to express numbers when they accompany a symbol and in tables. For example, $1,000,000, 10.30am, 50% and 25km.

Judgment is to be used in deciding whether to include a decimal point in monetary sums. For example, do not include a decimal point when referring to large sums such as $1,000,000. However, a decimal point can be used when referring to smaller sums, such as $10.00. When using a decimal point, it must be preceded by the $ symbol and a figure and followed by at least two figures. For example, $100.00.

In numbers greater than 999, a comma is to be placed before each group of three figures. For example, $100,250.75.

Do not capitalise the first letter of a number unless it begins a sentence.

Hyphens are to be used when fractions are expressed in words (such as one-third). In expressing fractions in figures an oblique or slash can be used (such as 1/3).

Bolding and underlining of a condition

Do not underline words or headings. Use bolding instead.

Page endings in a conditions package

Avoid ending a page with headings, lead-ins or short sentences which carry over to the next page.

References to legislation in a condition

An act or other legislation is to be referred to by its full and correct short title and is to be italicised. For example refer to SPA as the *Sustainable Planning Act 2009*.

In conditions do not bold or italicise the word "section" or "regulation".

Language of a condition

Plain language

Plain language is commonly considered to be the best technique for achieving effective written communication in a legal document including the conditions of a development approval. It is the technique used for the drafting of legislation such as Acts of the Queensland Parliament.

Plain language involves the deliberate use of simplicity to achieve clear, effective communication.

A condition is to be as simple as possible. The ordinary person in the community is to be regarded as the ultimate user of a condition. A condition that is easy to understand is less likely to result in a dispute.

The plain language technique does not involve the simplification of a condition to the point that it becomes legally uncertain. In particular, care needs to be taken that legal uncertainty is not created by dispensing with a term which has an established meaning for the users of a condition.

In drafting a condition, the objective is to produce a condition which achieves the following:

- First, the condition is easily read and understood.
- Second, the condition is legally effective to achieve the desired purpose.

Use the present tense

Using the future tense unnecessarily makes the language complicated and difficult to understand.

There is no need to write in the future tense merely because a document such as a development approval will have continuing application in the future. A document will be treated as if it is "continually speaking". The present tense applies to the present – when the words are being read and each time they are read.

If there is doubt about whether a statement will be interpreted in the present tense, a phrase such as "if at any time" can be used.

For example:

Instead of:

The applicant shall indemnify the Council against any loss arising from the use of the high impact telecommunications facility.

Write:

The applicant indemnifies the Council against any loss arising from the use of the high impact telecommunications facility.

Whilst it is appropriate to use the future tense for expressing a consequence that may arise in the future the present tense can also be used.

For example:

Instead of:

If the applicant should fail to pay the contribution when it is due, the Council may refuse to approve a plan of subdivision.

Write:

If the applicant fails to pay the contribution when it is due, the Council may refuse to approve a plan of subdivision.

Use the active not passive voice

The next two sentences show the difference between the active and the passive voice.

Active voice:	The applicant must pay the money to the Council.
Passive voice:	The money must be paid to the Council.

The structure is simple.

- Active voice – Subject (the actor), active verb, object (the thing being acted upon).
- Passive voice – Object, complex verb, subject.

Writing in the active voice is livelier, more personal and is generally easier to understand.

The passive voice usually takes more words and is less direct.

Also the passive voice is often used in a reduced form and does not identify the actor.

For example:	
Passive voice:	Written notice must be given to the owner.
Active voice:	The local government must give written notice to the owner.

This can lead to uncertainty. By writing in the active voice the writer is forced to identify the person responsible for the action. A writer can often forget this when writing in the passive voice.

However there are circumstances when it might be preferable to use the passive voice such as where it would avoid clumsy repetition.

For example:	
Instead of:	
Active voice:	The applicant must apply to the Council for consent to the extended hours of operation. The applicant must include in the application the applicant's address and references. The applicant must make the application within 28 days of the proposed event.
Write in the	
Passive voice:	The applicant must apply to the Council for consent to the extended hours of operation. The application must include the applicants address and references. It must be made within 28 days of the proposed event.

Uncover hidden verbs

Verbs are often hidden as nouns. This makes a sentence longer and harder to read. It also tends to rob a sentence of its sense of action and introduces a sense of detachment.

For example:	
Instead of:	Write:
If they make a decision …	If they decide …
They will make an application …	They will apply …
He made an argument that …	He argued that …
Please give your response …	Please respond …
Please make payment to …	Please pay …
She entered an appearance …	She appeared …

Avoid false, double and layered negatives

Where an idea can be expressed either positively or negatively, it is preferable to express it positively. A negative statement forces the reader to work out what can be done. Generally a positive statement is easier to understand. Avoid multiple negatives.

For example:	
Instead of:	Not only the applicant, but also the owner must sign the infrastructure agreement.
Write:	The applicant and the owner must both sign the deed.
Instead of:	The applicant must not omit the certificate.
Write:	The applicant must include the certificate.
Instead of:	It is not easy to read something that is not written in a positive way.
Write:	It is easy to read something written in a positive way.

The constructions ***may only...if*** or ***may only...when*** are easier to understand than a negative and "unless".

> **For example:**
>
> Instead of:
>
> The applicant cannot assign its obligations under the infrastructure agreement to another person unless the Council has consented to the assignment.
>
> Write:
>
> The applicant may only assign its obligations under the infrastructure agreement to another person if they have the Council's consent.

"Provided that" and provisos

It is still common to find halfway through a long condition the words "provided that". This phrase has many meanings. It can mean "and", "or", "but", "except that", "if". To discover the history of these words and why they have been used in legislation for more than 600 years.[45]

The correct use of "provided that" is to qualify what has gone before. It marks a legal condition and could be replaced with "if".

> **For example:**
>
> Instead of:
>
> The applicant may pay the lower contribution provided that they pay on or before 1 January 2001.
>
> Write:
>
> The applicant may pay the lower contribution if they pay on or before 1 January 2001.

The phrase should not be used to introduce a new idea or as along-winded way of saying "and".

> **For example:**
>
> Instead of:
>
> The applicant must repaint the premises provided that if there has been an earthquake the applicant must repair any structural damage.
>
> Write:
>
> The applicant must repaint the premises and if there has been an earthquake the applicant must repair any structural damage.

Use everyday words

A writer is to use words that a reader will understand. The following guidelines are to be followed:

- Technical words – Words that are genuine terms of art or technical terms are to be used appropriately. These words have precise meanings and there is often no convenient substitute. They are words that have an irreducible core of legal meaning.

  A technical word is to be used when the word:

  - is the only correct term, for example, plan of subdivision;
  - is a useful shorthand for a complex idea, for example, perjury;

"Shall", "may", "will" and "must"

Use "must" or "is to" for the imperative. It is a common word that imposes an obligation with certainty. Using "shall" to express an obligation is becoming obsolete. It is very confusing when you use "shall" as an imperative and also write in the future tense.

Use "may" to indicate a privilege, power or right. It is construed as permissive not obligatory.

Use "will" only when writing in the future tense. Writing in the present tense can easily eliminate it.

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[45] See Centre for Plain Legal Language "Provided that" 1993 31 *New South Wales Law Society Journal*, p28.

"Deemed"

"Deemed" is commonly used to create a legal fiction or to create the presumption of fact irrespective of reality. However it is obsolete and unfamiliar to many readers. Use instead "treated as", "taken as", "considered" or "regarded".

> **For example:**
>
> Instead of:
>
> If a communication is served after 5.00p.m. in the place of receipt, it is deemed to be served on the next business day.
>
> Write:
>
> If a communication is served after 5.00p.m. in the place of receipt, it is taken to be served on the next business day.

"Duty"

Use "must" instead of "it is the duty of..." to create an obligation.

"Money", "monies" and "moneys"

Do not use "moneys" and "monies". They are merely archaic forms of "money".

"Pursuant to"

Avoid "pursuant to", "in pursuance of", "by virtue of', "in exercise of the powers conferred by". To the reader these are hallmarks of legalese. Try instead "under".

"The same", "the paid" and "such"

These words are also hallmarks of legalese. Replace them with a pronoun, a definition or leave them out.

Alternative or cumulative lists

Make it clear whether a list of things is to be read in the alternative or cumulatively. Do this by using the disjunctive 'or' or the conjunctive 'and' which is repeated between each item.[46]

An exception is where the introductory words to the list make it clear whether the list is to be read in the alternative or cumulatively and include the word 'following'.[47]

The expression 'and/or' is never to be used.

Internal consistency

Internal consistency in the use of language is important, in particular, different words and expressions are not to be used for the same thing.

Content of a condition

Parts of a legal obligation

There are potentially four parts to a legal obligation, namely:

- **Legal subject** – the legal person on whom the legal obligation is imposed.
- **Legal action** – the action which expresses the legal obligation.
- **Legal case** – the circumstances where the legal obligation applies.
- **Legal condition** – the action which causes the legal obligation to apply.

[46] See for example sections 347(1) and 353(2) of *Sustainable Planning Act 2009*.
[47] See for example section 350(1) of *Sustainable Planning Act 2009*.

A condition must include the first and second parts. The third and fourth parts are not always present.

For example:	
Legal subject:	The applicant.
Legal action:	must pay all fees, rates, interest and other charges levied on the land
Legal case:	where an application has been made to the local government
Legal condition:	the fees, rates, interest and other charges levied on the land have not been paid

Often all four parts are found in one sentence. This can make the sentence long and complex, particularly where there are many legal conditions.

Traditionally legal conditions are placed first in a sentence. This is the **if...then** structure. This is fine if there is only one condition. However if there are many legal conditions then this creates a problem for the reader. They must keep all these legal conditions in mind before they reach what the legal condition is really about. This can be avoided by placing the legal conditions after the legal action.

For example:

Instead of:

If fees, rates, interest and other charges levied on the land remain unpaid and the applicant makes an application for the release of a plan of subdivision the applicant must pay the fees, rates, interest and other charges levied on the land.

Write:

The applicant must pay the fees, rates, interest and other charges levied on the land if:

(a) The applicant makes an application for the release of a plan of subdivision; and

(b) The fees, rates, interest and other charges remain unpaid.

Legal subject

The subject of a legal obligation is to be a legal person. This is to ensure that the identity of the person who is to take the legal action is never in doubt.

An example condition states as follows:

Example condition:

"All fees, rates, interest and other charges levied on the land must be paid in accordance with the rate at the time of payment prior to release of the plan of subdivision".

No legal subject is specified in the example condition. It is unclear which of the following persons is to take the legal action (that is pay the money):

- applicant;
- developer;
- owner.

A development approval attaches to the land and is binding on the owner of the land. Accordingly, the legal subject should, as a general rule, be the applicant for the development approval.

The example condition could be rewritten as follows:

Example condition amended:

"All fees, rates, interest and other charges levied on the land must be paid by the applicant in accordance with the rate at the time of payment prior to release of the plan of subdivision".

Legal action

The legal obligation is to specify what the legal subject is enabled or commanded to do. A legal obligation is to contain a predicate.

A legal obligation is to contain a predicate that satisfies as many of the following guidelines as possible:

- It contains a verb – that is the action to be taken.
- The verb is finite – that is the action is limited in time.
- The verb is expressed in the active voice as opposed to the passive voice so as not to obscure the legal subject which is identified to take the legal action. For example:

> **For example:**
>
> "The money must be paid by the applicant" (passive).
>
> "The applicant must pay the money" (active).

- It is to contain an object as often as possible. For example, money is the object used in the active/passive voice examples used above.
- It is to distinguish whether the legal action is mandatory or discretionary.

> **For example:**
>
> If mandatory the word "must" should be used.
>
> If discretionary the words "may at the applicant's discretion" should be used.

- The example condition could therefore be rewritten as follows:

> **Example condition amended:**
>
> "The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment of fees, rates, interest and other charges levied on the land".

The elements of the example condition as rewritten are as follows:

- A mandatory legal action – "must".
- Legal subject – "The applicant".
- Legal action – "must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land".

The legal action in the example condition as redrafted comprises:

- A verb – "pay".
- A finite verb – "prior to the release of the plan of subdivision".
- An active verb – "the applicant must".
- An object – "fees, rates, interest and other charges levied on the land".

Legal case

A legal obligation is to specify the circumstances in respect of which or the occasion on which the legal obligation is to take effect. This is generally known as the legal case.

The legal case is generally introduced by the word "where" for those circumstances which may be repeated and the word "when" for those circumstances which will happen only once.

The example condition does not specify the when or where. In this example the example condition only takes effect where an application has been made to the local government for the release of the plan of subdivision. However this has not been stated although it is implied.

As the example condition is currently written a person could one day after receiving the development approval pay the fees, rates, interest and other charges that were outstanding on that day and they would have satisfied the example condition even if other fees, rates, interest and other charges became payable after the date of the payment.

The example condition could therefore be rewritten to include the legal case as follows:

> **Example condition amended:**
>
> "The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land when an application has been made to the local government for the release of the plan of subdivision".

Legal condition

A legal obligation is to specify, if appropriate, what is to be done for the legal obligation to become operative.

This is generally known as the legal condition. A legal condition is normally introduced by the word "if". Where there is both a legal case and a legal condition limiting the application of the legal action the words "where/when" or "if" may be used interchangeably.

The example condition does not specify the legal condition that must be satisfied before it operates. In this example, the example condition will operate where at the date of an application to the local government for the release of a plan of subdivision there are outstanding fees, rates, interest and other charges levied on the land.

As the example condition is currently written, the local government could call on a person to pay the fees, rates, interest and other charges levied on the land notwithstanding that they have already been paid or have been levied but not yet delivered to the person.

The example condition could therefore be rewritten to include the legal condition as follows:

> **Example condition amended:**
>
> "The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment all fees, rates, interest and other charges levied on the land where:
>
> (a) an application has been made to the local government for the release of the plan of subdivision; and
>
> (b) the fees, rates, interest and other charges levied on the land have not been paid."

Order of parts

There is no set rule as to how the parts of a condition should be ordered. However it is recommended that a condition is wherever possible structured as follows:

- Legal subject.
- Legal action.
- Legal case.
- Legal condition.

Example condition rewritten

If the example condition is structured in accordance with the suggested order it would be written as follows:

> **Example condition rewritten:**
>
> "The owner must pay all fees, rates, interest and other charges levied on the land where:
>
> (a) an application has been made to the local government for the release of the plan of subdivision; and
>
> (b) the fees, rates, interest or other charges have not been paid."

The parts of the example condition would be structured as follows:

- Legal subject – "The owner".
- Legal action – "must pay all fees, rates, interest and other charges levied on the land".

  It should be noted that the legal action:

  - Is in the active voice and is mandatory – "must".
  - Comprises a verb – "pay".
  - Comprises an object – "all fees, rates, interest and other charges levied on the land".

- Legal case – "an application has been made to the local government for the release of the plan of subdivision".
- Legal condition – "the fees, rates, interest or charges have not been paid".

It should be noted that the word "where" was chosen to introduce the legal case and the legal condition as more than one plan of subdivision may be lodged with the local government especially where the local government may require changes to the plan of subdivision as submitted.

Drafting exercises

Drafting Exercise No. 1 – Example condition

Example condition

All fees, rates and other charges levied on the property must be paid in accordance with the rate at the time of payment prior to release of the plan of subdivision.

Legal subject

All fees, rates, interest and other charges levied on the property must be paid by the applicant in accordance with the rate at the time of payment prior to release of the plan of subdivision.

Legal action

The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment of all fees, rates, interest and other charges levied on the property.

Legal case

The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment of all fees, rates, interest and other charges levied on the property when an application has been made to the local government for the release of the plan of subdivision.

Legal conditions

The applicant must prior to the release of the plan of subdivision pay in accordance with the rate at the time of payment of all fees, rates, interest and charges levied on the property where:

- an application has been made to the local government for the release of the plan of subdivision; and
- the fees, rates, interest and other charges levied on the property have not been paid.

Example condition rewritten

The applicant must pay all fees, rates, interest and other charges levied on the property where:

- an application has been made to the local government for the release of the plan of subdivision; and
- the fees, rates, interest or other charges have not been paid.

Drafting Exercise No. 2 – Answer provided in workshop material

Original condition

The Property Records will be noted that a geotechnical investigation is required on each lot before a building application is made to Council and that such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.

Legal subject

Legal action

Legal case

Legal condition

Rewritten condition

Drafting Exercise No. 3 – Answer to be provided at workshop

Original condition

To ensure compliance with the conditions of this approval, Council will require that you enter into a bank bond to guarantee performance. The value of such bond would be determined and would need to be lodged prior to the issue of a building permit, and any costs incidental thereto will be the applicant's responsibility.

Legal subject

Legal action

Legal case

Legal condition

Rewritten condition

Drafting Exercise No. 4 – Answer to be provided at workshop

Original condition

Development must be carried out in accordance with the approved Environmental Management Plan such that:

- all pollutants are contained and managed within the site boundaries; or
- treated to levels acceptable for discharge from the site such that natural limits are not exceeded and no environmental harm is caused.

Legal subject

Legal action

Legal case

Legal condition

Rewritten condition

Suggested answer – Drafting Exercise No. 2

Original condition

The Property Records will be noted that a geotechnical investigation is required on each lot before a building application is made to Council and that such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.

Legal subject

There is no legal subject specified in the Condition. The obligation is on the owner of the land to arrange for the geotechnical investigation, therefore, the legal subject would be the applicant:

A geotechnical investigation is to be conducted by the applicant of each lot before a building application is made to Council and such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.

Legal action

The legal action should be expressed in the active voice:

The applicant must conduct a geotechnical investigation of each lot before a building application is made to Council and such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.

Legal case

In this example, the Condition takes effect prior to a development application for building work being lodged:

The applicant must conduct a geotechnical investigation of each lot prior to a *development application for building work* being made to Council and such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.

Legal condition

The Condition requires a geotechnical investigation be submitted to the Council prior to a development application for building work being made, however, the intent of the Condition is for the Council to have received the report prior to a building approval being issued:

The applicant must conduct a geotechnical investigation of each lot prior to the grant of a development permit for building work by the Council and such geotechnical investigation is to be undertaken by a suitably qualified and experienced geotechnical consultant.

Rewritten condition

The applicant must prior to the grant of a development permit for building works in respect of a lot submit to the Council a geotechnical investigation of the lot which is undertaken by a suitably qualified consultant.

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Colin Biggers & Paisley

Probity in Tendering – a reminder for government departments and agencies

Paul Muscat

This article discusses the decision of the Federal Court of Australia in the matter of *Australian Competition and Consumer Commission v T.F. Woollam & Son Pty Ltd* [2011] FCA 973

September 2011

Executive Summary

In a decision made on 24 August 2011, the Federal Court has found that three Queensland construction firms engaged in price fixing and misleading or deceptive conduct in the course of tendering for a number of government construction projects between 2004 and 2007.

Case

The court determined that T.F. Woollam & Son Pty Ltd, J.M. Kelly (**project builders**) Pty Ltd and Carmichael Builders Pty Ltd had been involved in 'cover pricing' and consequently were in breach of provisions of the *Trade Practices Act 1974* (Cth) (now known as the *Competition and Consumer Act 2010* (Cth)).

Facts

The practice known as 'cover pricing' arises in circumstances where a builder wishes to be seen to tender for a particular project (so as to have the opportunity to participate in future tenders), but either did not wish to win the tender or did not have the time or resources to prepare a tender for that project. The practice includes Builder A (wishing to be seen to tender for a particular project) asking Builder B (whom Builder A knows or believes to be tendering for the same project) for a 'cover price' in respect of that project. It is understood between the parties that should Builder A choose to tender for the project, Builder A will tender at a price no less than the cover price, and Builder B lodges a tender for the project with a price less than the cover price.

Decision

The court found that this conduct had the substantial purpose of controlling the price at which the defendants were respectively to supply their services pursuant to the tenders submitted by them and that the purpose of this conduct would have the effect of substantially lessening competition. In addition, the court also held that misleading and deceptive conduct had been engaged in by the defendants in relation to the representations made by the defendants in their tender documents regarding the competitive nature of their respective bids.

This decision provides a good reminder for government departments and agencies to ensure probity is an integral element of procurement by adopting and implementing probity principles when undertaking the tender process. Any action taken or decision made should be tested against the applicable probity principles, and tested before it is taken or made, in an effort to eliminate this type of conduct by tenderers and to ensure the integrity of the tender process.

The main probity principles that should be regarded by government departments and agencies during the tender process include fairness and impartiality, use of a competitive process, consistency and transparency of process, confidentiality and security of information and material, effective management of conflicts of interest and a clear audit trail.

The publicity generated by a decision such as this one is not favourable for the government, as it can impact on the reputation and integrity of the government, and result in a loss of confidence in the government tendering process by both the public and suppliers. In addition, the need for action by the Australian Competition and Consumer Commission against tenderers in cases such as this results in increased costs for the government, the process being tainted to the extent that the process must be conducted afresh with the consequent waste of industry and government time and resources, as well as the inconvenience of the conduct of court proceedings.

Being vigilant and applying these probity principles to the tendering process should not only assure integrity and transparency, but will also minimise the government's exposure to litigation and liability if the tender process outcome is disputed, and maintain public sector integrity and reputation.

Urban or Rural

Diane Coffin | James Langham

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Moore v Cairns Regional Council & Ors* [2011] QPEC 102 heard before Everson DCJ

September 2011

Executive Summary

This case involved a submitter appeal against the decision of the Cairns Regional Council to grant a development permit for the reconfiguration of a lot for residential development in a rural area. The Planning and Environment Court allowed the appeal in part but only to the extent that conditions agreed to by parties during the appeal process, be imposed.

Case

This case involved a submitter appeal against the decision of the Cairns Regional Council (**council**) to grant a development permit for the reconfiguration of a lot at Brays Road, Little Mulgrave (**site**). On 8 December 2010, the Planning and Environment Court (**P&E Court**) declared that the development application made to the council was pursuant to section 3.1.6 of the *Integrated Planning Act 1997* (**IPA**) to vary the effect of the planning scheme to permit uses consistent with the Low Density Residential planning area of the Cairns Plan 2005 (**plan**) and to reconfigure a lot.

Facts

The site had an area of 79.62 hectares which was heavily vegetated with rainforest and contained various water courses including the Little Mulgrave River and Pilba Creek. Many of the submitter appellants and co-respondents by election relied on the water from the Pilba Creek and had concerns about the impacts the proposed development would have on water quality and quantity.

During the course of the appeal the council and co-respondent negotiated new conditions relating to ecological values and water quality and quantity. These new conditions were subsequently agreed by the appellants and co-respondents by election.

The remaining issues in dispute included whether the proposed development inappropriately compromised good quality agricultural land (**GQAL**) on the Site and represented an urban encroachment into a rural area. The appellants and co-respondents by election argued that the proposed development would comprise the achievement of the following desired environmental outcomes (**DEO**) in the plan:

- DEO 2.3.1 Primary Production;
- DEO 2.3.4 Preservation of Resources; and
- DEO 2.3.5 Pattern of Urban Development.

The appellants and co-respondents by election also contend that the proposed development conflicted with:

- the intent of the Gordonvale – Goldsborough District Planning Area in which the site was situated;
- the purpose of the Rural 1 Planning Area Code and Part B Performance Criteria P1, P2, P3 and P4 thereof;
- the purpose of the Reconfiguring of a Lot Code and, in particular, the extent it resulted in the fragmentation or alienation of GQAL; and
- a number of land use policies set out in the Far North Queensland Regional Plan (**FNQRP**) relating to the limitation of urban development and the preservation of GQAL.

Expert Evidence

Expert evidence was provided in relation to the GQAL on the site. Two of the three experts found the site contained small areas of low quality GQAL and one of these experts went further to state that there had been a decline in commercial cropping and that properties in the vicinity of the site were unlikely to re-establish commercial cropping. The third expert found that the constraints on the use of the site were such that it could not be classified as GQAL.

Decision

His Honour Judge Everson, stated that although there would be further fragmentation of the GQAL on the site as a consequence of the proposed development this would not have an effect on the commercial viability of the site for agriculture. Furthermore, his Honour found that the GQAL would not be alienated as it would still be available for use on a small scale in the way residents in the vicinity used their lots.

His Honour, noted that the terms "urban" and "rural" were not defined in the plan and according to the plan it was therefore necessary to assign the meaning giving under the IPA. The terms are not defined in the IPA either, however, in schedule 10 (Dictionary) of the IPA "urban area" is defined to mean "*an area identified on a map in a planning scheme as an area for urban purposes, including future urban purposes, but not rural residential or future rural residential*". Further "residential purpose" is define to mean "*purposes for which land is used in cities or towns, including residential, …purposes*". On this point his Honour found, having regard to the large lots in the country as opposed to residential developments serviced by infrastructure in the city, the proposed development was not urban but rural in character.

His Honour went on to say that the relevant provisions of FNQRP should not be given such weight as to preclude the proposed development in circumstances where it was consistent with the identified DEOs and other provisions of the plan. He said that the proposed development would also provide permanent protection of over 12 hectares of significant rainforest vegetation which was not currently protected and would result in the removal of weed species and improve the vegetation on the site.

Held

The appeal was allowed in part, but only to extent of allowing the new conditions of approval to be imposed.

Existing anomalous developments deserve holistic planning approach

Diane Coffin | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Moncrieff v Townsville City Council (No. 2)* [2011] QPEC 100 heard before Durward SC DCJ

September 2011

Executive Summary

The proposed development in this case was an 850-lot park residential subdivision of land in the Rural Planning Area of the *City of Thuringowa Planning Scheme 2003*. The land was adjacent to Rupertswood, an existing, if somewhat anomalous in the rural surrounds, residential estate. The developer sought a preliminary approval overriding the planning scheme to allow the park residential use on the land.

Case

This was an appeal by the Moncrieffs (**developer**) against the refusal by the Townsville City Council (**council**) of a development application for preliminary approval for a material change of use (**MCU**) regarding land at Graniteville Road, Alice River (**land**).

Facts

Issues

The relevant grounds of refusal by the council were generally that the proposed MCU:

- did not comply with the character statement of the Rural Planning Area;
- did not comply with the Rural Planning Area Code, in particular the provisions relating to issues of character, separation distances, lot size, non-rural development and existing and future rural amenity;
- was at odds with the City-Wide Codes, namely those concerning Transport, Urban Growth Boundaries and Natural Areas; and
- was inconsistent with Desired Environmental Outcome No. 6 (**DEO6**) relating to land use patterns.

The developer's grounds of appeal were generally as follows:

- The existence of the adjacent Rupertswood residential estate (**Rupertswood**) influenced the character of the land, thereby negating the council's claim that the proposal was inconsistent with the character of the area. In addition, the proposal was argued to be consistent with Rupertswood and, therefore, had a consolidating effect on the area and increased the efficiency of established infrastructure.
- The land could not be viably used for rural purposes as it would cause a land use conflict due to the adjacent Rupertswood estate.
- The land adjoined the Urban Growth Boundary and, rather than restricting the implementation of the Urban Growth Boundary Code, it assists by contributing to the urban efficiencies of Rupertswood.
- The proposal was consistent with DEO6 because there was integration with Rupertswood, it consolidated Rupertswood, it promoted co-location and there were transport network advantages.

Urban Growth Boundary

The court decided that the Urban Growth Boundaries Policy (**policy**) and Urban Growth Boundaries Code (**code**) allowed for consideration to be given to residential development outside the Urban Growth Boundary. The court eventually accepted that the policy was a guideline only.

The anomalous presence of Rupertswood in the area was discussed. His Honour noted that despite the intentions of the policy and code:

> *Rupertswood is a reality. It is a community. It should not be shunned as an unwanted planning decision of the past, undeserving of improvement. It cannot be simply discounted or ignored in the holistic planning scheme context. The proposed development has the potential to create the sort of community envisaged in the policy. Whilst all planning policies are by there (sic) nature speculative in the context of planning guidance for future development, the urban growth boundary at Rupertswood is in my view an arbitrary line that recognises the existence of the residential estate but condemns it as a distant urban location with a less than optimal residential community status.*

It was noted that the policy referred to a 'reasonable level of infrastructure' which was not currently enjoyed by Rupertswood. An amendment to the Urban Growth Boundary was justified in this instance.

In addition the court was prepared to accept that other areas in the locality did not reasonably accommodate the development, that there would be no adverse environmental, economic, social or energy consequences and that the proposal was generally compatible with Rupertswood.

The ultimate decision was whether to grant the preliminary approval overriding the planning scheme pursuant to section 3.1.6 (Preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997*. This required that where there was a conflict with the planning scheme that there needed to be sufficient grounds to approve the development despite the conflict. In this regard expert evidence was submitted on issues of infrastructure, town planning, need, adjacent residents' concerns, traffic and whether there was an infrastructure burden on the council inherent in an approval.

Decision

On balance, the court decided that there were no infrastructure or environmental issues that could not be adequately dealt with by way of conditions. In addition, the developer's town planner's evidence was generally preferred and it was accepted that the planning scheme had not provided sufficiently for the development of Rupertswood. In addition, it was accepted that there was a need for the development and its effect would be to consolidate the existing residential development of Rupertswood and assist to achieve the kind of development envisaged by the policy.

As such there were sufficient grounds to approve the development application.

Held

Orders were made that the refusal of the council be set aside and that the development application be approved subject to lawful conditions.

Appeal struck out for want of prosecution

Diane Coffin | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Theo v Logan City Council & Ors* [2011] QPEC 103 heard before Robin QC DCJ

September 2011

Executive Summary

The Planning and Environment Court, considering applications by the respondent and co-respondents to be freed from further involvement in an appeal brought by the self-represented appellant, determined that the parties should be freed from the appeal given that the appellant had no prospect of success if the appeal were to proceed.

Case

This case concerned applications brought by Logan City Council (**respondent**) and the Chief Executive of the Department of Main Roads and the Chief Executive of the Department of Transport (**co-respondents**) to strike out an appeal brought by Mr Theo (**appellant**) in respect of conditions of a development approval granted by the respondent.

Facts

The Respondent and Co-Respondents effectively sought to free themselves from further involvement in the appeal as follows:

- the co-respondents, relying on rule 293 (Summary judgment for defendant) of the *Uniform Civil Procedure Rules 1999* (**UCPR**), sought summary judgment against the appellant to the extent the appellant appealed against the co-respondents' conditions of approval, on the basis of the revised conditions agreed to; and
- the primary relief sought by the Respondent was that the appeal be struck out for want of prosecution pursuant to rules 5 (Philosophy—Overriding obligations of parties and court) and 280 (Default by plaintiff or applicant) of the UCPR.

The appellant resisted the applications brought against him and needed the court's leave to proceed with the appeal under rule 389 (Continuation of proceeding after delay) of the UCPR, given that two years had passed since the previous step had been taken in the appeal.

Decision

Application of UCPR

The court indicated that, in accordance with rule 3(2) (Application of Rules) of the *Planning and Environment Court Rules 2010*, the UCPR apply where the Planning and Environment Court's rules do not provide for a matter in relation to an appeal.

Merits of the appeal

In determining whether to grant leave under rule 389 (Continuation of proceeding after delay) of the UCPR to allow the appeal to proceed, the court considered the merits of the appeal.

The issues raised by the appellant in respect of the conditions of approval included the following:

- the requirement to install a noise abatement barrier;
- the removal of words such as "at the time of payment" from conditions related to headworks and other pecuniary contributions; the removal of the requirement to connect the property to the water supply network;
- the requirement for water tanks as part of the development; and
- the specification to have all windows and door openings sealed.

In light of the views of an expert brought in by the appellant, the co-respondents made concessions in the appellant's interest in respect of certain conditions related to the requirement to install a noise abatement barrier. The application brought by the co-respondents set out the revised conditions.

The court considered that as far as the issues raised by the appellant in respect of the conditions of approval related to the co-respondents', the appellant had no real prospect of succeeding beyond the extent to which he had already succeeded, by gaining concessions as to conditions relating to noise barriers which adopt the recommendations of the appellant's noise expert. Accordingly, there was no need for a trial or hearing of the underlying appeal in respect of those conditions relevant to the co-respondents. His Honour Judge Robin QC indicated his preference to remove the co-respondents from the appeal on the basis that the conditions provided in the application of the co-respondents be imposed.

Moreover, the court held that the appellant had no real prospect of succeeding any further beyond those concessions made by the co-respondents and there was no need for a substantive hearing of the appeal. As such, the respondent was entitled to have the appeal struck out for want of prosecution.

Costs

Both applications sought costs, however, the court was not inclined to award them given that the Planning and Environment Court is a no-costs jurisdiction. His Honour Judge Robin QC did indicate that should the appellant pursue the appeal further, he was on notice as to being ordered to pay costs.

Held

The court gave the parties the opportunity to consider the court's judgment and make submissions as to the appropriate order to give effect to the court's views.

Relief from non-compliance: State resource evidence

Diane Coffin | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Neilsens Quality Gravels Pty Ltd v Brisbane City Council & Ors* [2011] QPEC 101 heard before Robin QC DCJ

September 2011

Executive Summary

This case was an application to the Planning and Environment Court for excusal of non-compliance with the *Integrated Planning Act 1997* in respect of the failure to obtain the required evidence regarding allocation of or entitlement to a State resource for a development application. The court exercised its discretion to excuse the non-compliance having regard to the views of the Department of Environment and Resource Management and the court's broad powers of discretion under the *Sustainable Planning Act 2009*.

Case

This case was an application to the Planning and Environment Court (**court**) pursuant to section 820 (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009* (**SPA**) for excusal of non-compliance with section 3.2.1(5) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**) in respect of Neilsens Quality Gravels (**Neilsens**) failure to obtain the required evidence regarding allocation of or entitlement to a State resource for the development application.

Facts

The appeal to which this application related was by Neilsens against the Brisbane City Council's (**council**) refusal of a development application seeking approval of sand and gravel extraction operations on land at Brendale in Brisbane with the extracted material (including wastewater) to be taken by river crossing over the South Pine River to another parcel of land.

The development application sought a development permit for:

- operational work in a Coastal Management District for drainage over State Coastal Land;
- operational work for the construction of waterway barrier works (ie the river crossing); and
- operational work for works in a watercourse that interferes with water (associated with the construction of the river crossing).

Accordingly, the development application required evidence regarding the allocation of or entitlement to a State resource in respect of the river crossing which involved taking or interfering with water.

Decision

In making its decision the court identified the expanded power that the court now enjoys under section 440 (How court may deal with matters involving noncompliance) of the SPA (and transitionally under section 820 (Proceedings for particular declarations and appeals) of the SPA) which allows the court to make orders about a development application which was not properly made.

The relevant parties agreed that section 820 (Proceedings for particular declarations and appeals) of the SPA was available in circumstances such as those in this application.

In considering whether to exercise its discretion, the court stated that a telling factor "*will always be the attitude of the State entity where it is known*". In this respect, his Honour Judge Robin QC referred to the case of *Vidler v Fraser Coast Regional Council* [2011] QPEC 19 at [38] which relevantly provides as follows:

> *the Council and now the court should not be required to further process the development application, as we have any idea whether the State resource issue would defeat it and make [assessment] a costly, pointless exercise.*

In this application, the Department of Environment Resource Management's (**DERM**) view was known to the court. DERM's advice in this respect was that it did not object to the application to excuse the non-compliance.

Finally, the court accepted Neilsens' identification of the following five factors supporting the relief sought:

- DERM's support and its confirmation that it asserts no harm from any loss of opportunity to "veto the development";
- Neilsens had taken reasonable steps to identify what State resource evidence was needed and its failure was an innocent misunderstanding;
- no rights or entitlement of members of the public had been limited or adversely affected by reason of the non-compliance;
- the issues were procedural only and a successful outcome in this application did not prevent a full examination of the merits of the proposal, particularly in respect of the river crossing and drainage, when the appeal goes before the court for hearing; and
- a favourable exercise of the court's discretion would avoid a significant waste of public and private resources that would follow from Neilsens having to go back to the application stage of the IDAS process.

Held

The application was allowed and relief pursuant to section 820 (Proceedings for particular declarations and appeals) of the SPA from non-compliance with section 3.2.1(5) (Applying for development approval) of the IPA was granted.

Draft State Planning policy to protect Queensland's strategic cropping land: Are you affected?

Matthew Soden-Taylor | Tom Buckley

This article discusses the potential implications of the State Government's draft State Planning Policy: Protecting Queensland's strategic cropping land

September 2011

Executive Summary

On 5 August 2011, the Department of Environment and Resource Management (**DERM**) released the draft State Planning Policy: Protecting Queensland's strategic cropping land (**SPP**). The draft SPP, which is open for public comment until Friday, 30 September 2011, has potential implications for developers who own land on or near land that is identified as 'strategic cropping land' (**SCL**).

State planning policy

The aim of the policy is to recognise and protect Queensland's best cropping land. This is implemented through a development assessment framework which seeks to limit development on SCL to the extent that it inhibits cropping or results in its 'permanent alienation'. Permanent alienation is defined in the SPP to include where a use on or near SCL will endure for 50 years or more and prevents cropping during that time or in the future. Uses in this definition include urban development.

Under the development assessment framework in the SPP, development involving material change of use and operational work is generally not permitted on SCL, unless the development or use is temporary and the SCL is restored when the development or use ceases. Additionally, development involving reconfiguring of a lot is only permitted in very limited circumstances, which does not include urban development.

Significantly, the SPP may also have an effect on other land that is located within one kilometre of SCL. In this context, the SPP has two significant requirements which affect future urban development:

- firstly, the SPP requires that future regional plans must set the urban footprint boundary one kilometre away from SCL; and
- secondly, new or amended local planning instruments must not zone land within one kilometre of SCL for 'sensitive uses', which includes various forms of urban development.

At a regional planning level, this will mean that any land currently situated within one kilometre of SCL is at risk of being designated outside the urban footprint in a future regional plan. This will have significant consequences for developers as the land use designation for those areas would revert to either regional landscape and rural production or rural living, which do not support urban development.

At a local planning level, a new or amended planning scheme will not be able to zone land within one kilometre of SCL for uses that permit urban development. This will mean that any future proposed urban development would likely be inconsistent with the planning scheme and increase the difficulty in obtaining the necessary development approvals.

Whilst this policy will not presently affect land within one kilometre of SCL, developers should take note of the need to plan for the development of such land in order to minimise the risks associated with the consequences of the draft SPP.

As mentioned, submissions can be made to DERM about the draft SPP until Friday, 30 September 2011. The following is a link to a copy of the draft SPP on DERM's website:

http://www.derm.qld.gov.au/land/planning/pdf/strategic-cropping/sci-draft-spp.pdf

Colin Biggers & Paisley

Sympathy but no error of law

Diane Coffin | Matthew Soden-Taylor

This article discusses the decision of the Queensland Court of Appeal in the matter of *Wood v Redland City Council* [2011] QCA 242 heard before Muir JA, Margaret Wilson AJA and North J

October 2011

Executive Summary

This case was an appeal to the Court of Appeal involving the refusal of a development application for a material change of use to authorise Mr Wood to continue fishing operations from his residence. This case was dismissed on the basis that no error of law was identified by Mr Wood, however, the Court of Appeal considered several aspects of the primary judge's decision.

Case

This case was an appeal to the Court of Appeal against the decision of the Planning and Environment Court (**P&E Court**) to dismiss Mr Wood's appeal against the Redland City Council's (**council**) refusal of his development application for a material change of use for home business for land at Cleveland.

Facts

Mr Wood was a professional fisherman who had for many years conducted his business out of his residence. The business or use of the land involved the loading of two outboard driven fishing boats, the towing of the boats to and from the subject land, unloading and cleaning the boats on return from fishing, freezing and storage of crabs and at times their sale.

The development application the subject of the appeal to the P&E Court, was made in order to lawfully continue the business as a previous development approval for the business had expired.

The P&E Court dismissed Mr Wood's appeal of the council's refusal of his development application. The P&E Court concurrently allowed an application by the council for a declaration that Mr Wood's use of the land constituted a development offence in that it involved assessable development for which no effective development permit had been issued and that the use was otherwise unlawful.

The P&E Court also granted the council's application for an injunction restraining Mr Wood from using the land for the purpose of processing, cooking and storing seafood for sale without first having obtained an effective development permit.

The stated grounds of appeal by Mr Wood to the Court of Appeal were "primary grounds of income" and the orders sought were specified as "*inquiry into the scandal why IDC2881 was cancel (sic) by Redland City Council*".

No error of law was identified in any of the applications for leave to appeal or proposed notices of appeal to the Court of Appeal. Nevertheless, the Court of Appeal considered whether the primary judge erred in determining that 'sufficient grounds' justifying the use despite the conflict for the purposes of the *Sustainable Planning Act 2009* (**SPA**) excluded "*the personal circumstances of [Mr Wood] and are concerned with matters of public interest or benefit*".

Decision

The Court of Appeal relevantly stated as follows at paragraph 21:

> *It does not follow, necessarily, that the exclusion of the personal circumstances of the applicant and his son-in-law and the financial hardship they may be expected to suffer from the concept of 'public interest' meant that no public interest consideration could arise out of the closure of [Mr Wood's] business consequent upon the refusal of the subject application. 'Public interest' is a broad concept, the meaning of which needs to be determined in the context of the Act.*

However, public interest grounds were not raised by Mr Wood.

The order made by the primary judge contained the words "*…in that it involved assessable development for which no effective development permit for material change of use had been issued, and the use is not otherwise lawful*". These words were referrable to section 578 (Carrying out assessable development without permit) of the SPA to which the primary judge had been referred by the barrister for the council.

The Court of Appeal held that the substance of the declaration was to the effect that the use of the land was unlawful which demonstrated a breach of section 582 (Offences about the use of premises) of the SPA. Accordingly, the Court of Appeal held that the above quoted words should be deleted from the order made by the primary judge.

The Court of Appeal held that no error of law was identified in the applications for leave, the proposed notices of appeal or in Mr Wood's outline of arguments. The Court of Appeal also held as follows at paragraph 29:

> *[Mr Wood] was in an unfortunate position and is deserving of sympathy. The primary judge appeared sympathetic to his plight. However, the primary judge, like this Court, had a duty to apply the relevant statutory provisions. A perusal of the transcript of the proceedings at first instance shows that [Mr Wood] was given every opportunity to present his case and that he was treated fairly.*

Held

The Court of Appeal ordered as follows:

- Allow the application for leave to appeal in CA No 3967 of 2011.
- That the declaration made by the primary judge in Planning and Environment Court Application No 2394 of 2010 be varied by deleting the words, "*...in that it involves assessable development for which no effective development permit for material change of use has been issued, and the use is not otherwise lawful*".
- Otherwise dismiss the appeal in CA No 3967 of 2011.
- Refuse the application for leave to appeal in CA No 3966 of 2011.

Colin Biggers & Paisley

Adverse costs orders result from duplication of proceedings

Diane Coffin | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Court of Appeal in the matter of *Hammercall Pty Ltd v Robertson & Anor; Hammercall Pty Ltd v Robertson & Ors* [2011] QCA 214 heard before Chesterman and White JJA, and Boddice J

October 2011

Executive Summary

Adverse costs orders were made against Hammercall Pty Ltd for pursuing declaratory relief relating to the designation of land for electricity infrastructure in both the Planning and Environment Court and the Court of Appeal, in circumstances where the proposal to designate the land was discontinued.

Case

This Court of Appeal (**QCA**) case dealt with an application to the Planning and Environment Court (**P&E Court**) and subsequent applications to the QCA concerning the same factual issues whereby Energex Limited (**Energex**) proposed to construct a power line through part of some land (**land**) owned by Hammercall Pty Ltd (**Hammercall**) for a transmission line between Mudgeeraba and Tugun (**proposed transmission line**).

P&E application

Upon being notified of Energex's intentions to seek designation of the land for community infrastructure pursuant to the relevant provisions of the *Sustainable Planning Act 2009* (**SPA**) to enable the construction of the proposed transmission line, Hammercall commenced proceedings in the P&E Court seeking, among other declarations, a declaration that Energex's proposal to have the land designated for community infrastructure was unlawful or unauthorised (**P&E application**). Energex was the second respondent to these proceedings, with the Minister for Energy and Water Utilities and the Attorney-General being the first and third respondents respectively.

P&E order

The P&E Court made a directions order regarding the conduct of the proceedings pursuant to section 446 (Orders or directions) of SPA, including a direction that affidavit evidence be filed in order to distil the issues prior to the hearing (**P&E order**). The matter was to be further reviewed on 15 April 2011 and set down for hearing in late May.

Leave application

On 1 April 2011, Hammercall filed an application in the QCA for leave to appeal against the P&E order (**leave application**). In addition to leave, various other declarations were sought concerning the lawfulness of the proposed designation application by Energex.

QCA application

Hammercall filed a separate originating application in the QCA on 29 April 2011 (**QCA application**), which in its settled form sought declarations and orders pursuant to section 29(1) (Jurisdiction and powers) of the *Supreme Court of Queensland Act 1991* which were similar in substance to those declarations sought in the P&E application.

Suspension of designation process

On 20 July 2011, Energex notified Hammercall that it had reconsidered the proposed transmission line, partially due to public opposition among other issues, and would suspend the designation process accordingly.

Hammercall was then prompted to lodge another application in the QCA which claimed among other things, relief against Energex in the form of a costs order because the proposal and eventual suspension of the proposed designation had caused a waste of costs (**costs application**).

The first and third respondents sought an order against Hammercall for the first and third respondents' costs of resisting the leave application and the QCA application.

The issue before the court was whether to grant the relief sought by Hammercall against Energex and by the first and third respondents against Hammercall.

Decision

Leave application

While Energex did not seek a costs order, the first and third respondents did seek costs, and were held to be entitled to costs because the leave application was defective and totally devoid of any prospects of success. This was because section 498 (Who may appeal to Court of Appeal) of SPA allows a party to appeal a decision of the P&E Court on the ground of "*error or mistake in law on the part of the court*" but "*only with the leave of the Court of Appeal*". However, the QCA did not consider that the P&E order contained any error or mistake in law that could be appealed against.

There was also no final decision against which an appeal could be brought, because the P&E order concerned the conduct of proceedings and was not a judgment in the matter.

QCA application

The QCA awarded costs to the first and third respondents because the QCA application unreasonably sought declaratory relief on basically the same terms as the P&E application. In this regard it was noted that the "*applicant appeared to confound…jurisdiction to make declarations with the grant of writs of prohibition which are beyond the P&E Court's power*".

Held

- The leave application was refused, with Hammercall ordered to pay the first and third respondents' costs on a standard basis. There was no order as to the costs of Energex.
- The QCA application was dismissed, with Hammercall ordered to pay the first and third respondents' costs on a standard basis. There was no order as to the costs of Energex.
- The costs application was dismissed with no order as to costs.

Colin Biggers & Paisley

Relevance of events after acquisition date: arriving at the correct market value for compulsory acquisitions

Diane Coffin | Aaron Madden

This article discusses the decision of the Queensland Court of Appeal in the matter of *Brisbane City Council v Mio Art Pty Ltd & Anor* [2011] QCA 234 heard before Margaret McMurdo P, Fraser JA and Fryberg J

October 2011

Executive Summary

This Court of Appeal case was concerned with the material which may be considered in determining the market value for a compulsory acquisition at the date of acquisition (the relevant date for valuation). Planning documents which were under review at the date of acquisition, which took legal effect a number of months after the date of acquisition had the effect of allowing a building of greater height and increased the value of the land being compulsorily acquired.

The Court of Appeal ultimately found that the occurrence of events subsequent to the acquisition date could not be considered in the market valuation of the property in the context of section 20 (Assessment of compensation) of the *Acquisition of Land Act 1967*. The Court of Appeal also confirmed that the likelihood of future events affecting the property at the date of acquisition was a well established factor in determining market value. However, in this instance the content of the planning documents under review at the date of acquisition was not known and was, therefore, unable to be considered.

Case

This case was an application by the Brisbane City Council (**council**) for leave to appeal to the Court of Appeal from the Land Appeal Court, and concerned the valuation of land of the first respondent, Mio Art Pty Ltd, and the second respondent, Greener Investments Pty Ltd (in liquidation), which was being compulsorily acquired by the council. The major ground of appeal involved the consideration of planning instruments in determining market value which were published subsequent to the date on which the council compulsorily acquired the land.

Facts

On 31 August 2007, the council compulsorily acquired 5,643m^2 of a total of 8,825m^2 of land on Montague Road, South Brisbane of which the first and second respondents were the owner and mortgagee respectively. For the purposes of valuation the council and respondents views differed as to the type of building which would have been approved for the land in the context of a 'hypothetical development' method of valuation. In this method, the returns from a property are considered in terms of the assessment a 'prudent purchaser' would make.

In the initial hearing of the matter, the Land Court held that the prudent purchaser would have considered there to be four main planning documents which would determine the constraints of use and, therefore, the ultimate commercial value of the site. Two of these were the Kurilpa Structure Plan – Version 1 (**Kurilpa 1**) and the *West End and Woolloongabba District Local Plan* (**local plan**) which authorised building heights of 10 storeys. At the time of acquisition, a review of Kurilpa 1 was being undertaken, with the second version of the document (**Kurilpa 2**) being released in December 2007, 3 to 4 months after the acquisition of the land. Kurilpa 2 in conjunction with the local plan, allowed building heights of 12 storeys and would, if considered, increase the value of the land being acquired.

The Land Court held that the relevant date for valuation under section 20 (Assessment of compensation) of the *Acquisition of Land Act 1967* (**ALA**) was the date of acquisition. Furthermore, the Land Court found that while the hypothetical purchaser might be aware that a review of Kurilpa 1 was being undertaken as at August 2007, there was no evidence as to the specifics of Kurilpa 2, particularly the posited increase to 12 storeys of allowable height. On this basis Kurilpa 2 was not taken into consideration in the valuation and, accordingly, the valuation was given on the basis that the building height would not exceed 10 storeys.

The Land Appeal Court ultimately overturned this ruling stating that it was erroneous to exclude Kurilpa 2 from consideration given that it was foreseeable in August 2007 under Kurilpa 1 and the local plan, that the building heights allowed would be increased. The Land Appeal Court also found that events after acquisition are admissible if they confirm what was foreseeable at the time of acquisition.

The council sought leave to appeal to the Court of Appeal, with both respondents initiating separate appeals. There were a number of grounds stated, however, the major ground with which the Court of Appeal concerned itself was whether Kurilpa 2 could be considered given that it was introduced subsequent to the acquisition date.

Decision

The judgement of Fryberg J gave reasons for the orders made, with Fraser JA and Margaret McMurdo P in support of the reasons for judgement and the orders given.

His Honour Fryberg J (**his Honour**) began by emphasising the importance of the wording employed in section 20 (Assessment of compensation) of the ALA as the main reference point in assessing the value of land in this context. His Honour stated that terms are often not used in a uniform sense in statutes concerned with valuation and, as such, ad hoc reference to seemingly relevant judicial dicta from cases not concerned with the specific provision should be avoided.

This view went some way to forming the basis of his Honour finding for the council in this matter. The respondents relied upon a number of cases in their submissions which were treated favourably by the Land Appeal Court in arriving at its decision to consider subsequent events in determining market value. However, his Honour placed emphasis on the cases which concerned provisions similar in form to section 20 (Assessment of compensation) of the ALA, finding that of the cases relevant to this appeal, none demonstrated that events subsequent to the date of acquisition could be taken into account in assessing market value. On this basis, his Honour found that the subsequent introduction of Kurilpa 2 and its associated changes in height could not affect the valuation undertaken at the date of acquisition.

His Honour, however, sought to distinguish the 'consideration of subsequent events' from the 'likelihood of future events affecting the property value' at the date of acquisition. His Honour adopted the reasoning in the High Court decision of *Spencer v The Commonwealth* [1907] HCA 82, finding that at the date of acquisition in August 2007, the hypothetical parties were able to consider future events to the extent that such likelihood would have been known to the hypothetical parties at the acquisition date. Ultimately his Honour agreed with the position of the President in the Land Court, finding that a prudent purchaser would have been aware at the date of acquisition, of the review of Kurilpa 1 and, therefore, of the eventual introduction of Kurilpa 2. However, they could not have been aware of the content of the review. As such they could not have known of the proposed increase in allowable building height and could not consider this in their valuation.

Having made these findings, his Honour ordered the matter to be returned to the Land Appeal Court for reconsideration. His Honour stated that this was not a decision taken lightly, but one which was necessary due to a mathematical error identified in the judgment of the President in the Land Court.

Held

- Application for leave to appeal granted, with costs to be assessed.
- Appeal allowed with costs to be assessed.
- Set aside the order of the Land Appeal Court allowing the appeals to that court.
- Order that the matter be returned to the Land Appeal Court for decision in accordance with the reasons for judgment of the Court of Appeal and with costs of the further hearing at the discretion of that court.
- Order that the respondents pay the council's costs of the appeal to the Land Appeal Court to be assessed, save for the costs of the further hearing pursuant to Order 4.

Colin Biggers & Paisley

Code or impact assessable - demolition of a heritage building

Diane Coffin | James Langham

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Barnes & Anor v Southern Downs Regional Council & Ors (No. 2)* [2011] QPEC 119 heard before Judge Robin QC DCJ

October 2011

Executive Summary

This case involved a submitter appeal against the decision of the Southern Downs Regional Council to grant a preliminary approval for building work, namely the partial demolition of a building on the Register of Cultural Heritage Places. The Planning and Environment Court allowed the appeal and ruled that the second co-respondent's development application should be refused.

Case

This case was an appeal to the Planning and Environment Court (**court**) against a decision by the Southern Downs Regional Council (**council**) to grant a preliminary approval for the partial demolition of a building listed on the Register of Cultural Heritage places (**Heritage register**) on 26 November 2009. The relevant building was located at 84 Fitzroy Street, Warwick (**number 84**).

Facts

Number 84 was a two storey sandstone structure constructed in the mid 1870s, located in the town centre amongst other historic and architecturally significant buildings including 82 Fitzroy Street, Warwick (**number 82**). The purpose of this appeal was to preserve number 84 in its entirety and as much of number 82 as possible. However, number 82 did not appear in the Heritage register and there was no development approval before the court in respect of number 82, therefore, the court's powers in relation to number 82 were limited.

Number 84 housed a shopping centre which the second respondents proposed to expand. As part of the proposed expansion, number 82 was to be demolished to make way for a driveway to provide access in and out of the shopping centre. Number 84 was to be partly demolished by removing the service wing at the rear of the building to facilitate turning movements and provide enhanced access to an enlarged underground parking area.

Numbers 82 and 84 were not only linked by geography and their joint contribution to the proposed expansion of the shopping centre, they were also linked as components of a building entered in the Heritage register under the *Queensland Heritage Act 1992* (**Act**). The responsible entity for matters relating to the Act was the Department of Environment and Resource Management (**DERM**). The DERM was open to the council granting an approval if the council's assessment indicated that an approval was appropriate but imposed conditions.

His Honour Judge Robin QC stated that the appeal came down to a balancing exercise, between the conditioning of the partial demolition of number 84, a building the *Warwick Shire Council Planning Scheme* (**planning scheme**) wanted protected to save the rest of the building. The question to be asked was whether demolishing the service wing of number 84 in exchange for the restoration of the remainder of the building was sufficient to overcome the conflict between the proposal and the planning scheme?

Decision

His Honour Judge Robin QC made reference to sections 3.1.4.1(ii) (Landscape and cultural heritage values) and 4.2.2 (City centre) of the planning scheme and noted that impact assessment would be required. Therefore, the co-respondent bore the onus of showing that the appeal should be dismissed. His Honour Judge Robin QC found that this burden had not been discharged.

His Honour Judge Robin QC stated that the planning scheme's requirement that number 84 was to be preserved was in his view taken to mean the whole of the premises. It was not shown that the demolition of the service wing and/or the creation of open space in its place advanced any public interest or even on its own enhanced or benefited the structure remaining from any point.

His Honour Judge Robin QC in answering the above question found that as much as the restoration of the remainder of number 84 would advance the public heritage interest, the partial demolition of the service wing of number 84 cannot be supported in terms of the planning scheme. More would be needed by way of countervailing benefiting to the public interest in order to overcome the conflict with the planning scheme.

Held

The appeal was allowed and the second co-respondent's development application was refused.

Who regulates a private airstrip?

Diane Coffin | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *McIlwraith v Scenic Rim Regional Council* [2011] QPEC 121 heard before Robin QC DCJ

October 2011

Executive Summary

The aviation industry in Australia is regulated by a mix of Commonwealth and State laws, the majority of which is a plethora of Commonwealth legislative instruments that regulate, amongst other things, aircraft operations, air space safety and airports. Local governments, through their powers under State planning legislative instruments, also have limited jurisdiction to regulate aircraft movement and airport development in their planning schemes, particularly in the context of private airstrips. However, it was the interaction of these State and Commonwealth laws which led to the landowner in the current case to challenge the constitutional validity of the State laws to require a development permit for the use of his land as a private airstrip.

Case

This case concerned an appeal and an application by Douglas McIlwraith (**appellant**) against the conditions of the decision of the Scenic Rim Regional Council (**respondent**) to approve a development application for a development permit for material change of use for a private airstrip.

Facts

In May 2007, the appellant applied to the respondent for a development application for a development permit for material change of use for a private airstrip with respect to rural land situated at Biddaddaba near Beaudesert. The development application was lodged as a consequence of prior prosecutions that had been initiated by the respondent against the use of the land as a private airstrip without approval. In February 2008, the appellant's development application was approved subject to conditions, the majority of which related to the use of the land as a private airstrip for light aircraft.

In September 2010, the appellant appealed the decision of the respondent to the Planning and Environment Court (**court**), principally arguing that the respondent's powers and functions under the *Integrated Planning Act 1997* (**IPA**) with respect to aircraft regulation was in fact under the constitutional control of the Commonwealth of Australia (**Commonwealth**) and thus any such powers of the respondent were invalid by way of section 109 (Inconsistency of laws) of the *Commonwealth of Australia Constitution Act 1900* (**Constitution**).

Section 109 (Inconsistency of laws) of the Constitution relevantly provides as follows:

> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

In this context, the appellant suggested that State legislation which granted the respondent powers under the IPA to regulate the operation of aircraft on and from above the surface the appellant's land were invalid because they were inconsistent with Commonwealth legislation, specifically certain Civil Aviation orders, which are instruments made under the *Civil Aviations Regulations 1988* (Cth) (**CAR**) and which are also one of the many Commonwealth legislative instruments that regulate aircraft and aviation practices in Australia.

Because the appellant's appeal was lodged well out of time, in December 2010, the appellant also filed an originating application (**application**) seeking among other orders, relief equivalent to that sought in the appeal. The court decided both the appeal and application at the same time.

Decision

His Honour, Judge Robin QC DCJ (**Judge Robin**), dismissed the appeal for being out of time and also dismissed the appellant's application on the basis that the respondent's powers under the IPA were not inconsistent with the Commonwealth laws with respect to aircraft regulation.

In coming to this decision Judge Robin referred to a number of authorities, the first of which was the case of *William Montague Morris v The Queen* [2005] HCA Trans 168. In this case the High Court of Australia (**HCA**) rejected a request for leave to appeal an earlier decision regarding the operation of State and Commonwealth aviation laws because the HCA determined in that case that both laws operated 'harmoniously for their respective purposes'. In that case His Honour Justice Kirby identified that the Commonwealth law operated for the ordinary regulation of civil aviation whilst the State law, in that case, dealt specifically with the use of an aeroplane for dangerous and criminal activities.

Judge Robin also referred to the case of *Heli-Aust Pty Ltd v Cahill* [2011] FCAFC 62 in which his Honour Judge Flick of the Full Court of the Federal Court of Australia, found that "laws of the Commonwealth", for the purposes of section 109 (Inconsistency of Laws) of the Constitution, covered legislative instruments such as the CAR, however, it did not extend to other instruments such as Civil Aviation orders which are created under the CAR.

Judge Robin went on to reason that there was no constitutional inconsistency between the Commonwealth Civil Aviation orders and the respondent's powers under the IPA because, whilst the Commonwealth authorities regulate major airports and aircraft operation, they do not do so in respect of 'private airstrips'. His Honour specifically noted at paragraph 24 that:

> *Doubtless, the Commonwealth regime extends to, indeed covers the field to the extent that it regulates not only what happens in air space but what happens on the ground where airports or landing strips come under Commonwealth control. There is not the slightest indication anywhere in the voluminous statutory and regulatory material placed before the court to which my attention was drawn which evinces any intention to regulate what might happen on the ground in relation to private airstrips.*

Held

The appeal and application were dismissed.

Colin Biggers & Paisley

Infrastructure contributions reform in Queensland: Development Assessment Implications

Ian Wright | Tony Chadwick

This article discusses the development assessment implications of the infrastructure contributions reform in Queensland

October 2011

Introduction

New infrastructure contributions regime

- Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011 – commenced 6 June 2011.
- Draft State Planning Regulatory Provision (Adopted Charges) – commenced 1 July 2011.

Significant practical implications

- Capped infrastructure charges.
- Restricted infrastructure contribution powers.

Topics

- Capped infrastructure charges.
- Restricted infrastructure contribution powers.
- Practical implications for development assessment.

Capped infrastructure charges

Implementation of reform

- Adopted Charges SPRP.
- Existing financial contribution powers excluded.
- Adopted infrastructure charge.
- Adopted infrastructure charges resolution.

Adopted Charges SPRP

- Adopted infrastructure charges schedule – maximum adopted charges.
- Priority infrastructure areas for local government areas.
- Relevant proportions of adopted charge for local governments and SEQ distributor-retailers.

Previous financial contribution powers excluded

- Conditioned financial contribution under a planning scheme policy.
- Levied infrastructure charge under an infrastructure . charges schedule in a priority infrastructure plan.
- Levied infrastructure charge under a regulated infrastructure charges schedule.
- Levied infrastructure charge for water and wastewater infrastructure under SEQ. infrastructure charges schedule.

Adopted infrastructure charge

- If no adopted infrastructure charges resolution – lesser of:
  - maximum adopted charge;
  - charge under previous infrastructure contributions regime of a planning scheme policy, infrastructure charges schedule or regulated infrastructure charges schedule.
- If an adopted infrastructure charges resolution – stated infrastructure charge.

Adopted infrastructure charge – Excluded development

- Development under a State Resources Act.
- Development under Urban Land Development Authority Act 2007.
- Development in a declared master planned area unless the adopted infrastructure charges resolution states that an adopted infrastructure charge is to be levied.

Adopted infrastructure charges resolution – Adopted infrastructure charge and discount

- Adopted infrastructure charge – less than:
  - maximum adopted charge in Adopted Charges SPRP;
  - respective proportions of local government and SEQ distributor-retailer.
- Discount for existing usage.

Adopted infrastructure charges resolution – Trunk infrastructure planning matters

- Trunk infrastructure planning:
  - trunk infrastructure;
  - networks;
  - standards of service;
  - establishment costs.
- Relevant to:
  - development assessment;
  - conditioned land and work contributions;
  - calculation of offsets.

Adopted infrastructure charges resolution – Brisbane City Council

- Application of the resolution.
- Assumptions about future development.
- Priority infrastructure area.
- Desired standards of service.
- Establishment cost for trunk infrastructure networks.
- Adopted infrastructure charge.
- Allocation of adopted infrastructure charge.
- Offsets and refunds.
- Schedule of works.
- Trunk infrastructure plans.

Restricted infrastructure contribution powers

Conditions for financial contributions

- Conditioned payment under a planning scheme policy – removed.
- Conditioned payment for development outside priority infrastructure area in Adopted Charges SPRP or priority infrastructure plan.
- Conditioned payment for development inconsistent with assumptions in priority infrastructure plan.

Conditions for land and work contributions – Land dedication notices

- Conditions powers:
  - conditions under planning scheme policy – removed;
  - conditions for development infrastructure – if no stated trunk infrastructure;

  - conditions for non-trunk infrastructure – if stated trunk infrastructure;
  - conditions for necessary trunk infrastructure – if stated trunk infrastructure.
- Land dedication notice for trunk infrastructure.

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	Infrastructure charges plan (Noosa)	Priority infrastructure plan (Gold Coast)	Trunk infrastructure not included in resolution	Trunk infrastructure included in resolution	Trunk infrastructure 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 (s863 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)	–	✓	✓	–	✓	✓
Conditioned necessary trunk infrastructure (s649 and 755Q)	–	✓	✓	–	✓	✓

Infrastructure contribution powers	No adopted infrastructure charges resolution			Adopted infrastructure charges resolution		
	Planning scheme policy	Infrastructure charges plan (Noosa)	Priority infrastructure plan (Gold Coast)	Trunk infrastructure not included in resolution	Trunk infrastructure included in resolution	Trunk infrastructure included in PIP (or ICP)
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*).

Practical implications

Transitional arrangements

- Previous infrastructure contributions regime – if local government has exercised powers and issued a decision notice or infrastructure charges notice.
- New infrastructure contributions regime – if local government has **not** exercised powers – has made no decision or has refused a development.

Development assessment

Assess development application against trunk infrastructure planning matters to determine conflict with planning principles:

- prematurity of development;
- compromised trunk infrastructure plans;
- compromised desired standard of service.

Specific conditions powers

- Condition must be:
  - within specific conditioning powers;
  - otherwise relevant or reasonable.
- Specific condition powers for financial contributions limited to:
  - development inconsistent with the assumptions about the type, scale, location or timing of future development in the PIP;
  - development outside of the priority infrastructure area.
- Specific condition powers for work for trunk infrastructure limited to:
  - existing trunk infrastructure is inadequate;
  - future trunk infrastructure is necessary;
  - existing or future trunk infrastructure is on premises.
- Specific condition powers for work for non-trunk infrastructure limited to:
  - infrastructure internal to premises;
  - infrastructure to connect premises to external infrastructure;
  - infrastructure for the safety or efficiency of infrastructure network.

Case Study 1

Facts

- Preliminary approval for reconfiguring of lots for 48 lots.
- Development is accessed by a non-trunk road and intersection which only permits left hand turns.
- Condition is imposed requiring the construction of an additional lane at the intersection to accommodate right hand turn movements out of development site.

Decision prior to 1 July 2011

- Law:
  - Condition about non-trunk infrastructure must relate to (section 5.1.2 IPA; section 626 SPA):
    - networks internal to the premises;
    - connecting premises to external infrastructure networks; or
    - protecting or maintaining safety or efficiency of infrastructure network.
  - Condition must be relevant and reasonable (section 3.5.30 IPA; section 345 SPA).
- Answer – Condition will maintain safety and efficiency of non-trunk infrastructure network.

(See *Courtware (Australia) Pty Ltd v Council of the Shire of Noosa* [2009] QPELR 172)

Decision after 1 July 2011

- Law – Condition about non-trunk infrastructure must relate to (section 626 SPA):
  - networks internal to premises;
  - connecting premises to external infrastructure networks; or
  - protecting or maintaining safety or efficiency of infrastructure network of which non-trunk infrastructure is a component.
- Answer – Council does have power to impose condition.

Case Study 2

Facts

- Material change of use for an extension to a light industrial building.
- Building has a frontage to three non-trunk roads (A, B and C).
- Road A frontage is the main entrance to the building.
- Condition is imposed requiring the construction of a 1.2m wide footpath along all three road frontages.

Decision prior to 1 July 2011

- Law – Condition must be relevant and reasonable (section 3.5.30 IPA).
- Answer:
  - Not relevant and reasonable to require the construction of a footpath along all three road frontages.
  - Relevant and reasonable to require the construction of a footpath along Road A frontage.

(See *Bryant v Caloundra City Council* [2006] QPELR 335)

Decision after 1 July 2011

- Law – Condition about non-trunk infrastructure must relate to (section 626 SPA):
  - networks internal to the premises;
  - connecting premises to external infrastructure networks; or
  - protecting or maintaining safety or efficiency of infrastructure network of which non-trunk infrastructure is a component.
- Answer – Council does not have the power to impose the condition.

Case Study 3

Facts

- Material change of use to construct a shopping centre.
- Development site is accessed by an existing roundabout on what would be a trunk road.
- Development would increase traffic volumes by 9-12%.
- Condition is imposed requiring the payment of the total costs of upgrading the roundabout.

Decision prior to 1 July 2011

- Law – Condition must be relevant and reasonable (section 3.5.30 IPA).

- Answer:
  - Not reasonable that a minor user should be made to pay the total costs.
  - Relevant and reasonable to require the payment of a "bring forward cost".

(See *Neilson v Gold Coast City Council & Anor* [2005] QPELR 452)

Decision after 1 July 2011

- Law – Council may impose a condition requiring a payment for additional trunk infrastructure if development (section 650 SPA):
  - is inconsistent with the assumptions about the type, scale, location or timing of future development stated in a priority infrastructure plan; or
  - is for premises is completely or partly outside the priority infrastructure area.
- Answer – Gold Coast has the power to impose condition requiring payment for additional costs as Gold Coast has prepared a PIP. However Brisbane does not have a PIP and would not be able to impose the condition.

Case Study 4

Facts

- Development permit for a material change of use for dwelling houses and a reconfiguring of lots for 46 lots.
- Conditions are imposed requiring financial contributions towards an external collector road and off-road bicycle path networks.

Decision prior to 1 July 2011

- Law – Conditions must be relevant and reasonable (section 3.5.30 IPA).
- Answer:
  - Not relevant and reasonable to require financial contribution for the construction of pathway networks as there was no policy or plan.
  - Relevant and reasonable to require financial contribution to upgrade collector road.

(See *Barooga Projects (Investments) Pty Ltd v Caboolture Shire Council* [2005] QPELR 91)

Decision after 1 July 2011

- Law – Payment of additional trunk infrastructure costs may only be imposed if development (section 650 SPA):
  - is inconsistent with the assumptions about the type, scale, location or timing of future development stated in the priority infrastructure plan; or
  - is for premises completely or partly outside priority infrastructure area.
- Answer – Council does not have the power to require a financial contribution for non-trunk infrastructure or trunk infrastructure.

Practical implications

Offsets for land and work contributions

- No statutory guidance as to:
  - calculation of value;
  - indexation of value;
  - refunds of unused offsets.
- Council policy position is set out in its adopted infrastructure charges resolution.

Standard templates

- Standard condition templates drafted for:
  - section 626 non-trunk infrastructure conditions;
  - section 649 trunk infrastructure conditions.
- Standard land dedication notices templates.
- Standard adopted infrastructure charges notices.

Colin Biggers & Paisley

Temporary State Planning Policy 2/11 - Planning for stronger, more resilient floodplains released for consultation

Diane Coffin | Jamon Phelan-Badgery

This article discusses the State government's 'Temporary State Planning Policy 2/11 - Planning for stronger, more resilient floodplains' during its consultation period

November 2011

Executive Summary

The State government's 'Temporary State Planning Policy 2/11 - Planning for stronger, more resilient floodplains' has been released and is currently in its consultation period. Readers may view the relevant documents, interactive Floodplain Assessment Overlay Map and obtain further information from the Queensland Reconstruction Authority's website accessed at http://www.queenslandreconstruction.org.au.

Overview

The Queensland Reconstruction Authority (**QRA**) has released Temporary State Planning Policy 2/11 - Planning for stronger, more resilient floodplains (**TSPP**) for consultation until 11 November 2011. After consultation, the TSPP will come into force on 14 November 2011.

In addition to the TSPP, a guideline document has been published entitled 'Planning for stronger, more resilient floodplains: Part 1 - Interim measures to support floodplain management in existing planning schemes' (**Guideline Part 1**).

As part of a long term plan by the State government intended to increase the resilience of development in floodplains, the TSPP and Guideline Part 1 have the effect of:

- suspending the operation of paragraphs A3.1 and A3.2 of Annex 3 of 'State Planning Policy 1/03 Mitigating the Adverse Impacts of Flood, Bushfire and Landslide' which provide how 'Natural Hazard Management Areas' for flooding are determined;
- providing a Floodplain Assessment Overlay Map and an Interim Floodplain Assessment Overlay Code for incorporation into the planning schemes of participating local governments; and
- redefining 'Natural Hazard Management Area' for flooding to include areas identified on the Floodplain Assessment Overlay Map.

Local governments will be able to voluntarily adopt the Floodplain Assessment Overlap Map and Interim Floodplain Assessment Overlay Code where they have not the resources to perform similar flood mapping themselves. However, it should be noted that mapping is not consistently detailed across all areas.

Interim measure

The TSPP represents an interim measure to assist local governments to quickly incorporate provisions into planning schemes dealing with development in floodplains.

The Guideline Part 1 provides as follows with respect of Part 2 to be prepared in the future:

> *Part 2 will build upon Part 1 to work towards a consistent approach of floodplain management in new planning schemes. To support this approach, Part 2 will address the following matters:*
>
> - *Fit for purpose flood study template to help inform the strategic planning process developed in partnership with CSIRO and Bureau of Meteorology;*
> - *Standardised floodplain management provisions;*
> - *Advice on transition strategies for land uses, zoning recommendations and other key land use policy matters which effectively translates flood studies and floodplain management plans into land use plans using the Queensland Planning Provisions (**QPP**).*

Implementation by local governments

The TSPP provides as follows with respect to its implementation by participating local governments:

> *For those Councils wishing to adopt the interim provisions, this can be done through incorporating a new section into the existing planning scheme, titled "Interim Floodplain Assessment Overlay" and incorporating as a minor amendment to the planning scheme.*
>
> *Alternatively, a Council may use a TLPI [Temporary Local Planning Instrument] however the minor amendment process is preferred given the limited timeframe associated with TLPIs. Further advice in relation to the interim tool and how it can be implemented is provided in section 4 of this Guideline.*
>
> *The Floodplain Maps provided (as well as an adopted flood level) can also be used by Councils to trigger the relevant building assessment provisions for construction of buildings in flood hazard areas. This applies to both the current suite of building provisions and those soon to be implemented through the proposed amendments to the QDC [Queensland Development Code].*
>
> *It is also important to note the adoption of the Floodplain Maps is not proposed to alter the level of assessment for development within the overlay area. It simply utilises the existing levels of assessment prescribed in the Table of Development for an area. Therefore, the adopted Floodplain Maps will be used as a trigger for already Assessable Development to be assessed against the Model Code. Any changes to the levels of assessment will require specific consideration by Council and DLGP [Department of Local Government and Planning] as part of the amendment process.*

Action

Any local governments to whom the measures in the TSPP may be suited ought to consider making a formal submission by 11 November 2011 to ensure that any concerns are raised before the TSPP takes effect.

For all stakeholders we recommend keeping up to date with the progress of the QRA.

Colin Biggers & Paisley

Development approval no longer attaches to land once conditions are satisfied

Diane Coffin | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Rofail & Ors v Wells* [2011] QPEC 125 heard before Dorney QC DCJ

November 2011

Executive Summary

In this case the developer of residential land sought declarations that the subsequent purchaser had committed a development offence by moving stormwater drainage pipes installed subject to the operational works approval for the subdivision. The court dismissed the application on the basis that the conditions of the operational works approval had been satisfied and no longer attached to the land.

Case

Rofail sought declarations that Wells had committed a development offence and enforcement orders relating to the interference with the roofwater drain. Wells, in response, sought summary dismissal of Rofail's application.

Facts

The respondent (**Wells**) purchased land in Thornlands (**land**) in 2010 on which she resides. In 2011, Wells built a swimming pool on the northern rear boundary of the land.

The land was created as part of a 2002 reconfiguring a lot development approval, which was carried out in stages by the applicants (**Rofail**) who still retained ownership of land adjoining the northern boundary of the land.

The stage that included the land was completed to the extent of enabling the land to be registered in 2007 and the works for that stage were carried out pursuant to a development approval for operational works (**DA**).

The DA included the installation of a roofwater drain along the northern boundary of the land. This drain was relocated by Wells during the swimming pool construction using two 150mm pipes, when the DA had required a 225mm pipe.

Decision

Matters accepted by the court

The court was willing to infer that the roofwater drainage pipe on the Land was designed to carry roofwater from other lots to be created in later stages of Rofail's subdivision, and to eventually be connected to local government stormwater infrastructure. However, the court was not willing to construe the DA as having a continuing obligation attaching to the land resembling the features of a drainage easement.

In addition, the court accepted that the interference by Wells with the existing pipes was of such a minor nature that it would be classified as exempt development under the relevant planning scheme provisions.

Aside from sections 245 (Development approval attaches to land) and 580 (Compliance with development approval) of the *Sustainable Planning Act 2009* (**SPA**), there were no other legislative provisions of relevance.

Issues under section 245 of the Sustainable Planning Act 2009

The court noted that there was no express guidance by any relevant authority of any kind which provided for an easy resolution of the question of the continuing effect of a development approval after all operational works had been completed and all conditions fulfilled. The court went on to consider whether the DA had any continuing application to the land subject to section 245 (Development approval attaches to land) of the SPA.

Because the development had been completed and accepted "off maintenance" in May 2010, the court accepted that the conditions of the DA had been fulfilled prior to Wells becoming the owner of the land. The court considered case law which related to the predecessor provision to section 245 of the SPA, being section 3.5.28 (Approval attaches to land) of the *Integrated Planning Act 1997* (**IPA**) and generally to the relationship of statutory rights affecting property with the effective operation of the land title system in Queensland. However none of the cases considered was equivalent to the present situation.

The court observed that, on balance, the cases showed that "*planning legislation will not be readily interpreted as interfering with private property rights of remote parties*". For this reason, in the absence of any clear legislative provision to allow interference with Wells' property rights, it was not considered proper to interpret the DA as having continuing effect now that its conditions had been fulfilled.

The court found support for this conclusion in the definition of development in the explanatory notes for the IPA, being "*an 'action' rather than the result of an action, exemplifying the concept of 'carrying out' of the works*". Of course, in this case the works under the DA had already been carried out.

Therefore, there was no need for Wells to have sought to make a change to the DA before changing the roofwater pipes.

Issues under section 580 of the Sustainable Planning Act 2009

Section 580 (Compliance with development approval) of the SPA makes it an offence for a person not to comply with a development approval. The court concluded section 580 of the SPA could not apply in this situation where the development approval did not continue to attach to the land once the conditions of the development approval had been fulfilled.

Held

- The applicants' amended originating application was dismissed.
- Both parties had leave to file, and serve on the other party, submissions (if any) in writing on the issue of costs, by 4pm on 13 October 2011.

Colin Biggers & Paisley

Clarity as to costs: what constitutes vexatious proceedings

Diane Coffin | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Rofail & Ors v Wells (No. 2)* [2011] QPEC 131 heard before Dorney QC DCJ

November 2011

Executive Summary

The Planning and Environment Court considered whether the circumstances of a proceeding in respect of an application for declarations and remedial enforcement orders for a development offence were "vexatious" such that an order for costs for the proceeding should be made.

Case

This case concerned whether an order in respect of costs was appropriate in respect of previous proceedings in which his Honour Judge Dorney QC ordered that the application brought by the applicant (**Rofail**) be dismissed (see *Rofail & Ors v Wells* [2011] QPEC 125). The application concerned operational work carried out by the respondent (**Wells**) to install a roofwater drain along the boundary of land which adjoined land owned by Rofail. Rofail sought a declaration that the operational work constituted a development offence and an enforcement order in respect of that offence. Ultimately, the court ordered that the application be dismissed given that Rofail could not establish a basis for seeking the relief that was claimed.

Facts

The issue for the court in this proceeding was whether Rofail's previous proceeding was "vexatious" within the meaning of section 457(2)(b) (Costs) of the *Sustainable Planning Act 2009* (**SPA**).

Whilst each party to a proceeding in the Planning and Environment Court ordinarily bears its own costs, section 457(2)(b) (Costs) of the SPA provides that the court may order costs for a proceeding as it considers appropriate if the court considers the proceeding, or part of the proceeding, to have been frivolous or vexatious.

Wells argued that, by letter dated 8 July 2011, Rofail was given notice of two discrete matters which were asserted to be fatal to Rofail's originating application as a matter of law, namely that:

- what had been done by Wells was exempt development and as such could not lead to a development offence; and
- the proceeding was of no utility where the relief sought was discretionary and Rofail had no lawful right of way by easement, or equivalent right created by any development permit condition, to discharge roofwater through Wells' property.

Accordingly, Wells argued that from 9 July 2011 onwards, Rofail's maintenance of the previous proceedings was vexatious and as such a costs order should be made against Rofail.

Decision

The court considered the meaning ascribed to "frivolous or vexatious" in section 457(2)(b) (Costs) of the SPA in light of the decision of the Court of Appeal in *Mudie v Gainriver Pty Ltd (No. 2)* [2003] 2 Qd R 271. There, President McMurdo and Justice Atkinson noted that the words "frivolous or vexatious" should be given their ordinary meaning, unfettered by their meaning in the context of striking out or staying proceedings for an abuse of process. Moreover, it was suggested that something more than a lack of success needed to be shown before a party's proceeding would be "frivolous or vexatious".

The court also considered the interpretation adopted by Justice Deane in *Oceanic Sun Line Special Shipping Company Inc v Fay* [1988] 165 CLR 197 who suggested that "vexatious" meant "*productive of serious and unjustified trouble and harassment*". The court indicated that both elements, "unjustifiable trouble" and "harassment", were necessary for a matter to be "vexatious".

His Honour Judge Robin QC went on to conclude in respect of the two matters of law raised by Wells that:

- whilst exempt development could not lead to a development offence, Rofail's argument that the development was assessable having regard to the continued operation of the operational work approval even after the works were completed was never patently unarguable;

- since the arguments that related to the second aspect of Rofail's case were not fully canvassed before the court, it was impossible to determine what the outcome would otherwise have been if Rofail had been successful in that application, however difficult the actual orders might have been to formulate.

The court concluded that whilst Wells may have been seriously troubled by the course taken by Rofail, such a course was not unjustified in the circumstances of the case and did not amount to harassment. Ultimately, what was argued was a point involving public policy considerations which had not been earlier determined and for which neither party was able to identify any authority which was in any way a determinative factor. Accordingly, it was in the interests of justice for the matter to be determined.

Held

The court ordered that there be no order as to costs for the proceeding.

No development offence by "occupier" of land

Diane Coffin | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Sugarbag Road Pty Ltd & Anor* [2011] QPEC 124 heard before Dorney QC DCJ

November 2011

Executive Summary

The Planning and Environment Court considered whether a contractor, occupying land to undertake civil works in accordance with a development approval for operational work, committed a development offence being the contravention of a development approval.

Case

This case concerned an application brought by Sunshine Coast Regional Council (**council**) in the Planning and Environment Court (**court**) seeking an order that the registered owner of land at the corner of Caloundra Road and Sugar Bag Road, Little Mountain (**land**), Sugarbag Road Pty Ltd (**Sugarbag**), and the contractor undertaking civil works on the land, BMD Constructors Pty Ltd (**BMD**), be subject to specific, interim, remedial enforcement orders to alleviate concerns arising from erosion and sediment control issues associated with civil works being undertaken on the land.

The council and Sugarbag agreed to the content of the orders sought, and as such the remaining issue for the court was whether the order should include BMD as being subjected to it.

Facts

Sugarbag and BMD had entered into a contract in respect of civil works to be undertaken on the land in accordance with a development approval issued by the council for operational work. In order to alleviate concerns arising from erosion and sediment control issues which had arisen in the course of the civil works being carried out on the land, the council sought interim enforcement orders against both Sugarbag and BMD.

In accordance with section 601 (Proceeding for orders) of the *Sustainable Planning Act 2009* (**SPA**), an application for an interim enforcement order may be brought if the person making the application has brought a proceeding for an order to remedy or restrain the commission of a development offence and the court has not decided the proceeding.

Here, the council alleged that the development offence committed was one under section 580 (Compliance with development approval) of the SPA which provides that a person must not contravene a development approval, including any condition in the approval.

BMD claimed that it should not be subject to the order sought by the council as it was a limited contractual occupier of the land, and was not subject to the relevant provisions of the SPA relied upon by the council.

Decision

It was necessary for the court to consider the nature of the rights arising from a development approval concerning an occupier of land and whether an offence under section 580 (Compliance with development approval) of the SPA could be committed by an occupier of land.

Section 245 (Development approval attaches to land) of the SPA provides that a development approval attaches to the land the subject of the application to which the approval relates and binds the owner, the owner's successor's in title and any occupier of the land.

The court, considering the decisions of *Sushames v Pine Rivers Shire Council* [2007] 1 Qd R 382 and *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] 220 CLR 472, indicated that for the purpose of determining the application made by the council, it was the applicable statutory provisions alone which were to be examined in order to determine the rights of the parties.

His Honour Judge Dorney QC determined that where section 245(1)(a) (Development approval attaches to land) of the SPA states that a development approval "attaches" to the land, it must be in that context that the rights in respect of the land are to be adjudged. The relevant rights are those which are granted to permit "the" person to implement the development approval.

The court went on to indicate that where section 245(1)(b) (Development approval attaches to land) of the SPA provides that a development approval binds not only the owner and the owner's successors in title but also "any occupier of the land", the "occupier" must be one who has the relevant rights that have been attached to the land.

The court proceeded to consider the meaning of "occupier" in section 245 (Development approval attaches to land) of the SPA. His Honour Judge Dorney QC indicated that in order to achieve a harmonious goal between section 245 (Development approval attaches to land) of the SPA and section 580 (Compliance with development approval) of the SPA, it is necessary to read down section 245 insofar as it refers, expressly or impliedly, to the occupier, because that is the only way in which an interpretation which balances the obligations and rights concerning how a development approval can be contravened should be appropriately read.

The court concluded that for a person with a limited right of occupation, for which no relevant rights concerning the implementation of the development approval had been granted, section 580 (Compliance with development approval) of the SPA could not apply.

The court considered the terms of the contract in respect of civil works on the land between Sugarbag and BMD, and concluded that the nature of the contractual rights and obligations were of a kind that strongly suggested that the nature of the "occupation" undertaken by BMD was far more limited than what was contemplated by section 245 (Development approval attaches to land) of the SPA and section 580 (Compliance with development approval) of the SPA.

Accordingly, section 603 (Making interim enforcement order) of the SPA could not apply to BMD given that it had not committed an offence under section 580 (Compliance with development approval) of the SPA.

The court also considered how discretion should have been exercised in the event that it was incorrect in the conclusion that section 603 (Making interim enforcement order) of the SPA did not apply. Given that there was no clear right under the contract for BMD to be remunerated in respect of an order requiring BMD to do certain works on the land, the court was concerned about the prospect of economic injury to BMD should such an order be made. Moreover, the court considered that an undertaking as to damages may not have been an adequate remedy to alleviate the prospect of economic injury to BMD. As such, his Honour Judge Dorney QC indicated that should he have been required to consider the issue of the balance of convenience, he would have been inclined to find that it favoured BMD, and that no interim enforcement order should have been made against BMD.

Held

The court ordered as follows:

- That the application for an interim enforcement order against BMD be dismissed.
- That orders be made in the terms of the draft prepared and presented by the council, subject to the references to BMD being deleted.

Colin Biggers & Paisley

Impacts not severe enough to grant interim relief

Diane Coffin | Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Rockhampton Regional Council v R C Toole Pty Ltd & Toole* [2011] QPEC 127 heard before Rackemann DCJ

November 2011

Executive Summary

The Rockhampton Regional Council sought to restrain RC Toole Pty Ltd and Roger Toole from using a property as an airstrip pending the outcome of a separate application concerning the lawfulness of that development. The Planning and Environment Court considered the relative positions the parties would be in if an interim order was or was not made, the impacts to amenity caused by the development and the potential inconvenience caused to the respondents if an interim order was made. The court held that the balance of convenience fell on the side of not granting an interim order due to the length of time that the development had occurred, the undertakings offered by the respondents and that the low intensity level use would only continue for a few more weeks before the matter would be fully heard.

Case

This case was an application for an interim enforcement order under section 603 (Making interim enforcement order) of the *Sustainable Planning Act 2009* made by the Rockhampton Regional Council (**council**) seeking to restrain RC Toole Pty Ltd and Roger Toole (**respondents**) from using a property as an airstrip pending the final hearing and determination of a separate application in the Planning and Environment Court (**P&E Court**) which concerned the lawfulness of that use.

Facts

The respondents purchased a lot which for many years contained an airstrip. However, the respondents formed the view that the airstrip was less than ideal because of, amongst other reasons, unfavourable crosswinds. The respondents purchased the adjoining lot and commenced building a more favourable airstrip along with facilities including an aircraft hangar and fuelling facilities. The council was aware of the development and wrote to Roger Toole prior to the airstrip becoming operational, stating that the council was of the view that the operation of a low scale private airstrip and hangar on a rural property was exempt development. A development permit for the aviation fuel tank was subsequently issued by the council. The council then sought to resile from that position and declare that the development was unlawful.

Counsel for the council relied on both the ongoing amenity impacts resulting from the continued use of the airstrip as well as the availability of the old airstrip as matters to support the making of an interim order. Three neighbours were complainants and swore affidavits complaining about impacts such as noise, dust and disturbance to livestock. Other neighbours swore affidavits stating that they did not feel that their amenity was unduly impacted. The respondents offered to give various undertakings in support of an interim order not being made, including, that the airstrip would only be used for flights in and out by Roger Toole, that no more than three flights (a total of six movements) would occur in any week and that the route for landings and take off would not involve flying over the properties of the three neighbouring objectors at heights below 1500 feet. As to the availability of the old strip, the respondents stated that this would involve some inconvenience in that fuel would have to be transported from the new facilities to the old at some cost.

Decision

In considering whether to issue an interim order the P&E Court first stated that it was not necessary for it to make any final determination on the legality of the development, as that would be determined at the final hearing of the separate application, but that it was sufficient for it to observe that there was a sufficiently strong prima facie case to consider the granting of the relief. Furthermore, the P&E Court stated that the granting of interim relief was discretionary and all relevant matters were to be considered in undertaking the balance of convenience.

The P&E Court held that the history of the matter, in which the council informed the respondents that they did not need approval, was not a particularly weighty factor. Of more weight were the relative positions of the parties if an interim order was made or not.

As to the impact on amenity, the P&E Court found that in this case the material did not go so far as to show an unchallenged impact of a severe kind. Furthermore, the P&E Court acknowledged that, due to the locality being under the flight path of other aircraft, the respondents use did not introduce a substantially different type of noise to the locality. Overall it found that the opportunity for any substantial further impacts upon amenity were constrained by the respondents' undertakings and such potential for impact needed to be set against two other factors, namely, that the activity had already been occurring for 12 months and that the matter was likely to be set down for final hearing within a matter of weeks. Therefore, the P&E Court observed, that if no interim order was made the use would at least be at a lesser level than had occurred over the past 12 month period.

Other matters the P&E Court considered included the inconvenience to the respondents which, while not dire, should still be weighed in the balance. The P&E Court also considered that even if the respondents were to use the old air strip, there would still be light aircraft taking off and landing in the vicinity.

In conclusion the P&E Court held that the balance of convenience fell on the side of not granting the interim order sought due to the length of time that the development had occurred, the undertakings offered and that the low intensity level development would only continue for a few more weeks before the matter could be fully heard.

Held

The P&E Court refused to grant the interim order sought.

Colin Biggers & Paisley

Defaulting in the Planning and Environment Court's procedural requirements

Diane Coffin | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *McIlwraith v Scenic Rim Regional Council* [2011] QPEC 130 heard before Robin QC DCJ

November 2011

Executive Summary

The Scenic Rim Regional Council was successful in an application for costs in circumstances where Mr McIlwraith's conduct caused previous proceedings to be more burdensome and costly than they ought to have been.

Case

Mr McIlwraith (**McIlwraith**) had in the past obtained a development approval from the Scenic Rim Regional Council (**council**) for a private airstrip. In the previous proceedings, McIlwraith sought the court's determination that the development approval and the underlying development application were a nullity for constitutional reasons.

That end was sought through two proceedings: an 'out of time' appeal under the *Integrated Planning Act 1997* (**IPA**) and an originating application under the *Sustainable Planning Act 2009* (**SPA**). In both cases McIlwraith was unsuccessful.

In this proceeding, the council sought costs against McIlwraith on the basis that the previous proceedings were essentially hopeless and, on that account, vexatious.

Facts

The court has the power to award costs in certain situations under section 457 (Costs) of the SPA including under subsection 2(a) where the proceedings are frivolous or vexatious, and under subsection 2(f) if "*a party has incurred costs because another party has defaulted in the Court's procedural requirements*".

The council argued that McIlwraith's proceedings were hopeless and therefore vexatious. However, the court disagreed because the planning and environment jurisdiction is one which facilitates access to the court to have issues determined and, in the ordinary event, without risk as to costs orders should the court's determination not be what is desired.

However, there was conduct of McIlwraith that caused additional days in court to be necessary in preparation for hearing and incurred additional costs for council as follows:

- failure to comply with the time limit to institute the appeal with a delay of two years (although McIlwraith was entitled to approach the court to seek a longer period under section 4.1.55 of the IPA);
- failure to notify relevant authorities in respect of the constitutional law point which was raised in the proceedings;
- failure to comply with the procedural requirements of the court including vacation of the hearing date;
- failure to serve notice of the appeal on parties entitled to such notice, particularly submitters; and
- refusal of an offer to settle which was considered relevant to the extent that the communication of the offer placed McIlwraith on notice that costs would be requested and was therefore a relevant factor for the court's determination regarding costs.

Decision

McIlwraith's conduct was accepted by the court as sufficient to invoke the jurisdiction of the court under section 457(2)(f) of the SPA on the basis of having made the proceedings more burdensome and costly for the council to defend than ought to have been the case.

Held

- That McIlwraith pay the council's costs of and incidental to the appearances of 28 January 2011, 23 February 2011, 25 February 2011 and 15 April 2011.
- That McIlwraith pay the council's costs of the appeal except to the extent of the costs that the council would have incurred in resisting the originating application.

Infrastructure Contributions Reform in Queensland: Implications for distributor-retailers

Ian Wright | Susan Cleary

This article discusses the implications of the infrastructure contributions reform for distributor-retailers in Queensland

November 2011

Introduction

New infrastructure contributions regime

- Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011 – commenced 6 June 2011.
- Draft State Planning Regulatory Provision (Adopted Charges) – commenced 1 July 2011.
- Sustainable Planning and Other Legislation Amendment Bill –introduced 11 October 2011.

Significant practical implications

- Capped infrastructure charges.
- Restricted conditioning powers for infrastructure.
- Development assessment.
- Offsets for land and work contributions.
- Standard templates.

Topics

- Capped infrastructure charges.
- Restricted conditioning powers.
- Practical implications for development assessment.
- Public policy implications.

Capped infrastructure charges

Implementation of reforms

- Adopted charges State planning regulatory provision (Adopted charges SPRP).
- Adopted infrastructure charge.
- Adopted infrastructure charges resolution of local governments.
- Unitywater board decisions.

Adopted Charges SPRP

- Adopted charges SPRP contains:
  - Adopted infrastructure charges schedule – maximum adopted charges.
  - Priority infrastructure areas for local government areas.
  - Relevant proportion of adopted charge for Ipswich City Council and Queensland Urban Utilities.
- Previous financial contribution powers switched off:
  - Infrastructure charges under an infrastructure charges schedule in a PIP (Gold Coast and Allconnex).
  - Financial contributions under a planning scheme policy (all other local governments, QUU and Unitywater).

Adopted infrastructure charge – Amount

- Calculation of charge for local governments:
  - If an adopted infrastructure charges resolution – stated infrastructure charge – but must be less than the maximum adopted charge in the SPRP.
  - If no adopted infrastructure charges resolution – lesser of:
    - maximum adopted charge in SPRP;
    - charge under the previous infrastructure contributions regime – a planning scheme policy or infrastructure charges schedule.
- Calculation of charge for SEQ distributor-retailer:
  - If an SEQ distributor-retailer's board has decided to adopt a charge – the adopted charge – Unitywater has adopted a charge.
  - 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.

Adopted infrastructure charge – Excluded development

- Adopted infrastructure charge cannot be applied to:
  - development under a State Resources Act;
  - development under *Urban Land Development Authority Act 2007*;
  - development in a declared master planned area unless the adopted infrastructure charges resolution states that an adopted infrastructure charge is to be levied.
- Adopted infrastructure charge does not apply to:
  - Caloundra South – ULDA area;
  - Palmview – master planned area;
  - Maroochydore master planning units (Sunshine Plaza and HPGC) – master planned area.

Adopted infrastructure charges resolutions – Moreton Bay and Sunshine Coast

- Adopted infrastructure charges:
  - local governments;
  - Unitywater.
- Discounts.
- Trunk infrastructure planning:
  - trunk infrastructure networks;
  - plans for trunk infrastructure;
  - standards of service;
  - establishment cost of trunk infrastructure networks.

SEQ distributor-retailer decisions

- An SEQ distributor-retailer's board may decide:
  - to adopt a charge that is not more than its relevant proportion of the maximum adopted charge;
  - to adopt a charge for infrastructure in part of the geographic area;
  - that an adopted infrastructure charge does not apply in relation to its geographic area or part of its geographic area.
- Amendment Bill allows SEQ distributor-retailer's board to increase an adopted infrastructure charge – by CPI up to maximum amount that could have been levied at time of payment.

Restricted conditioning powers

Infrastructure contributions

- Conditions cannot be imposed under a planning scheme policy.

- Conditions must be:
  - within specific conditioning powers;
  - otherwise reasonable or relevant.

Financial contributions and land contribution

- Financial contributions (section 755R and section 650):
  - conditioned payment for development outside of priority infrastructure area;
  - conditioned payment for development inconsistent with assumptions about the type, scale, location or timing of future development stated in the priority infrastructure plan – not applicable to Unitywater.
- Land contribution only (section 755K(2)) – dedication notice for trunk infrastructure.

Work and land contributions

- Non trunk infrastructure (section 755J and section 626) – conditions limited to:
  - infrastructure internal to premises;
  - infrastructure to connect premises to external infrastructure;
  - infrastructure for the safety or efficiency of infrastructure network.
- Trunk infrastructure (section 755Q and section 649) – conditions limited to:
  - Existing trunk infrastructure is inadequate or future trunk infrastructure is necessary and the extent of infrastructure:
    - > is necessary to service the premises;
    - > is the most efficient and cost effective to service the premises.
  - Existing or future trunk infrastructure is on premises and the extent of the required infrastructure is not an unreasonable imposition on development or use.

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	Infrastructure charges plan (Noosa)	Priority infrastructure plan (Gold Coast)	Trunk infrastructure not included in resolution	Trunk infrastructure included in resolution	Trunk infrastructure 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 (s863 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)	✓	✓	✓	✓	✓	✓

Infrastructure contribution powers	No adopted infrastructure charges resolution			Adopted infrastructure charges resolution		
	Planning scheme policy	Infrastructure charges plan (Noosa)	Priority infrastructure plan (Gold Coast)	Trunk infrastructure not included in resolution	Trunk infrastructure included in resolution	Trunk infrastructure included in PIP (or ICP)
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)	–	✓	✓	–	✓	✓
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*).

Case Study 1

Facts

- Material change of use for an extension to a light industrial building.
- Building has a frontage to three non-trunk roads (A, B and C).
- Road A frontage is the main entrance to the building.
- Condition is imposed requiring the construction of a 1.2m wide footpath along all three road frontages.

Decision prior to 1 July 2011

- Law – Condition must be relevant and reasonable (section 3.5.30 IPA).
- Answer:
  - Not relevant and reasonable to require the construction of a footpath along all three road frontages.
  - Relevant and reasonable to require the construction of a footpath along Road A frontage which was the main entrance.

  (See *Bryant v Caloundra City Council* [2006] QPELR 335)

Decision after 1 July 2011

- Law – Condition about non-trunk infrastructure must relate to (section 626 SPA):
  - networks internal to the premises; or
  - connecting premises to external infrastructure networks; or
  - protecting or maintaining safety or efficiency of infrastructure network of which non-trunk infrastructure is a component.
- Answer – Council does not have the power to impose the condition.

Case Study 2

Facts

- Material change of use to construct a shopping centre.
- Development site is accessed by an existing roundabout on what would be a trunk road.
- Development would increase traffic volumes by 9-12%.
- Condition is imposed requiring the payment of the total costs of upgrading the roundabout.

Decision prior to 1 July 2011

- Law – Condition must be relevant and reasonable (section 3.5.30 IPA).
- Answer:
  - Not reasonable that a minor use should be made to pay the total costs.
  - Relevant and reasonable to require the payment of a "bring forward cost".

  (See *Neilson v Gold Coast City Council & Anor* [2005] QPELR 452)

Decision after 1 July 2011

- Law – Council may impose a condition requiring a payment for additional trunk infrastructure if development (section 650 SPA):
  - is inconsistent with the assumptions about the type, scale, location or timing of future development stated in a priority infrastructure plan; or
  - is for premises completely or partly outside the priority infrastructure area.
- Answer – Gold Coast has the power to impose condition requiring payment for additional costs as Gold Coast has prepared a PIP. However, Moreton Bay and Sunshine Coast do not have a PIP and would not be able to impose the condition.

Case Study 3

Non-trunk works condition

- Facts:
  - Material change of use of premises for an industrial use.
  - Proposed development requires a change to the vertical alignment of an adjoining road in which there is an existing 150mm water main which is adequate to service the proposed development.
  - Condition is imposed requiring a 225mm water main to be built to provide additional capacity.
- Law:
  - Condition about non trunk infrastructure must relate to (section 626):
    - networks internal to the premises;
    - connecting premises to external infrastructure networks;
    - protecting or maintaining safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.
- Condition must be reasonable and relevant (section 345).
- Answer – Discussion.

Case Study 4

Trunk works condition

- Facts:
  - Material change of use of premises for an industrial use.
  - Existing 150mm water main in adjoining road is inadequate to service the proposed development.
  - Adopted infrastructure charges resolution identifies a future 300mm trunk water main in adjoining road with an establishment cost of $1 million.
  - Proposed development can be serviced if part of existing 150mm water main is upgraded to a 225mm water main at a cost of $800,000.
  - Condition is imposed requiring the provision of 300mm trunk water main in accordance with adopted infrastructure charges resolution.
- Law:
  - Condition about trunk infrastructure must relate to (section 649):
    - existing trunk infrastructure which is necessary;
    - future trunk infrastructure which is necessary;
    - trunk infrastructure which is on the premises.
  - Condition limits the extent of infrastructure to that which is (section 649(8)):
    - necessary to service the premises;
    - the most efficient and cost effective to service the premises.
- Answer – Discussion.

Case Study 5

Financial contribution condition

- Facts:
  - Material change of use of premises for an industrial use which is a high water user in an urban area contrary to the planning scheme requirements.
  - Proposed development can be serviced by an existing 225mm water main but will bring forward the need for a future 300mm trunk water main from 2025 to 2015.
  - Condition is imposed requiring the payment of a bring forward cost.
- Law:
  - Condition requiring financial contribution can only be imposed (section 650):
    - if outside of priority infrastructure area;
    - if contrary to assumptions about type, scale, location or timing of future development in a priority infrastructure plan.
- Answer – Discussion.

Practical implications

Transitional arrangements

- Previous infrastructure contributions regime (planning scheme policies) – if local government has exercised powers and issued a decision notice or infrastructure charges notice.
- New infrastructure contributions regime – if local government has **not** exercised powers – has made no decision or has refused a development.

Development assessment

- Assess development application against trunk infrastructure planning matters in resolution to determine conflict with planning principles:
  - prematurity of development;
  - compromised trunk infrastructure plans;
  - compromised desired standard of service.

Offsets for land and work contributions

- No statutory guidance as to:
  - calculation of offset value;
  - indexation of offset value;
  - refund of unused offsets.
- Unitywater policy position is needed for these matters.

Standard templates

- Standard condition templates for:
  - section 626 non-trunk infrastructure conditions;
  - section 649 trunk infrastructure condors.
- Standard land dedication notice templates.
- Standard adopted infrastructure charges notices.

Public policy implications

Capped infrastructure charges – Bad public policy

- Maximum adopted charges reflect the very generalised average cost of trunk infrastructure provision across Queensland.
- No relationship to the marginal cost of trunk infrastructure provision in different parts of Queensland.
- Public policy approach is contrary to following reports:
  - 1993 Industry Commission Report;
  - 2004 Productivity Commission Report;
  - 2009 Henry Tax Review;
  - 2011 Productivity Commission Report.

Capped infrastructure charges – Public policy implications

- Price signal to encourage economic efficiency and effectiveness emasculated.
- Cross subsidies from ratepayers and customers (taxpayers) to landowners and developers.
- Fringe or remote greenfield areas encouraged.
- Cost of living pressures increased – regressive impacts.

Housing affordability

- Infrastructure charges set above the cost of provision of trunk infrastructure (ie a tax) do affect housing affordability.
- Infrastructure charges linked to the cost of provision of trunk infrastructure (ie user charge) do not affect housing affordability.
- No persuasive evidence that existing infrastructure charges operated as a tax.
- However capped infrastructure charges will result in infrastructure charges that are taxes which will impact adversely on housing affordability in some areas.

Colin Biggers & Paisley

Temporary State Planning Policy 2/11 – Planning for stronger, more resilient floodplains

Diane Coffin | Jamon Phelan-Badgery

This article concerns the 'Temporary State Planning Policy 2/11 – Planning for stronger, more resilient floodplains' once it took effect on 14 November 2011

December 2011

Executive Summary

Further to our article of 3 November 2011 concerning the *Temporary State Planning Policy 2/11 – Planning for stronger, more resilient floodplains* (**policy**), the policy published by the Queensland Reconstruction Authority (**QRA**), which is supported by the first part of a guideline, *Planning for stronger, more resilient floodplains: Part 1 – Interim measures to support floodplain management in existing planning schemes* (**guideline**), took effect on 14 November 2011.

The effect of the policy can be summarised as follows:

- *Interim Floodplain Assessment Overlay* mapping and an *Interim Floodplain Assessment Overlay Code* are provided for voluntary incorporation into the planning schemes of participating local governments;
- the definition of 'Natural Hazard Management Areas' in *State Planning Policy 1/03 Mitigating the Adverse Impacts of Flood, Bushfire and Landslide* is suspended and redefined to include areas identified on the Interim Floodplain Assessment Overlay mapping.

The flood mapping that forms the basis of the *Interim Floodplain Assessment Overlay* mapping has been undertaken by the QRA with a view to encapsulating data from the 2010/2011 floods as well as previous floods, on a catchment-by-catchment basis. The guideline states that the interim measures are "*in lieu of detailed flood studies which will take significant time and resources to complete across the State*".

Local governments may begin adopting the voluntary measures associated with the policy, such as the *Interim Floodplain Assessment Overlay Code*. Even where these tools are not adopted, now that the policy has taken effect, local governments reviewing their planning arrangements with respect to floodplain management will likely be informed by the provisions of the policy and the guideline.

The QRA is expected to continue to add to its floodplain management materials when it releases Part 2 of the guideline, with further tools that may be utilised by local governments in the management of development in floodplain areas.

The problems associated with fronting a State-controlled road

Diane Coffin | Tom Buckley

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 & Ors* [2011] QPEC 132 heard before Jones DCJ

December 2011

Executive Summary

Whenever a proposed development adjoins a State-controlled road, the Department of Transport and Main Roads is triggered as a referral agency to that application to assess the impacts of the development on its road network. Matters regarding pedestrian and traffic safety, traffic flows, congestion, location and access are typical issues that arise in the assessment of the suitability of a proposed development. These matters can sometimes carry greater weight in deciding whether to approve a development, even if the development is supported on planning and economic grounds. This was the case for a proposed shopping centre at Brendale that would otherwise have been upheld at appeal on planning grounds but for the overarching traffic issues that related to the development.

Case

This case concerned an appeal by Comiskey Group (**appellant**) against the decision of the Moreton Bay Regional Council (**respondent**) to refuse a development application for a development permit for a material change of use for a shopping centre and a development application for a preliminary approval for building work and operational work.

Facts

In December 2009, the appellant applied to the respondent for a development application for a development permit for a material change of use for a shopping centre and a development application for a preliminary approval for building work and operational work (**development applications**) with respect to land situated at 646 South Pine Road, Brendale. The proposed shopping centre development was to comprise a Woolworths supermarket, speciality shops, a gymnasium, 395 car parking spaces and 10 motorcycle parking spaces (**proposed development**).

Relevantly, the land the subject of the appeal fronted a busy State-controlled road, that being South Pine Road, and was located within the Sport and Recreation Zone of the *Pine Rivers Planning Scheme 2006* (**planning scheme**).

In September 2010, the respondent refused the appellant's development applications on the basis that they conflicted with various provisions of the planning scheme and there were not sufficient grounds to justify approval despite those conflicts.

In October 2010, the appellant appealed the respondent's decision to the Planning and Environment Court (**court**). It was identified that the main issues to be resolved in the appeal included the proposed development:

- economic and community need;
- impact on amenity and character;
- conflict with the planning scheme; and
- impact on traffic flows on South Pine Road.

Decision

His Honour, Judge Jones, concluded that whilst there was sufficient grounds to justify the proposed development despite its conflicts with the planning scheme, the appeal could not be upheld at this stage because of the uncertainty surrounding the traffic issues.

In respect of the identified conflicts with the planning scheme, his Honour firstly noted that whilst the proposed uses were inconsistent with the Sports and Recreation Zone of the planning scheme, the proposed development did not conflict with the site because of the adjoining tavern and motel that had been previously approved within this zone. His Honour secondly noted in respect of the proposed conflict with the centre hierarchy for the Urban Locality within the planning scheme, that whilst the proposed development was not centrally located within the catchment area (being situated on the eastern most extremity), when considered in context, no appropriately zoned or otherwise designated land within this zone would satisfy the overall outcomes for the centre hierarchy.

In respect of the arguments relating to impacts on character and amenity, his Honour dismissed the arguments in respect of character that the community would expect to see a predominance of sporting grounds and playing fields with generally little built-form on areas such as the proposed development. He also noted that whilst development of the kind proposed would have a visual impact, it would not create a conflict with the planning scheme. This was because the proposed development was otherwise part of a surrounding urban corridor and could not be reasonably said to be part of any physical separation between the urban areas.

Referring to the case of *Isgro v Gold Coast City Council* [2003] QPELR 414, his Honour additionally agreed that there was sufficient economic need for an additional full line supermarket of the type proposed and considered with the planning grounds, this would justify its approval despite the conflicts with the respondent's planning scheme. In this context his Honour noted that there was no alternative site which could meet the demand and the proposed development would likely improve the ease, comfort, convenience and efficient lifestyle of the community.

However, his Honour also concluded that there were significant traffic concerns with respect to the proposed development. Agreeing with the respondent's and co-respondent's traffic experts, his Honour noted that the proposed development would generate unacceptable traffic volumes (particularly associated with turns onto the State-controlled road), compromise pedestrian safety and adversely affect traffic operations in the future. This was specifically identified through:

- its poor location with respect to the State-controlled road and within the catchment;
- its access onto the State-controlled road and the contestation that would flow from it;
- the impact it would have on the ability to provide upgrades to relieve such congestion; and
- the unsuitability of the proposed staged pedestrian crossing.

Instead of refusing the appeal all together, his Honour noted the case of *Metroplex Management Pty Ltd v Brisbane City Council & Ors* [2009] QPEC 110, and considered that because the traffic issues could be addressed by amending the proposal and following the solutions which were outlined by the respondent and the Department of Transport and Main Roads, the appropriate course was to adjourn the appeal to allow the appellant time to prepare a traffic master plan addressing the traffic concerns raised by the other parties.

Held

- But for the traffic issues, the appeal would have been upheld.
- An approval would be premature on traffic grounds.

An unlawful condition or a development offence?

Diane Coffin | Aaron Madden

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MC Property Investments Pty Ltd v Sunshine Coast Regional Council (No. 2)* [2011] QPEC 133 heard before Robertson J

December 2011

Executive Summary

The Planning and Environment Court of Queensland considered an originating application seeking orders that conditions imposed by the Sunshine Coast Regional Council (**council**) involving infrastructure contributions were unlawful. The court was also required to consider a cross-application by the council seeking a declaration that a development offence had been committed pursuant to section 580 (Compliance with development approval) of the *Sustainable Planning Act 2009* (**SPA**) by virtue of the failure to pay the required contributions. An enforcement order requiring the payment of the contributions was also sought by the council.

Case

This case involved an originating application filed on behalf of MC Property Investments Pty Ltd (**MCPI**) on 19 May 2011, seeking the following orders against the council:

- a declaration that the imposition of infrastructure contributions totalling $57,494.75 with respect to development permit MCU/05/0169 (**development permit**) was unlawful (**Order 1**);
- that the council remove a charge from the Certificate of Title for the land the subject of the development permit (**Order 2**).

On 3 August 2011, the council made a cross-application for a declaration pursuant to section 456 (Court may make declarations and orders) of the SPA that MCPI had committed development offences by contravening conditions attached to the development permit for the site. An enforcement order was also sought by the council pursuant to section 604 (Making enforcement order) of the SPA requiring payment of the outstanding contributions.

Facts

The development permit concerned a material change of use (warehouse) from a building display premises to mini-storage sheds with a total of 1980 square metres of GFA (MCU). Conditions 5, 6 and 7 which were said to be breached (**conditions**) related to infrastructure contributions in respect of bikeways and bicycle facilities, road networks and stormwater management respectively. At the date of hearing the use had commenced and the contributions required under the conditions which remained unpaid totalled $71,959.65.

The council contended that the conditions were correctly imposed as the infrastructure contributions which were sought were based on an increase in demand on infrastructure resulting from the use. Notwithstanding the fact that the use was approved under the Maroochy Planning Scheme 2000 (**planning scheme**), the use of a warehouse was not a preferred use for the General Rural Lands Precinct (**precinct**). Furthermore, no demand factor rate for infrastructure contributions was provided for the precinct in the planning scheme, despite the fact that the demand on infrastructure would increase as a result of the use. In keeping with the standard approach of the council in situations where the use was inconsistent with that provided for in the planning scheme, the council applied the demand factor rate for the precinct type that most closely aligned with the proposed use.

It was MCPI's contention that as there is no 'demand factor rate' for infrastructure contributions for the precinct under the planning scheme, no infrastructure contributions can be imposed upon the development approval. Accordingly MCPI asserted that the conditions relating to infrastructure contributions, as imposed, were not relevant, certain or able to be implemented in a real and practical sense. This position was adopted notwithstanding the fact that the imposition of the relevant conditions was not challenged by way of a negotiated decision or by an appeal within time.

Decision

MCPI's application

In dealing with MCPI's applications, his Honour Judge Robertson noted that whilst not explicitly stated, it is clear that Order 1 is seeking a declaration pursuant to section 456 (Court may make declarations and orders) of the SPA. His Honour also found that in considering the lawfulness of the conditions, regard must be had to the planning scheme and associated policies which were in force at the time of the application in 2005. As the

planning scheme at that time was a scheme made under the *Integrated Planning Act 1997* (**IPA**) rather than the SPA, his Honour found that the court had no jurisdiction in relation to the declaration sought under Order 1.

In relation to Order 2 of the application, his Honour noted that this was not pursued by MCPI as a title search clearly indicated that no such encumbrance existed.

Council's application

Having dealt with MCPI's application in isolation, Judge Robertson found that it was still necessary to consider the merits of MCPI's arguments in the context of determining the council's cross-application.

In doing so, his Honour found that MCPI's assertions offended the well established principles of construction in relation to planning schemes. In focusing solely upon the lack of demand factor rates as a basis for the assertion that the conditions were unlawfully imposed, MCPI failed to construe the planning scheme as a whole and in a manner which seeks to achieve the purpose of the planning scheme.

His Honour demonstrated this by pointing to provisions present in all of the relevant policies relating to infrastructure contributions in the planning scheme which provided that infrastructure contributions apply to every development application for an MCU. Clearly MCPI's argument that they are not required to pay any infrastructure contributions despite being granted an MCU, is inconsistent with those express provisions.

Taking this inconsistency into account and in further construing the relevant provisions of the planning scheme as a whole, Judge Robertson found that the conditions were lawfully imposed. Accordingly, by failing to pay the contributions despite commencing the use, MCPI had committed a development offence pursuant to section 580 (Compliance with development approval) of the SPA.

Held

- Pursuant to section 456 (Court may make declarations and orders) of the SPA, his Honour Judge Robertson made a declaration to the effect that:
  - MCPI had committed and continued to commit development offences pursuant to section 580 (Compliance with development approval) of the SPA by contravening the conditions of the development approval.
- Accordingly, his Honour Judge Robertson made the following order:
  - an enforcement order was made pursuant to section 604 (Making enforcement order) of the SPA that the company pay the amount of $71,959.65 which constitutes the monetary contributions required, pursuant to the conditions.

Compensation for compulsory acquisition

Diane Coffin | James Langham

This article discusses the decision of the Queensland Land Court in the matter of *Van Byron Pty Ltd v Chief Executive, Department of Main Roads* [2011] QLC 65 heard before CAC MacDonald

December 2011

Executive Summary

This case involved a claim for compensation by Van Byron Pty Ltd (**Van Byron**) under the *Acquisition of Land Act 1967* (**ALA**) against the Department of Main Roads (**DMR**). The subject land was described as Lot 14 on RP34896 (**Lot 14**) and Lot 5 on RP348996 (**Lot 5**). Part of Lot 14 was taken for the purpose of transport, in particular road purposes and vested in the Chief Executive of the DMR. The DMR argued that to be eligible for compensation the severed land must have been used for a common use or purpose. The Land Court (**court**) disagreed with the interpretation of the DMR.

Case

This case involved a claim for compensation by Van Byron under the ALA against the DMR. Part of Lot 14 was taken for the purpose of transport, in particular road purposes and vested in the Chief Executive of the DMR.

Facts

Van Byron owned Lot 14 which had an area prior to resumption of 9.5635 hectares. The DMR resumed an area of 1.257 hectares leaving a balance of 8.3065 hectares. Van Byron, at the date of resumption also owned the adjoining lot, being Lot 5, which had an area of 3.324 hectares. No land was resumed from Lot 5.

Von Byron claimed compensation for the land resumed and injurious affection to Lot 14 and for injurious affection within the meaning of sections 20(1)(a) and (b) (Assessment of compensation) of the ALA for Lot 5. Sections 20(1)(a) and (b) of the ALA relevantly provide as follows:

> *(1) In assessing the compensation to be paid, regard shall in every case be had not only to the value of land taken but also to the damage (if any) caused by either or both of the following, namely:*
>
> *(a) the severing of the land taken from other land of the claimant;*
>
> *(b) the exercise of any statutory powers by the constructing authority otherwise injuriously affecting such other land.*

Von Byron submitted that the severance damage to Lot 14 was caused by the reduction in size and change in shape to the lot. The injurious affection to Lot 14 was identified as a loss of rural residential amenity and loss in demand. Von Byron submitted that Lot 5 had been injuriously affected for the same reasons but not to the same extent.

The DMR accepted the effect the resumption had on Lot 14 and that it was therefore injuriously affected. However, the DMR did not accept that Lot 5 had been injuriously affected and submitted that no compensation should be payable in respect of Lot 5, as Lot 5 did not amount to "such other land" within the meaning of section 20(1)(b) of the ALA.

The DMR argued the term "such other land" referred to land mentioned in section 20(1)(a) of the ALA, being land that had been served from other land of the applicant. In order for the land to be severed there must have been a common use or purpose and common unity of ownership. Von Byron had used the land together for grazing cattle but the DMR argued that that was not the highest and best use of the two lots. Rather the highest and best use of the two lots was as two separate rural residential allotments and, therefore, there was insufficient common use or purpose between the two lots to warrant compensation in respect of Lot 5.

Decision

In reaching a decision as to the interpretation of the term "such other land" and whether there was a sufficient common use or purpose between the two lots, President CAC MacDonald, considered the common law principles put forward by the DMR in the cases of *Cowper Essex v Acton Local Board* [1889] 14 AC 153 and *Suntown Pty Ltd v Gold Coast City Council* [1979] 6 QLCR 196 (**Suntown**). Those principles provided that the properties need not be contiguous but must have sufficient common use or purpose between the two lots and that something more than co-ownership was required.

President CAC MacDonald made reference to the Land Appeal Court decision in *Gold Coast City Council v Halcyon Waters Community Pty Ltd* [2011] QLAC 3, which considered that common ownership of adjoining parcels may not be sufficient to establish severance within the meaning of section 20(1)(a) of the ALA. The Land Appeal Court went on to observe that it was difficult to think that the legislature in section 20(3) of the ALA intended to adopt a different concept of severance from that which underpinned the relevant part of section 20(1) of the ALA. Given this statement the continuity of Lots 14 and 5 was not sufficient to establish that there had been severance between the two lots.

President CAC MacDonald stated, that it was clear from the decision in *Suntown* that there must be severance within the meaning of section 20(1)(a) of the ALA before a claim for injurious affection can succeed under 20(1)(b) of the ALA. However, President CAC MacDonald stated that, in her opinion, the DMR had misdirected the focus of the severance enquiry by asking whether there had been severance of Lot 5 from Lot 14. The correct question to be asked, was whether there had been severance of the land taken (part of Lot 14) from the remaining land of the applicant. As the DMR has not contended that there was no severance of Lot 14, it necessarily follows that the DMR had accepted that Lot 14 was "such other land".

The remaining question was whether Lot 5 was also included in the term "such other land". Counsel for Van Byron argued that the word "land" as it appears in the term "such other land" included both Lot 14 and 5 because both fell within the definition of land in section 2 (Definitions) of the ALA. President CAC MacDonald stated that this was consistent with the rule of statutory construction that, so far as possible, words are to be given the same meaning throughout an Act. Therefore, there was no reason to give the word "land" in the phrase "other land" in sections 20(1)(a) and (b) of the ALA a different meaning from the word "land" in the phrase "any land" in section 20(3) of the ALA.

The effect of the DMR's submissions was that the severance test was to be applied to each lot in the landowner's remaining parcel of land. Section 20(1) of the ALA does not say that severance must be established between various parts of the remaining land. As it was accepted that the balance of Lot 14 is "other land" within the meaning of section 20(1)(b) of the ALA, there was nothing in the section or the authorities to indicate that it is necessary to establish that any lots that adjoin the "other land" are to be treated separately.

Held

The court ordered as follows:

- DMR pay Von Byron compensation for loss of land and injurious affection for Lot 14 and for injurious affection for Lot 5.
- DMR pay Von Byron interest.

Public policy issues in urban planning

Ian Wright

This article is a draft position statement in relation to public policy issues in urban planning

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Urban planning is spatial planning (strategic planning in a physical context)

- National urban policy
- COAG city planning
- Metropolitan plans/regional plans
- Integrated land use and infrastructure planning
- Outcomes focussed planning
- Evidence based decision making.

Governance in spatial planning

- Arrangements – spatial planning led by public sector, private sector (market urbanism) or community (emergent urbanism)
- Politics, power and accountability
- Decision making:
  - collaboration
  - participation
  - subsidiarity
  - transparency.

Resilience in spatial planning

- Disaster planning – flooding, earthquake, tsunami, bushfire
- Living affordability and adaptability
- Triple bottom-line assessment
- Life cycle assessment – development and infrastructure
- Waste management
- Continuous improvement
- Best practice.

Economics in spatial planning

- Land economics – gains and costs of smart growth
- Infrastructure economics – transport, water, wastewater and electricity
- Industrial, retail and commercial economics
- Housing economics
- Cost/benefit analysis.

Taxation in spatial planning

- Infrastructure charges
- Carbon tax
- Utility charges (electricity, water, sewerage)
- Congestion charges
- Resource rent tax/royalties for regions
- Capital gains tax
- Stamp duty
- Land tax.

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