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Proposed development on the nose: The Planning and Environment Court of Queensland has dismissed an appeal against the refusal of a development application for a residential community and commercial services in a flood plain and adjacent to a sewerage treatment plant

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Palmer v Council of the City of Gold Coast* [2023] QPEC 47 heard before McDonnell DCJ

February 2024

In brief

The case of *Palmer v Council of the City of Gold Coast* [2023] QPEC 47 concerned an appeal by Mr Clive Palmer (**Applicant**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Council of the City of the Gold Coast (**Council**) to refuse a development application for a preliminary approval for a material change of use and a variation request (**Application**) in respect of land situated at Merrimac, on the Gold Coast (**Land**).

In deciding to dismiss the appeal, the Court considered the following issues (at [32]):

- Land use.
- Built form, density and character and visual amenity.
- Transport and traffic planning.
- Odour.
- Ecology.
- Need.
- Other relevant matters.
- The variation request.

Background

Specifically, the Application sought the following (at [8]):

> *(a) a preliminary approval for a material change of use in accordance with the Greenheart Gardens Development Plan (V1.5) to facilitate the development of the land for predominantly Residential Activities (up to 3,000 dwellings) and associated Business Activities, Community Activities, Industrial Activities, Recreation and Environment Activities, Tourism and Entertainment Activities, and Transport and Infrastructure Activities including up to 2,000m^2 gross floor area for a Neighbourhood Mixed Use Hub* (**Proposed Development**)*; and*
>
> *(b) a variation request to vary the effect of the Gold Coast Planning Scheme 2023 (Version 1.2).*

The Council refused the Application on the basis of the uncertainty about the overly-broad range of uses sought to be facilitated and that "*… the preliminary approval seeks to facilitate future development applications being subject to code assessment in circumstances where the ultimate use cannot be identified with any precision*" (at [11]).

The Application was impact assessable and assessed against benchmarks in the *Gold Coast Planning Scheme 2003* (version 1.2) (**2003 Planning Scheme**), as the categorising instrument in force at the time the Application was lodged, and the *Gold Coast Planning Scheme 2016* (version 9) (**2016 Planning Scheme**), as a relevant matter pursuant to section 45(5)(b) of the *Planning Act 2016* (Qld) (**Planning Act**) and a statutory instrument entitled to discretionary weight pursuant to section 45(8) of the Planning Act (see [18] to [21]).

The Land is subject to the Guraganbah Local Area Plan Place Code (**Place Code**) under the 2003 Planning Scheme and the Limited Development (Constrained Land) Zone Code (**Zone Code**) under the 2016 Planning Scheme (see [35] to [36] and [44]).

Court finds that the proposed ecological rehabilitation outweighs the non-compliance with the assessment benchmarks

The Council's and Applicant's aquatic ecologists agreed that "*… the net ecological benefits arising from the restoration of wetland habitat would meet the relevant desired environmental outcomes of the planning schemes*" and residual concerns with respect to long term maintenance could be addressed by the imposition of conditions (at [51]).

The Council accepted that, with respect to terrestrial ecology, the development facilities would generate "*rehabilitation to establish a significant net ecology benefit*" subject to several concerns that could also be addressed by the imposition of conditions (at [53]).

The Court identified several non-compliances with provisions in the 2003 Planning Scheme and the 2016 Planning Scheme (at [56]) in relation to, for example, the disturbance of the natural landform, yet accepted the evidence that the Proposed Development will result in a "*net ecological benefit*". The Court found that the ecological benefit in association with the proposed rehabilitation is a factor that weighs in favour of approval (see [57] and [59]).

Court finds that the adverse odour impacts are a factor weighing in favour of refusal

The dispute with respect to air quality concerned impacts on amenity by potential odours from the Merrimac Sewerage Treatment Plant (**STP**) which is owned and operated by the Council and borders the Land to the east (see [60] and [63]).

The relevant air quality outcomes from the 2003 Planning Scheme include the following (at [61]):

- Desired Environmental Outcome (**DEO**) Soc 5 and Planning Objectives Soc 5.1, 5.,4 and 5.5.
- Performance Criteria PC23 and PC24 of the Place Code and corresponding acceptable solutions AS24.1 and AS24.2.

The relevant air quality outcomes from the 2016 Planning Scheme include the following (at [62]):

- Strategic Outcome 3.8.1(13) of the Strategic Framework.
- Specific Outcome 3.8.6.1(5) from the Strategic Framework.
- Performance Outcome PO3 from the Industry, Community Infrastructure and Agriculture Land Interface Area Overlay Code.

The experts for both parties agreed that relevant modelling demonstrated that odour concentrations did not exceed the odour criterion under "*normal operations*" but did under "*Upset Scenarios 1 and 3*" and so "*[d]uring that time the amenity of the proposal may be unsuitable*" (at [65]).

The Court did not accept the Council's position that "*… consideration of normal operations alone is appropriate*" although factored in to its assessment the improbability of the occurrence of upset scenarios (at [67]).

The Court recognised that the 2003 Planning Scheme and the 2016 Planning Scheme dictate that regard must be had to impacts on the residents as well as the "*… safe and optimal operation*" of the STP "*… now and in the future*" (at [67]).

The Court found that "*… there is inadequate separation of the site from the STP which has the potential to adversely impact upon residential amenity even under normal operations*" (at 73]). The Court was "*… not satisfied that a 'consistently high level of residential amenity' can be maintained consistent with the residents' reasonable expectations*" and found that the relevant assessment benchmarks were not complied with (at [74]).

The Court also found the Proposed Development, relevantly the placement of an additional 6,000 to 7,500 people in close proximity to the STP, places a constraint on the "*… safe and optimal operation*" of the STP, having regard to the increased likelihood of contravention of its environmental authority, indicating non-compliance with the relevant assessment benchmarks in the 2003 Planning Scheme and the 2016 Planning Scheme (see [76] and [77]).

The Court concluded that "*[d]ue to the importance of the STP to the community, these are significant considerations that weigh strongly against approval of the proposal*" (at [79]).

Court finds that proximity and accessibility issues weigh in favour of refusal

The Council raised the following issues with respect to transport and traffic planning (at [80]):

> *(a) … the proximity of the site to the proposed Merrimac Railway Station;*
>
> *(b) the Cheltenham Drive issues;*
>
> *(c) the acceptability of certain works to the relevant government department being;*
>
> *(i) the inclusion of bus stops within the site, contrary to the "decision" of the referral agency; and*
>
> *(ii) the works on the Gooding Drive roundabout.*
>
> *(d) accessibility.*

The Council alleged non-compliance with the following assessment benchmarks addressing ease of access and the reduction in reliance upon private transport from the 2003 Planning Scheme (at [81] and [82]):

- DEO Ecol 3 and Planning Objectives Ecol 3.1 and 3.2.
- DEO Soc 6 and Planning Objectives Soc 6.1 and 6.3.
- The Transport Key Strategy.
- TR Policies 1 and 3.
- The Purpose of the Car Parking, Access and Transport Integration Code and Performance Criteria PC21 and PC22.

Court finds that the Proposed Development is not proximate to the proposed Merrimac Railway Station

The Department of Transport and Main Roads Public Transport Infrastructure Manual indicates the reasonable walk-up catchment for a rail station is 800m and a limited walk-up catchment is 1.2km (at [86]).

The Court found that none of the Land is within 800m of the proposed Merrimac Railway Station (**Station**) and none of the Land, except for most of the western portion and a small part of the eastern portion, is situated within 1.2km of the Station (at [87]).

The Court also considered evidence of several factors impacting the accessibility of the Station from the Land, including the narrowness of the footpath along Gooding Drive, its proximity to the carriageway, and the carriageway's 70km speed limit (at [88]).

None of the proposed 3,000 dwellings on site are within the reasonable walk-up catchment of the Station and thus the Court concluded that the Proposed Development is not proximate to the Station, and this weighed against approval (at [91]).

Court finds the Cheltenham Drive intersection issues are not worsened by the Proposed Development

The Council argued that the proposed upgrade to the Robina Parkway and Cheltenham Road intersection is unacceptable on the basis that there is not "*… sufficient space within the existing road reserve to accommodate the proposed infrastructure upgrades in a manner consistent with the Council's design standards*" (at [94]).

The Court found, on the evidence relating to pedestrian experience, safety and pathways, that "*[a]s the intersection is presently compromised, and is not worsened by the proposal, this is not a factor which warrants refusal of the application*" (at [94]).

Court finds that the road upgrades are not a factor that warrant refusal of the Application

The Court concluded that the Applicant's proposed upgrade works to the Gooding Drive State-controlled intersection, which were not required by the State concurrence agency response, do not warrant refusal of the Application (at [95]).

Court finds that the Proposed Development does not provide a high level of accessibility to community facilities and activity centres

The Court accepted evidence that the Land does not have a high level of accessibility to Robina Activity Centre, even with the Station in operation, and so access will most likely be by private vehicle (at [97]).

The Court found that the Proposed Development does not comply with TR Policies 1 and 3 because the Land is not in close proximity to either a line haul bus terminal or rail terminal (at [98]).

The Court further found that the Proposed Development "*… will be largely car based*" and therefore held that it will not comply with assessment benchmarks "*… seeking to reduce the reliance upon private sector vehicles and provide for residential areas which maximise accessibility between residential areas and community facilities and places of employment and provide high levels of accessibility to activity Centres and Activity Clusters*" (see [96] and [99]).

The Court therefore concluded that "*[f]or these reasons transport and traffic planning matters do not support approval*" (at [99]).

Court finds that the built form, density, character and visual amenity issues relating to the Proposed Development support refusal

The Applicant submitted that the Application should be approved to take advantage of the opportunity to establish a medium density development in proximity to the Station, and that any issues in respect of built form, density, character and visual amenity could be addressed by the imposition of conditions (at [100]).

Court finds visual amenity impacts warrant refusal

The Court considered the evidence of the Council's expert and the Applicant's expert (see [107] to [113]) and found that the proposed landscaping would result in "*unacceptable adverse impacts*" to visual amenity, when viewed from several viewpoints captured by photomontages prepared by the experts (at [114]).

The Court was not satisfied that conditions could be imposed to ameliorate the visual impacts of the Proposed Development in order to satisfy the relevant assessment benchmarks (at [115]).

Court finds non-compliance with the assessment benchmarks relating to character

The Court found that, while the 2003 Planning Scheme and the 2016 Planning Scheme contemplate only "*… clusters of urban development*" among a flood plain of "*open character*", the "*open character*" of the flood plain would not be maintained in the event of approval, thus compromising its "*environmental capacity*" (see [116] to [119]). The Court held that DEOs 3.1 and 3.2 of the Place Code are not satisfied (at [119]).

Court finds non-compliance with the assessment benchmarks relating to density

Performance Criteria PC7 of the Place Code provides that (at [123]):

> *The gross accommodation density must be low, to maintain and enhance the quality of the flood plain landscape and nature conservation values. However, in areas where large expanses of open space are securely managed, net densities may be greater, consistent with the land use pattern indicated on Guraganbah LAP Map 14.7 - Conceptual Land Use.*

The Applicant asserted that PC7 contemplates greater density because of "*the secure management of the large expanse of open space so that the proposal fits comfortably within the range anticipated by the acceptable solutions*" (at [125]).

The Court reiterated that the Proposed Development does not maintain the character of the floodplain, is not proximate to the Station or Robina Town Centre, and does not have a low population density settlement pattern (at [126]). The Court found that the Proposed Development is inconsistent with PC7 and contrary to the Place Code's purpose (at [127]).

Court finds non-compliance with the assessment benchmarks relating to land use

The relevant land use provisions from the 2003 Planning Scheme include DEO Soc 2 and Planning Objectives Soc 2.1, Soc 2.2 and Soc 2.3 (see [128] to [129]). The relevant land use provisions from the 2016 Planning Scheme include Strategic Outcome 3.3.1(13), Strategic Outcomes 3.3.5.1(1), (2) and (4), and Overall Outcomes 2(b) and 2(d) of the Zone Code (see [130] to [131]).

The Court observed that the Land is predominantly mapped as "*Active/Passive Recreation*" on the Guraganbah Local Area Plan Map 14.7 (**LAP Map**) under the 2003 Planning Scheme, whereas the Application seeks to locate urban development. The Court, however, noted that the LAP Map "*… envisages flexibility and requires a site-specific assessment of technical matters to resolve the suitability and extent for urban development*" (at [133]).

The Court found that, with respect to whether urban development on land mapped for active/passive recreation purposes could be reconciled, "*… the proposal is for development on a greater portion of the site than envisaged by the LAP, and is of a scale that does not maintain and enhance open landscape character, natural features and low population density settlement pattern of the LAP Area*" (at [136]). The Court found that the Proposed Development does not comply with the relevant assessment benchmarks in the Place Code (see [136] to [140]).

The Court found that the Proposed Development seeks to develop a significantly greater portion of the Land than is envisaged by Conceptual Land Use Map 10 under the 2016 Planning Scheme, amounting to an inconsistency with the development intent for the Land (at [137]). The Court also found that the Proposed Development pursues predominantly medium rise built form which is inconsistent with the intended low to medium rise development in the 2016 Planning Scheme (at [138]).

The Court held that the Proposed Development is inconsistent with the purpose of the Place Code and the intent statement for the Guraganbah Local Area (see [136] and [140]).

Court finds that there is no need for the Proposed Development

The Applicant argued that there is a need for the Proposed Development that warrants approval of the Application and indeed "*ought overwhelm any other issues that might be said to arise from approval of the development application*" (at [141]).

The Court considered the findings made by the economists called for by the Council and the Applicant and found that "*[t]o the extent there is any need it appears to arise from a shortfall in meeting population projections which does not indicate planning need*" (at [147]). The Court also considered the consistent proportion of approved multiple dwellings in the Gold Coast that have not been converted to built stock, and opined that the failure to convert is not attributable to a flaw in the 2016 Planning Scheme but rather represents a lack of need for multiple dwellings on the Gold Coast (see [149] to [150]).

The Court concluded that there is no need for the Proposed Development and, even if there is, it would not be afforded significant weight (at [155]).

The Court was not persuaded by any of the "*relevant matters*" submitted by the Applicant as supporting approval of the Application (see [157] to [160]).

Conclusion

The Court refused the development application for a preliminary approval and therefore concluded that the variation request is also necessarily refused (see [25] and [161]).

The Court held that the Applicant did not discharge its onus and therefore dismissed the appeal and confirmed the Council's decision to refuse the Application.

Lack of jurisdiction: The Queensland Court of Appeal considers whether the Planning and Environment Court has jurisdiction to hear and determine an appeal with respect to an application to amend an area development plan under the Springfield Structure Plan

Victoria Knesl | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Spring Lake Holdings Pty Ltd v Ipswich City Council & Anor* [2023] QCA 233 heard before Morrison and Dalton, and Boddice JJA

February 2024

In brief

The case of *Spring Lake Holdings Pty Ltd v Ipswich City Council & Anor* [2023] QCA 233 concerned an application for leave to appeal to the Queensland Court of Appeal (**Court of Appeal**) the decision of the Planning and Environment Court of Queensland (**Court**) in the case of *Spring Lake Holdings Pty Ltd (ACN: 156 492 885) as Trustee for Spring Lake Trust v Ipswich City Council & Anor* [2023] QPEC 1 in which the Court dismissed an appeal against the deemed refusal by Ipswich City Council (**Council**) of an application to amend an area development plan under Part 14 of the *Ipswich Planning Scheme 2006* (**Planning Scheme**), being the *Springfield Structure Plan* (**Structure Plan**) on the basis that the Court did not have jurisdiction to hear and determine the appeal by Spring Lake Holdings Pty Ltd (**Applicant**).

The Applicant applied for leave to appeal on the following grounds:

- The Court erred in law in finding that an application to amend the Area Development Plan should not be characterised as a development application for a preliminary approval.
- As a substantial landowner, the Applicant ought to have appeal rights under the Structure Plan.

Background

The Applicant owns land (**Subject Land**) which is subject to the Structure Plan and has been developed in accordance with the relevant area development plan (**Area Development Plan**). The Structure Plan "*has a considerable legislative history*" and is now in Part 14 of the Planning Scheme (at [8]).

The Court of Appeal recited the following relevant matters, facts and circumstances:

- The Applicant wished to expand the existing development on the Subject Land to include "*… an additional childcare centre, an extension of the motel and some additional tenancies of the same type as those already approved under the existing [Area Development Plan] …*" (**Proposed Development**) (at [4]).
- To do so the Applicant needed development approval under the *Planning Act 2016* (Qld) (**Planning Act**) because the Proposed Development fell within the definition of a material change of use under the Planning Act (also at [4]). The Applicant lodged the development application on or about 6 December 2017 (**Development Application**) (at [5]).
- Given that the Subject Land is situated within the area to which the Structure Plan applies, development on the Subject Land must be assessed for consistency with the Area Development Plan (at [8]).
- The Council sent a letter to the Applicant dated 14 December 2017 in which the Council relevantly stated that an amendment to the Area Development Plan was required because the Proposed Development involves uses already occurring on the Subject Land but in locations different to those shown on the Area Development Plan (see [8] and [13]).
- The Applicant subsequently made an application to the Council under section 2.2.4.4 of the Structure Plan to amend the Area Development Plan (**Area Development Plan Application**). At the same time, the Applicant made minor amendments to the Development Application to refer to the amended Area Development Plan the subject of the Area Development Plan Application (see [14] to [15]).
- The Council did not decide the Area Development Plan Application or the Development Application, and the Applicant appealed to the Court on the basis of a deemed refusal of both applications (at [16]).

- The Applicant argued that there were no lawful grounds for refusing either of the applications but the Court determined that the primary issue was whether the Court has jurisdiction to hear and decide the appeal in respect of the Area Development Plan Application (see [16] to [17]).
- The Court held that "*[t]he [Court] does not have jurisdiction to hear and determine the appeal from an application to amend the area development plan approved under the [Structure Plan]*" (at [18]).

Court of Appeal upholds the Court's interpretation and characterisation of the Area Development Plan

The Applicant argued that the Court erred in the following respects (see [25] and [30]):

- The Area Development Plan Application should be characterised as a development application for a preliminary approval under the Planning Act.
- The Structure Plan is a local planning instrument and therefore the Area Development Plan Application was a variation request under the Planning Act as what was sought was to vary the effect of a local planning instrument.

In respect of the first argument, the Court of Appeal found that whilst "*at a general level of abstraction it might be thought that there are some similarities in effect between …*" the Area Development Plan Application and a development application for a preliminary approval under the Planning Act, each are "*… different statutory concepts and processes …*" and therefore concluded that "*[t]here is nothing in this argument*" (at [29]).

In respect of the second argument, the Applicant "*fastened*" onto discussion by the Court in its judgment that "*an approved [area development plan] is not said to form part of the planning scheme and otherwise does not meet the definition of a local planning instrument*" (see [30] to [31]). The Applicant's argument relied upon section 7(1) of the *Acts Interpretation Act 1954* (Qld) (**Acts Interpretation Act**) which provides that, "*[i]n an Act, a reference … to a law (including [another] Act) … includes a reference to the statutory instruments made or in force under [that] law*".

More specifically, the Applicant's argument was that a variation request, being the part of a development application for a preliminary approval which seeks to vary the effect of any local planning instrument, includes a variation to an approved area development plan given the operation of section 7(1) of the Acts Interpretation Act (at [31]). The Court of Appeal rejected the Applicant's argument for the reason that the application of section 7(1) of the Acts Interpretation Act can be displaced, wholly or partly, by a contrary intention appearing in any Act (see [31] and [32]).

The Court of Appeal went on to find that such contrary intention appears within the regime for making and amending local planning instruments under the Planning Act which sets out a process for making or amending a planning scheme and thus it cannot be the case that an area development approval, which has not undergone that process, can be treated as part of the planning scheme (at [31]).

The Court of Appeal held that even if the Structure Plan "*… were a local planning instrument, an application to change an [area development plan] is not a variation request within the Planning Act*" and "*… a variation request is not a development application or an application for preliminary approval; it is something less than each of those things which may be made at the same time as an application for preliminary approval*" (see [27], [28] and [32]).

Court of Appeal rejected an argument that it would be "very odd" if the Structure Plan denied appeal rights to landowners

The Applicant argued that it would be "*very odd*" if the Structure Plan denied appeal rights to substantial landowners such as itself (at [33]).

The Court of Appeal made it clear that "*an intention to deny appeal rights would not lightly be inferred by a court*" (at [33]). However, the Applicant's argument was ultimately rejected by the Court of Appeal for the following reasons:

- Whether or not there are appeal rights is a question of law; "*it does not matter whether or not the person asking the question is a substantial landowner*" (at [34]).
- "*[If] there were a provision which was ambiguous as to whether or not appeal rights were created, it might be relevant to consider a beneficial construction*", but in the current circumstances "*… there is no statute to beneficially construe. There is simply no provision identified by the [Applicant] capable of creating an appeal right*" (at [34]).
- "*[The] express provisions of the [Structure Plan] give every indication that there is to be no appeal to the [Court] from a refusal to change an [area development plan]*" (at [35]).
- Section 857(5) of the [repealed] *Sustainable Planning Act 2009* (Qld) which has continued operation by section 316(4) of the Planning Act "*supports the conclusion that there is no appeal to the [Court] from a rejection of an application for an [area development plan] under the [Structure Plan]*" (at [39]).

Conclusion

The Court of Appeal ordered that the application be dismissed with costs.

Coal mine climate change challenge canned: The Federal Court of Australia has dismissed applications for judicial review against two decisions of the Minister for the Environment and Water to reaffirm decisions made by the Minister's delegate to approve coal mine expansion operations for the reason that the Minister acted within their statutory power

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Federal Court of Australia in the matter of *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No. 2)* [2023] FCA 1208 heard before McElwaine J

February 2024

In brief

The case of *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No. 2)* [2023] FCA 1208 concerned two applications for judicial review to the Federal Court of Australia (**Court**) by the Environmental Council of Central Queensland (**Applicant**) with respect to decisions of the Minister for the Environment and Water (**Minister**) to reaffirm the decisions of the Minister's delegate to approve applications for the expansion of two coal mine operations in New South Wales at Mount Pleasant and Narrabri (**Proposed Actions**).

The Court noted that the proceedings were not concerned with the merits of the Minister's decision, but rather whether the Minister erred in the application of the Minister's statutory power when making the decisions (at [5]). The Court did not find jurisdictional error and dismissed each application.

Background

In the original decisions, the Minister's delegate determined the Proposed Actions to be a "*controlled action*" under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (at [1]). Section 67 of the EPBC Act relevantly states as follows:

> *An action that a person proposes to take is a controlled action if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be (or would, but for section 25AA or 28AB, be) prohibited by the provision. The provision is a controlling provision for the action.*

The Applicant made applications to the Minister for reconsideration, revocation, and substitution of the delegate's decision under section 78A of the EPBC Act on the basis that "*substantial new information*" had become available about the impacts of the Proposed Actions on matters protected in Part 3 of the EPBC Act, being Matters of National Environmental Significance (**MNES**) (at [2]).

The Applicant provided to the Minister documents in support of the applications which were in respect of greenhouse gas emissions as a primary contributor to climate change (at [2]). After considering the documents provided, the Minister reaffirmed the delegate's original decisions. The Applicant then sought judicial review of the Minister's decisions under section 39B of the *Judiciary Act 1903* (Cth) on the basis of jurisdictional error on behalf of the Minister (at [19]).

Minister reaffirmed the delegate's decisions

When reconsidering the delegate's decisions, the Minister did not dispute the documents provided by the Applicant that coal mine operations produce greenhouse gas emissions (**GHG emissions**), and that MNES have been or will be affected by climate change (at [3]).

The Minister considered, among other things, the "*indirect impact requirement*" contained within section 527E of the EPBC Act to determine whether the Proposed Actions would be a "*substantial cause*" of climate change.

The Minister reached two alternate conclusions, being as follows (**Minister's Conclusion**) (at [10]):

- the Proposed Actions would not cause any net increase in GHG emissions; and
- even if a net increase was demonstrated, any GHG emissions contribution would be "*very small*".

When the Applicant presented their review grounds, they structured it to address these conclusions separately and respectively as (at [61]):

- The Minister's net increase conclusion.
- The Minister's relative contribution conclusion.

The Minister's reasons for the decisions was summarised by the Court as follows (see [69]):

- It is anticipated that the mined coal would be transported to countries to be combusted where they have emissions targets and climate change adaptation regimes in place.
- There are in the export countries various GHG emissions reduction policies that would need to be adhered to.
- A variety of factors make it difficult to determine the net increase in GHG.
- The proposed buyers of coal would most likely source an "*equivalent amount of coal*" elsewhere, and therefore the same amount of GHG emissions would be produced irrespective of the origin of the coal.

The Minister stated in their reasons that they had taken into account the precautionary principle as required under section 391 of the EPBC Act (at [35]). This principle requires that the absence of full scientific certainty ought not to be used as a reason to postpone implementing measures to protect the environment.

The Minister was not satisfied the new information was about the impacts of the Proposed Actions on MNES and reaffirmed the original decisions (at [10]).

Grounds for review

The Applicant submitted ten grounds for review (**Review Grounds**) which were split into two to address each of the Minister's Conclusions alleging error, irrationality and illogic by the Minister. Grounds 1 to 7 addressed conclusion 1 being the Minister's "*net increase conclusion*", and grounds 8 to 10 addressed conclusion 2 being the Minister's "*relative contribution conclusion*" (at [61]).

The Review Grounds were as follows:

- The Minister misdirected herself in that she turned her mind to future universes in which the Proposed Actions will not be taken, or not all of the Proposed Actions will be taken for reasons, for example, that the countries receiving the coal will not burn all of the coal (at [62]).
- The Minister failed to engage in counterfactual reasoning.
- The Minister relied on future potential actions of other countries implementing climate change regimes.
- The Minister did not correctly apply the precautionary principle (at [101]).
- The Minister misunderstood the precautionary principle (at [102]).
- The Minister was irrational in her decision making (at [118]).
- The Minister misunderstood what is meant by "*substantial*", equating it to "*large numerical significance*" (at [150]).
- Repeat of ground [4] above in the context of the Relative Contribution Condition (at [157]).
- Repeat of ground [5] above in the context of the Relative Contribution Condition (at [157]).
- Repeat of ground [6] above in the context of the Relative Contribution Condition (at [158]).

The Court dismissed each of the Review Grounds finding that the Minister was rational and reasonable and had identified multiple factors in her reasoning to support the decisions. Further, the Applicant had misdirected itself in its interpretation of the ways the Minister was required to consider the impacts of the Proposed Actions (at [78]).

The Court was satisfied that the Minister "*proceeded on material that was before her, disclosed her reason for doing so and there is nothing in that which bespeaks of legal irrationality*" (at [161]).

The Court found no error on behalf of the Minister under current laws, but recognised that the Applicant's arguments "*… raise matters for Parliament to consider whether the Minister's powers must be exercised to explicitly consider the anthropogenic effects of climate change in the manner the applicant submits they must*" (at [7]).

Conclusion

Both applications for review were dismissed with costs.

Tough read for Reading Street: The Queensland Planning and Environment Court awards costs after finding part of the proceeding was frivolous and vexatious

Marnie Robbins | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Baxter v Preston & Ors (No. 2)* [2023] QPEC 37 heard before Williamson KC DCJ

February 2024

In brief

The case of *Baxter v Preston & Ors (No. 2)* [2023] QPEC 37 concerned an application to the Planning and Environment Court (**Court**) for costs brought by the first and second respondents seeking an order that the applicant pay the costs of the applicant's originating application which was dismissed by the Court (**Costs Application**).

Background

The originating application the subject of the Costs Application concerned an application brought by Steven Baxter (**Applicant**) against both Anthony and Kylie Preston (**First Respondents**), and Graya Construction Pty Ltd (**Second Respondent**), seeking declarations and consequential relief in respect of redevelopment of the First Respondents' land (**Redevelopment**) which the Applicant alleged was being carried out unlawfully and in the absence of the necessary development approvals (**Originating Application**).

The Redevelopment involved modifications to a dwelling and the construction of a pool and associated deck area on a steep block owned by the First Respondents in Reading Street, Paddington. The Applicant owned the adjoining land and objected to the Redevelopment, asserting that it would affect the amount of natural light and ventilation available to the Applicant's property. The Second Respondent was the construction company engaged by the First Respondents to assist in the carrying out of the Redevelopment.

On 21 April 2021 the Applicant obtained leave to file the Originating Application alleging that assessable development, being filling and excavation as well as building works associated with the construction of the pool (**Works**), were being carried out in the absence of a development approval for operational works, and therefore the First Respondents were committing a development offence. An interim enforcement order was made during an *ex parte* hearing requiring the Works to cease.

By 15 July 2021 the First Respondents had obtained both an exemption certificate under section 46 of the *Planning Act 2016* (Qld) and a development approval for operational work from the council authorising the completion of the Works and the Applicant had been notified of this outcome. The First Respondents had therefore, by this date, responded directly to the Applicant's allegations and the Applicant had ostensibly achieved what was sought at the time of the filing of the Originating Application.

Despite these actions, the Applicant went on to amend the Originating Application to raise new allegations several times to such an extent that "*the original pleading [was] lost in a sea of red tracked changes*" (at [20]). The new contentions raised by the Applicant were described as "*… unmeritorious, misconceived and futile*" and the Applicant was unsuccessful in relation to all contentions (at [24]).

As a result, the Applicant's third further amended Originating Application was dismissed.

The Applicant also made an Application for leave to appeal against that decision which was dismissed.

Application for costs

Under section 60(1) of the *Planning and Environment Court Act 2016* (Qld) (**PECA**) the Court has a discretion to make a costs order in a number of circumstances, including most relevantly to this case the following (at [3]):

- the proceeding was instituted and conducted primarily for an improper purpose (PECA section 60(1)(a));
- the proceeding was frivolous or vexatious (PECA section 60(1)(b)); and
- the applicant introduced new material (PECA section 60(1)(e)).

The First Respondents and Second Respondent argued that costs incidental to the Originating Application were incurred by them in each of the three circumstances identified in section 60(1) of the PECA (at [3]). The Court dealt with each circumstance as a separate issue in the Costs Application.

The Court ultimately found that from 15 July 2021 onwards the Applicant's maintenance of the proceedings represented egregious conduct intended to engage section 60(1)(b) of the PECA and made an order for costs reflective of this.

Court finds the proceeding was not instituted and conducted for an improper purpose

The Applicant commenced proceedings on 21 April 2021, at which time the Applicant, as an adjoining neighbour, had a reasonable concern about the lawfulness of the Redevelopment and how it would impact the enjoyment of the Applicant's residence (at [43]).

The Court appreciated that to commence the proceeding in the way the Applicant did was reasonable as the Applicant could only make an objection to the Council and had no right of appeal in relation to any decision regarding the development (at [43]).

It was found that the Applicant's proceeding during the period from 21 April 2021 until 14 July 2021 was reasonable and the proceeding was not commenced for an improper purpose (at [50]).

Section 60(1)(a) of the PECA was therefore not engaged.

Court finds the proceeding was frivolous and vexatious from 15 July 2021 onwards

The Court acknowledged that prior to 14 July 2021 the Applicant's proceeding was not frivolous or vexatious for the same reasons it gave regarding the first issue (at [43]).

However, from 15 July 2021 onwards, the Applicant pressed on despite the First Respondents and Second Respondent having successfully responded to the Originating Application as originally filed, and in doing so the Applicant failed to appropriately re-examine the prospects of success (see [45] to [48]).

The Applicant pursued unmeritorious points of form rather than substance and had abandoned the original pleading entirely. The Court found that the "*[Applicant's] insistence on compliance with the law was misplaced and pursued with unnecessary belligerence*" (at [47]).

It was therefore concluded that the maintenance of the Originating Application from 15 July 2021 onwards was "*… productive of serious and unjustified trouble and harassment*" (at [55]).

The Court was satisfied that the circumstances engaged section 60(1)(b) of the PECA.

Court finds the applicant had introduced new material from 15 July 2021 onwards

The Applicant made several late amendments to the pleading, including twice during the three-day hearing (at [48]).

The amendments introduced new allegations, being technical in nature and "*unnoticeable other than to a person-well versed in legal quagmire*" (at [29] of the Originating Application).

The introduction of new material caused the Applicant's case to "*shift, repeatedly*" and had the effect of prolonging the trial (see [21] and [48]).

The Court was satisfied that section 60(1)(e) of the Act was engaged (at [48]).

Conclusion

The Court concluded that the power to make a costs order under section 60(1) was enlivened and ordered the Applicant to pay the First Respondents and Second Respondent costs, assessed on an indemnity basis, on and from 15 July 2021 up to and including 9 December 2021, being the date the Originating Application was decided.

Rural RoL Refusal Reaffirmed: The Planning and Environment Court of Queensland confirms the refusal of a development application which would fragment rural land

Ashleigh Foster | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Danma Property Pty Ltd v Western Downs Regional Council* [2023] QPEC 41 heard before Long SC DCJ

February 2024

In brief

The case of *Danma Property Pty Ltd v Western Downs Regional Council* [2023] QPEC 41 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the Western Downs Regional Council's (**Council**) decision to refuse a development application for reconfiguring a lot (1 lot into 2 lots) (**Proposed Development**) with respect to land located at Red Hill Road, Red Hill (**Land**).

The Court considered three issues:

- whether the Proposed Development would result in the fragmentation of rural land contrary to the *Western Downs Planning Scheme 2017 Amendment 1* (**Planning Scheme**);
- whether the Proposed Development would satisfy a community need; and
- whether there are any relevant matters in support of the Proposed Development.

The Court upheld the Council's decision to refuse the development application for the Proposed Development after finding that the Proposed Development would result in non-compliance with provisions of the Planning Scheme regarding the fragmentation of rural land and that there was no community need or other relevant matter which justified approval of the Proposed Development despite the non-compliance with the Planning Scheme.

Court finds that the Proposed Development would result in the fragmentation of rural land contrary to the Planning Scheme

The Land is identified by a map in the Strategic Plan in the Planning Scheme as rural land, and more particularly agricultural land. The Council argued that the Proposed Development did not comply with various provisions of the Planning Scheme which required the prevention and avoidance of the fragmentation of rural land, including provisions within the Strategic Plan, Rural Zone Code, Reconfiguring a Lot Code and Natural Resources Overlay Code (see [12] to [13]).

The Appellant argued that the Proposed Development would not result in "*… any meaningful or practical fragmentation of rural land*", because the Land was already fragmented in "*every practical sense*" by an existing Community Title Scheme that applied exclusive use rights to parts of the Land (see [16] to [19]).

The Appellant also noted the following contextual considerations in support of its argument (at [20]):

- Whilst the Land is identified as rural land by the Planning Scheme, the Land has an area of 17.62 hectares which is less than 2% of the minimum lot size area required by the Rural Zone Code and less than 3% of the minimum lot size area required by the Natural Resources Overlay Code.
- The uses occurring on the Land are consistent with the uses intended for the rural zone by the Planning Scheme.

The Court emphasised that the *Planning Act 2016* (Qld) (**Planning Act**) and relevant categorising instruments treated community title schemes differently to subdivisions. The Court relevantly noted that the Community Title Scheme adopts a building format plan which creates an individual title only in respect of the buildings identified on the Land and the adoption of the Community Title Scheme is placed outside of the Council's planning controls (see [26] to [32]).

The Court found that there is "*… no division or separation of the land, in any legal or practical sense*" under the Community Title Scheme and it therefore followed that the Proposed Development would result in the fragmentation of rural land contrary to the provisions of the Planning Scheme which present strongly against the fragmentation of rural land (at [31] and [34]).

Court finds that there is not a community need to justify approval of the Proposed Development

Whilst the Planning Scheme requires that fragmentation of the Land is avoided, it provides exceptions where there is, for example, "*over-riding need for the development in terms of public benefit*" (at [37]).

Whilst the evidence of the respective town planning expert witnesses was that there is no identified community need for the Proposed Development, the Appellant's town planning expert witness (**Town Planner**) opined that the Proposed Development would not result in any adverse community impact (at [39]). However, the Court disagreed with the Town Planner's opinion in this regard and found the following:

- the Town Planner was seeking to apply a test to the Proposed Development which is not the test that is required by the Planning Scheme (at [40]);
- an adverse impact would arise because the fragmentation of the Land would make the Land more attractive to purchasers who would use the Land for "*lifestyle rural residential occupancy*" contrary to the Planning Scheme's intention to preserve the Land for rural use (at [42]);
- the Town Planner's reasoning relied on the incorrect assumption that the Proposed Development would not result in any practical fragmentation of the Land (at [43]).

The Court found that in circumstances where there is no community need for the Proposed Development, greater weight should be ascribed to the Proposed Development's non-compliance with the Planning Scheme with respect to the fragmentation of the Land (at [45]).

Court finds that there are no relevant matters deserving substantial weight to justify approval of the Proposed Development

The Appellant contended that the existing approval given by the Council for a material change of use allowing multiple dwellings on the Land was a matter that favoured approval of the Proposed Development because the Proposed Development is consistent with the historic use of the land for two separate households (at [48]).

However, the Court did not agree that this matter favoured approval because the existing approval for a material change of use was given in respect of the Land in its current undivided state [at [49]).

The Appellant also argued that the absence of negative impacts from the Proposed Development should be considered as a matter that favours the approval of the Proposed Development (at [50]).

Whilst the Court agreed that the absence of negative impacts can be a matter which favours approval of a proposed development, the Court found that the Proposed Development could result in an adverse impact by compromising the policy underpinning the Planning Scheme and the ability of the Planning Scheme to protect the intended use of the Land (see [51] to [53]).

The third matter that the Appellant asked the Court to consider was the "*improved utilisation*" of the Land (at [55]). In particular, the Appellant argued that the Proposed Development would result in improved efficiency with respect to utility infrastructure and the co-ordination of utility bills and insurance (at [57]).

The Council argued that this matter involved reliance upon the personal circumstances of the owners of the Land which is a matter expressly excluded by section 45(5)(b) of the Planning Act (at [56]).

The Court found that there was no relevant matter deserving substantial weight which would justify the approval of the Proposed Development in light of the significant non-compliance with the requirements of the Planning Scheme (at [58]).

Conclusion

The Court confirmed the Council's decision to refuse the development application for the Proposed Development.

Amounts levied to be refunded by local government: High Court of Australia has rejected a "good consideration" defence by a local government against the repayment of invalid special levies

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the High Court of Australia in the matter of *Redland City Council v Kozik* [2024] HCA 7 heard before Gageler CJ, Gordon, Edelman, Steward, and Jagot JJ

March 2024

In brief

The case of *Redland City Council v Kozik* [2024] HCA 7 concerned an appeal and a cross-appeal to the High Court of Australia (**High Court**) against the decision of the Queensland Court of Appeal (**Court of Appeal**) in the case of *Redland City Council v Kozik & Ors* [2022] QCA 158 with respect to an appeal of the Supreme Court of Queensland (**Supreme Court**) decision in the case of *Kozik & Ors v Redland City Council* [2021] QSC 233. The High Court majority granted special leave for both the appeal and cross-appeal, but dismissed the appeal and the cross-appeal with costs.

Background

The Redland City Council (**Council**), by invalid resolutions during 2011 to 2016 (**Resolutions**), issued special levy rate notices to certain owners of waterfront properties in their local government area (**Rateable Land**) to fund various waterway works (**Works**) they were required to undertake under the *Local Government Act 2009* (Qld) (**Local Government Act**) and the *Coastal Protection Management Act 1995* (Qld) (**Acts**).

The owners of the Rateable Land paid the special levy rate notices (**Levied Charges**). The Council, once aware of the invalidity of the Resolutions, refunded the owners the percentage of the Levied Charges which were remaining at the completion of the Works, but refused to refund the spent Levied Charges. Certain owners of the Rateable Land brought an action to recover the spent Levied Charges paid under the Resolutions (**Respondents**). The Respondents sought repayment of the spent Levied Charges both in debt and as money had and received.

The Supreme Court found in favour of the Respondents with respect to their debt action, but rejected their action for money had and received. The Supreme Court ordered that the Council repay the spent special charges to the Respondents. The Council appealed to the Court of Appeal, and the Respondents cross-appealed the rejection of their claim for money had and received.

A summary of the Supreme Court Judgment is available in our February 2022 article.

The Court of Appeal allowed the Respondents' cross-appeal and allowed the Council's appeal in part. A majority of the Court of Appeal held that Council was not liable to the Respondents in debt, but found that the Council was liable for restitution at common law. Special leave was then sought from the High Court for the Council to appeal and the Respondents to cross-appeal the Court of Appeal's decision.

A summary of the Court of Appeal Judgment is available in our September 2022 article.

Issues

There was no dispute that the Council had invalidly levied the Levied Charges due to non-compliance with regulations made under the Local Government Act (**Regulations**). The two issues for determination by the High Court were as follows:

- Whether the Regulations made pursuant to the Acts entitled the Respondents to recover the Levied Charges raised under the invalid Resolutions (at [83]).
- Whether Council had a defence (see [6] and [151]).

High Court agrees with the Court of Appeal that the Respondents do not have entitlement to restitution by way of debt

The High Court considered the construction of the Regulations when determining the entitlement of the Respondents to restitution in debt. The High Court rejected the Respondents' contention that the provisions in the Regulations relating to the return of special levies preserved the validity of the rate notices and provided the Respondents with a statutory entitlement to recover the special charges (see [162] to [163]). The reason for this finding was that the provisions of the Regulations requiring the return of special levies were for the purpose of addressing errors in *valid* special levy notices (see [170] to [176]). However, the special levy notices were *invalid* as a result of their non-compliance with the Regulations and Acts (at [177]).

The High Court agreed with the Court of Appeal, and concluded that the Respondents do not have a claim to recover the Levied Charges by way of debt, and proceeded on the basis of a prima facie claim at common law.

High Court majority found the Council does not have defence of "good consideration"

After determining that the Respondents did have a prima facie entitlement to restitution, the issue was then whether it was open to the Council to deny recovery on the ground that the Respondents received "good consideration" from the Council (at [150]).

The High Court considered its decision in the case of *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353 (**David Securities Decision**) where it was recognised that a mistake of law afforded a prima facie claim for restitution, and rejected the defence of "good consideration" (at [192]). The David Securities Decision established the defence of good consideration as one by which a significant factor of the restitution claimed is reduced to the extent that the respondent seeking the restitution also received a benefit from the payment.

The High Court majority rejected the "good consideration" defence by the Council for the following three reasons:

- **No failure of the basis for the relevant works**

  The Council's performance of the Works was not done objectively on the basis that they would be funded by the Levied Charges as the Council was obliged under statute to perform the Works (at [206]).

- **No benefit to the Respondents or group members**

  Whilst it was accepted that the Respondents may have received a benefit from the Works, the benefit was not established in the sense required to satisfy the defence (at [208]). The Council submitted that the benefit received was the net accretion to the wealth of the Respondents by an asserted increase in the value of their land by one to two percent (at [209]). No evidence that was "*objectively quantifying*" was presented to support this measure, and the High Court rejected this "*colloquial, and incorrect*" meaning attributed to "*benefit*" by the Council (at [209]). Further, in the instances where the Respondents had no intention to sell their land or use it to obtain a loan, the Respondents could not enjoy this benefit (at [210]).

- **Defence would stultify the operation of the Regulations**

  The Respondents submitted that the purpose of the Regulations are to ensure that care is taken by the Council before incurring substantial costs that will be borne by a section of the community. The High Court agreed with this submission and accepted that the duty of compliance with the Regulations is firmly placed on the "*… shoulders of the Council for the protection of those members of the community within its area of government*" (at [212]). Allowing the defence of good consideration in this case would have the possibility of undermining the Regulations.

The High Court then clarified that the "good consideration" defence does not apply to excess payments made for a service under an agreement or other obligation. The claim for restitution, in these instances, will be limited to the excess of the agreed price, as this is the only amount the receiver was not entitled to receive (at [236]).

High Court majority refuses to recognise the defence of "recipient not unjustly enriched"

Unjust enrichment was defined in the case of *Spence v Crawford* [1939] 3 All ER 271 at 289 as occurring where the claimant for restitution "*both got back what [they] had parted with and kept what [they] had received in return*". The restitution of unjust enrichment was later considered in the David Securities Decision, which quoted at [72] the case of *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221 as "*… a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff …*".

The High Court minority recognised this defence in the sense that the Council was not unjustly enriched as they had acted in good faith, the Respondents benefitted from the Works, and paid to the Council no more than the Council would have been entitled to levy (at [132]). For these reasons the High Court minority concluded that the Appeal should be allowed (at [133]).

However, the High Court majority rejected this defence. This defence stems from the *Restatement (Third) of Restitution and Unjust Enrichment* (**Restatement**) which is included in elements of the "good consideration" defence, which the High Court majority had already rejected. For the following reasons the High Court majority did not find this defence as being applicable (see [216] to [221]):

> *(1) Australian law does not recognise 'unjust enrichment' as a premise capable of direct application …*
>
> *(2) The general recognition of the [recipient not unjustly enriched] defence would lead to results inconsistent with Australian law …*
>
> *(3) Australian law rejects the basis of the [recipient not unjustly enriched] defence, being a direct appeal to "equity"*.

The High Court majority elaborated that it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable (at [226]). The High Court majority also noted the discretionary or equitable approach to this defence in the case of *Atlantic Coast Line Railroad Co v Florida* (1935) 295 US 301, wherein a railroad carrier collected increased freight charges pursuant to an invalid order, but was not required to pay restitution (at [227]). Although that case and the present case both concerned charges raised through an invalid mechanism, the High Court majority distinguished that case on the basis that the recipients of the railroad service had requested and received the service, whereas in the present case the Respondents did not request the Works (at [228]).

No defence of fiscal chaos or change of position

The High Court majority recognised a further defence from the Restatement, being a defence where restitution would disrupt the orderly fiscal administration, which was described as a "*broader application*" of the Australian law defence of "*change of position*" (at [241]). The change of position defence applies where the recipient, in good faith and reliance upon the payment received, suffered an "adverse" or "irreversible" change of position. The High Court majority noted that the Council had "disavowed" a change of position defence, in that they did not plead this (at [244]).

Conclusion

The High Court majority dismissed the appeal with costs and unanimously allowed the cross-appeal, and dismissed it with costs.

Colin Biggers & Paisley

State Heritage Place listing reversed: Planning and Environment Court of Queensland decides the Ashgrove Methodist Church Complex is not a State Heritage Place

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Uniting Church in Australia Property Trust (Q.) ABN 25 548 385 225 v Queensland Heritage Council* [2023] QPEC 40 heard before McDonnell DCJ

March 2024

In brief

The case of *The Uniting Church in Australia Property Trust (Q.) ABN 25 548 385 225 v Queensland Heritage Council* [2023] QPEC 40 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision (**Decision**) of the Queensland Heritage Council (**Council**) to enter the Ashgrove Methodist Church Complex (**Church**) as a State Heritage Place in the Queensland Heritage Register (**Register**).

The Council made the Decision because it found that criteria (a) and (e) of section 35(1) of the *Queensland Heritage Act 1992* (Qld) (**Heritage Act**) were satisfied.

Accordingly, the Court considered the following issues:

- Whether the Church is important in demonstrating the evolution or pattern of Queensland's history – criteria (a) of section 35(1) of the Heritage Act (**Criteria (a)**).
- Whether the Church is important because of its aesthetic significance – criteria (e) of section 35(1) of the Heritage Act (**Criteria (e)**).

The Court found that the Church did not satisfy Criteria (a) or Criteria (e) and therefore ordered that the Decision be set aside and replaced with a decision not to enter the Church in the Register.

Procedural matters

The appeal was commenced under part 13 of the Heritage Act. Section 164 of the Heritage Act provides that the *Planning and Environment Court Act 2016* (Qld) (**PECA**), part 5, division 1, "*… with any changes the Planning and Environment Court considers appropriate …*" applies to any appeal under part 13 as if the appeal were a *Planning Act 2016* (Qld) appeal under the PECA.

Despite the guidance provided by section 164 of the Heritage Act, the Court had to adjudicate a number of disputes with respect to how the appeal would be heard and decided. The Court's decisions are summarised below.

Could the Court exercise any discretion?

The Court contemplated that there may be an exercise of discretion involved in deciding an appeal commenced under part 13 of the Heritage Act. However, the Court did not resolve this question in circumstances where an exercise of discretion was not necessary because the Court found that the Church did not satisfy Criteria (a) or Criteria (e) (see [13] to [22]).

Who bears the onus of proof?

The Court found that in the absence of a legislative provision assigning the onus of proof, the common law position applied, being that the onus rests with the party that seeks to disrupt the status quo (at [34]).

The Court found that the status quo was the state of affairs resulting from the Decision, that is, the Church being listed in the Register. As the party appealing the Decision, the Appellant was the "moving party" seeking to disturb the status quo (at [32] and [34]).

Accordingly, the Court found that the Appellant bore the onus of proof (at [35]).

What evidence could the Court consider?

The Appellant argued that the evidence concerning cultural heritage significance should be limited to the Statement of Significance included in the Register in respect of the Church (at [36]).

The Court did not agree and found that given the appeal is by way of hearing anew, the Court must make its decision having regard to all of the admissible evidence before it (at [43]).

What was the role of the Guideline?

The Court considered the role of the Guideline published by the Chief Executive pursuant to section 173 of the Heritage Act (**Guideline**) which was referenced by some of the expert witnesses who gave evidence in the appeal.

The Court likened the role of the Guideline in the appeal to the role of the *Development Assessment Rules* in assessing whether a change to a development application, or development approval, would result in "*substantially different development*" and found that it may have regard to the Guideline but is ultimately bound by the words of the relevant statutory instrument, being the Heritage Act (see [48] to [49]).

Court considers the meaning of the word "important"

Criterion (a) and Criterion (e) both include the word "*important*" as a qualitative benchmark.

The Heritage Act does not include its own definition for "*important*", so the Court had regard to definitions for the word in dictionaries as well as the meaning attributed to the word previously by the Court with respect to section 35(1) of the Heritage Act (see [61] to [62]).

The Court adopted an approach whereby the use of the word "*important*" requires that Criterion (a) and Criterion (e) are "*… viewed through the lens that their satisfaction requires qualities that are more than just commonplace, but not qualities that are out of the ordinary or exceptional*" (at [63]).

Court finds that the Church does not satisfy Criterion (a)

The Court considered evidence provided by the parties' historians and preferred the evidence of the Appellant's historian because the Council's historian considered in his evidence criteria of section 35(1) of the Heritage Act which were not relevant to the appeal (at [76]).

Having regard to the Guidelines, the Court relevantly found that:

- the Church is not a rare example of post-war modern church buildings, or more particularly A-frame church buildings, in Brisbane or Queensland (at [88]);
- the Church does not hold a highly distinctive or exceptional place in Queensland's heritage (see [88] and [92]); and
- the Church is not representative because its intactness has been substantially compromised by alterations (at [89]).

Whilst the Court accepted that the Church had importance to the Ashgrove Methodist community, and the building type is early for Brisbane, it was not satisfied that the Church was important in demonstrating the evolution or pattern of Queensland's history (see [86] to [87] and [92]).

Court finds that the Church does not satisfy Criterion (e)

The Court firstly considered what test ought to be adopted in assessing the aesthetic significance of the Church. Whilst the Appellant argued that the perspective of an "*ordinary passer-by*" should be adopted, the Court agreed with the reasoning of the Court in the case of *The Corporation of the Sisters of Mercy of the Diocese of Townsville v Queensland Heritage Council (No. 2)* [2017] QPEC 14; (2017) QPELR 391 that the appropriate test adopts the perspective of the informed Council, as the Court's role in a hearing anew is to step into the shoes of the decision maker (at [98]).

Both parties engaged architects as expert witnesses for the appeal. However, the Court ascribed less weight to the evidence of the Council's architect because she was an advocate for the protection and care of religious buildings with a lively interest in the subject matter (at [103]).

Having regard to the Guidelines, the Court relevantly found that the Church's limited beautiful attributes are impacted by the external surrounds and that the Church has limited visibility from the public realm which impacts its aesthetic significance in that (at [110]):

- the views to the Church are not picturesque (see [106] to [107]);
- the Church makes a limited contribution to the streetscape and has reduced evocative qualities (at [118]); and
- the expressive attributes conveyed by the symbolism of the Church's use of an A-frame are limited (at [120).

Further, the Court found that the Church had not maintained a reasonable degree of intactness and integrity because of alterations made to the Church, particularly to its interior, which meaningfully altered the original building fabric (at [123]).

The Court also considered the Church's representation in art, literature, and photography. The Court found that the Church had limited representation in these mediums and noted that the Church had not been included in any of the Appellant's architect's extensive body of literature regarding post-war modernist religious buildings in Queensland (at [125]).

Conclusion

Having found that the Church did not satisfy Criteria (a) or Criteria (e), the Court found that it was not appropriate for the Church to be listed in the Register (at [130]).

Therefore, the Court ordered that the Decision be set aside and replaced with a decision not to enter the Church in the Register (at [131]).

Fine is manifestly inadequate: District Court of Queensland allows appeal after finding penalty imposed on respondent company for demolition of historical cottage was manifestly inadequate

Marnie Robbins | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland District Court in the matter of *Brisbane City Council v Natural Lifestyle Homes Pty Ltd* [2023] QDC 234 heard before Kent KC DCJ

March 2024

In brief

The case of *Brisbane City Council v Natural Lifestyle Homes Pty Ltd* [2023] QDC 234 concerned an appeal under section 222 of the *Justices Act 1886* (Qld) to the District Court of Queensland (**Court**) against what the appellant local government argued to be the manifest inadequacy of the penalty which had been imposed on the respondent in respect of development offences arising from the respondent's demolition of an historical cottage.

Background

Natural Lifestyle Homes Pty Ltd (**Respondent**) applied to the Brisbane City Council (**Council**) to redevelop a residential property at 41 Wilden Street, Paddington (**Property**) owned by one of the Respondent's shareholders, Mr Keane and his wife (**Keanes**). The Respondent proposed to demolish a heritage cottage on the site (**Cottage**) and create a replica of it as part of a new residential build which the Keanes were intending to be their new family home.

The Council refused the application for demolition of the Cottage on the basis of its age and historical significance, having been built in 1888, as well as the clear protections afforded to the Cottage under the *Brisbane City Plan 2014*.

The Council granted a development approval in respect of the Property with stringent conditions requiring the Cottage to be structurally protected and preserved, with any additional works to be completed behind and around the Cottage (**Redevelopment**).

In order to undertake the Redevelopment, the Respondent intended to move the Cottage to the back of the Property and complete the required works before reinstating the Cottage at which stage it would be integrated with the rest of the Redevelopment. However, upon being moved to the back of the Property, the Cottage's bracing was removed and no structural assessments were undertaken.

The Respondent formed the view that the relocation of the Cottage was no longer feasible and instead demolished the Cottage and built a replica, with the only retained artefacts being the original door and two windows (at [7]). As a result, the Respondent achieved the very development which the Council had refused.

The Respondent pleaded guilty to one count of carrying out assessable development without a permit in breach of section 163(1) of the *Planning Act 2016* (Qld) (**Planning Act**) and one count of contravening a development approval under section 164 of the Planning Act in the Magistrates Court on 9 June 2023 (**Offences**).

The Respondent was fined $20,000 in respect of the Offences, along with its two shareholders, Mr Keane and Mr Carroll (**Shareholders**) who were each fined $19,000 and $15,000 respectively.

Appeal

The overarching issue for the Court on appeal was whether, as the Council alleged, the penalty was manifestly inadequate.

In determining the issue, the Court had regard to a number of factors relevant to the exercise of the sentencing discretion, including:

- the seriousness of the conduct;
- the maximum penalty for corporations being five times that for natural persons (see section 181B(3) of the *Penalties and Sentences Act 1992* (Qld));
- the cost of doing business;
- the relationship between the theoretical maximum penalty and the penalty imposed;

- the Respondent's capacity to pay; and
- the nature of the offending.

The Court found that the penalty imposed on the Respondent was manifestly inadequate (at [34]).

Court finds the penalty imposed on the Respondent was manifestly inadequate

Seriousness of the conduct

The Court relevantly noted the lack of compliance with the development approval, the decision to demolish the Cottage having been reached over a period of weeks, and a failure to inform the Council of the decision (at [12]). The Court found that the important protections afforded to the Cottage by the approval scheme were undermined and disregarded. The Court concluded that general deterrence was a significant consideration in this context (at [12]).

Penalty five times that for natural persons

The Court agreed with the Council's argument that attention must be paid to the higher maximum penalty, even where company directors are also being sentenced or where there is a double punishment scenario (at [13]).

Cost of doing business

The Court relevantly noted that imposing significant penalties for offences of this kind are important to prevent developers from viewing penalties as a mere "cost of doing business" (at [14]). Whilst the Court acknowledged that the development was not a "for profit" exercise, being a residential build, the Court found the principle to be relevant nonetheless.

Relationship to maximum penalty

The Court relevantly noted that the maximum penalty, being a fine of $3,002,625 is a "yardstick" to which attention should be paid by judges. The Council contended that the minimal nature of the penalty was "*… so untethered to the maximum penalty available that the error in the exercise of the sentencing discretion is apparent, without separate identified discrete legal error in reasoning*" (at [17]). The Court had regard to the significant total cost of the Redevelopment, the insignificance of the fine by comparison, and the avoidance of costs associated with moving and reinstated the Cottage.

Capacity to pay

The Court considered both indemnity of the Respondent by its insurer and the Respondent's capacity to pay generally.

The Respondent argued that its indemnity by its insurer of both legal costs and the fine received was neither relevant to the issues on appeal nor the error alleged by the Council. The Court concluded that "*[w]here the insurance policy means that a personal burden is not being imposed on the respondent by way of the fine, there is no reason to adjust it upwards, however nor is there a reason to adjust it downwards*" (at [21]). The Court concluded that the question of indemnity is therefore neutral as to the issues on appeal.

The sentencing Chief Magistrate emphasised that the fine was informed by the totality of the punishment which the Shareholders would also bear given their connection to the company. The Court disagreed with this, having established that the penalty should be no less than if the company had been the sole contravener (at [22]).

The Respondent also pointed to evidence indicative of its inability to pay a significant fine without the consequence of insolvency which would in turn impact existing building projects, along with the careers and livelihoods of the Shareholders. The Court had regard to a number of considerations of the financial circumstances of the Respondent and its Shareholders (see [24] to [30]) and deemed them "*... relevant but not determinative as to the precise quantum of the appropriate penalty ...*" concluding that "*[f]ines are intended to penalise offenders ...*" (at [31]).

Nature of the offending

The Court noted that the conduct of the Respondent was accepted as not a deliberate defiance of the approval and noted there was no commercial benefit to the Respondent arising from the offending (at [32]). Nonetheless, the Court found that the Respondent's behaviour was reckless having regard to the Shareholders' considerable experience in the area and that the Respondent could have and ought to have consulted with its structural engineer involved in the project regarding the proper preservation of the Cottage.

Conclusion

The Court concluded that the penalty imposed on the Respondent was manifestly inadequate and should be set aside.

The appeal was allowed and the fine of $20,000 imposed on the Respondent was replaced with a fine of $100,000 in respect of the Offences.

Positive attributes outweigh non-compliance: Planning and Environment Court of Queensland dismisses a submitter appeal in respect of a proposed 5-star resort complex in Airlie Beach

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Save Our Foreshore Inc v Whitsunday Regional Council & Ors; Meridien AB Pty Ltd (Receivers & Managers Appointed) (In Liquidation) & Anor v Whitsunday Regional Council & Anor* [2023] QPEC 34 heard before Rackemann DCJ

March 2024

In brief

The case of *Save Our Foreshore Inc v Whitsunday Regional Council & Ors; Meridien AB Pty Ltd (Receivers & Managers Appointed) (In Liquidation) & Anor v Whitsunday Regional Council & Anor* [2023] QPEC 34 concerned two appeals to the Planning and Environment Court of Queensland (**Court**) against the decision of the Whitsunday Regional Council (**Council**) to grant a preliminary approval for a material change of use including a variation approval (**Preliminary Approval**) and a development permit for a material change of use for seven multiple dwelling units/short term accommodation units for a 46.7 metre high, 12-storey 5-star resort complex (**Proposed Development**) on land located in Airlie Beach, Queensland (**Land**).

The appeals were with respect to the Preliminary Approval and not the development permit component, and were as follows:

- A submitter appeal by local community organisation, Save Our Foreshore Inc (**SOF**), against the Preliminary Approval (**Submitter Appeal**).
- An applicant appeal against conditions imposed in the Preliminary Approval (**Applicant Appeal**).

The relevant planning scheme was the *Whitsunday Planning Scheme 2017* (version 3.6) (**Planning Scheme**) and the variations sought to the Planning Scheme were as follows (at [9]):

- to increase the maximum building height to 47 metres;
- to make code assessable a resort complex up to 47 metres on the Land when assessed against the Canal Street Resort Complex Development Code, Landscaping Code, and Transport and Parking Code; and
- to make accepted development building works for the Proposed Development.

The issues in dispute as agreed between the parties included the following (at [20]):

- Relevance of the draft planning scheme.
- Promotion of tourism and economic growth.
- Protection of natural landscape values.
- Height of the proposed buildings.
- Need.

The Court found that whilst it is "*… common ground that the height of the building exceeds that which is provided for in the [P]lanning [S]cheme*" (at [22]) need outweighed the non-compliance with the relevant height limit.

The Court determined that the Submitter Appeal ought to be dismissed and adjourned the appeals to allow the parties to incorporate amendments to the conditions of the Preliminary Approval.

Relevance of the draft planning scheme

At the time of the appeals, the Planning Scheme was in the process of being amended (at [17]). As these amendments were not in force, they were not given any weight under section 45(8) of the *Planning Act 2016* (Qld). However, the Court considered the Coty principle, as restated in the case of *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253, as follows:

> *"[21] The Coty principle identifies two public interest considerations when considering development applications in an era when a new planning scheme is under construction but not yet taken effect …*
>
> *[23] The first public interest consideration is the avoidance, as far as possible, of a judgment which will render more difficult the ultimate decision as to the form that a planning scheme should take …*
>
> *[24] The second public interest consideration … is that the judgment should be arrived at, as far as possible, in consonance with town planning decisions which have been embodied in the new planning scheme in the course of preparation …*

As the Council had already resolved to adopt the draft amendments, the Court determined that only the second public interest consideration is relevant (at [19]).

Court finds that the Proposed Development supports economic and tourism growth

The strategic intent of the Planning Scheme includes five themes with a strategic outcome proposed for each theme and includes land use strategies for achieving the strategic outcome. The strategic outcome for economic growth in section 3.2.2.1(1) of the Planning Scheme states as follows:

> *The economic resilience, wealth creating and employment generating capacities of the Region's key sectors are protected and enhanced for present and future generations.*

The land use strategies for achieving that outcome in section 3.2.2.2(7) of the Planning Scheme states as follows:

> *… new or expanded tourist accommodation and ancillary [b]usiness activities are located in Airlie Beach … A major regional function facility is located adjacent to Airlie Beach Main Street and Esplanade area …*

The Court found that this theme was satisfied for the reasons that the Proposed Development provides tourism opportunities and is located within the relevantly identified area.

Court finds that the Proposed Development will not impact the "core values" of the local landscape

SOF alleged that the Proposed Development did not comply with the environment and heritage theme insofar as it relates to landscape values. The strategic outcome for this theme in section 3.2.3.1(1) of the Planning Scheme states as follows:

> *The cultural heritage and life supporting capacities of air, eco-systems, soil and water are conserved, enhanced or restored for present and future generations.*

The land use strategy for this theme in section 3.2.3.2(2) of the Planning Scheme states as follows:

> *The core landscape values within the region are protected and, if practical, enhanced. The core landscape values include the urban gateways to Airlie Beach … as well as the significant visual backdrops as viewed from major scenic routes of … Shute Harbour Road …*

SOF alleged visual interruption to the core landscape values, to the extent that views to the ocean and the forested areas are considered "core landscape values". The Court accepted that there would be "*no more than minor impacts*" and did "*… not consider that the proposal is inconsistent with the protection of the core landscape values …*" (see [31] and [32]).

Courts finds that the positive attributes of the Proposed Development outweigh any adverse impacts because of non-compliance as to height

The Land is within "*Precinct F*" of the mixed use zone of the Planning Scheme, which has a maximum building height of 18 metres (see [33] and [38]).

The Court was satisfied that the "*scale, character and built form*" of the Proposed Development reflects its nature as a luxury resort (at [45]).

The Court then considered the Building Heights Overlay Code, in particular Table 8.2.5.3.2 of the Planning Scheme, which "*… admits of the prospect of some development being of a greater height*" (at [56]). The maximum height table is referenced in the acceptable outcome, but not in the performance outcome. The Court stated that "*[a] proposal which does not conform to the maximum height in the table may still demonstrate compliance with the performance outcome*" and concluded that "*the [Proposed Development] would meet the performance outcome*" (at [57]).

The Court went on to consider the proposed amendments to the Planning Scheme, which includes in a relevant performance outcome that the height of a building is not to unduly overshadow adjoining dwellings or dominate the intended streetscape character.

The Court accepted evidence that overshadowing would "*not be unacceptable*" and this evidence remained unchallenged (at [73]). Further, the Court held that the non-monolithic design of the Proposed Development reduces visual bulk by breaking the built form into components (at [75]).

The Court was satisfied that the Proposed Development would not dominate the intended streetscape character or otherwise have any undue impact on the streetscape (at [78]). The Court also accepted evidence that the Proposed Development would "*make a positive contribution*" (at [79]).

The Court was satisfied that the positive attributes of the Proposed Development "*… outweigh any adverse impact arising from the [Proposed Development's] non-compliance as to height*" (at [90]).

Courts finds that there is a need in Airlie Beach for the Proposed Development

When considering the issue of need, the expert economists for the parties in their joint report had regard to relevant provisions in the following (at [91]):

- The Mackay, Isaac and Whitsunday Regional Plan.
- The Whitsunday Region Economic Development Strategy 2017-2021.
- Draft Regional Economic Development Strategy 2022-2025.
- The Whitsunday Destination Tourism Plan 2019-2024.
- The Strategic Framework of the Planning Scheme.

These documents, read together, recognise the importance of the tourism sector and the opportunity for diversity at Airlie Beach, including for high end accommodation (at [92]). It was recognised that Airlie Beach accommodation is "*dominated by self-contained apartments*" and "*… none are to the 5-star level …*" (see [94] and [95]).

The Court accepted that "*… there is a public or community and an economic need for the proposal*" (at [126]), for the following reasons:

- The Proposed Development would involve the following community benefits:
  - upskilling of local hospitality workforce to meet the standards of a premium hotel;
  - additional employment;
  - attracting high spending visitors;
  - diversifying the premium accommodation options available in the Whitsunday region;
  - attracting the premium internation tourism market.

- The Proposed Development would "*… address a public and community need to improve the extent and adequacy of facilities offered in Airlie Beach … where there is a clear gap in what is currently offered*" (at [103]).

As to certainty that a five star operator could be secured, the Court was satisfied that one could be secured and the desired rating could be attained and retained having regard to the following (at [124]):

- strong growing demand;
- an upward trend of passengers through the airport;
- an obvious gap in the market;
- the suitability of the location of the Land;
- the range of facilities proposed;
- the quality of the Proposed Development;
- the cost efficiency of the design;
- the opportunity for guests and visitors to enjoy premium views;
- the future potential for complementary development.

Court finds support for the variation request

The Court stated that the "*… preliminary approval for the material change of use supports the proposed variation request …*" (at [138]) and "*[t]he variations facilitate development of the kind subject to the preliminary approval but are otherwise generally in accordance with the rest of the [P]lanning [S]cheme*" (at [137]).

Conclusion

The Court determined that the Applicant had discharged its onus that the Submitter Appeal ought to be dismissed. The Court therefore adjourned the appeals to enable the parties to consider the terms of an appropriate order, and to incorporate amendments to the Preliminary Approval to reflect the matters in the Court's judgment.

Market value six weeks too early: Supreme Court of Queensland determines dispute about construction of an infrastructure agreement

Victoria Knesl | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Palm Cove Nominees Pty Ltd v Cairns Regional Council & Anor* [2023] QSC 289 heard before Henry J

March 2024

In brief

The case of *Palm Cove Nominees Pty Ltd v Cairns Regional Council & Anor* [2023] QSC 289 concerned an originating application to the Supreme Court of Queensland (**Supreme Court**) by a developer, Palm Cove Nominees Pty Ltd (**Applicant**), for a declaration to avoid being contractually bound by the market value determination with respect to a land contribution purported to be made under an infrastructure agreement with the Cairns Regional Council (**Council**).

The Applicant argued that the valuation was not a valuation as required by the infrastructure agreement.

The issues for the Supreme Court to consider were as follows:

- what is the required process under the infrastructure agreement;
- whether the timing for the valuation meant it was not a valuation as required by the infrastructure agreement; and
- whether the methodology used for determining the valuation meant it was not a valuation as required by the infrastructure agreement.

The Supreme Court held that the valuation determination six weeks before the contribution of the land was not in accordance with the infrastructure agreement which required the valuation to be determined at the date of the land contribution. Consequently, the Supreme Court made a declaration that the market value determination for the land contribution did not accord with the requirements under the infrastructure agreement. Thus, the Applicant was not contractually bound by the market value determination for the land contribution.

Background

The Applicant owns land at Cedar Road, Palm Cove which is being developed into thirty-six residential lots. To secure a development approval for the reconfiguration of its land, the Applicant contributed a portion of the land to the Council to accommodate a transport link next to the Applicant's residential property development. The Applicant and the Council entered into an infrastructure agreement that set out the process for determining the market value of the land contribution. However, the Applicant was disappointed by the valuation and sought a declaration in the Supreme Court to avoid being contractually bound on the basis that the valuation was not a valuation as required under the infrastructure agreement because of the timing of the valuation and the adopted methodology used.

Clause 7.3

Clause 7.3(d) of the infrastructure agreement provided for the parties to agree to the market value of the land contribution or to submit to an independent valuation process as follows (at [4]):

> *Where the parties fail to agree on the Market Value of the Land Contribution after each having obtained independent valuation reports, the Market Value of the Land Contribution is to be determined by a third independent Valuer agreed between the parties. The third independent Valuer acts as an expert, not as mediator or determinator for* ***clause 12.6*** *of this agreement, and his/her valuation is binding on the parties.* (emphasis added)

Valuation process

The Supreme Court identified the following relevant matters, facts, and circumstances in regard to the valuation process for determining the market value of the land contribution:

- "*Land and works contributions were required by the infrastructure agreement. For those contributions the [Applicant] is entitled, pursuant to cl 7.1 of the infrastructure agreement, to an offset or refund against levied charges in an amount referred to as the 'relevant amount'*" (at [3]).
- "*The parties accept under clause 7 the relevant amount for land contributions is the market value of the land contribution*" (at [3]).
- "*Clause 7.3 provides for the parties to agree to the market value of the land contribution or to submit to an independent valuation process, stipulated by cl 7.3(d) …*" (at [4]).
- The parties did not agree on the market value of the land contribution and thus engaged Wesley Coates (**Independent Valuer**) pursuant to clause 7.3(d) (at [5]).
- "*Part of the valuation process included the parties' joint obtaining of counsel's advice regarding the date on which the market value of the land contribution was to be determined. The effect of counsel's advice was that the relevant market value of the land contribution was its value as at the date of its transfer*" (at [5]).

The Supreme Court went on to find that although the value of land can change over time, the relevant market value must logically be determined at the time of the land contribution.

Supreme Court finds non-compliance with the infrastructure agreement because the valuation was done six weeks prior to its transfer

The Independent Valuer had determined the market value of the land on 2 September 2022, being six weeks earlier than the date of the land contribution on 19 October 2022 (at [6]). Therefore, the Applicant did not get what it bargained for under the infrastructure agreement and was correct to complain about the timing of the valuation determination (at [7]).

The Council made two arguments about the timing of the valuation (see [8] and [9]):

- "*[T]he six week temporal difference is a trivial one, a complaint of form rather than substance, so that despite it the valuation ought to be characterised as the market value of the land contribution.*"
- "*[T]here would have been no material change in the land's value in the six week period between the date of the assessed market value and the actual date of the land contribution.*"

In respect of the first argument, the Supreme Court held that the valuation was a mere guess of the market value of the land at the time the land was contributed because whether the valuation was the same as the market value of the land at the time the land was contributed was unknown as a result of the valuation determination being six weeks before the land contribution.

In respect of the second argument, the Supreme Court considered the possibility that the Independent Valuer had been aware of recent transactions that would have materially altered the value of the land contribution at the time of the assessment in early 2023. However, the report provided by the Independent Valuer contained no information about the valuation of comparable properties after the date of assessment. Consequently, the Supreme Court could not infer that any potential difference between the valuation determined and the valuation as at the date of the land contribution would be so minor that there would be no utility in Granting the declaration sought by the Applicant.

The Supreme Court went on to explain that the parties were both entitled to the valuation they had bargained for and that they did not get it. Thus, "*[t]he valuation determination was not a determination of 'the market value of the land contribution' within the meaning of cl 7.3 because it assessed the market value as at a date … [that was] prior to the date the land was contributed …*" (at [13]).

The Supreme Court found that intervening to provide declaratory relief would be appropriate in the circumstances.

Supreme Court finds that the Independent Valuer's valuation methodology complied with infrastructure agreement

When determining the market value of the land contribution, the Independent Valuer considered the value of the land to the parent site in its englobo form. The Applicant contended that this was the wrong approach and that the value of the land ought to be by reference to the reconfigured parent site to account for the future value of the lots created and remaining in the Applicant's possession after the land contribution from the parent site. For this reason, the Applicant argued that even if the Independent Valuer's determination was of the market value of the land at the time the land was contributed it would not fall within the meaning of a "market value determination" under clause 7 of the infrastructure agreement.

The Supreme Court found the following three obstacles to the Applicant's argument:

- The parties "*… made a choice to adopt a commercially expeditious method of calculating the relevant amount for land contribution*" (at [17]).
- "*[T]he argument it necessarily relied upon to avoid the confining effect of the [relevant] principles was premised upon an unsustainable construct*" (at [19]).
- "*[H]aving regard to the value of the land at the parent site in its englobo form was not all the valuer did*" (at [21]).

The Supreme Court emphasised that the land was not compulsorily acquired but rather contributed in an exercise of free commercial choice. In addition, the infrastructure agreement failed to prescribe a particular valuation methodology and left the choice of methodology to the expertise of the Independent Valuer. Consequently, the Supreme Court held that it was "*… no more than a complaint about the process of the valuer's application of expertise to make an expert determination, a process by which the [Applicant] agreed to be bound*" (at [22]).

Conclusion

The Supreme Court found in favour of the Applicant and declared the valuation of the Independent Valuer to not be a determination of "the market value of the land contribution" within the meaning of clause 7.3 of the infrastructure agreement, because the valuation determination was carried out on 2 September 2022, six weeks prior to the date the land was contributed on 19 October 2022.

Colin Biggers & Paisley

Proceedings to proceed: Supreme Court of Queensland dismisses strike out application in proceedings concerning the proposed relocation of an easement finding the proceedings are not hypothetical or vexatious

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Body Corporate for Ye Olde Avalon Community Titles Scheme v Dorchester Nominees (No. 1) Pty Ltd* [2023] QSC 180 heard before Brown J

March 2024

In brief

The case of *Body Corporate for Ye Olde Avalon Community Titles Scheme v Dorchester Nominees (No. 1) Pty Ltd* [2023] QSC 180 concerned an application by Dorchester Nominees Pty Ltd (**Applicant**) to the Supreme Court of Queensland (**Supreme Court**) to strike out the Second Further Amended Statement of Claim (**2FASOC**) of the Body Corporate for Ye Olde Avalon Community Titles Scheme 2787 (**Plaintiff**) or alternatively, paragraphs 16C to 16H of the 2FASOC, in proceedings concerning the proposed relocation of an easement granted over land in Albion, Brisbane.

The Applicant applied to strike out the 2FASOC pursuant to rules 171(1)(a), 171(1)(c), 171(1)(d), and/or 171(1)(e) of the *Uniform Civil Procedure Rules 1999* (Qld) on the ground that paragraphs 16C to 16H of the 2FASOC "*… have rendered the proceedings as showing no reasonable cause of action, being vexatious and oppressive and an abuse of process*" (at [1]).

The Applicant alternatively applied to strike out paragraphs 16C to 16H of the 2FASOC on the ground that "*… they are irrelevant to the relief sought by the plaintiff and are therefore unnecessary and disclose no reasonable cause of action, principally because the pleaded construction of clause 5 of the Instrument of Easement is incorrect*" (at [2]).

The Plaintiff subsequently filed a cross-application for leave to file a Second Further Amended Claim and Third Further Amended Statement of Claim (**3FASOC**) (at [3]).

The Supreme Court had to determine the following issues, namely whether (at [46]):

> (a) *the proceedings are now hypothetical in nature or an abuse of process or vexatious such that they should be struck out; and*
>
> (b) *paragraphs [16C]–[16H] disclose no reasonable cause of action, such that they should be struck out.*

The Supreme Court held that the proceedings were not hypothetical in nature or an abuse of power or vexatious (see [55] to [57]) and that the pleading in paragraphs 16C to 16H is not inarguable and does disclose a reasonable cause of action (see [76] and [80]).

The Supreme Court dismissed the strike out application (at [81]).

Background to the Planning and Environment Court proceedings

The Applicant is the registered proprietor of land situated in Albion (**Land**) that is burdened by an easement (**Easement**) benefitting the neighbouring property which is owned by the Plaintiff (at [5]). The Easement's purpose is "*… to enable the plaintiff to repair, maintain and replace a retaining wall which was constructed along the boundary of the parties' properties in the 1990s*" (at [6]).

Clause 5 of the registered instrument of easement (**Instrument of Easement**) relevantly provides as follows (at [7]):

> *Redevelopment by the Grantor*
>
> *The Grantor and Grantee hereby agree that this easement may be extinguished in the following circumstances:*
>
> *(a) In the event that the Grantor proposes to redevelop part or all of the land comprising the Servient Tenement and in the event that the Servient Tenement shall be required by the Grantor for the construction of improvements of any sort rendering it impossible for the Grantee to exercise its right of way over the servient tenement; and*
>
> *(b) The Grantor shall give to the Grantee previous written notice that it requires the Servient Tenement for the purposes of redevelopment; and*
>
> *(c) The Grantor shall grant to the Grantee an easement over another part of its land to be substituted for this Grant of Easement, such easement to be granted on the same terms, covenants and conditions as this Grant of Easement and provided also that the Servient Tenement the subject of the alternative easement shall be of the same width so far as is nearly practicable as the Servient Tenement described herein.*

On 15 June 2018, the Applicant notified the Plaintiff that it "*… requires the Servient Tenement that is subject of the Easement for the purposes of a redevelopment*" (**First Notice**) and attached a plan depicting a proposed replacement easement (**Proposed Replacement Easement**) (see [8] and [9]). The Plaintiff contested the legal validity of the First Notice on the basis that the Proposed Replacement Easement was too narrow (at [10]).

On 23 October 2018, the Applicant sent the Plaintiff a second notice (**Second Notice**) in response to which the Plaintiff raised "*… several further alleged defects in the Proposed Replacement Easement*" (see [11] to [12]). The Applicant did not respond to the Plaintiff's correspondence inviting the Applicant "*... to issue a revised, final easement addressing the defects identified …*" (see [13] to [14]).

On 26 April 2019, the Applicant submitted a development application seeking approval for the construction of a high-rise apartment building on the Land (**Development Application**).The accompanying plans assumed that the Easement had been replaced by the Proposed Replacement Easement in accordance with the Second Notice (at [14]).

The Brisbane City Council (**Council**) refused the Development Application and the Applicant appealed against this decision to the Planning and Environment Court of Queensland (**Planning and Environment Court**) (at [16]). In light of alterations made by the Applicant to the dimensions of the Proposed Replacement Easement during the Planning and Environment Court proceedings, the Council withdrew its opposition to the Development Application (at [16]).

The Planning and Environment Court proceedings were stayed pending determination of the Supreme Court proceedings, which stay was not opposed by the Applicant (see [16] to [17]).

Background to the Supreme Court proceedings

In the Supreme Court, the Plaintiff sought a declaration that the Proposed Replacement Easement does not comply with clause 5 of the Instrument of Easement or, alternatively, that a wider easement be imposed by the Supreme Court pursuant to section 180 of the *Property Law Act 1974* (Qld).

Paragraphs 16C to 16H of the 2FASOC, the subject of the strike out application made by the Applicant, relevantly provides as follows (at [19]):

> *(i) the [Applicant] purported to give notice pursuant to clause 5(b) of the Instrument of Easement on 15 June and 23 October 2018;*
>
> *(ii) the [Applicant] does not intend to undertake the proposed redevelopment of the Land or require the servient tenement for the construction of improvements of sort;*
>
> *(iii) the [Applicant] intends to sell the Land after obtaining development approval for the proposed development and after relocating the Easement;*
>
> *(iv) the commercial purpose for the [Applicant] issuing the First and Second Notices is to move the Easement so as to improve the value of the Land for the purpose of sale; and*
>
> *(v) in the premises of the above:*
>
> *(A) the [Applicant] was not and is not entitled to invoke cause 5 of the Instrument of Easement; and*
>
> *(B) the Proposed Replacement Easement does not comply with clause 5 of the Instrument of Easement.*

Supreme Court finds that the Plaintiff's amended case is not hypothetical or an abuse of process or vexatious

The Plaintiff alleged that several assertions made in the Applicant's Second Notice are incorrect because the Applicant did not and "*… does not propose to redevelop the Land or require the Land for construction of improvements, with the result that the Second Notice is void and of no legal effect*" (at [50]). As a consequence, the Plaintiff argued that clause 5 of the Instrument of Easement was not validly invoked (at [51]).

The Applicant contended that the Plaintiff's amended case "*… is an abuse of process, which the Supreme Court has an inherent power to deal with by striking out or staying the proceedings*" (at [52]).

The Applicant submitted that the Plaintiff's allegation the subject of paragraphs 16C to 16H of the 2FASOC "*… transforms the present questions for consideration by the Court into hypothetical ones because, if the development does not occur, the Proposed Replacement Easement will not be granted, the question of width of the Proposed Replacement Easement will not matter, the statutory right of user will not be required, and no purpose will be served by the relief sought*" (at [52]).

The Supreme Court identified that the Applicant purported to exercise a contractual right in the Instrument of Easement and so distinguished the present case from one where a declaration was sought regarding "*… contractual consequences of a future event that may or may not occur where the contractual power had not been exercised*" (at [54]). The Court identified that the exercise of contractual rights has occurred and the Plaintiff has challenged the validity of that exercise under clause 5(a) of the Instrument of Easement (at [54]).

Supreme Court finds that the Applicant's action sought to be challenged by paragraphs 16C to 16H of the 2FASOC is not deprived of sufficient immediacy and reality

The Supreme Court had to consider "*… whether the controversy between the parties will have adverse legal impacts of sufficient immediacy and reality to warrant the making of a declaration …*" (at [55]).

Although the Applicant argued that the First Notice and Second Notice could not themselves extinguish the Easement because of the requirements of section 90 of the *Land Title Act 1994* (Qld), the Plaintiff argued, and the Supreme Court agreed, that the Easement might still be regarded as extinguished in equity (see [39] and [55]).

The Applicant invoked clause 5 of the Instrument of Easement and relied on the Proposed Replacement Easement for the purposes of its Development Application and although it might not proceed with the Proposed Development if it obtained a development approval, the Supreme Court was of the view "*… that does not mean the question before the Court is hypothetical*" (at [56]).

Furthermore, the Supreme Court found that the Applicant has "*… by issuing the notices elected to take some course and the plaintiff has by its amendments sought to challenge that the basis for doing so under clause 5(a) did not exist and that the notices are invalid as they stand*" (at [56]).

The Supreme Court found that (at [56]):

> *While the actual documents for extinguishing the Easement and registering the Proposed Replacement Easement have not been issued by the [Applicant] to the plaintiff for signing, and there is uncertainty whether it will do so in the future, that does not deprive the [Applicant's] actions sought to be challenged by the plaintiff in paragraphs [16C]–[16H] of a sufficient immediacy and reality and establish that the question is hypothetical such that the proceedings should be regarded as frivolous or an abuse of process.*

The Supreme Court was not satisfied that "*… on the basis of the case as pleaded by the plaintiff in the 2FASOC and 3FASOC … the declarations sought are hypothetical and inutile such that the proceedings should be struck out or regarded as an abuse*" (at [57]).

The Supreme Court noted that "*[i]f the plaintiff is successful, that will likely have an impact on the utility of the appeal proceeding in the Planning and Environment Court given the Development Application is premised on the ability of the [Applicant] to relocate the Easement presently on the basis of the Proposed Replacement Easement*" (at [58]).

Supreme Court finds that the disputed validity of the First Notice and Second Notice does not negate the utility of the proceedings

The Supreme Court had to consider whether the First Notice and, in particular, the Second Notice were validly given under clause 5(a) of the Instrument of Easement. In doing so, the Supreme Court considered and contrasted an appeal against a decision to refuse an application where there was no pre-existing authority to build as part of the approval process that could have been allowed upon the condition that the relevant authorities be obtained, with the fact that, if the Plaintiff is successful in establishing that the Applicant must intend and, as a question of fact, lacked that intention, to redevelop the Land in order to exercise the power in clause 5 of the Instrument of Easement, that is a matter which may not be overcome in the future (at [61]).

The Supreme Court found that "*[t]he fact that clause 5 is contained in the Instrument of Easement, and may be sought to be exercised again in the future by the [Applicant] but perhaps on a different basis, does not establish the lack of utility of the proceedings*", nor "*… does it negate the fact that the Planning and Environment Court's consideration of the Development Application may be rendered futile if the plaintiff is successful in these proceedings*" (at [61]).

The Supreme Court held that "*[t]he amendments in the 2FASOC and 3FASOC do not … render the continuation of the proceedings vexatious and oppressive*" (at [61]) and, in particular, that "*[t]he inclusion of paragraphs [16C]-[16H] in the 2FASOC has not rendered these proceedings unnecessary*", but rather "*... expanded the basis upon which the legality of the Proposed Replacement Easement is challenged*" (at [62]).

Supreme Court finds that compliance with clause 5(c) of the Instrument of Easement remains a live issue

As a result of its expert report, the Plaintiff's case changed from asserting the Proposed Replacement Easement must be 12 metres wide to asserting it ought to be five metres wide (at [21]).

Consequently, the Applicant contended that the narrowed scope of the Supreme Court proceedings in relation to the alleged non-compliance of the Proposed Replacement Easement renders the Supreme Court proceedings unnecessary, as the Planning and Environment Court could consider the dimensions and location of the Proposed Replacement Easement (at [68]).

The Supreme Court distinguished these considerations from the "*… underlying question of whether the Proposed Replacement Easement complies with clause 5(c) of the Instrument of Easement at all and is valid under the Instrument of Easement*" (at [68]). The Supreme Court identified that the validity of the Proposed Replacement Easement directly impacts the Planning and Environment Court proceedings and is capable of rendering the Development Application futile (at [68]).

The Supreme Court found that the narrowed scope of the Plaintiff's case does not detract from its need to be determined by the Supreme Court and that its "*… determination has a direct legal effect in terms of the Proposed Replacement Easement underlying the Development Application and the utility of that application*" (at [69]).

The Supreme Court held that the issue of compliance of the Proposed Replacement issue with clause 5(c) of the Instrument of Easement remains a live issue and should not be struck out (at [69]).

The Applicant made the Development Application without the Plaintiff's consent on the basis that the proposed premises were "*excluded premises*" under the *Planning Act 2016* (Qld) (**Planning Act**) because the Development Application was consistent with the Easement. If the Supreme Court were to find that the Proposed Replacement Easement did not comply with clause 5(c) of the Instrument of Easement, that might mean the premises were not "*excluded premises*" under the Planning Act (see [15] and [70]). However, the Supreme Court stated that it was for the Planning and Environment Court to determine whether the Plaintiff's consent would have been required in these circumstances (at [70]).

As a result, the Supreme Court concluded that it was not "*… satisfied that the proceedings should be struck out in their entirety and the proceedings dismissed*" (at [73]).

Supreme Court finds that paragraphs 16C to 16H of the 2FASOC disclose a reasonable cause of action

The Applicant applied, in the alternative to its application to strike out the whole of the proceedings, to strike out paragraphs 16C to 16H of the 2FASOC on the ground that "*… they are irrelevant to the relief sought by the plaintiff and are therefore unnecessary and disclose no reasonable cause of action …*" (at [2]).

The Supreme Court reiterated that "*… there is at least an arguable case justifying the relief in terms of the other matters the subject of the declaration which are sought*" (at [75]). The Court found that "*… the pleading in paragraphs [16C]-[16H] is not irrelevant and does disclose a reasonable cause of action*" (at [76]).

The Supreme Court rejected the Applicant's contention that the basis of the pleaded case in paragraphs 16C to 16H of the 2FASOC is incapable of success because the Applicant's intention is irrelevant given the ordinary meaning of "*propose*" (at [77]).

The Supreme Court considered the Macquarie Dictionary's definition of "*propose*" and opined that "*[t]he meaning of 'proposes' has to be determined in the context of the clause in which it appears*" (at [79]). The Supreme Court accepted the Plaintiff's contention that the latter part of clause 5(a) "*… does lend support to a construction of clause 5 whereby a reasonable businessperson would have understood that to propose to redevelop includes an actual intention to redevelop …*" (at [79]).

The Supreme Court held that the pleading in paragraphs 16C to 16H of the 2FASOC is not inarguable and discloses a reasonable cause of action (at [80]).

Conclusion

The Supreme Court held that the strike out application ought to be dismissed and granted the Plaintiff leave to file the Second Further Amended Claim and the 3FASOC, subject to the Plaintiff inserting the words "*if the defendant proposed to carry out the proposed development*" after "*alternatively*" in paragraph 17 to make clear the basis of the alternative argument (see [81] to [82]).

Colin Biggers & Paisley

Change to objector review rights: Amendment VC243 has knock on effects for applications for review of Council decisions to grant a permit issued before gazettal

Evie Atkinson-Willes | David Passarella

This article discusses the decision of the Victorian Civil and Administrative Tribunal in the matter of *Eddy v Yarra CC (Red Dot)* [2024] VCAT 2 heard before Carol Daicic, Acting Deputy President

March 2024

In brief

The case of *Eddy v Yarra CC (Red Dot)* [2024] VCAT 2 concerned an application to the Victorian Civil and Administrative Tribunal (**Tribunal**) for the review of a decision of the Yarra City Council (**Council**) to grant a planning permit to construct a dwelling on a single lot between 300 to 500 square metres. Importantly, this proceeding relates to Amendment VC243 (**Amendment**), which, among other things, removed from Victorian Planning Schemes the need for planning permission to construct or extend one dwelling on a lot between 300 to 500 square metres.

The Council issued a Notice of Decision (**NOD**) granting a permit prior to the gazettal of Amendment. The Applicant, who objected to the application before the Council, applied to the Tribunal to review the decision after the Amendment came in to force.

The predominant issue in this proceeding was whether the Tribunal had the jurisdiction to consider the application for review where planning permission was no longer required by the relevant planning scheme.

The Tribunal held that it had no jurisdiction to consider the matter and the proceeding was struck out.

Parties' positions

It was agreed between the parties that the NOD should be set aside and no planning permit issued because the Amendment removed the requirement for planning permission.

The Applicant contended that by virtue of the NOD being issued the Applicant had a right of review under section 82(1) of the *Planning and Environment Act 1987* (Vic) (**PE Act**), from which flowed a 'bundle of rights' for that review application to be heard and determined by the Tribunal.

The Respondents argued that given that the Amendment removed the requirement for planning permission under the planning scheme, the Tribunal did not have jurisdiction to consider any application for review lodged after the Amendment came into force.

Tribunal's decision

In making its decision, the Tribunal considered the persuasive authority of *Von Hartel & Ors v Macedon Ranges Shire Council & Ors* [2014] VSC 215 (***Von Hartel***), which dealt with a similar matter, wherein an objector filed an application for review for a notice of decision to grant a permit before the planning scheme was amended to introduce an exemption from notice for a car parking reduction provision.

In *Von Hartel*, the Supreme Court of Victoria held that the review rights under section 82(1) of the PE Act introduced a 'bundle of rights' which entitle a person who lodges an application for review to invoke the Tribunal's review jurisdiction under section 48 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) to have that application heard and determined by the Tribunal.

However, under common law, in exercising its jurisdiction the Tribunal's task is to stand in the shoes of the original decision-maker and make the correct decision having regard to basis of the facts and the law at the time the review decision is made.

Consequently, in accordance with section 5 of the PE Act which states that the PE Act "*… applies to any planning scheme approved under this Act as in force from time to time under this Act*", the Tribunal's review jurisdiction is to be exercised so as to automatically pick up amendments to planning schemes where there is no transitional provision to the contrary. Accordingly, in this case, the third party rights were removed, as were the 'bundle of rights' flowing from section 82(1) of the EP Act.

In contrast to *Von Hartel*, in this proceeding, the application for review was lodged after the Amendment was gazetted. Therefore, given that no planning permission was required at the time the application was lodged, the objector was not entitled to bring the application before the Tribunal.

Further, in any event, any rights that would have flowed from section 82(1) of the PE Act to invoke the Tribunal's review jurisdiction and the objector's right to have their application heard and determined were removed. As a result, the application was deemed to be misconceived and was struck out.

Conclusion

The proceeding was struck out because the Amendment removed the requirement for a planning permission to construct or extend one dwelling on a lot between 300 to 500 square metres and, as a result, at the time the application was made to the Tribunal the Applicant did not have any right of review.

In conjunction with previous decisions such as *Koneska v Greater Geelong CC (Red Dot)* [2023] VCAT 359, this case reaffirms that the Tribunal is obliged to consider the planning scheme as it is written at the time a review decision must be made. The Tribunal cannot give itself jurisdiction where jurisdiction does not exist.

Ultimately, where no transitional provisions apply, the impact of the Amendment in this case was three-fold:

- to remove the need for a planning permission to construct or extend one dwelling on a lot between 300 to 500 square metres;
- thereby removing the objector's ability to apply for review of a decision after the Amendment was gazetted; and
- in turn, removing an objector's right to have their application heard and determined by the Tribunal where no planning permission is required.

Colin Biggers & Paisley

Development permit is a "statutory authorisation": Victorian Civil and Administrative Tribunal's decision in the case Hanson Construction Materials Pty Ltd v Greater Bendigo CC (Corrected) (Red Dot) [2023] VCAT 1341 (2 December 2023)

Bailiejean Hohnberg | David Passarella

This article discusses the decision of the Victorian Civil and Administrative Tribunal in the matter of *Hanson Construction Materials Pty Ltd v Greater Bendigo CC (Corrected) (Red Dot)* [2023] VCAT 1341 (2 December 2023) heard before Geoffrey Code, Senior Member

March 2024

In brief

The case of *Hanson Construction Materials Pty Ltd v Greater Bendigo CC (Corrected) (Red Dot)* [2023] VCAT 1341 (2 December 2023) concerned an application to the Victorian Civil and Administrative Tribunal (**VCAT**) regarding a decision by the Greater Bendigo City Council (**Council**) to grant a development permit under section 64 the *Planning and Environment Act 1987* (Vic) (**PE Act**) and whether this was a statutory authorisation for the purposes of section 52 the *Aboriginal Heritage Act 2006* (Vic) (**AH Act**). VCAT's decision demonstrates how amendments to local planning law can impact planning applications that have been submitted but not yet decided.

Background

Hanson Construction Materials Pty Ltd (**Hanson**) operated the Axedale Quarry, east of Bendigo, Victoria. The quarry adjoined rural land owned by Axedale Rural Living Pty Ltd (**Axedale Rural Living**). Axedale Rural Living's land was the subject of this proceeding (**Subject Land**).

Originally, Axedale Rural Living lodged a permit application to seek permission to subdivide the Subject Land into five lots. This application did not seek permission to use or develop a dwelling on any of the proposed lots because, at the time, permission was not required to do so. However, before the Council decided the application, the planning scheme was amended to require permission to use and develop land for a dwelling within 500 metres of the nearest boundaries of land in respect of which a work authority under the *Mineral Resources (Sustainable Development) Act 1990* (Vic) has been granted. Neither party disputed that a work authority had been granted for the Axedale Quarry.

Axedale Rural Living lodged a new permit application in response to the planning scheme amendment. On 3 July 2023, the Council issued notice of its decision to grant subject to conditions a permit for the use and development of the Subject Land for three dwellings and a three lot subdivision.

On 7 July 2023, Hanson lodged the merits proceeding. On 31 August 2023, Axedale Rural Living lodged an application to review the permit conditions under section 80 of the PE Act.

Does VCAT have Jurisdiction?

VCAT held that it has jurisdiction to determine all of the merits proceeding, including decisions related to the cultural heritage management plan and relevant provisions of the AH Act. This is because the Council's decision was deemed to be made under the PE Act even if the decision was beyond its power.

Is the Council's decision a statutory authorisation?

Under sections 51 and 52 of the AH Act, if a sponsor proposes to carry out an activity for which a cultural heritage management plan is required, and if a statutory authorisation is required before the sponsor can carry out the activity, the relevant decision maker must not grant a statutory authorisation unless it receives an approved cultural heritage management plan for the activity.

Axedale Rural Living is a sponsor that is proposing to carry out an activity. Thus, if the Council has not granted a statutory authorisation there can be no breach of the obligation under sections 51 and 52 of the AH Act.

Axedale Rural Living submitted that the Notice of Decision issued by the Council was not a statutory authorisation as it is not a permit, but rather a mere intention to grant a permit if there is no review application lodged under section 82 of the PE Act. VCAT rejected this submission and held that a statutory authorisation includes a permit under the PE Act to use or develop land for or part of an activity (see [22] and [29]).

High impact activity

Axedale Rural Living proposed to carry out an "activity". An activity is regarded as the use or development of land. It was not in dispute that the subdivision of the land is part of the proposed activity; but it was in dispute whether the use and development of three dwellings is a high impact activity. A "high impact activity" includes the construction of three or more dwellings on a lot, the carrying out of work for three or more dwellings on a lot, and the use of a lot for three or more dwellings (see regulations 48(1), 48(2), and 58(3) of the *Aboriginal Heritage Regulations 2018* (Vic)).

Axedale Rural Living submitted that the activity did not constitute high impact activity as it was neither construction or carrying out works for three dwellings on a lot, or using a lot for three dwellings. Rather, the activity was construction and carrying out works for one dwelling on one lot following the subdivision of the subject land, and using each one of the lots for one dwelling. VCAT rejected these submissions (see [55] to [64]). The activity amounted to a high impact activity and the Council was therefore required to receive an approved cultural heritage management plan before it granted a permit to Axedale Rural Living (at [65]).

VCAT set aside the Council's decision and remitted the matter for reconsideration because the Council was best placed to make a fresh merits assessment of any amended permit application. However, the Council was instructed not to make a fresh decision until in accordance with section 52(1) of the AH Act an approved cultural heritage management plan is received (at [76]).

Conclusion

VCAT set aside the Council's decision to grant a permit subject to conditions for the use and development of the Subject Land for three dwellings and a three lot subdivision because an approved cultural heritage management plan was required. VCAT remitted the application back to the Council for re-consideration.

Significance of this decision

This VCAT decision demonstrates how amendments to local planning law can impact planning applications that have been submitted but not yet decided. Furthermore, this decision also emphasises the importance of considering whether VCAT has jurisdiction to hear a matter and how VCAT approaches the task of considering whether a cultural heritage management plan is required for activity proposed by developers.

Colin Biggers & Paisley

Contaminated mulch: What are the NSW Environment Protection Authority's powers?

Rebecca Pellizzon | Katherine Pickerd | Todd Neal

This article discusses the NSW Environment Protection Authority's powers in response to the discovery of contaminated mulch across multiple sites in New South Wales

March 2024

In brief

Given the recent media attention focusing on the discovery of asbestos contaminated mulch at multiple sites, this article provides a reminder of some of the NSW Environment Protection Authority's (**EPA**) powers in these types of situations.

In response to the discovery of contaminated mulch across multiple sites in NSW on 15 February 2024, the EPA set up a task force to coordinate government agencies and to prioritise securing and remediating sites considered to be a high risk to the community. There will also be a criminal investigation to determine whether there have been any breaches of the law, which could lead to prosecutions.

Landowners and occupiers of sites that are potentially affected need to take steps to ensure that mulch that has been applied to land is free of contamination.

EPA's powers

The EPA generally operates under the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) and has a broad range of regulatory powers which includes issuing **clean-up notices**.

Section 91 of the POEO Act permits an appropriate regulatory authority, which includes the EPA, to direct certain people to take clean-up action specified in a clean-up notice. The direction can be issued to:

- owners or occupiers of land at or from which the authority reasonably suspects that a pollution incident has occurred or is occurring;
- a person who is reasonably suspected by the authority of causing or having caused a pollution incident; and
- a person who is reasonably suspected by the authority of contributing, to any extent, to a pollution incident.

Although in recent days there have been announcements that fines will be significantly increased, the current maximum penalty is $1,000,000 for a corporation and $250,000 for an individual for the offence of failing to comply with a clean-up notice (without reasonable excuse): see section 91B of the POEO Act. It is a continuing offence, and further penalties could be imposed for each day the clean-up notice is not complied with.

Another type of regulatory notice that can be issued in certain circumstances is a **prevention notice**. A prevention notice can be issued under section 96 of the POEO Act when the EPA believes that an activity has been carried out in an "environmentally unsatisfactory manner". Examples of actions that the EPA could direct to be taken include:

- monitoring, sampling or analysing any pollution or otherwise ascertaining the nature and extent of pollution or the risk of pollution; and
- preparing and carrying out a plan of action to control, prevent or minimise pollution or waste.

Before exercising the above powers, the EPA will likely exercise its powers under the POEO Act to carry out an investigation, where it may do any or all of the following:

- **Enter land** – The EPA has various powers under Part 7.4 of the POEO Act to enter premises. However, there are different limitations on the exercise of power depending on the how the premises is being used and whether an authorised officer reasonably suspects pollution has been, is being or is likely to be caused. For example, entry to a premises used for residential purposes can only occur with the permission of the occupier or with the authority of a search warrant.

- **Take samples, photographs and copy records** – Where an authorised officer lawfully enters a premises, they can do anything they deem necessary for the purposes of Chapter 7 – Investigation of the POEO Act. This includes:
  - taking and removing samples;
  - taking photographs or videos;
  - requiring records to be produced for inspection and copying those records.
- **Issue notices to provide information and records** – Under section 191 of the POEO Act, the EPA may require a person to provide information and records in connection with any matters relating to its responsibilities or functions under the Act.

Obligations to notify relevant authorities of pollution incidents

Under section 148 of the POEO Act, certain people and organisations have a duty to immediately notify the appropriate regulatory authority (including but not limited to, EPA and local council) of a pollution incident.

"Pollution incident" is defined in the Dictionary of the POEO Act as:

> *… an incident or set of circumstances during or as a consequence of which there is or is likely to be a leak, spill or other escape or deposit of a substance, as a result of which pollution has occurred, is occurring or is likely to occur. It includes an incident or set of circumstances in which a substance has been placed or disposed of on premises, but it does not include an incident or set of circumstances involving only the emission of any noise.*

The application of mulch contaminated with asbestos to land would be a pollution incident for the purpose of the POEO Act.

However, whether or not a duty to notify is triggered depends on the facts of each situation and whether each of the triggers for notification have been met. For example, there needs to be a pollution incident occurring during an activity so that material harm to the environment is caused or threatened.

Care is needed to ensure that the manner and form of notification is met. The source of the requirement is in section 149 of the POEO Act, which in turn raises section 137 of the *Protection of the Environment Operations (General) Regulation 2022* (NSW).

Take home message

The EPA has broad powers under the POEO Act to investigate and take regulatory action in response to pollution. In light of the contaminated mulch investigations and community concern, those who are affected are likely to need to deal with the EPA (or other regulatory authority such as a local council).

Cleaning up contaminated land can be a costly exercise. It may also have commercial implications for an ongoing business, which may be restricted from operating, or impacted in other ways such as from obtaining a subdivision or occupation certificate until the contamination is lawfully removed and disposed of.

To ensure these matters are dealt with safely, efficiently and lawfully, it may be necessary for owners and occupiers of land to seek legal advice about their obligations and any directions that are issued by regulatory authorities as well as advice from a person who is suitably qualified in cleaning up and remediating contaminated land.

Holiday cancelled: Dismissal of appeal against the refusal of a local law permit for short stay letting in Noosa because the relevant approval did not allow for short-term accommodation or a visitor use

Marnie Robbins | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Escanaba Pty Ltd v Noosa Shire Council* [2023] QPEC 14 heard before Cash DCJ

April 2024

In brief

The case of *Escanaba Pty Ltd v Noosa Shire Council* [2023] QPEC 14 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by Escanaba Pty Ltd (**Applicant**) against the decision of the Noosa Shire Council (**Council**) to refuse its application under a local law (**Application**) for short stay letting (**Proposed Use**) to allow the Applicant to let a unit which it owns in a duplex at Sunshine Beach, Noosa (**Premises**).

The Court considered the relevant provisions of the local law and an existing development approval for the Premises, and upheld the Council's decision to refuse the Application.

Background

The *Noosa Shire Council Local Law No. 1 (Administration) 2015* (**Local Law**) relevantly defines "short stay letting" as "*… the provision, or making available, of premises for use by 1 or more persons, other than the owner of the premises, for less than 3 consecutive months …*". Also relevant is section 5(a) of the Local Law which states a "prescribed activity" is an activity listed in part 1 of schedule 2, which includes the "*operation of short stay letting or home hosted accommodation*" that is defined in part 2 of schedule 2 as "*… the provision, or making available, on a commercial basis, of short stay letting or home hosted accommodation*".

Under section 6 of the Local Law it is an offence to undertake a prescribed activity without a current approval granted by the Council. Section 9 of the Local Law sets out the Council's discretion to grant an approval where the stated requirements are met, and under section 9(1)(d) reference is to be had to additional criteria prescribed for the activity under a subordinate local law.

The relevant additional criteria are contained in section 4 of schedule 21A of the *Noosa Shire Council Subordinate Local Law No. 1 (Administration) 2015* (**Subordinate Local Law**). In particular, section 4(e)(i)(A) of the Subordinate Local Law states that the Council may only grant an approval if it is satisfied that "*… the operation of the short stay letting or home hosted accommodation [complies with] … any relevant development approval …*".

At the time the Application was made, the Premises had the benefit of a development approval issued in 2015 for a development permit for a material change of use for "Multiple Housing Type 2 - Duplex" (**2015 Approval**). Accordingly, the Application "*… could not … be approved if the [P]roposed [U]se for the operation of short stay accommodation [was] inconsistent with the terms of the [2015 Approval]*" (at [8]).

On 27 April 2022 the Council refused the Application, finding that the Proposed Use was inconsistent with the terms of the 2015 Approval as it did not permit "*visitor or short term accommodation*" (at [8]).

The issue for the Court was therefore confined to whether the 2015 Approval authorised the Proposed Use as defined in the Local Law.

The Court found that the 2015 Approval did not authorise the Proposed Use as defined in the Local Law.

Court finds that the 2015 Approval did not authorise short term accommodation

At the outset, the Applicant conceded that if as a matter of construction the 2015 Approval does not authorise the Proposed Use then all of the relevant criteria in section 4 of schedule 21A of the Subordinate Local Law are not satisfied and it follows that the appeal ought to be dismissed (at [10]).

The Court considered in its determination of the construction of the 2015 Approval the relevant provisions of the *Noosa Plan 2006* (as at 16 September 2013) (**Planning Scheme**), being the planning scheme in force at the time the 2015 Approval was granted, as well as other relevant planning instruments which were incorporated expressly or by implication in the terms of the 2015 Approval (at [19]).

The Court found that whilst on its face the 2015 Approval did not contain a temporal restriction on the use of the Premises which might confine the permitted accommodation period, when read in the context of the Planning Scheme which the 2015 Approval expressly referenced, a temporal element may be implied (at [26]).

The Court pointed to the clear distinction in the Planning Scheme between permanent and semi-permanent occupation in the definition of use and use classes contained in section 2.11.5 of the Planning Scheme. The Court stated that semi-permanent occupation is associated with the multiple housing use class of residential uses in contrast to short-term accommodation which is associated with the visitor accommodation use class (at [21]).

In this context the Court found that the 2015 Approval, being the multiple housing use class, did not involve an approval for short-term accommodation (at [21]). The Court further found that planning schemes are to be read sensibly, and for the Planning Scheme, short-term accommodation and short stay letting must be analogues (at [23]).

The Court also considered the Eastern Beaches Locality Plan under which multiple housing is code assessable and visitor accommodation is impact assessable, and found that this further supported the construction that the Planning Scheme intended for the definitions of uses and use classes to convey meaning in the way the Court had concluded (at [21]).

The Court dismissed the Applicant's reliance upon cases in which the Court had previously found that extraneous considerations should not be imported to inform an explicit definition within a planning scheme (see [24] to [25]).

The Court distinguished the present case from those relied on by the Applicant because here there was a clear intention for the meaning of terms to be informed, particularly in relation to any possible temporal limitations, by extraneous considerations namely the Planning Scheme. In the cases relied on by the Applicant, however, the terms critical to the decisions were clearly defined and the outcome turned upon their meaning (see [26] to [28]).

The Court concluded that the relevant provisions of the Planning Scheme ought to be construed "*… according to ordinary principles of statutory construction and in the context of the [2015 Approval]*" (at [28]).

Conclusion

The Court found that the 2015 Approval did not authorise the operation of short stay accommodation and thus upheld the Council's decision to refuse the Application.

Colin Biggers & Paisley

Acceptable amenity impacts: Planning and Environment Court of Queensland confirms approval of three-storey multiple dwelling at Main Beach on the Gold Coast with minor shadow impacts

Victoria Knesl | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Thorogood v Council of the City of Gold Coast* [2023] QPEC 13 heard before Everson DCJ

April 2024

In brief

The case of *Thorogood v Council of the City of Gold Coast* [2023] QPEC 13 concerned a submitter appeal by Mr Neil Thorogood (**Appellant**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Council of the City of Gold Coast (**Council**) to approve a development application for a development permit for a material change of use for a multiple dwelling (**Proposed Development**) on land situated at 34 Tedder Avenue, Main Beach, on the Gold Coast (**Site**).

The Proposed Development is a three-storey multiple dwelling with one unit per storey and a basement car park (at [1]). The Appellant is the joint owner of a two-storey multiple dwelling adjoining the Site immediately to the south and argued that the Proposed Development will cause unacceptable shadow impacts to his neighbouring dwelling contrary to the reasonable amenity expectations of nearby residents (see [1] and [4]).

The relevant planning scheme is the *Gold Coast City Plan 2016* (Version 8) (**Planning Scheme**) and in terms of the shadow impacts, Performance Outcome 8 (**PO8**) of the General Development Provisions Code (**Code**) was relevant to the determination of the appeal.

In deciding to dismiss the appeal, the Court considered the following issues (at [16]):

1. *whether the [P]roposed [D]evelopment (limited to only the alleged shadow impacts) satisfied the outcome in s 3.3.2.1(9)(b) [of the Planning Scheme];*
2. *whether the [P]roposed [D]evelopment complied with PO8 of the Code; and*
3. *whether various relevant matters support an approval of the [P]roposed [D]evelopment, focussing upon the extent to which it complied with provisions of the [P]lanning [S]cheme and managed impacts upon amenity.*

The Court held that the relevant assessment benchmarks had been satisfied and that there would not be any unacceptable amenity impacts as a consequence of the Proposed Development (at [27]).

Background

The Site is in the urban neighbourhoods area, within the medium density residential zone, and is subject to the Building Height Overlay Map (at [2]). The Building Height Overlay Map provides that development for a two-storey multiple dwelling that is nine metres high with a partial third storey is subject to code assessment (at [5]). The Building Height Overlay Map also designates the land on the opposite side of Tedder Avenue as being in the unlimited height area and there are numerous examples of buildings of three storeys or more in the vicinity of the Site (at [2]).

The Proposed Development is for a three-storey building with some rooftop elements and a minor basement protrusion above ground level that measures to a total height of 13.5 metres (at [5]). Therefore, the Proposed Development is impact assessable.

The Appellant's primary argument was that the Proposed Development needs to take into account the orientation of adjoining residences when giving effect to the relevant provisions of the Planning Scheme, and in particular PO8 of the Code. Further, that in respect of the Appellant's property, the Proposed Development needs to take into account that there will be shadowing of the main habitable areas including the Appellant's backyard which is the Appellant's only outdoor recreation space (at [17]).

Relevant provisions of the Planning Scheme

Section 3.3.2.1(9)(b) of the Strategic Framework of the Planning Scheme contains height uplift provisions which permit height increases of up to 50% above that which is stated in the Building Height Overlay Map where certain outcomes are achieved. Those outcomes relevantly include "*a well-managed interface with, relationship to and impact upon nearby development including the reasonable amenity expectations of nearby residents*".

Section 9.4.4.2 of the Code contains provisions with respect to shadow impacts, and relevantly states as follows:

> *(1) The purpose of the [Code] is to provide a consistent approach to city wide issues and avoid duplication of regulation throughout the City Plan.*
>
> *(2) The purpose of the code will be achieved through the following overall outcomes:*
>
> *(a) Development is designed to maintain the expected level of amenity for the area.*

PO8 of the Code relevantly states as follows:

> *The building is designed and located to ensure that the shadow cast by the building does not detract from a comfortable living and ground level environment and the access of adequate sunlight to private and public spaces having regard to:*
>
> *…*
>
> *(b) the degree of containment of the shadow on the subject site at different times of the day on the summer and winter solstice and spring and autumn equinox;*
>
> *(c) the cumulative impact of the shadow and existing shadows;*
>
> *…*
>
> *(e) the effect of the shadow on any other site or other building.*

Expert evidence of the parties' architects

The Court considered expert evidence given by the architects for each party. The Applicant Co-respondent's architect and the Council's architect relied upon shadow diagrams that were prepared by another architect, Mr Pope, having regard to the parameters contemplated by PO8 of the Code. These diagrams compared the expected shadow impacts from the Proposed Development to a hypothetical development application requiring code assessment which complies with the relevant acceptable outcomes under the Planning Scheme (at [19]). The Applicant Co-respondent's architect concluded that the shadowing of neighbouring properties, as a consequence of the Proposed Development, would not be significantly greater than that resulting from the hypothetical alternative development. To demonstrate this, the Council's architect "*produced a diagram demonstrating increased shadowing at midday in mid-winter and at midday in equinox …*", and concluded that there is a relatively minor additional impact to the neighbour to the south of the Site (at [19]).

The Appellant's architect conceded in cross-examination that his shadow analysis contained mistakes, that the analysis relied upon by the Applicant Co-respondent's architect and the Council's architect demonstrated that the neighbouring residents could reasonably expect the shadow impacts from the Proposed Development, with the exception of the spring equinox, and further "*… that on his evidence any unacceptable amenity impact would only be for a portion of the day*" (at [22]).

Court finds shadow impacts to be an acceptable amenity impact

The Court concluded that any unacceptable amenity impact that is attributable to the Proposed Development is confined to a very limited part of the year, and preferred the evidence of the Applicant Co-respondent's architect and the Council's architect over that of the Appellant's architect (at [23]).

Court finds that the Proposed Development is compliant with the Planning Scheme

The Court was satisfied, having regard to the criteria set out in PO8 of the Code, that the design and location of the Proposed Development "*… ensure that shadows cast from it will not detract from a comfortable living and ground level environment and the access to adequate sunlight to private spaces …*" (at [24]). The Court also considered whether the purpose and overall outcome of the Code are satisfied and came to the conclusion that they are satisfied because the Proposed Development is designed to maintain the expected level of amenity for the area (at [24]).

The Court was also satisfied that the expert evidence given by the Applicant Co-respondent's architect and the Council's architect did not establish any non-compliance with the Planning Scheme, and in particular, section 3.3.2.1(9)(b) of the Strategic Framework.

Conclusion

The Court concluded that there would not be unacceptable amenity impacts as a consequence of the Proposed Development and that the onus of demonstrating that the appeal should be dismissed had been discharged.

Colin Biggers & Paisley

End of the road: Planning and Environment Court of Queensland refuses minor change application finding there is inadequate amenity and traffic evidence to establish proposed changes would not result in substantially different development

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *427 Beckett Rd Pty Ltd v Brisbane City Council* [2024] QPEC 4 heard before Williamson KC DCJ

April 2024

In brief

The case of *427 Beckett Rd Pty Ltd v Brisbane City Council* [2024] QPEC 4 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to refuse an impact assessable development application for a mixed use development (**Development Application**) on land at Bridgeman Downs, Queensland (**Land**).

In particular, the Applicant sought an order that the appeal be heard and determined on the basis of a changed development application (**Change Application**) (at [1]).

The Court had to determine whether, pursuant to section 46(3) of the *Planning and Environment Court Act 2016* (Qld) (**PEC Act**), the proposed change was a "*minor change*" as defined in schedule 2 of the *Planning Act 2016* (Qld) (**Planning Act**) (see [2] and [36]).

The Court found that the proposed changes, explained further below, were not a "*minor change*" as defined in the Planning Act and dismissed the Change Application (see [4] and [5]).

Background

The Development Application sought an approval to reconfigure the Land "*… from one into five lots with associated stormwater infrastructure, private access roads and new public roads*" (**Proposed Development**) (at [7]). The Proposed Development involved the construction of a public road connecting Beckett Road located to the west of the Land to the adjoining land located east of the Land, thus dividing the Land into a northern portion and a southern portion (at [7]). The Proposed Development was to occur in four stages and comprise a "*… balanced mix of commercial and residential uses …*" (at [25]).

By contrast, the Change Application sought development that "*… is predominantly commercial in nature and is to be carried out in one stage*" (at [25]). The Change Application sought to effect the following predominant changes to the Proposed Development (**Proposed Changes**) (see [24] to [35]):

- A reduction of the number of residential units proposed from 39 units to 12 units, consequent material changes to the land use mix between residential and non-residential uses, and changes to the built form for residential dwellings.
- The deletion of a staged approval for the development.
- An increase in the area of Lot 5, a reduction in the footprint of residential development within Lot 5, and a consequential southward movement of Lot 1.
- Design changes to the access to Lot 5 and the number and layout of uses proposed on Lot 5.
- The deletion of the east-west connection road.
- Changes to the earthworks design and stormwater management regime.
- The introduction of a network of acoustic barriers.
- An alteration to the building design of a childcare centre and relocation of a redesigned carpark.

Under section 46(3) of the PEC Act, the Court cannot consider a change to a development application unless the change is only a "*minor change*". The term "*minor change*" is defined in schedule 2 of the Planning Act, and requires an applicant to demonstrate, according to paragraph (a)(i) of the definition, that the proposed change will not result in "*substantially different development*" (at [36]).

Court finds that the Proposed Changes result in substantially different development

The Council opposed the Change Application on the following alternative grounds (at [3]):

- The Proposed Changes to the Development Application would result in "*substantially different development*" for the purposes of the relevant definition of "*minor change*".
- There are discretionary reasons that militate against granting the Change Application.

The Court stated preliminarily that "*[t]he extent of change between …*" the form of development under the Development Application and under the Change Application "*… is, as a matter of impression, significant*" (at [37]).

Court finds inadequate evidence pertaining to visual and traffic impacts to find not substantially different development

The Court concentrated on the issues of visual impacts and traffic impacts and emphasised the exiguity of evidence in this respect (see [37] to [46]).

The Court considered that it was necessary to examine whether the introduction of a network of acoustic barriers ranging in height and in proximity to proposed residential land included in the Proposed Changes "*… would give rise to a new impact or exacerbate a known amenity impact*" (at [40]). The Court, however, was ultimately unable to make a finding given the inadequacy of the evidence pertaining to potential amenity impacts (at [41]).

The Court was also not satisfied that the Applicant provided sufficient evidence to demonstrate that the Proposed Changes would not result in impacts to traffic flows or the transport network (at [43]). In particular, the Court identified that the evidence of the traffic expert considered neither the traffic impacts arising due to the deletion of the staged approval, nor the impact of the deletion of future road connections to the adjoining land (at [42]).

The Court held that the Applicant's affidavit filed in support of the Change Application failed to mention the deletion of a pedestrian path between the childcare centre and a convenience restaurant on Lot 2, and the potential impacts on multi-purpose vehicle trips (at [44]).

In respect of structure planning, the Court held that the Applicant failed to analyse potential impacts that may arise by reason of the replacement of the internal road system with internal private roads and easements (at [45]).

The Court was not satisfied, on the basis of these omissions and inadequacies in the evidence, that the Proposed Changes would not result in "*substantially different development*" (at [46]).

Court finds submissions relating to the scale and extent of the changes do not negate a finding of substantially different development

The Court accepted the following submissions made by the Applicant (at [48]):

- "*[T]he development depicted in Annexure B 'remains' a mixed use development comprising a service station, food and drink outlet, childcare centre multiple dwellings*".
- "*[T]he changed form of development is a lesser scale than that depicted in Annexure A*".
- "*[T]he reduction in development scale is intended to be responsive to reasons for refusal founded in, inter alia, ecological and stormwater management considerations*".

However, the Court was not satisfied that these matters demonstrated that the Proposed Changes would not result in "*substantially different development*" having regard to "*… their resulting impacts, both individually and cumulatively*" (at [49]).

The Court also rejected the Applicant's reliance on earlier orders of the Court, and in particular an order made on 7 December 2022, which permitted the Development Application to proceed to hearing inclusive of most of the changes contained within the Change Application (at [50]). The Court identified a series of additional changes that were not included in the order of 7 December 2022 (at [51]). In particular, the Court emphasised the materiality of the deletion of staging, in combination with all the other Proposed Changes, and having regard to the traffic engineering issues (at [53]).

The Court concluded that there was inadequate evidence to determine that the Proposed Changes, having regard to the form of the development under the Change Application, constituted a "*minor change*" as defined by the Planning Act (at [54]).

Court finds that it is unnecessary to consider discretionary consideration opposing approval

Having found that the Proposed Changes would result in a "*substantially different development*", the Court found that it was unnecessary to determine whether discretionary considerations alone warranted the dismissal of the Change Application (see [55] and [56]).

Conclusion

The Court found that the Proposed Changes were not a minor change as defined in the Planning Act and dismissed the Change Application (see [4] and [5]).

Colin Biggers & Paisley

No extension: Planning and Environment Court of Queensland has dismissed an application to extend the currency period of a development approval

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Emzay Pty Ltd v Bundaberg Regional Council* [2023] QPEC 20 heard before McDonnell DCJ

April 2024

In brief

The case of *Emzay Pty Ltd v Bundaberg Regional Council* [2023] QPEC 20 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the refusal by the Bundaberg Regional Council (**Council**) of an application by the applicant (**Appellant**) to extend the existing 11-year currency period for a further five years for a development approval for reconfiguring a lot located on Goodwood Road in Bundaberg, Queensland (**Land**) into 28 rural lots (**Proposed Development**).

The development application for the Proposed Development was properly made in February 2009 and approved on 14 December 2012 (**Approval**) (at [2]). The currency period of the Approval was extended until 14 December 2020 upon application by the Appellant, and the Appellant applied for a further extension of the currency period which was refused by the Council (**Council Decision**).

The Court was not satisfied that the Appellant demonstrated a satisfactory explanation for the Appellant's delay in making the extension application and thus dismissed the application.

Background

The Land has an area of 1,137 hectares. The Proposed Development comprises a range of lots from 5.93 hectares to 16.88 hectares, with an additional 886 hectare balance lot proposed to be dedicated to the State for conservation purposes (**Balance Lot**).

The Appellant applied under section 86 of the *Planning Act 2016* (Qld) for and was granted a four-year extension to the currency period of the Approval, until 14 December 2020, which was automatically extended until 9 June 2021 as a consequence of the extension notices given by the Planning Minister because of COVID-19.

On 9 June 2021, the Appellant again applied for an extension to the currency period of the Approval which was refused by the Council.

Issues

Under section 47 of the *Planning and Environment Court Act 2016* (Qld), the Court must in respect to the Council Decision either confirm it, change it, or set it aside and make a decision replacing it.

The issues considered by the Court relevantly included the following (at [17]):

- Whether there was a satisfactory explanation for the delay.
- Whether steps were taken to act on the Approval.
- The changes in the assessment regime and the zoning of the Land; and
- The need for the Proposed Development.

Court did not accept the Appellant's explanation for the delay

The Appellant submitted that illness of the Appellant's sole director, economic conditions, and extrinsic litigation proceedings were reasons for the delay (at [19]).

The Appellant and its related companies operate under one conglomerate trading name (at [22]). The Appellant gave evidence that since 2003, the conglomerate has started and either continued or completed 38 development projects (at [26]). Development managers were engaged to attend to the day-to-day operations of the projects, which included the engagement of a development manager for the Proposed Development during 2010 to 2020 (at [26]).

The Court did not accept the Appellant's evidence of a drop in sales at a conglomerate beachside residential development as being attributed to "*… lack of purchaser interest in regional Queensland …*" as related Supreme Court proceedings cited evidence that the drop in sales was due to the "*… foul smelling, stagnant water on the development site*" (see [23] to [24]). Further, the Court found limited relevance of the beachside development to the Proposed Development given the locational and lot size differences (at [24]).

Further evidence was given that from 2009 to the date of the Court's judgment the sole director of the Appellant was actively involved in "*significant planning litigation*" (at [27]). The Court found that this contradicted the evidence of illness being the reason for the delay.

Whilst the Court accepted that the illness of the Appellant's sole director "*… would have adversely affected [the sole director's] ability to operate his business …*", the engagement of a development manager to manage the Proposed Development and evidence of active involvement in litigation negated this as a reason for delay (at [25]).

Court was not satisfied with the steps taken by the Appellant to progress the Proposed Development

The Appellant submitted that it had obtained a quote for civil engineering design works in 2016 and made enquiries about obtaining a development approval for operational work in 2019 (at [30]).

The Court found "*… that no meaningful steps have been taken to progress the [Proposed Development] …*" (at [33]). The Court also observed that the evidence presented did not demonstrate the Appellant's intention to act upon the Approval if granted the extension, and the need for the extension to be for five years.

Court noted that the time since the Approval and the similar assessment requirements under the current planning scheme weigh against the extension application

The Court noted that the Approval was assessed as impact assessable, and if the application for the Proposed Development were to be made under the *Bundaberg Regional Council Planning Scheme 2015* (version 6.0) (**Planning Scheme**), it would similarly be impact assessable and thus require public notification (at [37]).

The Court considered the opportunity for new submitters on the Proposed Development if an application for the Proposed Development were to be remade under the Planning Scheme. The Appellant submitted that although a change in ownership of properties in the surrounding area of the Land has occurred since the Approval was granted, those people would have been aware of the extant Approval before moving into the area.

The Court noted that "*… the location of potential submitters is not limited to those in the vicinity of the Land*" (at [39]). The Court was "*… satisfied that the combination of the length of time which has elapsed since the [Approval] and that it remains impact assessable if made today (matters contributing to public awareness) are factors which weigh against approval of the extension*" (at [40]).

Court took a conservative approach to address the elevated bushfire rating for the Land

Since the Approval was granted, the bushfire rating for the Land has increased from "*medium to high*" (at [41]). Although a condition of the Approval requires a bushfire management plan to be submitted to the Council, that condition related to a 2009 bushfire risk assessment which predates the increase in the rating (at [42]).

The Court noted that although the Appellant submitted that compliance with contemporary benchmarks for bushfire management could be achieved through applications for later stages of the Proposed Development, the Court was not satisfied that the condition could be construed in its current form to require compliance with the contemporary benchmarks, and that compliance with this condition could be evidenced by reference to the 2009 bushfire risk assessment (see [43] to [44]).

As a result of the elevated bushfire rating for the Land, the chance the outdated 2009 bushfire risk assessment could warrant compliance with the Approval, and the significant risks associated with bushfire, the Court considered this factor weighed heavily against the extension application.

Court gave no weight to the dedication of the Balance Lot to State due to the lack of evidence of acceptance by the State

The Court accepted that the dedication of the Balance Lot to the State for environmental benefit would be a positive conservation outcome, however no evidence was submitted that the State would accept such a dedication (see [50] to [51]). Without acceptance, the plans for the Balance Lot would not be sealed, and therefore would not be realised. Given the lack of evidence, the Court did not give this matter any weight (at [51]).

Court accepted a need for rural residential development can be found elsewhere

Since the introduction of the Planning Scheme in 2015, there has been a significant increase in land designated for rural residential development. The economic expert for the Appellant opined that whilst there is an increase in the area of land designated for rural residential development, this "*… [does] not guarantee when and how an individual site is developed*" (at [52]). The Appellant therefore submitted that there is a need for the Proposed Development as it is intended to be developed.

The Court preferred the evidence of the Council's economic expert that "*… there is no economic or community need for the proposed development because there is a significant quantum of land designated for rural residential development in the local study area with a significant number of approved, vacant and development lots intended to meet future demand*" (at [54]).

The Court was satisfied that the need for rural residential development is being met by the designation of land under the Planning Scheme. Therefore, need was not considered a factor to support the extension application.

Conclusion

The Court dismissed the appeal against the Council Decision.

Complying development certificate invalidated: New South Wales Land and Environment Court has declared a complying development certificate invalid because of draft heritage status

Rebecca Pellizzon | Anthony Landro | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Randwick City Council v Belle Living Pty Ltd (No. 2)* [2023] NSWLEC 100 heard before Pritchard J

April 2024

In brief

The case of *Randwick City Council v Belle Living Pty Ltd (No. 2)* [2023] NSWLEC 100 concerned Class 4 proceedings in the New South Wales Land and Environment Court (**Court**) brought by Randwick City Council (**Council**) against the site owner, Belle Living Pty Ltd (**Belle Living**), and the private certifier.

The Court considered the interpretation of the words "draft heritage item" and invalidated a complying development certificate (**CDC**) issued by a private certifier to Belle Living for demolition because the building and site was a draft heritage item. This case also raised questions about the exercise of the Court's discretion, unreasonableness, and the issue of estoppel.

The status of a building as a "draft heritage item" impacts whether certain development can occur under the simpler complying development regime. In this case, although other quite recent Court proceedings in the case of *Helm No.18 Pty Ltd v North Sydney Council* [2022] NSWLEC 1406 relating to the challenge of an interim heritage order had concluded that the item did not reach the threshold for local heritage listing, the fact the property sat within the legal category of a draft heritage item was what was legally relevant to the validity of the CDC.

Whilst a draft heritage listing does not prevent someone from lodging a development application for demolition and a consent being granted, this case serves as a reminder to undertake careful due diligence before buying a property to understand whether the property is a draft heritage item.

Background

Proceedings

The Council commenced the proceedings in June 2023. The summons commencing the litigation sought a declaration from the Court that the CDC issued for demolition works at 3 Berwick Street, Coogee (**site**) was invalid, and the partial demolition works already carried out were unauthorised.

Belle Living defended the proceedings while the private certifier, who was listed as the second respondent and who had issued the CDC, filed a submitting appearance.

Council heritage review

In January 2020, the Council invited the Randwick community to nominate sites and places of potential heritage value as part of its planning proposal to amend the *Randwick Local Environmental Plan 2012* (**RLEP**). Following community consultation, 281 properties were identified for consideration. The site, which comprised a single-storey inter-war bungalow constructed in or about 1923, was one of those properties.

In May 2021, the Council resolved to include 57 properties as heritage items in schedule 5 of the RLEP. Although the site was not one of the 57 properties, the Council nevertheless resolved that the site, along with other properties, be identified and set aside by the Council for a future in-depth heritage study.

Development application and the interim heritage order

In August 2022, Belle Living lodged a development application for the subdivision of the site and construction of two dwellings.

Following the receipt of the development application, an urgent motion was carried at the Council meeting on 27 September 2022 for a heritage assessment of the site to be undertaken. Following that assessment, the Council made an interim heritage order for the site under section 25 of the *Heritage Act 1977* (NSW) on 14 October 2022, which was valid for 6 months.

In November 2022, Belle Living filed a Class 1 appeal against the Council's making of the interim heritage order (see the case of *Belle Living Pty Ltd v Randwick City Council* [2023] NSWLEC 1282 (**IHO proceedings**)). In the same month, the Randwick Local Planning Panel resolved that the site be listed as an item of local heritage in schedule 5 of the RLEP. The Council then prepared a planning proposal to give effect to this resolution, which was forwarded to the Minister for Planning (**Minister**) in February 2023. Gateway determination was then provided by the Minister's delegate in March 2023.

In May 2023, Belle Living's development application was refused by Council.

On 7 June 2023, the Court delivered its judgment in the IHO proceedings. The Court held as follows (at [56]):

> *The research and reports that have been undertaken and provided to the Court in evidence are, in my view, thorough and comprehensive and I am satisfied that any further investigation will not illicit additional information that would change the finding that the item does not reach the threshold for local heritage listing when the Heritage Guidelines are applied. On that basis, it is appropriate to revoke the IHO.*

Complying development certificate

On 7 June 2023 and immediately after the judgment in the IHO proceedings was delivered, the private certifier issued a CDC for the demolition of the building at the site under section 4.28(11) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

Action taken by the Council

Two days later on 9 June 2023, the Council issued a stop demolition work order to Belle Living under section 9.34 of the EP&A Act. By this time, some demolition work at the site had already started.

On the same day, the Council commenced these Class 4 proceedings by way of summons seeking to invalidate the CDC. The summons contended that the CDC issued for the site was invalid on the basis that the site was a "draft heritage item" as defined in clause 1.5 of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**Codes SEPP**), and thus not authorised to be issued. The Council also sought interlocutory relief, which was granted by the Court on 13 June 2023, preventing further demolition work from taking place.

Cross-appeal by Belle Living

On 16 June 2023, Belle Living filed a cross-summons on the basis that the site was not a "draft heritage item" within the meaning of clause 1.5 of the Codes SEPP, and the Council had failed to comply with the conditions of the Gateway Determination made by the Minister to facilitate the listing of the property as a local heritage item.

Issues

The main issue for the Court to determine was whether the development pursuant to the CDC was invalid under section 4.31 of the EP&A Act as it related to land involving a draft heritage item. Belle Living's cross-summons separately raised issues of unreasonableness and estoppel against the Council.

Interpretation of "draft heritage item"

The interpretation of the words "draft heritage item" was a significant issue at the hearing.

Clause 1.5 of the Codes SEPP defines "draft heritage item" and "heritage item" as follows:

- "***draft heritage item*** *means a building, work, archaeological site, tree, place or aboriginal object identified as a heritage item in a local environmental plan that has been subject to community consultation, other than an item that was consulted on before 1 March 2006, but has not been included in a plan before 27 February 2009.*"
- "***heritage item*** *means a building, work, archaeological site, tree, place or Aboriginal object identified as a heritage item in an environmental planning instrument.*"

Clause 1.17A of the Codes SEPP sets out the requirements for complying development, and contains provisions that in broad terms restrict complying development being carried out on land affected by heritage. Clause 1.18 sets out additional restrictions for complying development, including in clause 1.18(1)(c3) that it "*not be carried out on land that comprises, or on which there is, a draft heritage item …*".

The Council argued that in the context of clause 1.17A of the Codes SEPP (which makes reference to "heritage item") "*… 'a draft heritage item must be something other than a heritage item identified in an environmental planning instrument'. Otherwise, 'there would be no need to include the additional specification in cl 1.18 of the Codes SEPP' in relation to 'draft heritage item'*" (at [78]).

Belle Living submitted in response to the Council's interpretation that "*… the Court would need to read the definition of 'draft heritage item' in clause 1.5 of the Codes SEPP as including reference to the words 'planning proposal', which do not otherwise appear anywhere in the Codes SEPP*" (at [96]).

The Court made six findings on the issue (at [101]). This relevantly included the following:

- That to give the two expressions "heritage item" and "draft heritage item" the same meaning would be to make redundant the separate definition of "draft heritage item" in the same clause of the Codes SEPP. A draft heritage item must be something other than a heritage item identified in an environmental planning instrument.
- That "draft" in the definition of "draft heritage item" plainly means anything that is preliminary in nature and not yet finalised.
- The context and legislative history of the Codes SEPP suggests that the definition of "draft heritage item" is to be construed "purposively" with the reference to a "local environmental plan" also including a planning proposal that has been subject to community consultation.

Ultimately, the Court determined that the site was the subject of a planning proposal and was a "draft heritage item" within the meaning of clause 1.5 of the Codes SEPP.

Court's discretion to invalidate the CDC

The Court's discretion to invalidate a CDC is contained in section 4.31 of the EP&A Act, which relevantly provides that:

> *Without limiting the powers of the Court under section 9.46(1), the Court may by order under that section declare that a complying development certificate is invalid …*

Having determined that the site was the subject of a planning proposal and was a "draft heritage item", the Court exercised its discretion in section 4.31 of the EP&A Act and declared that the CDC was invalid (at [107]).

Cross-summons

Unreasonableness of the Council's conduct

In the cross-summons, Belle Living submitted that the Council had acted unreasonably based on the following timeframe of events:

- The Council had previously considered in 2020 and 2021 the site for local heritage listing but it had been recommended that the site did not meet the threshold for local listing.
- On 6 April 2021, the Randwick Local Planning Panel adopted the recommendations from the Council's external heritage consultant that the site did not meet the threshold for local listing.
- The site was not part of the 57 properties recommended to be listed at the Council meeting on 25 May 2021.
- Following the 25 May 2021 Council meeting, there was a 16 month period of inaction until the heritage assessment was commissioned.

Belle Living argued at [117] that it purchased the property in May 2022 on the "*reasonable assumption*" that the property was not of heritage significance as it has already been assessed by the Council and found to not meet the threshold for local heritage listing. Belle Living then promptly lodged a development application, which was refused on heritage grounds.

Belle Living also argued at [118] that in the IHO proceedings, the site had been found by the Court not to be of any local heritage significance, and on that basis, the Council's subsequent conduct was unreasonable.

The Court did not accept the unreasonableness argument.

The Court found at [125] that the grounds for unreasonableness related to the decision itself and not the process in which a decision is reached. The Court held that further investigations into the significance of the site provide an "*evident and intelligible justification*" for the steps taken by Council (at [135]).

Issue estoppel

Belle Living further submitted that it was unreasonable for the Council to list the site as local heritage given the Court's judgment in the IHO proceedings. Belle Living argued that an issue estoppel operated to stop in any subsequent proceedings the determination of issue or fact that had been resolved in the IHO judgment.

The Court found that the appeal in the IHO proceedings related to whether the site upon investigation or further inquiry would be found to be of a local heritage (at [144]). However, in these proceedings the central issue was whether the public exhibition of a planning proposal for a listing of a dwelling as a heritage item was considered a "draft heritage item" under the Codes SEPP. The Court considered that the heritage qualities of the site were irrelevant in the current proceedings.

Belle Living's issues estoppel ground therefore failed.

The Court found that as at the date the CDC was issued, the Council had substantially satisfied the conditions of the Gateway Determination (at [150]).

Outcome

The Court ultimately held that the Council was successful on its summons, and Belle Living was unsuccessful on its cross-summons. The Court made the following orders (at [168]):

- A declaration that the CDC was invalid.
- A declaration that Belle Living had failed to comply with the development control order issued by the Council on 9 June 2023.
- A declaration that Belle Living had caried out unauthorised work, being the partial demolition of the dwelling on the site.
- An order restraining Belle Living from carrying out any demolition works to the buildings on the site.
- An order that Belle Living pay the Council's costs in the proceedings.

No orders were made against the private certifier.

Conclusion

This decision serves as a reminder to those developing land under CDCs, and to certifiers, that CDCs can be challenged for their validity. In some situations, Councils are willing to bring such proceedings as seen in the other recent case of *Wollondilly Shire Council v Kennedy* [2023] NSWLEC 53, which is the second decision in 2023 where the Court has declared a CDC to be invalid upon the commencement of a summons by the relevant Council.

The decision clarifies the interpretation of the phrase "draft heritage item" in the context of clause 1.18 of the Codes SEPP. Private certifiers need to be alert to when there is a planning proposal to facilitate additional properties being added to the schedule of local heritage items in the RLEP.

More broadly, this decision serves as a reminder that private certifiers should meticulously consider the provisions of the Codes SEPP on a case by case basis to ensure that each requirement has been met.

"Existence of a disputed claim is central to the process of resolving compensation claims": Victorian Civil and Administrative Tribunal strikes out claimant's application as misconceived

Evie Atkinson-Willes | Ashleigh Pope | David Passarella

This article discusses the decision of the Victorian Civil and Administrative Tribunal in the matter of *Hire and Lease Pty Ltd v Secretary to the Department of Transport and Planning* [2024] VCAT 159 heard before Justine Jacono, Senior Member and SP Djohan, Acting Senior Member

April 2024

In brief

In the case of *Hire and Lease Pty Ltd v Secretary to the Department of Transport and Planning* [2024] VCAT 159, the Secretary to the Department of Transport and Planning (**Authority**) commenced proceedings in the Victorian Civil and Administrative Tribunal (**Tribunal**) under section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**) to strike out an application made by Hire and Lease Pty Ltd (**Claimant**) to the Tribunal for the determination of a disputed compensation claim.

The Claimant lodged an application with the Tribunal under section 80 of the *Land Acquisition and Compensation Act 1986* (Vic) (**LAC Act**) for a determination of a disputed claim for compensation relating to the Authority's compulsory acquisition of the land at 12 Terror Street, Keilor Park (**Application**). The Authority contested the Application on the basis that no disputed claim existed at the time, and therefore the Tribunal did not have the jurisdiction to hear the matter.

The issues before the Tribunal were three-fold:

- Was a "disputed claim" in existence in accordance with section 33(2) of the LAC Act as at 15 September 2023 when the Claimant made the Application (**Application Date**)?
- If a "disputed claim" did not exist at that time, did the Tribunal have jurisdiction to hear the matter pursuant to section 43 of the VCAT ACT on the basis that the claim became disputed when the Claimant rejected the Authority's response to the claim?
- Given the current proceeding was underway, did the Tribunal have the power to amend the Application under section 127 of the VCAT Act to change the date of the "disputed claim" from the Application Date to the date the Claimant rejected the Authority's response on 16 October 2023?

In this case, the Tribunal found that no "disputed claim" existed at the Application Date as required under the LAC Act. Accordingly, the Tribunal found that its jurisdiction was not enlivened to hear the matter. As a result, the Tribunal refused to consider either of the remaining issues and struck out the Application.

Was there a "disputed claim" as at Application Date?

To be eligible to apply to the Tribunal under section 80(a) of the LAC Act for a determination of a disputed claim, a claimant must establish that a "disputed claim" existed at the time of the application in accordance with the prescribed time limits and processes imposed by Part 3 of the LAC Act.

Section 33(1) of the LAC Act states that a claimant must serve a notice of acceptance or claim on the authority within three months of an initial offer of compensation by the authority, and section 33(2) of the LAC Act states that a failure to do so will result in the matter becoming a "disputed claim" for the purposes of the LAC Act.

The Authority relevantly served its initial offer of compensation for the compulsory acquisition on 20 December 2022 (**Offer**), and the Claimant served its response on 2 June 2023 (**Claim**).

In making the Application, the Claimant relied on its own failure to respond to the Offer in time, being by 21 March 2023, to assert that the matter had become a "disputed claim" under the LAC Act.

The Tribunal held that the Claim was not disputed at the time of the Application because the application of section 33(2) of the LAC Act is subject to section 107 of the LAC Act, which relevantly states as follows (see [42] to [47]):

> *(1) Notwithstanding anything in any other section of this Act, the time within which a person other than the Authority is required to do anything under this Act shall not expire until the expiration of seven days after the Authority has advised that person in writing of the effect of that expiration.*

In light of this, the Tribunal held that the Claimant could only rely on section 33(2) of the LAC Act to establish that there was an existing "disputed claim" if the Authority had advised the Claimant in writing of the expiration of the three month time period (at [43]). In the absence of any such written confirmation, the Tribunal held that there was no "disputed claim" as at the Application Date and the Claimant was not entitled to make the Application to engage the Tribunal's jurisdiction (see [48] to [50]).

Did a "disputed claim" come into existence when the Claimant rejected the Authority's response to Claim?

In the alternative, the Claimant submitted that the Tribunal was obliged to consider the matter on the basis that the Claim had become disputed by the time the proceeding was being heard.

The Claimant provided the Authority with a revised response to the Offer on 15 September 2023, to which the Authority provided its response on 9 October 2023 (**Response to Revised Claim**). On 16 October 2023, the Claimant rejected the Response to Revised Claim. The Claimant submitted that in rejecting the Response to Revised Claim a "disputed claim" came into existence under with section 36(9) of the LAC Act and, therefore, the Tribunal had jurisdiction to hear the matter.

The Tribunal rejected this submission on the basis that an application under section 80 of the LAC Act is only valid if the disputed claim exists at the time of the application. Accordingly, given that the Application Date predated the alleged "disputed claim", the Tribunal did not have jurisdiction to consider the matter (at [53]).

Did the Tribunal have jurisdiction to amend the Application?

The Claimant's attempt to invoke the Tribunal's power under section 127 of the VCAT Act to amend the Application to reflect the date of the disputed claim, being as 16 October 2023, to rectify the invalidity of the Application failed because the Tribunal held that it did not have the requisite jurisdiction (at [54]).

Conclusion

The Tribunal struck out the Application, but noted in obiter dicta that the Claimant was free to lodge a fresh application in the future with the requisite documents required to invoke the Tribunal's jurisdiction under clause 45 of Schedule 1 of the VCAT Act (at [56]).

Takeaway for claimants

The LAC Act is structured in such a way that ensures the timely resolution of claims. In instances where the time limits are exceeded and subject to the processes set out in the legislation, the parties are permitted to engage the Tribunal's jurisdiction to determine the claim in dispute.

Notably, there are certain restrictions on how a "disputed claim" may be brought before the Tribunal. Where an authority fails to meet a time limit imposed by the LAC Act, a claimant may apply to the Tribunal for a determination without notice. However, as seen in this case, if a claimant fails to respond in time, an authority must provide a notice to the claimant notifying the claimant of the effect of the expiration of time before the matter is eligible as a "disputed claim" capable of being the subject of an application to the Tribunal (at [47]).

Accordingly, this case demonstrates that claimants must be diligent to ensure that the processes under the LAC Act have been accorded with when lodging an application to the Tribunal under section 80 of the LAC Act. In particular, where a claimant fails to respond within a prescribed time limit and the authority is yet to provide a notice of the effect of its expiry, there will be no "disputed claim" capable of being the subject of an application.

Victorian government announces plan to build 70,000 additional homes: Suburban Rail Loop East precincts to support growing population

Evie Atkinson-Willes | David Passarella

This article discusses the benefits and impacts of the Suburban Rail Loop East project on the strategic planning for metropolitan Melbourne

April 2024

In brief

The Victorian government has released new vision plans for the Suburban Rail Loop East project which propose a series of strategic planning changes to support the addition of over 70,000 new homes and 230,000 jobs to the neighbourhoods along the eastern rail corridor by the 2050s.

Background

The Suburban Rail Loop (**SRL**) East project forms part of the Victorian government plan to manage growth across the state, alongside Victoria's Housing Statement. The purpose of the SRL East project is to develop upon existing neighbourhoods along the eastern rail corridor and provide a series of activity centres within 1.6km of each proposed station.

In 2023, the State government released a series of six Draft Precinct Visions for public consultation. After receiving feedback calling for greater housing supply closer to employment centres, the government has recently released a series of key directions and associated maps for public consultation with the intention of refining each proposed precinct vision. Notably, the government purports to create more than 70,000 additional homes and 230,000 permanent jobs across the six SRL East precincts by the 2050s. However, these directions and maps only provide an illustrative guide to how the Victorian government might seek to implement this significant housing goal. We have provided a summary of some of the proposed built form changes below.

Key directions

Given each precinct has unique characteristics and associated challenges to be considered, the proposed key directions and maps contemplate the needs of each community. These are proposed to eventually form the basis of a draft structure plan and planning scheme amendments to implement changes in each precinct.

In Monash, the directions focus on strengthening innovation sectors to attract new businesses to the area. In Clayton, the plan seeks to grow the health precinct and provide community infrastructure to support the resident and worker populations. While in Glen Waverley and Box Hill, plans are being made to channel significant employment growth into the areas by encouraging the construction of retail and commercial office spaces. However, to achieve these objectives will require significant changes to land use, built form, transport and community infrastructure, and public spaces to be implemented.

Accordingly, the maps provided as part of the directions propose significant increases in housing density in the immediate surroundings of each new station. It is proposed that the government will support the construction of high-rise office and apartment buildings of up to 40 storeys in the precinct core of Box Hill, down to 18 storeys in Cheltenham. Meanwhile, in areas of existing homes and neighbourhoods surrounding the new stations, the maps depict a vision of townhouses and mid-rise apartments of between 4 and 7 storeys, which will taper off in height further from each station. The proposed built form changes for each of the six draft precincts can be viewed here. These include Box Hill, Burwood, Clayton, Cheltenham, Glen Waverley, and Monash.

What's next?

While these maps model a future for these eastern precincts to solve the challenges Melbourne faces with its growing population, the project remains in its embryonic stages.

The structure planning process is currently in its second consultation phase. During this period, Suburban Rail Loop Authority (**SRLA**) will gather community feedback and use it to develop a final draft structure plan and draft planning scheme amendments. It is expected that the structure plan will give greater insight into how the project will be delivered in reality.

The draft structure plan and amendments are due to be put on exhibition in late 2024 to early 2025, where they will be available to the public to make submissions to the SRLA about the proposal. These submissions will be considered by an independent advisory committee, which will either make a recommendation to adopt, abandon or adopt the proposed amendments with changes. If adopted, SRLA will submit the draft plan and amendments to the Minister for Planning for approval and gazettal. Accordingly, it is predicted that this process will take several years.

However, this announcement demonstrates the possible opportunity for developers in the forthcoming decade. At this stage, while these preliminary directions and maps identify the development potential for each precinct, they only scratch the surface of what will be required to implement such a significant project. We note that the project has a long way to go before it is approved and implemented and the later stages of the amendment process will be crucial in extrapolating the finer details of how the project will unfold.

As the State government continues to employ further community feedback on the directions, we will continue to explore the benefits and impacts of this project on the strategic planning for metropolitan Melbourne. If your land is affected by these proposed changes or you're seeking consultation regarding the development potential of these area, please contact our office for assistance.

Community consultation for this project and the directions announced is open until 30 June 2024.

No existing lawful use, no short stay letting: Planning and Environment Court of Queensland confirms decision to refuse application for approval to operate short stay letting in Noosa

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Jephcott & Anor v Noosa Shire Council* [2024] QPEC 5 heard before Cash DCJ

May 2024

In brief

The case of *Jephcott & Anor v Noosa Shire Council* [2024] QPEC 5 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Noosa Shire Council (**Council**) to refuse an application for approval to make premises at Peregian Beach (**Premises**) available for short-term accommodation on a commercial basis (**Application**).

The Court considered whether the Premises had the benefit of an existing use right for "short-stay letting" for the purpose of section 260 of the *Planning Act 2016* (Qld) (**Act**) and whether the proposed use of the Premises was accepted development under the *Noosa Plan 2020* (**Planning Scheme**).

The Court found that the use proposed by the Application could not be lawfully conducted on the Premises as the Premises did not have the benefit of an existing use right as the Premises was not used for "short-stay letting" before the Planning Scheme came into effect, and the use of the Premises was not an accepted use under the Planning Scheme. The Court therefore dismissed the appeal and confirmed the decision of the Council to refuse the Application.

Statutory framework

The Application was made pursuant to the *Noosa Shire Council Local Law No. 1 (Administration) 2015* (**Local Law**) which, in section 6, makes it an offence to undertake a prescribed activity without a current approval granted by the Council. Having regard to relevant sections of the Local Law, the Court identified the prescribed activity as the "operation of short stay letting", which is defined as "*… the letting of premises to someone other than the owner, on a commercial basis, for a period of less than three months*" (**Short Stay Letting**) (see [3] to [5]).

Section 9 of the Local Law provides the circumstances in which the Council may grant an approval for Short Stay Letting. Relevantly, section 9(1)(d) of the Local Law requires that the operation and management of the Short Stay Letting is consistent with any additional criteria prescribed by a subordinate local law (see [5] to [6]).

Section 4 of schedule 21A of the *Noosa Shire Council Subordinate Local Law No. 1 (Administration) 2015* (**Subordinate Law**) prescribes additional criteria for the granting of an approval for Short Stay Letting. Relevantly, section 4(e)(i) of schedule 21A of the Subordinate Law requires that Short Stay Letting can lawfully be conducted on the Premises (see [6] to [7]).

As the Council had not issued a development permit for Short Stay Letting on the Premises, the Applicant argued that Short Stay Letting could be lawfully conducted on the Premises because there was an existing lawful use right protected by section 260 of the Act (at [7]).

Court finds that the Premises was not used for Short Stay Letting before the Planning Scheme came into effect

The Appellant argued that the Premises had an existing lawful use right as, immediately before the Planning Scheme came into effect, the Premises was used for a mix of short-term accommodation and long-term accommodation (at [11]).

The Appellant also argued that a broad approach ought to be used when determining the use for the purpose of section 260 of the Act. This approach would mean that the Premises was lawfully used as a dwelling house before the Planning Scheme came into effect and the proposed use for Short Stay Letting would be a continuation of the use of the Premises for a dwelling house (at [7]).

However, the Court found that a more precise definition of the use must be found for the purpose of section 260 of the Act, which in this case is Short Stay Letting. Whilst the Appellant's evidence established that the Premises had been previously used as a private holiday home and let to friends and family for periods of time, the Court found that the Premises was not let on a commercial basis before the Planning Scheme commenced and it therefore followed that the Premises was not used for Short Stay Letting when the Planning Scheme came into effect (see [12] to [14]).

Court finds that Short Stay Letting is not an accepted use for the Premises under the Planning Scheme

The Court also considered whether the Premises could be used for Short Stay Letting as of right under the Planning Scheme.

The Court found that the use of the Premises for Short Stay Letting would constitute "short-term accommodation" under the Planning Scheme. The Premises is in the low-density residential zone under the Planning Scheme and under the relevant table of assessment "short-term accommodation" is accepted development in that zone only if it complies with the four criteria, and is otherwise assessable development subject to impact assessment (at [15]).

The Court found that the Short Stay Letting proposed by the Appellant would not comply with three of the four criteria required by the Planning Scheme to be considered accepted development and a development permit is therefore required to lawfully conduct Short Stay Letting on the Premises (a [16]).

Conclusion

As the Appellant did not establish that it could lawfully conduct Short Stay Letting on the Premises, the Court confirmed the Council's decision to refuse the Application and dismissed the appeal (at [17]).

Size matters in rural residential areas: Planning and Environment Court of Queensland dismisses an appeal in respect of a reconfiguring a lot application in Tallai on the Gold Coast

Victoria Knesl | Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Casinco Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 50 heard before Jackson KC DCJ

May 2024

In brief

The case of *Casinco Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 50 concerned an appeal by Casinco Pty Ltd (**Applicant**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Council of the City of Gold Coast (**Council**) to refuse an impact assessable development application for reconfiguring a lot into two lots (**Development Application**) on land at Tallai, on the Gold Coast (**Subject Site**). The proposed lots are half of the minimum average lot size stated in the *Gold Coast City Plan 2016* (Version 8) (**Planning Scheme**) for the Subject Site and half of the size of most of the other properties in the local area.

The Court considered the following issues to determine the appeal (at [7]):

- "*[W]hether the [Development Application] is consistent with reasonable community expectations for the land.*
- *[W]hether the [Development Application] would compromise and disrupt the subdivision pattern of the local area.*
- *[W]hether the [Development Application] results in any adverse planning consequences or amenity impacts.*
- *[W]hether the [Development Application] is consistent with the draft amendments (Major Update 2 and 3) of the [Planning Scheme] to the extent relevant.*"

The Court held that the size of the reconfigured lots did not comply with the Planning Scheme and dismissed the appeal.

Background

The Subject Site is located on the corner of Alawara Drive and Worongary Road. The proposed development includes one 4,079m^2 lot, which includes an existing house and retains access from Alawara Drive, and a second lot of 4,015m^2 with new vehicular access from Worongary Road.

The Council refused the Development Application because the proposed development does not comply with the Planning Scheme for reasons including the proposed development does not support the "*lifestyle and amenity aspirations*" of local residents, is inconsistent with the current and future character and amenity of the rural residential area, and is not an average lot size of 8,000m^2 (at [5]).

The Applicant appealed the Council's decision to refuse the Development Application.

An appeal to the Court is by way of hearing anew under section 43 of the *Planning and Environment Court Act 2016* (Qld) (**PECA**) and section 46 of the PECA provides that section 45 of the *Planning Act 2016* (Qld) (**Planning Act**) applies for the Court's decision on the appeal as if the Court were the assessment manager for the Development Application.

Subject Site and its surrounds

The Subject Site has an area of 8,094m^2 and is in the rural residential area of Tallai where the majority of properties are 8,000m^2 or larger. Access to the Subject Site is limited because Alawara Drive is a cul-de-sac from Worongary Road, and therefore provides the only access to a "bounded area" made up of 56 lots which form part of an estate created many years ago (see [1] and [2]). Being a corner lot, the Subject Site is more visible than neighbouring lots in the area.

The Planning Scheme provides in Performance Outcome PO7 of the Rural Residential Zone Code (**Zone Code**) that the "*[a]verage lot size is no less than 8,000m^2 and no lots have an area less than 4,000m^2*" (**Minimum Lot Size Requirement**). The joint expert report of the town planning experts noted that three properties in the local area do not meet the Minimum Lot Size Requirement, one of which was created in 1967 before there was a rural residential area (see [28] to [29]).

Relevant assessment benchmarks

The relevant assessment benchmarks in the Strategic Framework of the Planning Scheme promote in the rural residential area development of a "*… very low intensity and low-rise environment … with a semi-rural landscape character and protected natural features. They are not expanded.*", that "*… continue[s] to support the lifestyle and amenity aspirations of residents in a semi-rural or bushland environment on very low intensity lots. They are not part of the urban area*", and that "*… is cognisant of the function and designed future appearance of each individual area and reinforces the character of that area*" (see [33] and Strategic Outcomes 3.3.1(15), 3.3.7.1(1), and 3.8.3.1(1) of the Strategic Framework).

The Minimum Lot Size Requirement and the following Overall Outcomes (**OO**) of the Zone Code were also relevant to the Court's consideration of the issues (at [35]):

- *OO2(b)* – "*Character consists of: (i) Very low intensity and low-rise environments; and (ii) private acreage or bushland living, typically situated along natural landscape settings like ridgelines or valleys with the intention of being separated from urban services and providing a high amenity lifestyle choice.*"
- *OO2(d)* – "*Lot design: (i) results in lots sizes and dimensions appropriate for the large lot residential locality that recognise the site's inherent values, constraints and character and supports very low density; (ii) provides an average lot size of no less than 8,000m^2 to protect local amenity and character. To respond to the various constraints in the zone the lots sizes may vary provided that no lot has an area less than 4,000m^2 …*".

Court finds inconsistency with the Planning Scheme

The Court held that the proposed development does not meet the relevant assessment benchmarks in the Planning Scheme for the following reasons:

- The proposed development is inconsistent with the reasonable community expectations of residents of the local area as informed by the submissions objecting to the proposed development, is contrary to the spacious character of the local area, and "*… would visibly intensify development …*" (see [72] to [74] and [92]).
- The Court preferred the evidence of the Council's town planning expert that the Planning Scheme requires "*very low intensity*" development to protect the local amenity and character of the area (at [39]).
- The Subject Site is at the gateway or entrance of the "bounded area" of Alawara Drive and therefore contributes more to the local character and amenity of the local area than other properties, for example, properties towards the end of the cul-de-sac (at [87]).
- The proposed development would compromise and disrupt the subdivision pattern of the local area because it does not comply with the Minimum Lot Size Requirement and it would be unreasonable to divide a lot, which just meets the Minimum Lot Size Requirement, into two lots where there is no balancing public need for the development (see [88] to [90]).
- Whilst the Minimum Lot Size Requirement is not absolute because a lot may be designed to continue to protect the local amenity and character, the Court held that the proposed development does not protect the local amenity and character (see [88] and [91]).
- The proposed changes in the draft amendments to the Planning Scheme, if adopted, would not significantly change the planning context of the existing Planning Scheme (at [32]).

Conclusion

The Court upheld the Council's decision to refuse the Development Application and dismissed the appeal.

Ride the wave: Planning and Environment Court of Queensland dismisses a submitter appeal against the approval of a development application for a surf park at Glass House Mountains despite the loss of good quality agricultural land

Matt Richards | Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sanad Capital Pty Ltd v Sunshine Coast Regional Council and Anor* [2023] QPEC 8 heard before Cash DCJ

May 2024

In brief

The case of *Sanad Capital Pty Ltd v Sunshine Coast Regional Council and Anor* [2023] QPEC 8 concerned a submitter appeal by Sanad Capital Pty Ltd (**Submitter**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Sunshine Coast Regional Council (**Council**) to approve an impact assessable development application (**Development Application**) for a development permit for a material change of use for a tourist attraction, being a surf park (**Proposed Development**), on agricultural land at Glass House Mountains.

The Court considered whether the Proposed Development is in conflict with the *South East Queensland Regional Plan* (**SEQRP**) and the *Sunshine Coast Planning Scheme 2014* (**SCPS**), and in particular the significance of the loss of good quality agricultural land, whether there are unacceptable impacts on amenity or landscape values, the location of the Proposed Development being outside a "tourism focus area", and the economic value of the Proposed Development.

The Court dismissed the appeal and approved the Development Application (see [2] and [157]).

Background

Surf Parks Australia Pty Ltd (**Co-respondent**) sought to establish a surf park on 13 hectares of agricultural land at Glass House Mountains, adjacent to the Bruce Highway (**Land**). The Land is an "*important agricultural area*" with Class B agricultural land under the *State Planning Policy* (at [13]). It is also relevantly located within the Rural Zone and the regional inter-urban break, and is included in the Scenic Amenity Overlay, in the SCPS (at [13]).

The Development Application involves the reconfiguration of two lots to create a 10-hectare lot for the surf park on the northern part of the Land and a three-hectare lot for the remaining good quality agricultural land, as well as a material change of use of the northern lot to develop "*… a high quality, purpose built surf park dedicated to surfers and those who want to become surfers*" (see [6] to [7]).

During public notification of the Proposed Development the Submitter, which was also granted a development approval for a material change of use for a tourist attraction for a surf park on land at Glenview in September 2021, objected to the Development Application (see [3] and [14] to [15]).

The Council approved the Development Application, subject to conditions, on 14 December 2021 (at [3]).

Court finds that the loss of good quality agricultural land does not weigh against approval in circumstances where the exceptions in the assessment benchmarks are met

The Court was satisfied that the exceptions to the assessment benchmarks in the SCPS and the SEQPR that seek to protect agricultural land from being fragmented, alienated, or diminished are satisfied (at [25]) for reasons including the following:

- *Need* – The Court accepted the evidence that both the Submitter's and Co-respondent's surf parks will attract approximately 200,000 visits per annum and that there was no evidence to suggest that the Submitter's surf park alone could accommodate this demand (at [59]).The Court held that any reduction in profit made by the Submitter's surf park "*… is a matter of private economics and not determinative of the issue of need*" (at [60]). Further, qualitative matters such as "*… the promotion of competition, choice, and healthy lifestyles, the prospect of jobs, and the contribution two surf parks would make to the tourism infrastructure of the Sunshine Coast with consequential economic benefits*" support a need for the Proposed Development (at [61]).

- *No other suitable sites* – The Court accepted evidence that the Land is "*… 'as well placed, if not better placed' than any alternative site*" (at [64]) and was satisfied that there was no other suitable and available site for the Proposed Development (at [72]). The Court did not consider the loss of good quality agricultural land to be a matter warranting refusal because "*… the land in question is not of substantial value*" (at [86]).

Court finds that the Proposed Development is not "urban development" and does not depart from the relevant assessment benchmarks in the SCPS

Items (a) and (b) in table 3.8.2.1 of the Strategic framework in the SCPS (**Strategic Framework**) are aimed at protecting and enhancing regional and sub-regional inter-urban breaks and avoiding adverse impact by urban or residential development (at [88]). Overall outcome 6.2.19.2(2)(p) of the Rural Zone Code in the SCPS also provides that development does not adversely impact upon the functional integrity of the regional and sub-regional inter-urban breaks (at [89]). The Scenic Amenity Overlay Code provides similar aims, in particular Performance Outcome PO2 states that "*[u]rban and rural residential development does not occur within the regional inter-urban break*" (at [90]).

The main issues in dispute were "*… whether there will be signage that would detract from scenic amenity, whether the vegetation will seem 'unnatural' because it is in straight lines, and whether the time it will take to become established is of concern*" (at [96]). The Court found in favour of the Council and the Co-respondent in respect of each issue having accepted the evidence of the visual amenity experts that the Proposed Development "*… would not significantly diminish the scenic amenity and landscape values of the inter-urban break*" (see [93] to [94] and [97] to [99]).

The Court was also satisfied that the Proposed Development will not diminish the sense of separation provided by the inter-urban break (see [93] and [100]) and that the Proposed Development was not "*urban development*" for the purposes of PO2 of the Scenic Amenity Overlay Code despite it possessing elements that are often found in urban settings (at [108]).

Court finds that the location of the Proposed Development outside of the "tourism focus area" does not conflict with the relevant assessment benchmarks in the SCPS

Specific outcome 3.4.6.1(a) of the Strategic Framework states that tourist orientated activities and services are to be within the "*tourism focus area*" (at [110]).

The Court held that developing a tourist attraction outside of a "*tourism focus area*" will not necessarily conflict with the Strategic Framework which is supported by Specific Outcome 3.4.6.1(e) providing for a merits-based assessment of tourist development in other areas (at [111]).

The Court rejected the Submitter's argument that only nature and hinterland tourist uses are consistent with the values of the inter-urban break because it was incorrectly premised on the description of tourist uses for the Glass House Mountains listed in Table 3.4.6.1 of the Strategic Framework being exhaustive and the Table makes no reference to the inter-urban break (at [113]). The Court also rejected the Submitter's argument that the SEQRP intends to restrict the types of tourist uses permitted to nature-based tourism, because "*tourist and outdoor recreation*" in the inter-urban break is also contemplated (at [114]).

The Court found that the Proposed Development did not, by virtue of its location outside of the "*tourism focus area*", conflict with the SCPS (at [116]).

Court finds that the Proposed Development will not unacceptably effect amenity

The Submitter asserted that the Proposed Development would have unacceptable adverse impacts on local amenity due to the noise that might be generated by machinery and patrons contrary to section 6.2.19.2(2)(f) and Performance Outcome PO1 of the Rural Zone Code and Overall Outcome 9.4.3.2(2)(a) of the Nuisance Code (see [117] to [119]).

The Submitter produced no evidence relating to noise. The expert engaged by the Co-respondent opined that there was suitable separation between the Proposed Development and existing land uses and that the Proposed Development would not result in environment amenity impacts (at [120]). The Court was satisfied that the various conditions on approval pertaining to amenity, including the establishment and maintenance of an agricultural buffer and the compliance of acoustic measures and treatments with a noise impact assessment, were sufficient to ensure "*… no significant, unacceptable, or unreasonable negative effect on amenity*" (at [121]).

Court finds that provisions in the SCPS relating to the encouragement of tourist activity favour approval

The Council and the Co-respondent argued that the SEQRP and the SCPS exhibit an underlying policy of encouraging appropriate tourist development. The Submitter did not dispute this contention, but reiterated the need to preserve good quality agricultural land (at [124]).

The Court observed that the SCPS "*… recognises tourism as a 'traditional sector' and 'high-value' industry in the economy of the Sunshine Coast*" (at [125]). The Court accepted that, subject to those regarding the preservation of good quality agricultural land, the assessment benchmarks in the SEQRP and the SCPS promoting tourism favour approval of the Proposed Development (at [126]).

Court finds that the Planning Regulation 2017 does not prescribe a matter to be considered and, even if it did, it would not favour refusal of the Proposed Development

The Submitter contended that the Proposed Development is non-compliant with the assessment benchmarks in schedule 10, part 16, division 2 of the *Planning Regulation 2017* (Qld) (**Planning Regulation**), which concern development assessment for a tourist or sport and recreation activity in the SEQ regional landscape and rural production area and the SEQ rural living area.

Under item 24 of schedule 10 of the Planning Regulation, "*[a] material change of use of premises for a tourist activity … is assessable development if*", among other things, "*the use … involves an ancillary commercial or retail activity with a gross floor area of more than 250m^2*" (at [132]). Whether the shop, kitchen, and bar included in the plans for the Proposed Development involve an "*ancillary commercial or retail activity with a gross floor area of more than 250m^2*" was in dispute (at [133]).

The Submitter argued that the total gross floor area (**GFA**) of the shop, kitchen, and bar exceeds 250m^2 because "*… the operation of the bar will necessarily involve an area greater than [its recorded GFA] as some patrons will congregate at and near the bar*" (at [135]). Whereas, the Co-respondent submitted that the shop, kitchen, and bar are not ancillary to the tourist attraction for the purpose of the definition of "*tourist activity*" because the uses form part of the activity (at [136]).

The Court did not accept the Co-respondent's argument on the basis that it "*… would produce an inconsistency in the treatment of 'ancillary' … in Schedule 24 and item 24(b)(ii)*" (at [137]). Rather, the Court held that the shop, kitchen, and bar each involve an ancillary commercial use, but none are essential to the operation of the Proposed Development as a tourist facility (at [140]). The total GFA of the shop, kitchen, and bar is exactly 250m^2 and, applying the planning provisions with "*common sense*", the Court held that the spilling of commercial activity "*at and near the bar*" will not cause the total GFA to exceed this threshold.

Thus, the Court held that schedule 10, part 16, division 2 of the Planning Regulation is not a prescribed matter under section 45(5)(b) of the *Planning Act 2016* (Qld) to be considered and, even if it was, it would not weigh in favour of refusal of the Proposed Development (see [141] to [147]).

Conclusion

The Court, in conclusion, held that "*[t]he loss of a small area of good quality agricultural land will be more than offset by the economic and social benefits provided by the proposed development, which can be delivered without unacceptable impacts on amenity or town planning considerations*" (at [152]).

The Court dismissed the appeal and approved the Development Application. The Court recognised that changes to the conditions of the Development Application may be appropriate before final orders are made (at [157]).

Colin Biggers & Paisley

No utility in declaration: Planning and Environment Court of Queensland dismisses an application for declaratory relief about the applicable planning legislation

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Parklands Blue Metal & Ors* [2024] QPEC 3 heard before Long SC DCJ

May 2024

In brief

The case of *Sunshine Coast Regional Council v Parklands Blue Metal & Ors* [2024] QPEC 3 concerned an originating application made to the Planning and Environment Court of Queensland (**Court**) by the Sunshine Coast Regional Council (**Council**) for declarations about the planning legislation applicable to a yet to be finalised appeal against the Council's refusal of a development application for a hard rock quarry in Verrierdale, Sunshine Coast (**Development Application**).

The Development Application was made, but not decided, under the repealed *Integrated Planning Act 1997* (Qld) (**IPA**). The Council refused the Development Application at a time when the repealed *Sustainable Planning Act 2009* (Qld) (**SPA**) was in force.

The Court dismissed the originating application finding that there was no utility in deciding declaratory relief of the nature sought.

Background

The Development Application was properly made in July 2009 under the IPA and refused in October 2011. The Respondent filed an appeal against the refusal in December 2011 which was allowed in May 2014 (**Appeal**), and the Court adjourned the Appeal for the parties to formulate conditions based on the Court's published reasons (at [51]). The Council sought leave to appeal against the Court's judgment in the Appeal, which was refused. The Appeal was the subject of a further hearing in early 2017 about some disputed conditions, which was resolved with an order being made in June 2017 that "*Conditions to be imposed in accordance with Ex 2 (as amended 20.04.17) and these Reasons*" (**June 2017 Order**) (at [3]).

The position therefore at the time the originating application was filed was that there was no judgment effecting any development approval. The Council contended it filed the originating application "*… to facilitate rather than frustrate, any eventual judgment of the Court in effecting an appropriately conditioned development approval*" (at [5]). More particularly, the Council contended for declarations that the applicable legislation should be IPA or SPA, but not the current in force *Planning Act 2016* (Qld) (**PA**).

Court finds it has jurisdiction to hear the originating application

Since coming into force on 3 July 2017, the jurisdiction of the Court is governed by the *Planning and Environment Court Act 2016* (Qld) (**PECA**). Section 11 of the PECA relevantly states a general right of any person to start a proceeding seeking a declaration about a matter or the interpretation of the PECA or PA and the jurisdiction of the Court to make an order about any declaration it makes.

The transitional provision in section 76 of the PECA permits the Court to hear an appeal commenced under the SPA, but not decided, or if there was an existing right to appeal immediately before the SPA was superseded.

The Court determined that it had jurisdiction to hear and determine the originating application under sections 76(1) and 11 of the PECA (at [12]).

Council contends that either the IPA or SPA applied to the Appeal but not the PA

The main issue considered by the Court was whether there would be utility in granting declaratory relief. The Council contended that the PA does not cater for documents, processes, and applications that were submitted under the IPA but were not completed by the time of the appeal of the SPA (at [18]).

The Council sought the following declarations as a matter of law (at [2]):

> (a) *a declaration, pursuant to section 4.1.21(1)(a) of the IPA and/or section 818(2)(a) of the SPA and/or section 20(2)(c), section 20(2)(e), section 20(4)(b) and/or section 20(4)(d) of the Acts Interpretation Act 1954 (the "**AIA**"), that the Development Application:*
>
> (i) *is a development application under the IPA;*
>
> (ii) *is not a development application under the SPA; and*
>
> (iii) *is not a development application under the [PA]*
>
> (b) *a declaration, pursuant to section 4.1.21(1)(a) of the IPA and/or section 818(2)(a) of the SPA and/or section 20(2)(c), section 20(2)(e), section 20(4)(b) and/or section 20(4)(d) of the AIA and/or section 11(a) and section 76 of the PECA, that any future infrastructure agreement in respect of the Development Application (being an infrastructure agreement entered into after the commencement of the PA):*
>
> (i) *is an infrastructure agreement under the IPA;*
>
> (ii) *is not an infrastructure agreement under the SPA; and*
>
> (iii) *is not an infrastructure agreement under the PA.*
>
> (c) *a declaration, pursuant to section 4.1.21(1)(a) of the IPA and/or section 818(2)(a) of the SPA and/or section 20(2)(c), section 20(2)(e), section 20(4)(b) and/or section 20(4)(d) of the AIA and/or section 11(a) and section 76 of the PECA, that the Appeal:*
>
> (i) *is an appeal under the IPA;*
>
> (ii) *is not an appeal under the SPA; and*
>
> (iii) *is not an appeal under the PA;*
>
> (d) *a declaration pursuant to section 4.1.21(1)(a) of the IPA and/or section 818(2)(a) of the SPA and/or section 20(2)(c), section 20(2)(e), section 20(4)(b) and/or section 20(4)(d) of the AIA and/or section 11(a) and section 76 of the PECA, that any development approval issued by order or judgment of the Court in the Appeal, arising from the Development Application:*
>
> (i) *is a development approval under the IPA;*
>
> (ii) *is a development approval that is taken to be a development approval under the SPA; and*
>
> (iii) *is not a development approval for the purposes of the PA;*
>
> (e) *such further or other declarations or orders as this Honourable Court considers appropriate.*

Court finds difficulty in the Council's reliance on the SPA transitional provisions

The Council contended as follows (at [8]):

> (a) *Pursuant to s 20A(2) of the [AIA], the effect of the transitional provisions of the SPA did not end on the repeal of the SPA;*
>
> (b) *Further, or in the* alternative*, pursuant to s 20(2) of the AIA the repeal of the SPA did not affect the right of the first respondent to have the appeal heard and determined and the development application assessed and decided, under the IPA; and*
>
> (c) *None of the transitional provisions of the [PA] effect transition of documents or processes made or* commenced *under the IPA, which were not in force and transitioned to documents or processes under the SPA by the time of the commencement of the PA, to being documents or processes under the PA.*

With respect to the first contention, the relevant SPA transitional provisions are in section 802 which states as follows:

> (2) *For dealing with and deciding the application, repealed IPA continues to apply as if this Act had not* commenced*.*
>
> *…*
>
> (7) *If a* development *approval is given under repealed IPA in relation to the application, it is taken to be a development approval given under this Act.*

The Respondent contended that there is difficulty in relying on the word "*under*" in the declarations sought by the Council (at [36]). Schedule 1 of the *Acts Interpretation Act 1954* (Qld) (**AIA**) defines "*under*" as follows:

> *… for an Act or a provision of an Act, includes—*
>
> *(a) by; and*
>
> *(b) for the purposes of; and*
>
> *(c) in accordance with; and*
>
> *(d) within the meaning of.*

The Court agreed, and found that section 311 of the PA preserves the application of the SPA to the Appeal and that the SPA transitional provisions preserve the application of the IPA to the assessment of the Development Application (at [37]). The Court went on to find that the Appeal and any prospective approval that might be given "*… must necessarily be for the purposes of and in accordance with the PA*" (also at [37]).

Court acknowledges that section 802 of the SPA read in conjunction with section 14H of the AIA to be a reference to the PA

The Council contended that any approval of the Development Application may be preserved under section 802(7) of the SPA which provides that "*[i]f a development approval is given under the repealed IPA in relation to the application, it is taken to be a development approval given under this Act.*"

The Court read section 802 of the SPA in conjunction with section 14H(1)(b) of the AIA, which states as follows:

> *In an Act, a reference to a law (including the Act) includes a reference to the following … if the law has been repealed and remade (with or without modification) since the reference was made—the law as remade, and as amended from time to time since it was remade …*

The Court held that there was no basis to conclude that section 14(H)(1)(b) of the AIA had been displaced by a contrary intention, and therefore the effect of section 802(7) of the SPA when read with section 14(H)(1)(b) of the AIA is that any development approval given under the repealed IPA is taken to be an approval given under the PA (at [48]).

Court finds previous Court determinations to be consistent with section 286 of the PA

The Court also considered the categorisation of "an order", and more specifically the Court's order allowing the Appeal in 2014 and the June 2017 Order, for the purpose of section 286 of the PA which continues the effect of documents in effect under the SPA when the PA commenced (see [2] and [55]).

The Court held the effect of section 286 of the PA is to carry forward the effect of various determinations made under repealed legislation, and that the determinations by the Court were "*entirely consistent*" with the purpose of section 286 of the PA (at [55]).

No declaration for future infrastructure agreement

The Court held that it was inappropriate to make the declarations sought by the Council in respect of a future infrastructure agreement as the Council did not provide any legislative provision to support its position (at [56]).

Conclusion

The Court held that, in light of the effect of its considerations, there was no support for finding that a prospective development approval would not be given or made under the PA or that the PA would not apply to any such approval (at [60]). The Court therefore held that there was no support for making any of the declarations sought by the Council and dismissed the originating application.

Issues need identifying: Planning and Environment Court of Queensland finds that the issues in dispute in the substantive proceedings have been far from adequately identified

Marnie Robbins | Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *GB Technology & Consulting Pty Ltd v Sunshine Coast Regional Council* [2023] QPEC 16 heard before Long SC DCJ

May 2024

In brief

The case of *GB Technology & Consulting Pty Ltd v Sunshine Coast Regional Council* [2023] QPEC 16 concerned an application in pending proceeding (**Application**) in the Planning and Environment Court (**Court**) by GB Technology & Consulting Pty Ltd (**Applicant**) regarding an appeal against the decision of the Sunshine Coast Regional Council (**Council**) to refuse a development application for a development permit for operational works to facilitate the creation of a wedding venue (**Development Application**) on land in Bald Knob, Queensland (**Land**).

As part of the Application, the Applicant sought the following four orders (at [6]):

- Pursuant to section 46(3) of the *Planning and Environment Court Act 2016* (Qld) (**PECA**), the appeal proceed upon the basis of a minor change to the Development Application.
- On the basis of the first order confirming a minor change, a consequential order that the matters relating to the Biodiversity Waterways and Wetlands Overlay Code (**BWW Overlay Code**) identified in the Council's Particularised Reasons for Refusal (**Council's Reasons**) are not in dispute in the substantive proceeding.
- That the matters stated in the fifth paragraph, excluding paragraph 5(d), of the Council's Reasons (**Paragraph 5**) are not issues in dispute in the substantive proceeding.
- The Council is required to provide further and better particulars as to the issues in dispute which are to be addressed by its nominated town planning expert.

The Court considered whether the change to the Development Application is a minor change, whether there are any non-compliances with the BWW Overlay Code, whether the matters stated in Paragraph 5 are issues in dispute and if the Court is permitted to take them into account under section 60(2) of the *Planning Act 2016* (Qld) (**Planning Act**), and whether the parties have adequately identified the issues in dispute in the substantive proceedings.

The Court found that there would be little utility in making the orders sought, apart from the order that the appeal proceed on the basis of the minor change to the Development Application, in circumstances where the issues in dispute in the substantive proceedings were "*far from adequately identified*" (at [45]).

Background

The Development Application relevantly proposes various earthworks on the Land (**Proposed Development**).

The Council refused the Development Application. The Council's decision notice did not refer to particular non-compliance with the relevant assessment benchmarks in the *Sunshine Coast Planning Scheme 2014* (Version 22) (**Planning Scheme**) but rather stated that the Proposed Development to create a wedding venue is an inconsistent use for the rural zone (at [3]).

Paragraphs one to four of the Council's Reasons identify provisions in the Landslide Hazard and Steep Land Overlay Code, the Works Services and Infrastructure Code, the Biodiversity Waterways and Wetlands Overlay Code, and the Stormwater Management Code of Planning Scheme, which the Council asserts the Proposed Development departs from (at [4]).

Paragraph 5 of the Council's Reasons relevantly assert that the following "discretionary matters" also favour a refusal of the Proposed Development (at [4]):

> *...*
>
> *(f) approval of the [Proposed Development] would result in unacceptable safety impacts and risks arising from the steepness of the land and geotechnical issues;*

> (g) *approval of the [Proposed Development] would result in unacceptable Scenic Amenity impacts both during the construction phase and once the proposed development had been carried out.*

The Applicant asserts in its List of Matters in Support of Approval that the Proposed Development complies with or can be conditioned to comply with, the relevant assessment benchmarks referred to in paragraphs one to four of the Council's Reasons and that the "discretionary matters" referred to in Paragraph 5 are irrelevant to the assessment of the Proposed Development which is code assessable (at [5]).

Court finds that the change to the Development Application is a minor change and there are no non-compliances with the BWW Overlay Code

The Applicant sought to change the Proposed Development (**Change Application**) to avoid any non-compliance with the BWW Overlay Code (at [7]). In order for the Court to consider the Change Application, the change must be for a "minor change" as defined in schedule 2 of the Planning Act (see section 46(3) of the PECA).

The Council did not contend that the change was not for a minor change, but took issue with the affidavit of a senior civil and environmental engineer deposing that the proposed change does not result in "*substantially different development*" because the affidavit did not state the matters required for an expert report under rule 35(5) of the *Planning and Environment Court Rules 2018* (Qld) (**Rules**) (at [9]).

The Court excused the non-compliance with the Rules because the deponent has demonstrated experience in the Court as an expert witness and has acknowledged the matters required by rule 35(5) (at [16]). Thus, the Court had regard to the affidavit and permitted the appeal to proceed on the basis of the changed Development Application (at [17]).

Accordingly, it was uncontroversial that there were no longer any non-compliances with the BWW Overlay Code.

Court finds that the matters contained in Paragraph 5 may represent an inappropriate exercise of the Court's discretion in the context of a code assessment

In deciding whether the matters in Paragraph 5 should be considered issues in dispute in the substantive proceeding, the Court had to firstly determine whether they are matters which could be taken into account in exercising the discretion afforded by section 60(2)(b) of the Planning Act in relation to code assessment.

Section 60(2) of the Planning Act relevantly states as follows:

> (2) *To the extent the application involves development that requires code assessment, and subject to section 62,* the *assessment manager, after carrying out the assessment—*
>
> (a) *must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and*
>
> (b) *may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and*
>
> *...*

The Applicant contended that the matters in Paragraph 5 could not be taken into account in making a decision under section 60(2) of the Planning Act, because the discretion does not extend to matters beyond non-compliance with the relevant assessment benchmarks (at [25]). Whereas the Council argued that the matters in Paragraph 5 could be relevant to an exercise of the discretion under section 60(2) (at [24]).

The Court found that the discretion under section 60(2)(b) of the Planning Act is (at [36]):

> (a) *only engaged in terms of considerations enlivening the prospect of approval of the application, despite and only where there is some identified noncompliance with the assessment benchmarks;*
>
> (b) *to be exercised in reaching the decision whether or not to approve the application, by being "based on the assessment of the development carried out by the assessment manager"; and*
>
> (c) *therefore to be based on an assessment (subject to whatever relevant application s 45(7) may have) which "must be carried out only –*
>
> (a) *against the assessment benchmarks in a categorising instrument for the development; and*
>
> (b) *having regard to any matters prescribed by regulation for this paragraph."*

The Court observed that section 45(3) of the Planning Act may also allow for regard to be had to other matters, being the matters prescribed by the *Planning Regulation 2017* (Qld) (at [26]).

The Court held that the discretion in section 60(2)(b) of the Planning Act allows a consideration of the significance of the assessment benchmarks with which there is non-compliance. However, that discretion must be qualified in the sense that "*… care must be taken to avoid introducing the breadth of matters which might be relevantly introduced into an impact assessment*" (at [40]).

The Court held that it is necessary to consider the importance of a non-compliance in the context of the relevant assessment benchmarks and whether a non-compliance should be determinative (at [41]). In the absence of an indication by the Council that the matters in Paragraph 5 relate to a non-compliance with an assessment benchmark, the Court found it inappropriate to rule on whether Paragraph 5 is relevant to an issue in dispute but noted that the current form of Paragraph 5 is "*… completely unsuitable to the identification of any issue ...*" (see [43] to [44]).

Court finds that the issues in dispute in the substantive proceeding have not been adequately identified by the parties

The Court held that at this stage in the proceeding there is no clear identification of the issues to allow a determination of the relevance of a particular part of the Planning Scheme or other consideration (at [44]).

The Court further noted that little guidance was provided by the Applicant as to the bases upon which the Applicant was seeking to obtain the relief sought and that the issues in dispute in the substantive proceeding must be narrowed as the matter approaches hearing (at [45]).

Conclusion

The Court ordered that the appeal proceed upon the changed Development Application but did not make the other orders sought by the Applicant. The Court also relevantly ordered that the parties provide a list of issues in dispute in the substantive appeal on or before the next review date (at [47]).

Colin Biggers & Paisley

No privity: A clause of an agreement requiring a new owner to enter into a similar agreement is not enforceable by the new owner and cannot require the continuing party to enter into the new agreement

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Bellevue Station Pty Ltd v Consolidated Pastoral Company Pty Ltd & Anor* [2024] QCA 47 heard before Mullins P and Dalton JA, and Applegarth J

May 2024

In brief

The case of *Bellevue Station Pty Ltd v Consolidated Pastoral Company Pty Ltd & Anor* [2024] QCA 47 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) against the decision of the Supreme Court of Queensland (**Supreme Court**) in the case of *Consolidated Pastoral Company Pty Ltd v Bellevue Station Pty Ltd & Anor; Bellevue Station Pty Ltd v Consolidated Pastoral Company Pty Ltd* [2023] QSC 202 in respect of a give and take agreement about the use of terrain separating land in Far North Queensland described as Bellevue Station and Wrotham Park (**Agreement**).

The Agreement was entered into by the First Respondent and the Second Respondent in 2009. Similar give and take agreements have been known to exist in relation to Bellevue Station and Wrotham Park dating back to 1980.

The Second Respondent sold Bellevue Station to the Appellant in 2021 and had, in accordance with Clause 6 of the Agreement, disclosed the Agreement to the Appellant and the contract of sale required the Appellant to enter into a similar arrangement with the First Respondent.

The First Respondent refused to sign an agreement put to it by the Appellant and the Second Respondent and Appellant subsequently entered into a deed of assignment seeking to assign the Second Respondent's rights under the Agreement to the Appellant (**Deed of Assignment**).

The Appellant relevantly sought declarations in the Supreme Court that the First Respondent was obliged to sign the new agreement, and the First Respondent sought declarations to the opposite effect.

The Supreme Court found in favour of the First Respondent and declared that the Deed of Assignment is of no effect at law, that the Appellant is not a party to the Agreement and cannot enforce its clauses, and that Clause 6 of the Agreement does not require the First Respondent to enter into the new agreement.

The Court of Appeal held that the orders of the Supreme Court were correct and dismissed the appeal.

Clause 6 of the Agreement

Clause 6 of the Agreement was significant and important to the proceedings and relevantly states as follows:

> *In the event that either party disposes of its land, it will draw the attention of the incoming purchase to this Agreement and have them enter into a similar arrangement with the continuing party.*

It was this clause that the Appellant contended required the First Respondent to enter into a new agreement on similar terms to the Agreement.

Issues considered by the Supreme Court and Court of Appeal

The Supreme Court and Court of Appeal considered the following issues:

- *Issue 1* – Whether covenants in the Agreement "run with the land" at general law and in equity, such that the Appellant is entitled to their benefit despite not being a party to the Agreement.
- *Issue 2* – Alternatively, whether section 55 of the *Property Law Act 1974* (Qld) (**Property Law Act**), which deals with contracts for the benefit of third parties, renders the Agreement enforceable by the Appellant as a beneficiary of the Agreement.
- *Issue 3* – Alternatively, whether the Appellant has been assigned the benefit of the covenants in the Agreement under the Deed of Assignment such that the First Respondent is bound to enter into the new agreement.

Criteria for a covenant to run with the land

A "covenant" is a promise made in a deed. A restrictive covenant restrains the covenantor from doing an act, "*… the benefit and burden of which runs with the land and is enforceable in equity*" (at [24] of the Supreme Court judgment). Whereas, a positive covenant does not generally run with the land (at [28] of the Supreme Court judgment). A covenant expressed as personal is for the covenantee only and does not run with the land (at [48] of the Court of Appeal judgment).

For a covenant to run with the land the following criteria must be satisfied:

Common law criteria (at [29] of the Supreme Court judgment)	Equity criteria (at [87] of the Supreme Court judgment)
The covenant touches and concerns the covenantee's land.	The covenant must touch and concern or benefit the land of the covenantee.
There is an intention that the benefit of the covenant should run with the land.	The covenantee must own the benefited land at the time the covenant is made.
The covenantee had a legal interest in the benefited land at the time the covenant was made.	The covenant must be intended to benefit the land of the covenantee.
	The land benefited must be identified or identifiable.

In the case of *P & A Swift Investments (a firm) v Combined English Stores Group PLC* [1989] AC 632 (**P&A Case**), the House of Lords provided the following test for whether a covenant touches and concerns the land:

> *(1) The covenant benefits only reversioner for the time being, and if separated from the reversion ceases to be of benefit to the covenantee. (2) The covenant affects the nature, quality, mode of user or value of the land of the reversioner. (3) The covenant is not expressed to be personal (that is to say neither being given only to a specific reversioner nor in respect of the obligations only of a specific tenant). (4) The fact that a covenant is to pay a sum of money will not prevent it from touching and concerning the land so long as the three foregoing conditions are satisfied and the covenant is connected with something to be done on, to or in relation to the land.*

Section 53 of the Property Law Act effectively codifies the common law position that covenants "relating to land" shall be deemed to be made with the covenantee and its successors in title. The Supreme Court held that whether a covenant "relates to land" requires the same considerations as stated in the P&A Case (see [35] and [39] to [40] of the Supreme Court judgment).

The Court of Appeal also observed the following in respect of the enforceability of covenants outside of contract, which ought to be considered in order (at [37]):

1. *If there is privity of contract, all covenants are enforceable …*
2. *If there is privity of estate, but not privity of contract, only covenants which touch and concern the land are enforceable …*
3. *If there is privity neither of contract nor of estate, then with two exceptions, no covenants are enforceable.*

Issue 1 – personal covenants do not "run with the land"

The Agreement is a commercial contract and thus ought to be construed by what a reasonable business person would have, having regard to the contract as a whole, understood the terms of the Agreement to mean as informed by the language used, surrounding circumstances, and the commercial purpose or objects secured by the Agreement and is to avoid making commercial nonsense (see [56], [57], and [58] of the Supreme Court judgment).

In respect of Issue 1, the Supreme Court held that limbs 1, 2, and 4 of the test in the P&A Case were satisfied (at [59]), but that the third limb failed because Clause 2 of the Agreement which relates to the use of Bellevue Station and Wrotham Park by the First and Second Respondent is a personal covenant excluding it from touching and concerning the land and properly construed Clause 6 does not require the continuing owner to enter into a new agreement (see [66] and [67]).

Whilst it was not necessary for the Supreme Court to consider the intention of the parties because the covenants were held not to touch and concern the land, the Supreme Court observed in obiter that there was nothing in the Agreement that suggested the covenants would benefit the Second Respondent's successors in title and Clause 6 was intended to give the First Respondent a choice to continue the arrangement or not (see [72], [73], and [77]).

The Supreme Court also found that for the same reasons that the covenants did not run with the land in equity (see [88] to [90]), and that section 53 of the Property Law Act does not operate to displace an intention that a covenant does not run with the land (see [71] and [80]).

The Court of Appeal held that there was no obligation on the First Respondent to enter into the new agreement under Clause 6 of the Agreement, and that implying such obligation is not necessary to achieve the "*business efficacy or commercial purpose*" of the Agreement or to give the Second Respondent the benefit of the Agreement (see [10], [15] to [17], [22], [56], and [59]). Even if there was an obligation, the majority of the Court of Appeal held that Clause 6 would be considered void at law because it is about an agreement to agree in respect of which the terms are uncertain (see [10], [18], and [19]).

The Court of Appeal also held that section 53 of the Property Law Act could not apply because the language of the Agreement leads to a finding that the promises within are personal do not touch and concern the land (at [12], [52], and [57]).

Issue 2 – no duty enforceable by a beneficiary

To satisfy section 55(1) of the Property Law Act it must be established that there is a promise "*… to do or refrain from doing an act for the benefit of a beneficiary …*" and the parties must "*… [intend] to create a duty enforceable by a beneficiary*" (see [94] of the Supreme Court judgment and section 55(6) of the Property Law Act).

The Supreme Court rejected the Appellant's argument that Clause 2 of the Agreement was also for the benefit of the Second Respondent's successors in title and held that the Agreement does not contain a promise enforceable by a beneficiary, rather the Agreement contemplated rights under a new agreement if agreed to by the continuing owner (at [97]).

The majority of the Court of Appeal held that because of its finding in respect of Issue 1, there is no promise enforceable under section 55 of the Property Law Act (see [10] and [26]).

Issue 3 – no assignment where identity is important to the party with the obligation

In respect of the assignment of legal things in action under section 199 of the Property Law Act, the Supreme Court held that an obligation cannot be assigned "*… where the identity of the person to whom the obligation is owed is a matter of importance to the person on whom the obligation rests*" (at [110]). The Court of Appeal also observed this at [33] of its judgment.

The Supreme Court held that Clause 6 of the Agreement is specific to the identity of the parties and the Second Respondent has a right to decide whether to enter into a new agreement, such that the identity of a new owner is of importance to the continuing owner (at [111]). Thus, the rights under the Agreement are personal and cannot be assigned. The Supreme Court declared the Deed of Assignment invalid (at [112]).

The Court of Appeal doubted that the rights under the Agreement were assignable, and held that even if they were, by the time of the Deed of Assignment, the Second Respondent had nothing to assign that would compel the First Respondent to enter into the new agreement or to exercise the Second Respondent's rights under the Agreement, because it is implied in the Agreement that if a party sells its lease it will no longer have the right to use the other party's land under the Agreement and the Second Respondent had sold its land thereby ending the Agreement (see [11], [35], and [36]).

Conclusion

Whilst the reasoning of the Court of Appeal differed in some respects to the Supreme Court, the Court of Appeal agreed with the orders made by the Supreme Court and dismissed the appeal.

Approval ahoy: Planning and Environment Court of Queensland allows appeal against decision to refuse a development application for marine industry use

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Harbour Island Pty Ltd v Gold Coast City Council & Anor* [2023] QPEC 29 heard before Kent KC DCJ

June 2024

In brief

The case of *Harbour Island Pty Ltd v Gold Coast City Council & Anor* [2023] QPEC 29 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision by the Gold Coast City Council (**Council**) to refuse a development application for a preliminary approval, including a variation request, which if approved would vary the effect of the planning scheme by requiring future development applications to be assessed against the superseded planning scheme with the *Gold Coast International Marine Precinct Plan and Place Code* (**GCIMP PoD and Code**) replacing the Coomera Local Area Plan including the Coomera Local Area Plan Place Code (**Development Application**).

The Court allowed the appeal and approved the Development Application, adjourning the matter for the parties to consider appropriate conditions of the approval.

Background

The Development Application was in respect of land at 2, 54, and 110 Shipper Drive, Coomera, which fronts the Coomera River and has an area of 61.98 hectares (**Land**). The Development Application had two components:

- Preliminary approval for a material change of use for mixed use development as set out in the proposed GCIMP PoD and Code.
- Variation request to vary the effect of the *"Our Living City" Gold Coast Planning Scheme 2003 Version 1.2 Amended November 2011* (**Superseded Planning Scheme**), with the GCIMP PoD and Code replacing the Coomera Local Area Plan including the Coomera Local Area Plan Place Code.

The Land is bisected by the reserve for the M1 highway extension, the Coomera Connector, and as a result, is divided into four separate precincts (see [5] to [8]):

- Western precinct, 46.1% of the developable Land (Precinct 1).
- Eastern precinct, 1.8 hectares and 6.4% of the developable Land, fronting the proposed internal marina (Precinct 2).
- Southern precinct, 13.4 hectares and 47.5% of the developable Land, fronting the internal marina, to be developed for waterfront industry (Precinct 3).
- Open space precinct, 28.4 hectares and intended to conserve natural vegetation and environmental qualities (Precinct 4).

The Appeal was commenced in December 2021, heard in May 2023, decided in June 2023, and governed by the *Planning and Environment Court Act 2016* (Qld) (**PECA**). Under section 46(6) of the PECA, the Court was required to assess the Appeal against the Superseded Planning Scheme.

Pursuant to section 61(2) of the *Planning Act 2016* (Qld) (**PA**), when deciding variation requests, the Court must relevantly consider:

> *(a) the result of the assessment of that part of the development application that is not the variation request; and*
>
> *(b) the consistency of the variations sought with the rest of the local planning instrument that is sought to be varied; and*
>
> *(c) the effect the variations would have on submission rights for later development applications …*

Issues

The following issues were agreed between the parties and considered by the Court (at [25]):

(a) *Land use and development generally;*

(b) *Need;*

(c) *Flooding (limited, in a practical sense to consideration of external impacts only);*

(d) *Other relevant matters.*

Court finds no unacceptable risk of proliferation of non-marine uses which could not be addressed by approval conditions

The Court considered whether approving the Development Application would result in "unacceptable uncertainty". The Council's town planning expert opined that the proposed GCIMP PoD and Code is more accommodating to non-marine industry uses being "*… considerably more lenient for general purpose warehouses, outdoor storage and even self-storage facilities*" (at [28]). Although concerned that the proposal did not accurately reflect the precinct intent, the Council's town planning expert recognised that the proposal could be redrafted for better clarity (at [31]).

The Applicant submitted that there are no detailed designs or a precise tenancy mix as that is "*… the very nature of the preliminary approval and variation request …*", and further that it "*… would not be reasonable to expect such a level of detail when seeking approval for the development of such a large site…*" (see [38] and [33]). The Applicant contended that its position was to seek a development footprint for the entire Land as "*it's better to do it in one overall application than to be confronted with the potential of actually having piecemeal applications over parts of the land in the future*" (at [35]). The town planning expert for the Applicant called this "*… a good planning approach to actually drill down from the broad to the next level …*" (at [35]).

Further, the Applicant called a witness with experience in marine industry in the Coomera area since 2002 who suggested that on the balance of probabilities it would be marine-related uses that seek to locate and will predominate (at [43]).

The Court found the town planning evidence to be "*… strongly in support of approval*" and accepted that "*[t]here is not an unacceptable risk of proliferation of non-marine uses*" which "*… can always be further addressed in the context of discussion of conditions for approval*" (see [27] and [50]).

Court finds that there is a need for the development

The need experts for each of the Council and the Applicant agreed that there is a need, not just for the development, but for it to occur on the Land to ensure the ongoing growth of the Coomera Marine Industry Precinct (at [51]). The need experts also agreed that there would be a need to provide ancillary uses to support the marine industry uses, including such uses as service station, tavern, and food outlets (at [58]).

The need expert for the Applicant gave evidence that the synergy between the existing marine industry uses would not be attractive to other general industry uses and that market forces would tend towards attracting uses focused on marine industry (at [61]). The need expert for the Council expressed concern that the scale of uses proposed is "*excessive and too wide*" (at [62]).

Although there was some dispute regarding the scale of non-marine industry uses, the need experts identified as a matter of common ground that there was a need for the development which would be facilitated by the approval of the Development Application (**Proposed Development**) (at [63]). The Court concluded that the issue of need favours approval (at [63]).

Court finds flooding impacts to be "so small as to be acceptable"

The Court considered whether the Proposed Development is consistent with the flooding assessment benchmarks having regard to whether it (at [64]):

- will have an adverse impact on flood storage in the catchment;
- has been acceptably designed to mitigate risk to life and property;
- will cause real damage to surrounding property;
- will cause adverse flooding impacts on surrounding property; and
- has increased risk to surrounding property from flood hazard.

The flood modelling showed that the Proposed Development will increase flooding to approximately 60 existing buildings by no more than three centimetres above existing flood levels (at [67]). This was found to be minimal (at [68]).

The Applicant was uncontended in its argument that there are no issues calling for refusal in terms of the safety of people on the site and evacuation during flood events (at [69]). However, the Council argued that there is reason to be concerned about flood impacts that would stem from the reduction in flood plain storage and off-site impacts (at [71]). The existing flood plain storage was modelled to be in the order of 62.5 million cubic metres, with the Proposed Development proposing a reduction of 460,000 cubic metres, or 0.73% (at [73]). The Applicant agued that this was not a significant loss in storage capacity (at [73]).

The Court accepted the Applicant's evidence that although there will be some loss of flood plain storage, "*… it is so small as to be acceptable*", concluding that the flooding issue is not a reason for refusal (at [82]).

Court finds other relevant matters do not warrant refusal

The Court also considered whether the Development Application ought to be approved or refused having regard to whether it provides for an appropriate basis for ongoing development assessment consistent with the town planning intent, unacceptable impacts, public interest impacts, and limitation on potential community involvement.

The Court agreed that the proposed uses are consistent with the current planning scheme, and appropriately controlled, the flooding impacts are not unacceptable (at [86]). Unacceptable impacts were considered in the context of adverse flooding, traffic, and amenity which could not be ameliorated by conditions (at [87]). Traffic was no longer argued as a reason for refusal, and flooding had already been dealt with. Given the location of the Proposed Development being within an existing marine precinct, the Court considered that amenity was not an issue of significance (at [88]). The public interest regarding submitter appeal rights was found not to be an issue in the context of the nature of the precinct and the over-arching planning intent, such that the Court found that approval of the Development Application would not result in an unacceptable reduction in submitter rights (at [97]).

Conclusion

The Court allowed the appeal and adjourned it to allow the parties to consider and formulate development conditions.

Colin Biggers & Paisley

No takers for caretaker's accommodation: Planning and Environment Court of Queensland confirms decision to refuse an application for a material change of use for caretaker's accommodation and animal keeping in the Tallebudgera Valley on the Gold Coast

Victoria Knesl | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *JJJM Pty Ltd v Council of the City of Gold Coast* [2024] QPEC 9 heard before Jackson KC DCJ

June 2024

In brief

The case of *JJJM Pty Ltd v Council of the City of Gold Coast* [2024] QPEC 9 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Council of the City of Gold Coast (**Council**) to refuse a development application for a material change of use for caretaker's accommodation and animal keeping (**Application**) in respect of a site situated at 13 Monday Drive, Tallebudgera Valley, Queensland (**Site**).

Under the *Gold Coast City Plan 2016* (Version 7) (**Planning Scheme**), animal keeping is code assessable and caretaker's accommodation is accepted development subject to requirements, unless such requirements are not met, in which case it is code assessable (at [16]).

The Court considered the issues in dispute broadly relating to ecology, bushfire, and traffic and whether the relevant assessment benchmarks are complied with, noting the discretion under section 60(2)(b) of the *Planning Act 2016* (Qld) (**Planning Act**) to approve the Application even if the development does not comply with some of the assessment benchmarks.

The Court concluded that the non-compliance with the relevant assessment benchmarks relating to ecology, in particular an environmentally significant corridor, was too serious to approve the Application despite the "*... excusable non-compliance with the bushfire code and the transport code*" (at [126]).

Site details

The Site has an area of 17.24 hectares, is situated between Chesterfield Drive to the north and Monday Drive to the south, and is within the rural landscape and environment precinct of the rural zone under the Planning Scheme (see [11] and [13]). It is proposed that the caretaker's accommodation be located in the flatter and lower finger-shaped portion of the Site (**Proposed Development Area**). Importantly and significantly, part of one of the Hinterland to Coast Critical Corridors (**Corridor**) traverses the Proposed Development Area and beyond in a generally east-west direction (at [46]).

Relevant assessment benchmarks and expert evidence

The Court considered the following provisions in the Planning Scheme as being relevant to the assessment of the Application (see [20] to [22]):

- Bushfire Hazard Overlay Code (**Bushfire Code**) – Performance Outcome (**PO**) PO1, PO6, and PO9.
- Environmental Significance Overlay Code (**ESO Code**) – Purpose 1, Overall Outcomes 2(a)(iv), 2(b), and 2(f), PO1, PO3, PO9, PO13, PO15, PO17, and PO19.
- Transport Code – Overall Outcome 2(a)(ii) and PO24.

The Court also considered expert evidence on behalf of the Council and the Applicant with respect to the ecology, bushfire, and traffic issues. However, some of the evidence was deemed irrelevant because it dealt with a previous location for the proposed caretaker's accommodation which has since been relocated to the Proposed Development Area (at [3]).

Court finds impact on the external road network would be miniscule

The Applicant argued that the overall outcome of the Transport Code had been complied with because the proposed animal keeping and caretaker's accommodation could be appropriately accessed from the existing Chesterfield Drive and Monday Drive access to the Site (at [90]).

The Council argued, contrary to the Transport Code, that the Site lacks "*appropriate vehicular connectivity*" between the north and south therefore burdening the external road network (at [91]).

The Court accepted that there is a lack of appropriate connection between the north and south of the Site. However, the Court agreed that the traffic impacts on the external road network as a result of the Application, if approved, would be miniscule (at [92]).

Court finds acceptable non-compliance with the Bushfire Code

The Applicant argued that there is compliance with PO6 of the Bushfire Code because Monday Drive provides adequate protection and access for emergency vehicles and residents trying to evacuate the proposed caretaker's accommodation during bushfire events. Relevantly, the bushfire mapping demonstrates that the area directly to the south of Monday Drive is a low bushfire hazard zone (at [79]).

The Applicant also argued that there is compliance with PO9 of the Bushfire Code because the agreed asset protection zone and bushfire attack level building rating as well as the existence of Monday Drive, eliminates the need for a fire trail to the north of the proposed caretaker's accommodation (at [79]).

The Council argued that there is non-compliance with PO6 of the Bushfire Code because the driveway connecting the Site to Monday Drive is too steep for safe use by emergency vehicles during bushfire events, does not provide turnaround facilities which means the emergency vehicles would have to reverse back to Monday Drive which would be unsafe during bushfire events, and that the only alternative to vehicular access would be pedestrian access but that would be unsafe and unrealistic given the steep driveway and that the emergency responders would be unfamiliar with the lay of the land on the Site (at [81].

The Council also argued that the evacuation of residents is not acceptable because of similar issues relating to the steepness of the driveway, lack of turnaround facilities, and that Monday Drive is a one-way in and out road servicing over 100 residences in a "*high-risk bushfire landscape*" (at [82]).

Overall, the Court preferred the Applicant's position and held that any non-compliance with the Bushfire Code in respect of the Application, if approved, would be excusable and acceptable (see [89] and [126]).

Court finds unacceptable non-compliance with the ESO Code

The Court's consideration of whether the Application complies with relevant assessment benchmarks relating to ecology turned on the construction of the words "protect in situ" which appear in overall outcome 2(a)(iv), PO3(b), PO3(c), PO9, PO13, PO17, and PO19 of the ESO Code (at [95]).

The Court held that the term is defined so as to require that matters of environmental significance are not damaged, removed, or offset for the purposes of the ESO Code (see [96], [97] and [105]).

The construction of "protect in situ" is particularly relevant to PO3 of the ESO Code which governs development within the Corridor. The requirement under PO3 of the ESO Code "*… is to provide corridors with certain characteristics to enable adequate movement of fauna through the site*" and therefore the Proposed Development Area must enable adequate movement of fauna through it (at [122]).

The Applicant argued that there would be no impact to the Corridor as a result of the proposed development "*… such that it cannot be said to damage or remove that matter of environmental significance*" (at [93]).

However, the Council asserted that this was wrong and gave reasons which included that the Proposed Development Area is mapped within the Corridor, which in its present form accounts for movement of fauna in all sorts of different directions, and that the establishment of the proposed caretaker's accommodation would not improve the regional connectivity of the Corridor, which is a requirement under the relevant assessment benchmarks relating to ecology (at [94]).

The Court found that the evidence demonstrated a clear impact to the Corridor and therefore non-compliance with the ESO Code (at [125]).

Conclusion

As the Applicant did not establish that the Application could comply with the relevant assessment benchmarks, in particular the ESO Code, the Court confirmed the Council's decision to refuse the Application and dismissed the appeal (see [125] to [128]).

Colin Biggers & Paisley

No compliance, no acceptance: Planning and Environment Court of Queensland dismisses an appeal against the refusal of a development application for a preliminary approval for a material change of use including a variation request and a development permit for reconfiguring a lot, finding significant non-compliances with assessment benchmarks

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Kenfrost (1987) Pty Ltd v CRC & Ors* [2024] QPEC 15 heard before Morzone KC DCJ

June 2024

In brief

The case of *Kenfrost (1987) Pty Ltd v CRC & Ors* [2024] QPEC 15 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Cairns Regional Council (**Council**) to refuse a development application for a preliminary approval for a material change of use including a variation request and a development permit for reconfiguring a lot (three into 65 lots, new roads, and a balance lot) (**Development Application**) in respect of rural land designated for drainage and open space at Redlynch, Cairns (**Subject Land**).

The Court considered whether the proposed town planning and land use is acceptable, whether the proposed material change of use will result in unacceptable flooding, agriculture, soil, and visual amenity impacts, whether approval is contrary to reasonable public expectations, whether there is a need for the proposed material change of use, and whether there are relevant matters that either favour approval or refusal (at [5]).

The Court dismissed the appeal and refused the Development Application (see [10] and [168]).

Background

The Subject Land is adjacent to a recently approved residential subdivision and development comprising three stages (**Redlynch Vistas**). Stage three of the Redlynch Vistas development reduced the number of lots approved for that development to 55 by a negotiated decision notice, which notice also conditionally required the transfer of the balance land to the Council for "*Town Planning Purposes - Drainage and Open Space*" in conjunction with the registration of the 50th allotment in the approved development (see [15] and [117] to [118]). The balance land to be transferred to the Council included the Subject Land (at [15]).

The Development Application sought the development of residential lots on the Subject Land which was, pursuant to the transfer of the balance land to the Council, previously accepted as designated for drainage and open space (**Proposed MCU**) (at [126]). The Subject Land includes a strip of land to act as a buffer to adjoining agricultural uses, pursuant to a minor change application allowed by the Court in 2022 which was the subject of our October 2023 article (at [16]).

The variation request seeks to vary the effect of version 1.2 of the *CairnsPlan 2016* (**Cairns Plan**) to create use rights consistent with the Low Density Residential Zone on the Subject Land (see [13] and [162]).

The Cairns Plan categorises the Subject Land as predominantly within the Rural Area as shown on strategic framework map SFM-1 Settlement Pattern in the Strategic Framework in the Cairns Plan (**Strategic Framework**), in the Rural Zone, subject to the Flood and Inundation Hazard Overlay and the Landscape Values Overlay, and outside of the Urban Area and the Priority Infrastructure Area boundary (at [18]). The Subject Land is within the Regional Landscape and Rural Production Area in the *Far North Queensland Regional Plan 2009-2031* (**Regional Plan**) and is also characterised as Agricultural Land Class A or B by the *State Planning Policy 2017* (**SPP**) (see [19] to [20]).

Court finds that the Proposed MCU conflicts with the assessment benchmarks in the Cairns Plan and the Regional Plan

The Court found that the Proposed MCU conflicts with the relevant assessment benchmarks in the Cairns Plan, the Regional Plan and the SPP for the following reasons:

- ***Inclusion of the Subject Land in the 'Rural Zone' under the Cairns Plan*** – The Court observed from the outset that the Proposed MCU is "*… illogical in a town planning policy sense …*" and fundamentally conflicts with the relevant assessment benchmarks in the Cairns Plan (at [54]). The Court recognised that, contrary to the Strategic Outcomes 3.3.1(2) and (8) of the Strategic Framework, the Proposed MCU "*… does not confine urban development within the existing urban areas with infill development but seeks urban expansion beyond that boundary*" (at [51]). The Court also observed that, contrary to Land Use Policy 4.1.1 of the Regional Plan, the Proposed MCU does not provide for the containment of urban development within the Urban Footprint (at [51]).
- ***Impacts on landscape values*** – The Court found that the Proposed MCU will result in unacceptable impacts on the landscape values, visual amenity, or character of the rural area in which the Subject Land is located by presenting as a visual intrusion into open space, contrary to Strategic Outcome 3.3.1(1)(m) and Specific Outcomes 3.3.6.1(4) and 3.4.4.1(2) of the Strategic Framework, Local Government Purpose 6.2.19.2(2)(c) and Overall Outcome 6.2.19.2(3)(d) of the Rural Zone Code of the Cairns Plan, and Purpose 8.2.10.3 and Overall Outcomes 8.2.10.3(2)(f)(ii) and (f)(iii), and (g)(i), (g)(ii), and (g)(iv) of the Landscape Values Overlay Code of the Cairns Plan (at [62]).
- ***Impacts on flooding and drainage and on other land in the locality*** – The Court found that the Proposed MCU relies on complex engineering solutions and may adversely impact on other premises due to stormwater drainage flows or flooding, contrary to Performance Outcomes PO1(d) and PO4 of the Excavation and Filling Code in the Cairns Plan (see [69] and [87]). Moreover, the Proposed MCU seeks excavation and filling in a natural hazard area, will not maintain the natural floodplain landforms and therefore does not enhance the natural drainage pattern, contrary to Assessment Benchmarks (3), (5), and (7) in Part E Natural Hazards, Risk and Resilience of the SPP (at [78]). The Court identified conflicts with numerous other assessment benchmarks in the Cairns Plan pertaining to the mitigation of climate change impacts and environmental risks, and maintenance associated with the impacts of flooding and inundation, including in the Strategic Framework - 3.3 Settlement Theme, the Strategic Framework - 3.4 Natural Areas and Features Theme, the Flooding and Inundation Hazards Overlay Code, and the Natural Areas Overlay Code (see [79] to [89]).
- ***Loss of agricultural land and impacts on rural land to be used for agricultural purposes*** – Specific Outcome 3.5.4.1(2) of the Strategic Framework provides that the availability and viability of rural land for ongoing agricultural use is not compromised by inappropriate or incompatible development (at [93]). The Court found that the Proposed MCU "*… will likely result in a significant and unacceptable loss of agricultural land (in circumstances where it could still be made available to farming after transfer to the Council) and thereby diminish the available area that is currently designated and utilised for farming purposes*" (at [99]).

The Court held that, as a result of the nature and degree of non-compliance with these assessment benchmarks, the Proposed MCU fails to advance the planning policy for the Subject Land and the strategic intent for the planning scheme area expressed in the Strategic Framework (at [100]). The Court stated that approval of the Proposed MCU would not accord with sound town planning practice and was unable to identify any reasonable and relevant conditions that could be imposed to resolve the non-compliances (see [148] to [149]).

Court finds that "relevant matters" do not weigh in favour of approval of the Proposed MCU

The Court considered the following relevant matters pursuant to section 45(5)(b) of the *Planning Act 2016* (Qld) (**Planning Act**):

- ***Treatment of the Subject Land as "rural land"*** – The Applicant contended that the designation of the Subject Land as "*rural land*" has been "*… overtaken by events and is not soundly based …*" because there are flood studies which demonstrate that the Subject Land is suitable for urban development, the Subject Land will not be available for rural uses unless the Proposed MCU is approved, the Proposed MCU will adjoin urban residential development under construction rather than undeveloped rural land, and the Proposed MCU is on land adjoining facilities and services characteristic of an urban area (at [108]). The Court rejected that any of these contentions rendered treatment of the Subject Land as "*rural land*" unsoundly based (see [109] to [114]).
- ***Current approvals of premises in the locality*** – The Court found "*… that the [Applicant's] proposal to now develop 65 housing lots on land previously accepted as designated for open space and drainage, in the absence of any changed circumstances, starkly contradicts the Stage 3 approval, reasonable community expectations and the public interest*" (at [126]). This, the Court held, weighed in favour of refusal of the Proposed MCU.

- ***Expansion of the existing approved urban area*** – The Court rejected the Applicant's contention that the Proposed MCU "*… represents orderly and logical development over a parcel of land that is effectively surrounded by land with existing or approved urban development and nearby to an array of infrastructure and services*" and held that the Proposed MCU is not a logical inclusion into an urban area (see [127] to [128]).
- ***Planning need and housing diversity*** – The Applicant contended that there is a strong community, economic, and planning need for the Proposed MCU because the proposal is well located relative to infrastructure, there is a need for diversity and choice of household products in light of the projected 20-year population growth in the Cairns local government area, and such population growth necessitates the provision of additional residential development in an area popular with young families (at [135]). The Court accepted that the location of the Proposed MCU is "*… attractive and convenient to public and private facilities …*" but was not of the opinion that the Proposed MCU provides any significant house diversity and choice for the area, observing that it merely continues to add detached dwellings (at [137]). The Court expressed the opinion "*… that there is no unsatisfied demand which is not being met or adequately met by the planning scheme in its current form*" (at [141]) and rejected the Applicant's contention that there is an economic or planning need which warrants approval of the Proposed MCU (at [147]).
- ***Community expectations*** – The Court rejected the Applicant's assertion that it was within the community expectations "*… that Redlynch Vistas may well include the proposed stage 4 having regard to its immediate adjacency to the existing stages, its compromise for agricultural use, and its location south of stage 3 and west of the cane tram line*" (see [150] to [158]).
- ***Public interest*** – The Court rejected the Applicant's assertion that the Cairns Plan does not represent an embodiment of the public interest (at [159]).

Court finds that the Proposed MCU should be refused

The Court concluded that, given the nature and extent of conflict between the Proposed MCU and the relevant assessment benchmarks, and the absence of relevant matters supporting approval of the Proposed MCU, the Proposed MCU should be refused (at [7] and [161]).

Court finds that the variation request and the development permit for reconfiguring a lot should be refused

Having regard to section 61 of the Planning Act, which prescribes matters that the Court must consider when assessing a variation request, the Court observed that the variation request is inconsistent with the Cairns Plan, the Regional Plan, and the SPP, and would deny submission rights for later developments on the Subject Land (at [166]). The Court held that, in alignment with the refusal of the Proposed MCU, the variation request should be refused (at [166]).

Having found that the Proposed MCU and the variation request should be refused, the Court also refused the development application for a development permit for reconfiguring a lot (at [167]).

Conclusion

The Court dismissed the appeal and refused the Development Application (at [167]).

Jurisdictional error: High Court provides practical guidance about the threshold for establishing that an error in a decision-making process is material

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the High Court of Australia in the matter of *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* [2024] HCA 12 heard before Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, and Beech-Jones JJ

June 2024

In brief

The case of *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* [2024] HCA 12 concerned judicial review proceedings in the High Court of Australia (**High Court**) in which the High Court provided practical guidance about the threshold of materiality in the context of jurisdictional error.

The test for establishing jurisdictional error is two-fold. Firstly, it must be established that an error occurred and secondly, the error must be material such that the decision affected by error could realistically have been different if there was no error (see [30] and [32]). The practical guidance provided by the High Court in respect of this test is set out in this article.

The judicial review proceedings relevantly concerned an allegation that the decision of the Administrative Appeals Tribunal (**Tribunal**) in respect of a decision made under section 501CA(4) of the *Migration Act 1958* (Cth) (**Migration Act**) about the revocation of a decision to cancel the Appellant's visa (**Cancellation Decision**) was affected by jurisdictional error.

There was no dispute that the Tribunal's decision involved an error because the Tribunal did not comply with a direction of the Minister in relation to the revocation of a mandatory cancellation of a visa under section 501CA (**Direction**) in breach of section 499(2A) of the Migration Act (at [30]).

In respect of the materiality of the error, the High Court held that the decision reached by the Tribunal could have been different if there was no error and thus the threshold of materiality was met (see [35] and [36]).

The High Court allowed the appeal, set aside the decision of the Full Court of the Federal Court of Australia, and ordered the issue of a writ of certiorari quashing the Tribunal's decision and a writ of mandamus directing the Tribunal to determine the Appellant's request for revocation of the Cancellation Decision according to law.

What is jurisdictional error?

Jurisdictional error arises where a decision-maker with authority to make a decision under statute is in breach of an express or implied condition of the decision-making authority, such that the decision made lacks legal force and is "*in law … no decision at all*" (at [2]).

The High Court observed that the following categories of jurisdictional error often arise, but that the categories are not closed (at [3]):

- A breach by a third-party of a condition of a statutory process before a decision is made.
- A breach by a decision-maker given authority under statute of a condition of making a decision. Common errors in this context include: the decision-maker misunderstands the applicable law, asks the wrong question, identifies a wrong issue, ignores relevant material, relies on irrelevant material, exceeds the bounds of what is reasonable, denies a requirement of procedural fairness, or makes an erroneous finding or reaches a mistaken conclusion.

Two-part test for jurisdictional error

Not every breach of an express or implied condition of making a decision will render the decision no decision at all (at [4]).

The limits imposed by the relevant statute on the making of a decision must be understood to determine the following (at [4]):

- "*… [W]hether an error has occurred (that is, whether there has been a breach of an express or implied condition of the statutory conferral of decision-making authority) ...*"
- "*… [W]hether any such error is jurisdictional (that is, whether the error has resulted in the decision made lacking legal force).*"

Practical guidance for considering jurisdictional error

The High Court stated the following practical guidance in respect of the test for jurisdictional error:

- Both parts of the test start with a consideration of the statute to understand the nature of the alleged error in its statutory context (at [5]).
- Both parts of the test are backward-looking in that they are answered having regard to the decision that was made, and if necessary, how that decision was made (at [10]).
- Whilst the applicant has the onus of proof on the balance of probabilities, proving the facts ought not be difficult or contentious. In some cases the tendering of the decision-maker's reasons is sufficient, whereas in others, for example those involving an allegation of a denial of procedural fairness, may require evidence of the content or information required to be provided to the decision-maker (see [10] to [13]).
- To establish materiality, it is not necessary that absent the error a different decision "*would*" have been made, rather it is whether a different decision "*could realistically*" have been made. The High Court observed that "*realistic*" is used to distinguish a possible different outcome from an outcome that is fanciful or improbable (see [7] and [14]).
- The threshold of materiality is not onerous or demanding. What must be demonstrated to meet the threshold depends upon the error. A Court in determining whether the threshold is met must not assume the function of the decision-maker and fall into a merits review of the decision made (see [14] to [15]).
- Once the applicant establishes an error and that there is a realistic possibility of a different outcome if the error had not been made, the threshold of materiality is met and relief is justified subject to any utility and discretion (at [16]).

The High Court also observed that in some cases, such as those involving apprehended or actual bias, the alleged error will be jurisdictional regardless of any effect on the decision made, whilst in others, such as those involving unreasonableness, the potential for the decision to be effected is inherent in the nature of the error (at [6]). In both of these examples, the error satisfies the requirement of materiality.

The practical guidance from the High Court set out above overrides any previous guidance of the Courts (at [8]).

Jurisdictional error established in this case

The High Court was satisfied that the threshold of materiality was satisfied in this case because the Appellant established on the balance of probabilities that a different decision realistically could have been made if the Tribunal followed the process of reasoning required by the Direction in deciding whether the Cancellation Decision should be revoked (see [34] and [35]).

Conclusion

The High Court allowed the appeal, set aside the decision of the Full Court of the Federal Court of Australia, and ordered the issue of a writ of certiorari quashing the Tribunal's decision and a writ of mandamus directing the Tribunal to determine the Appellant's request for revocation of the Cancellation Decision according to law.

Community residence accepted: Planning and Environment Court of Queensland dismisses a local government's application for declarations and enforcement orders because the use for "community residence" is accepted development

Marnie Robbins | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Redland City Council v Boutique Capital Pty Ltd as Trustee & Ors* [2024] QPEC 1 heard before McDonnell DCJ

June 2024

In brief

The case of *Redland City Council v Boutique Capital Pty Ltd as Trustee & Ors* [2024] QPEC 1 concerned an originating application to the Planning and Environment Court of Queensland by the Redland City Council (**Council**) for declarations and enforcement orders in respect of the building work which the Council alleged was being carried out unlawfully (**Building Work**) at 22 Danielle Street, Cleveland (**Site**) for construction for specialist disability accommodation (**SDA Housing**).

The principal issue for determination was whether the proposed SDA Housing met the definition of "*community residence*" in schedule 24 of the *Planning Regulation 2017* (Qld) (**Regulation**).

In determining the issue, the Court considered a number of subsidiary questions, including:

- What is the meaning of "*community residence*"?
- What is the meaning of "*reasonably associated with*"?
- Is the proposed development a "*community residence*"?

The Court found that the proposed use for the SDA Housing was a use for a "*community residence*", and therefore was accepted development. No development offence had been committed, and the Council's application was dismissed.

Background

The Council made the application for declarations and orders under section 11 of the *Planning and Environment Court Act 2016* (Qld) and enforcement orders under section 180(3) of the *Planning Act 2016* (Qld) against three respondents. The First Respondent is the owner of the Site on which the SDA Housing was to be constructed, the Second Respondent is the construction company which was in the process of undertaking the Building Work, and the Third Respondent is responsible for issuing three decision notices which granted approval for three stages of the Building Work.

The Council submitted that the Building Work for the construction of the SDA Housing would involve a material change of use which requires a development permit from the Council. The First and Second Respondents (**Respondents**) argued that the proposed use was a "*community residence*" which does not require a development permit from the Council. The Third Respondent did not enter an appearance in the proceedings.

Section 7 of the Regulation allows for use terms prescribed in schedule 3 to be adopted into planning schemes. Schedule 24 of the Regulation provides the following definition for "*community residence*":

> ***community residence—***
>
> *(a) means the use of premises for residential accommodation for—*
>
> *(i) no more than—*
>
> *(A) 6 children, if the accommodation is provided as part of a program or service under the Youth Justice Act 1992; or*
>
> *(B) 6 persons who require assistance or support with daily living needs; and*
>
> *(ii) no more than 1 support worker; and*
>
> *(b) includes a building or structure that is reasonably associated with the use in paragraph (a).*

Schedule 6 of the Regulation deals with development which a local categorising instrument is prohibited from stating is assessable development and relevantly provides the following definition for a material change of use for "*community residence*":

> ***6 Material change of use for community residence***
>
> *(1) A material change of use of premises for a community residence, if—*
>
> *(a) the premises are included in a prescribed zone under a local categorising instrument; and*
>
> *(b) no more than 7 support workers attend the residence in a 24-hour period; and*
>
> *(c) at least 2 car parks are provided on the premises for use by residents and visitors; and*
>
> *(d) at least 1 of the car parks stated in paragraph (c) is suitable for persons with disabilities; and*
>
> *(e) at least 1 car park is provided on the premises for use by support workers.*

The Site is located in the Low Density Residential Zone under version 6.00/2022 of the *Redland City Plan 2018*, which was the planning scheme in effect when the decision notices were issued and that is a prescribed zone in accordance with the provision.

Therefore, if the proposed SDA Housing complies with the above provisions it is accepted development which does not require a development permit from the Council.

Court finds that the SDA Housing is a "community residence"

The SDA Housing was proposed to be a two-storey building. The ground floor would comprise of two two-bedroom units for NDIS participants (**Residents**), a garage, foyer, lift, two stairways, a therapy pool, and terrace, and the second floor would include a single-bedroom support-worker unit, two two-bedroom units for Residents, foyer, lift, two stairways, and a multi-purpose room for shared use. Each of the Residents' units contained an area labelled "*bed 1*" with an ensuite equipped with a hoist as well as an area labelled "*guest*" with a bathroom which is accessible from that room and the living area (at [10]). The SDA Housing would therefore be capable of accommodating up to eight Residents and two support workers.

Meaning of "community residence"

The Respondents submitted that the Court "*… should not impute to the Queensland legislature ignorance of the NDIS under Federal legislation …*" and that paragraph (b) of the definition should be read "*… as an enlargement of the matters that fall within the scope of a Community residence*" (at [19]) through the use of the word "*includes*".

The Council submitted that the use of the word "*and*" necessitated the requirements of both paragraphs (a) and (b) to be satisfied, and that they are distinct requirements. This was submitted to require firstly "*… an assessment to determine the number and type of occupants of the Building …*" and secondly "*… consideration of the nature of the building or structure, and whether it is 'reasonably associated with' the use of the Site …*" (at [20]).

The Court concluded that the definition of "*community residence*" permits only accommodation of no more than six residents and no more than one support worker. The definition therefore did not allow "*… for residential accommodation of persons who are not support workers or Residents, such as family members …*" (at [27]). The use of the SDA Housing for people other than those satisfying both criteria was said to not be "*reasonably associated with*" the use.

Meaning of "reasonably associated with"

The Respondents submitted that "*reasonably associated with*" should be construed as meaning "*logically connected to the use*" (at [28]).

The Court considered a number of authorities which state that the words should be given their ordinary meaning and concluded that the phrase "*… suggests a connection or nexus with the use of the premises for residential accommodation for no more than six Residents and no more than one support worker*" (at [34]).

Proposed development

The Court heard evidence from various witnesses who attested to the design and layout of the proposed SDA Housing and how it would meet the needs of Residents.

The Respondents' evidence was that "*… the size of the guest bedroom and bathroom provide maximum choice and flexibility for the user …*" (at [35]) and that Residents may require a second bedroom to temporarily accommodate family and friends, to provide an at-home workspace, or to store various equipment and supplies which could be most conveniently stored in a spare room (at [41]).

The Respondents further submitted that despite the SDA Housing being capable of accommodating eight Residents, the Respondents "*… do not propose to use the Building to provide residential accommodation for more than six Residents and a single support worker*" (at [37]). It was accepted that use of the SDA Housing by more than six Residents would not comply with the definition of "*community residence*".

The Council's evidence was that a second bedroom and bathroom which both met the specialist disability accommodation (**SDA**) standard was not necessary in circumstances where the Residents' needs could be met by a smaller, accessible second bedroom and bathroom. It was also submitted by the Council that mobility and other equipment could be appropriately stored in the secure garage as shown on the relevant plans (at [45]).

The Council additionally submitted that the SDA Housing did not conform with the definition of "*community residence*" in the sense that it proposed "*four self-contained apartments*" as opposed to a "*communal form of living in a single dwelling*" (at [47]). The Court, however, was not persuaded by this argument and found that "*… whilst there might be more than one dwelling in the Building, the use of the Building remains a single Community residence*" (at [50]).

The Court accepted the evidence of the Respondents' experts, being that the inclusion of a second bedroom and bathroom which are compliant with the SDA standard was reasonable for housing of this kind in order to meet the needs of its Residents (at [53]) and had regard to the need for mobility and other equipment to be kept proximate to the Resident (at [54]). Further, the Court was satisfied that all areas within each unit ought to be accessible by the Resident, and that the evidence demonstrated such access was achievable for the SDA Housing (see [55] to [56]).

Conclusion

The Court was satisfied that the SDA Housing was capable of being used in a manner which is compliant with the definition of "*community residence*" and therefore lawful without the need for a development permit.

The Council's application was therefore dismissed.

Colin Biggers & Paisley

Amendments matter: Planning and Environment Court of Queensland dismisses an appeal against the refusal of a development application for a development permit for a material change of use and reconfiguring a lot, finding that decisive weight ought to be afforded to an amended planning scheme

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *427 Beckett Rd Pty Ltd v Brisbane City Council (No. 2)* [2024] QPEC 24 heard before Kent KC DCJ

July 2024

In brief

The case of *427 Beckett Rd Pty Ltd v Brisbane City Council (No. 2)* [2024] QPEC 24 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to refuse a development application for a development permit for a material change of use and reconfiguring a lot (**Development Application**) in respect of land situated at Bridgeman Downs, Brisbane (**Land**) described as Lot 1 on SP227437 (**Lot 1**) and Lot 2 on SP227438 (**Lot 2**).

The Court considered whether the proposal represents a change other than a minor change, whether the proposal results in unacceptable ecological impacts, issues pertaining to traffic and visual amenity, whether the proposed uses are consistent with the planning intent and what is expected for the land and locality, and whether amendments to the relevant planning scheme ought to be afforded weight in the proceedings (at [10]).

The Court dismissed the appeal for the reason that the amendments to the relevant planning scheme were directly relevant to the issues at hand, in particular the ecological issues, and should be afforded decisive weight (at [79]).

Background

The Development Application originally sought a material change of use for a service station and a food and drink outlet (Stage 1), a food and drink outlet and a childcare centre (Stage 2), 10 townhouses (Stage 3), and 29 townhouses (Stage 4), as well as a reconfiguration of a lot including provision for new internal roads (**Originally Proposed Development**) (see [3] and [4]).

The Court allowed two applications for a minor change in respect of the Originally Proposed Development in September 2021 and December 2022, but refused a minor change application in February 2024 (**2024 Minor Change Application**) which was the subject of our April 2024 article (at [5]). The Development Application at the time of the appeal included "*… the service station; two food and drink outlets; a child care centre; 10 multiple occupancy dwellings; and a conservation zone with a proposed fauna overpass to allow fauna (including koalas) to cross Beckett Road to an area of remnant vegetation on the western side of the road*" (**Proposed Development**) (at [7]).

The Land, comprised of Lot 1 and Lot 2 which have a combined area of 2.8 hectares, is densely inhabited by bushland that supports an endangered vegetation community and is an essential habitat for threatened species, including koalas (see [2] and [11]). The Land shares substantial frontage with, and is on the eastern side of, Beckett Road (at [12]).

At the time at which the Development Application was properly made (**Properly Made Date**), the Land was designated as being within the Emerging Community Zone and the McDowall-Bridgeman Downs Neighbourhood Plan of version 15 of the *Brisbane City Plan 2014* (**City Plan**) (at [2]). Since the Properly Made Date, the City Plan has been significantly amended and the Land has been rezoned and designated as being within the Environmental Management Zone and a new Bridgeman Downs Neighbourhood Plan (**Neighbourhood Plan**), which includes the Land in the Beckett Road precinct and Environmental living sub-precinct, under version 29 of the *Brisbane City Plan 2014* (**Amended City Plan**) (at [8]).

Court finds that the Proposed Development is not precluded by representing a non-minor change

Pursuant to section 46(3) of the *Planning and Environment Court Act 2016* (Qld), the Court cannot consider a change to a development application that is not a "*minor change*". The definition of "*minor change*" is in schedule 2 of the *Planning Act 2016* (Qld) (**Planning Act**), which relevantly states that a "*minor change*" to a development application, among other things, does not result in "*substantially different development*" (at [22]).

The Council argued that the Proposed Development should be refused on the basis that it is significantly changed from the Originally Proposed Development and does not represent a "*minor change*" (at [20]). The Applicant argued in response that the Proposed Development represents a sub-set of the Originally Proposed Development, is not qualitatively different, and can be achieved by the imposition of conditions (at [20]).

The Court considered whether the changes to the Originally Proposed Development, specifically, the previously accepted minor changes of 2021 and 2022 (**Changes**), cumulatively exceed the threshold of a "*minor change*" (see [23] to [25]). The Court observed that the Originally Proposed Development was significantly different from the Proposed Development which, among other things, reinstates staged development. The Court recognised that the deletion of staged development from the Originally Proposed Development was held to be material to the rejection of the 2024 Minor Change Application (at [26]).

The Court accepted the Applicant's argument that "*… in distinction from the [2024 Minor Change Application], the present proposal retains rather than changes features from the proposal resulting from the December 2022 orders …*" (see [29] to [31]). The Court held that the Changes which were minor and intended to be ameliorative can be seen as a part approval of the Proposed Development as opposed to a change (see [31] and [75]).

Court finds that the Proposed Development does not completely resolve ecological issues

The Court observed that the Land has "*significant ecological value*" by virtue of it being an endangered regional ecosystem, an essential habitat for several species, and its functioning as a linkage between Cabbage Tree Creek and Albany Creek (at [32]). The Court recognised that the Proposed Development plainly entails environmental impacts, including the removal of more than 30% of the remnant endangered vegetation and a more substantial percentage of the non-endangered vegetation (at [34]).

The Court accepted that the Proposed Development, in conjunction with the proposed conditions, would maintain "*… a reasonable degree of connectivity*" between the habitats in Cabbage Tree Creek and Albany Creek in light of "*… the adequacy of the 21-metre fauna corridor at the north-western corner of the site (which connects with the proposed fauna overpass, which in turn enhances connectivity to the area to the west including Albany Creek)*" (at [35]).

The Court also observed that the Proposed Development's inclusion of "*… a conservation zone representing the fauna corridor connecting with the proposed fauna overpass and preservation of existing vegetation*", in conjunction with the proposed conditions pertaining to rehabilitation, fencing, and protection, elevated the Proposed Development to become "*… more acceptable from an ecological basis …*" as compared to the Originally Proposed Development (see [36] and [37]).

Whilst the Court was satisfied that these improvements went some way to resolving the ecology issues (at [37]), it also accepted evidence from the Council's ecological expert that not all reasonable onsite mitigations for the Proposed Development had been taken by the Applicant before resorting to the provision of the koala overpass as an environmental offset, particularly in light of the Neighbourhood Plan under the Amended City Plan (see [38] and [77]).

Court finds that the Amended City Plan, which ought to be afforded decisive weight, does not support approval of the Proposed Development

The Court considered "*… whether the combination of uses planned for the site would have a scale not consistent with the expected land use within the locality and what weight, if any, should be given to any inconsistency with the Amended [City Plan]*" (at [39]).

The Court recognised that the Proposed Development is largely incompatible with the Amended City Plan, which adversely places the Land within the Environmental Management Zone and the Environmental living Sub-precinct under the Neighbourhood Plan (at [46]).

In determining the weight to be given to the Amended City Plan, the Court observed that because the Amended City Plan has come into effect - in contrast to, for example, a draft amendment - and is locally focussed, it is more likely to be given weight in the consideration of the Proposed Development, citing the case of *Tricare (Bayview) Pty Ltd v Gold Coast City Council* [2022] QPEC 31; [2023] QPLR 1073 (at [49]).

Despite contrasting the circumstances of the appeal with those in the case of *Roseingrave v Brisbane City Council (No. 2)* [2022] QPEC 43, wherein the Court gave decisive weight to new planning scheme mapping that was adopted after the development application but before the Council's refusal decision, the Court found that there was "*… no reason not to conclude that [the amendments to the City Plan] better [reflect] the actual ecological value of the site in a way that the previous mapping did not*" (at [52]). Accordingly, the Court found that the Amended City Plan should be taken into account in assessing the Proposed Development (at [52]).

The Court had regard to "*… the fairness of taking the amendments into account in circumstances where they were not in force at the time of the application*" (at [54]) but ultimately did not hold that the circumstances gave rise to such concerns as to preclude, or detract from, consideration of the Amended City Plan (at [58]).

The Court concluded that the Proposed Development conflicts with the Amended City Plan for the following reasons, which warranted refusal of the Proposed Development:

- The Land is mapped as General Ecological Significance Strategic under the Amended City Plan. The Proposed Development compromises the values emphasised by the Strategic Framework, namely "*… the importance of the Greenspace System, including ecological functions and ecosystem services and linking waterways, biodiversity areas and ecological corridors*" (at [60]).
- The Land is designated within the Environmental Management Zone under the Amended City Plan "*… the purpose of which is to identify environmentally sensitive areas and protect them from urban activities other than dwellings*". The proposed service station is non-compliant with this purpose (at [60]).
- The Proposed Development is not compliant with Purpose (1)(a)(ii) of the Biodiversity Area Overlay Code, which requires protection or enhancement of environmental values (at [61]).
- The Proposed Development is not compliant with Overall Outcomes 3(g), 3(h), 6(a), and 6(c) of the Neighbourhood Plan, which provide for the protection from inappropriate development, the protection and enhancement of ecological features and corridors, the continued function of the ecological corridor between Cabbage Tree Creek and Albany Creek, and the maintenance of dwelling houses on large acreage lots at a very low density to minimise impacts (at [62]).

Court finds that traffic impacts do not warrant refusal of the Proposed Development

The two traffic issues in the appeal concerned the proposed left-in turn to the service station from Beckett Road and whether it undermines the road hierarchy which ought to preserve the movement function of Beckett Road as a higher order road, and that the required auxiliary turn lane may generate the risk of rear end collisions (at [65]).

The Court acknowledged the existence of these traffic issues but found that they were "*not major*" and did not call for refusal of the Proposed Development (at [66]). The Court accepted the Applicant's argument that the relevant assessment benchmarks do not require there to be no impacts on traffic, only that there be no significant impact on the safety, efficiency, function, and convenience of use or capacity of the road network (at [67]).

Court finds that visual amenity impacts do not warrant refusal of the Proposed Development

The Applicant asserted that any non-compliance with the relevant assessment benchmarks pertaining to visual amenity was insufficient to warrant refusal of the Proposed Development, and that as agreed upon by the visual amenity experts any unacceptable visual amenity impacts could be resolved by the imposition of the proposed conditions (see [69] and [70]). The Council conceded that visual amenity impacts are alone insufficient to warrant refusal and did not contest the resolution by way of the imposition of conditions (at [68]).

The Court observed that the retaining walls and acoustic barriers along the southern boundary of Lot 2, in respect of which visual amenity impacts arise, are capable of being "*… partially concealed by planting of appropriate species in the area*" (at [68]). The Court found that visual amenity impacts did not call for refusal of the Proposed Development (at [70]).

Court finds that other relevant matters put forward by the Applicant do not warrant approval of the Proposed Development

The Applicant contended that several relevant matters favoured approval of the Proposed Development in the event of non-compliance with the relevant assessment benchmarks, including its ecological benefits, the convenience of its location, need, and increased convenience, choice, and competition in the proposed commercial outlets therein (see [71] and [72]).

The Court considered these matters pursuant to section 45(5)(b) of the Planning Act and acknowledged their relevance but did not find that they were determinative of the appeal (at [74]).

Conclusion

The Court found that the Proposed Development does not comply with the ecological requirements of the Amended City Plan and dismissed the appeal (at [79]).

Rural character trumps economic gain: Planning and Environment Court of Queensland dismisses an appeal against the refusal of a development application for a storage yard for vehicle parts

Marnie Robbins | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Grundy & Anor v Fraser Coast Regional Council* [2024] QPEC 17 heard before Cash DCJ

July 2024

In brief

The case of *Grundy & Anor v Fraser Coast Regional Council* [2024] QPEC 17 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by Barry and Maree Grundy (**Applicants**) against the refusal by the Fraser Coast Regional Council (**Council**) of a development application for a development permit for a material change of use for an open warehouse for the storage of vehicle parts for the facilitation of a towing and transport business (**Proposed Development**) on land owned by the Applicants at 674 Torbanlea Pilba Road, Takura (**Site**).

The primary issues considered by the Court were as follows:

- whether the proposed use of the land is incompatible with, and unacceptable in, the Rural Area and Rural Zone; and
- whether the proposed development will have unacceptable effects on visual and acoustic amenity in the surrounding area.

The Court found that the Proposed Development departed from important provisions of the relevant planning scheme, being the *Fraser Coast Planning Scheme 2014* (version 11) (**Planning Scheme**) and that the Council's decision to refuse the application should be upheld.

Background

The Applicants applied to the Council for a material change of use for a 2,500m^2 storage yard on part of the Site, to be used for the collection and temporary storage of vehicles and vehicle parts (at [6]). The application was described as a means of "*seeking to regularise an existing unlawful use*" by the Applicants (at [6]).

It was proposed to locate the Proposed Development adjacent to the western boundary of the Site, approximately 100 metres to the north of Torbanlea Pialba Road (at [10]). The southern side of the storage facility on the Site was proposed to also consist of a 100 metre long row of shipping containers, a two-metre high noise barrier, and an eight-metre wide vegetation buffer (at [10]).

The Council refused the development application for the Proposed Development on 30 April 2021 on the basis that it is "*… fundamentally incompatible with the Rural Zone Code*" (at [6]).

Court finds the Proposed Development is incompatible with, and unacceptable in, the Rural Area and Rural Zone

The Court considered what the Planning Scheme generally intends for the Rural Zone in which the Site is located, and noted that urban development, of the kind proposed, should be focused in the major regional population centres of Maryborough and Hervey Bay (at [16]).

The Court held that the Rural Zone Code contemplates some non-rural uses but only uses which "*… are compatible with a rural setting and support rural enterprise and tourism … and do not compromise the use of the land for rural activities*" (at [20]).

The Council's town planning expert gave evidence that the clear intent of the Planning Scheme is "*… to discourage inappropriate urban and industrial uses in the rural zone*" (at [23]) and opined that the Proposed Development is "*an industrial use of an urban character*" (at [24]).

The Applicants' town planning expert placed weight on the absence of any explicit prohibition on development, such as that proposed by the Applicants, in the provisions of the Planning Scheme and the private economic benefits which the Applicants would gain from the approval of the Proposed Development.

The Court preferred the evidence of the Council's town planning expert. The Court held that the Proposed Development "*… would not satisfy the performance outcomes of the Rural Zone Code that the use be 'located, designed and operated to minimise conflicts with existing and future rural uses and activities on the surrounding rural lands*'" (at [31]).

The Court therefore held that the Proposed Development is incompatible with and unacceptable in the Rural Zone.

Court finds the Proposed Development will have unacceptable effects on visual and acoustic amenity in the surrounding area

The Court noted that the relevant provisions of the Planning Scheme make clear that any permitted industrial use in the Rural Zone "*… is to have minimal effect on visual and acoustic amenity and surrounding land uses*" (at [37]).

Both parties' visual amenity experts gave evidence indicating that the plans for the Proposed Development were currently uncertain and there was a general lack of information as to many aspects of it.

The Council's visual amenity expert gave evidence that the Proposed Development is "*eye-catching and inconsistent with the rural character of the area*" (at [40]), citing concerns with the open storage, row of shipping containers, and the movement of vehicles on the Site.

The Applicants' visual amenity expert was only able to give evidence that the Proposed Development "*… had 'the potential to satisfy the planning provisions'*" (at 41]) related to visual amenity via the imposition of development conditions and that the Proposed Development "*… would not add much clutter to an already disrupted vista*" (at [43]).

The parties' acoustic amenity experts agreed that the Proposed Development "*… could be operated in a way that did not diminish the acoustic amenity of the area to an unacceptable degree*" by, for example, imposing time restrictions on the operation of machinery (at [46]). The Council's acoustic amenity expert had concerns about compliance with conditions, which the Court shared.

The Court ultimately concluded that even if the Proposed Development could be conditioned to comply with the Planning Scheme provisions related to acoustic amenity, the other significant non-compliances with the Planning Scheme indicated that the Proposed Development should be refused.

Conclusion

The Court found that the Proposed Development substantially departed from important provisions of the Planning Scheme, and there was nothing to demonstrate that it should otherwise be approved, aside from economic benefits to the Applicants.

The Court upheld the Councils decision to refuse the Proposed Development and the appeal was dismissed.

Character trumps luxury: Planning and Environment Court of Queensland dismisses an appeal against the refusal of a development application for a material change of use for a luxury five-star resort complex in Port Douglas

Victoria Knesl | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* [2023] QPEC 44 heard before Kefford DCJ

July 2024

In brief

The case of *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* [2023] QPEC 44 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Douglas Shire Council (**Council**) to refuse a development application for a material change of use for a resort complex (**Proposed Development**) in respect of a vacant parcel of land at 71 to 85 Port Douglas Road, Port Douglas, Queensland (**Subject Site**).

Under the relevant planning scheme, being the *Douglas Shire Planning Scheme 2018* (version 1) (**Planning Scheme**), the Proposed Development is impact assessable.

The outcome of the appeal was largely informed by the Court's findings with respect to "*… the appropriateness of the design and landscaping … having regard to its character and amenity impacts and the appropriateness of the scale of the use proposed to be located on the [S]ubject [Site]*" (at [29]). Based on these findings, the Court upheld the Council's decision to refuse the Proposed Development and dismissed the appeal because it was not satisfied that it reflects the character and amenity of the Port Douglas locality, that the scale of the Proposed Development complies with the relevant assessment benchmarks, and there were no relevant matters favouring an exercise of the Court's discretion to approve the Proposed Development.

Background

The tropical resort town of Port Douglas is located approximately 65 kilometres north of Cairns, Queensland. Significantly and importantly, Port Douglas is situated between the Great Barrier Reef and the Daintree Rainforest, which are internationally renowned UNESCO World Heritage natural attractions. The proximity to these natural attractions as well as the general character and scenery are contributing factors to Port Douglas' status as one of Australia's premier tourist destinations (at [1]).

The Proposed Development involves a luxury five-star resort complex contained in a single building which measures approximately 165 metres long and 75 metres wide, and that comprises five levels, 240 guest rooms for visitor and tourist accommodation, extensive leisure facilities, a rooftop terrace as well as 332 car parking spaces, 14 motorcycle bays, and 88 bicycle bays (see [4] and [321]).

The Council argued that the design of the built form and the landscape character of the Proposed Development is unacceptable because it would cause unacceptable impacts on the amenity, character, and sense of Port Douglas and the local area (at [6]). The Council also argued that there are inadequate proposed car parking arrangements and noncompliance with some of the relevant assessment benchmarks under the Planning Scheme (see [5] and [11]).

The Applicant disputed the allegations of noncompliance with the Planning Scheme and argued that the Court should have regard to the economic need and other benefits of the Proposed Development, and approve the Proposed Development even if it does not comply with some of the assessment benchmarks pursuant to section 60(2)(b) of the *Planning Act 2016* (Qld) (**Planning Act**) (see [12] and [16]).

Court finds unacceptable impact on character and amenity of Port Douglas

The Planning Scheme recognises the character and sense of place as being critical to the tourism industry, which alongside the sugar cane industry, is a leading industry in Port Douglas for employment, population growth, and economic activity (at [53] and [359]). The Court emphasised that "*… a strong planning policy to maintain the distinctive sense of place and character of Port Douglas and the various communities within Port Douglas*" can be discerned from the Planning Scheme, and went on to note that is why the assessment benchmarks require built form to integrate with the established urban qualities that distinguish Port Douglas from other destinations in Queensland (see [51] and [52]).

The Court also noted that in addition to the established urban qualities, there are also certain distinct features that contribute to the distinguished character and sense of place in Port Douglas, and these include the tropical climate, topography, physical setting, dominance of natural environment, dominance of vegetation over built form, forests growing down to the shoreline, and the built-form character of the existing development (see [70] to [78]).

The Council argued that the Proposed Development "*… present[s] as an over-scaled, intense resort development which disregards the distinctive tropical vernacular that makes Port Douglas and informs the sense of place for both residents and visitors*" (at [31]). The Applicant admitted that the built form of the Proposed Development was different to the existing built form in Port Douglas. However, the Applicant maintained that the Proposed Development could be consistent with the character and sense of place in Port Douglas because it is "*… dominated by tropical vegetation and appropriate landscaping*" (at [14]).

The Court found that the Proposed Development does not comply with the relevant assessment benchmarks because of its dominant and bulky nature, and inconsistency with the character and sense of place in Port Douglas, and that it does not "*… offer a positive or meaningful contribution to the character of the township or the local area within which it sits*" (see [166] and [167]).

Court finds unacceptable the scale of the Proposed Development

It was common ground that the nature of the Proposed Development, being for a resort complex, is one that can be appropriately accommodated on the Subject Site. The issue was that the Proposed Development included intense dinning, function, and entertainment uses, which the Council argued could not be appropriately accommodated on the Subject Site because of the possibility that these intense leisure facilities were of a scale that would draw both residents and visitors away from the Town Centre, as the Subject Site is 2.5 km from the Port Douglas activity centre, which would be contrary to the Council's deliberate forward planning strategy (at [266]).

The Court, having regard to the Planning Scheme as a whole, found that "*… there is strong encouragement for tourist accommodation uses and entertainment uses in the Port Douglas Town Centre in preference to, but not to the exclusion of, its development in other parts … such as Daintree Village, Cape Tribulation, or Craiglie*" (at [287]). The Court then applied the relevant assessment benchmarks to the Proposed Development and found that the scale of the Proposed Development was unacceptable for the Subject Site and inconsistent with the forward planning strategy in the Planning Scheme (at [311]).

It was also common ground that for the Proposed Development to be acceptable, the demand for car parking must be accommodated on the Subject Site and only the Subject Site, despite there being a wide road verge immediately adjacent to the Subject Site. This is because the use of the wide road verge for car parking would have a detrimental effect on the character and sense of place in Port Douglas, and pose an unacceptable safety risk to both residents and visitors (at [319]).

The Court considered the relevant assessment benchmarks relating to car parking arrangements and found that the Proposed Development would need to provide 521 car parking spaces, as opposed to the proposed 332 car parking spaces, on the Subject Site to achieve compliance (at [320]). The Court therefore held that the Applicant had not demonstrated that there would be adequate car parking provided or that an appropriate amount of car parking could be conditioned, and therefore the Proposed Development does not comply with the relevant assessment benchmarks relating to car parking arrangements (at [346]).

Court finds limited relevant matters for approval in the exercise of its planning discretion

The Court found as follows in the exercise of the planning discretion (see [374] to [377]):

- The need for tourist accommodation is a planning need that presently exists.
- There is evidence in support of an existing economic need and public benefit because of the importance of tourism to the economy.
- An appropriately designed, luxury, five-star resort complex on the Subject Site would positively contribute to the overall well-being of the Port Douglas community.

- The introduction of a luxury resort complex elsewhere in Port Douglas would have the potential to deliver similar benefits.
- There are other possible sites for luxury tourist accommodation in the Port Douglas area that presently exist.
- There is not any other benefit provided by the Proposed Development that supports approval.

However, the Court found that the partial compliance with the Planning Scheme and the relevant matters do not form a basis to approve the Proposed Development because of the non-compliances with the relevant assessment benchmarks, particularly relating to the character and sense of place in Port Douglas (at [412]).

Conclusion

The Court held that the Proposed Development does not comply with the relevant assessment benchmarks and that no relevant matters warranted an exercise of the planning discretion in section 60(2)(b) of the Planning Act. Therefore, the Court upheld the Council's decision to refuse the Proposed Development and dismissed the appeal (at [413]).

Colin Biggers & Paisley

No power, no fee: Supreme Court of Queensland finds imposition of $66.5m worth of default maritime fees to be invalid

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Sea Swift Pty Ltd v Torres Strait Island Regional Council* [2023] QSC 203 heard before Applegarth J

July 2024

In brief

The case of *Sea Swift Pty Ltd v Torres Strait Island Regional Council* [2023] QSC 203 concerned an application for review (**Review Application**) to the Supreme Court of Queensland (**Court**) by Sea Swift Pty Ltd (**Applicant**) against a decision of the Torres Strait Island Regional Council (**Council**) to issue 253 default maritime fee invoices totalling $66,543,146.37 in December 2022 (**DMF Invoices**) to the Applicant for a failure to accurately self-report their usage of the Council's cargo ship landing facilities.

The Court found that the Council did not have the power to impose the DMF Invoices and determined the DMF Invoices invalid.

Background

The Applicant is an Australian shipping company, operating and shipping cargo in areas governed by the Council (at [11]). The Council imposes maritime fees for the use of its landing facilities calculated on a usage basis (**Standard Maritime Fees**) which is reported to the Council through a prescribed cargo self-reporting form (**Self-Reporting Form**) (at [13]).

Cargo shipping companies are also required to hold a valid Council issued permit, upon which the Council may impose conditions. The Applicant had maintained a permit since the introduction of the permit system in mid-2014 (**Permit**) (see [14] to [17]).

The Council had experienced issues regarding the failure of cargo shipping companies to self-report and decided to implement a default maritime fee (**DMF**) regime for "*… failure to self-report by the due date*" which was designed to impose a fee equal to the maximum fee payable by the largest ship in the cargo ship carrier's fleet as a way to deter non-reporting (see [29] and [37]). The initial DMF was $27,104 (GST inclusive) per week (at [32]). The Self-Reporting Form and DMF were incorporated as a condition on the Permit (at [32]).

After the notification of the DMF regime to cargo shipping companies, the then Council Chief Executive Officer (**Former CEO**) conceded that the DMF "*… is likely to be considered a penalty and unenforceable*", but upon the carrier showing evidence of their actual use, the Council is able to "*… reverse the [DMF] … and issue a revised invoice for the correct fee …*" and that it "*… would expect no carrier to ever pay the [DMF]*" (at [39]).

The Council was dissatisfied with the Applicant's submissions of the Self-Reporting Form, and in December 2021, applied to the Federal Court of Australia for a preliminary discovery application which sought the discovery of documents from the Applicant to evidence their use of the Council's landing facilities (**Preliminary Discovery Proceeding**) (at [64]). This resulted in the Applicant producing over 120,000 documents to the Council (**Disclosure Documents**) (at [65]).

After receiving the Disclosure Documents, the Former CEO instructed the Council's legal representatives to draft the DMF Invoices which were said to be based on the Council's discoveries from the Preliminary Discovery Proceeding, and subsequently delivered to the Applicant on 21 December 2022 for the period from April 2015 to June 2018 (at [67]). The DMF Invoices had a seven day appeal period which spanned two public holidays and a weekend during a period that the Council's offices were closed and the Applicant was operating with only skeleton staff (at [78]). The Applicant then commenced this Review Application.

Legal professional privilege

During the conduct of the Review Application, the Court made a disclosure order requiring the Council to disclose certain categories of documents to the Applicant which evidenced the calculation and formation of the DMF Invoices. The Council claimed legal professional privilege over six of the documents, which lead the Applicant to commence a separate application for resolution on the documents' status in *Sea Swift Pty Ltd v Torres Strait Island Regional Council* [2023] QSC 160; [2023] 30 QLR (**Resolution Application**). In the Resolution Application, the Court decided that three of the six documents were covered by a valid legal professional privilege claim, one could be subject to a confidentiality order and be disclosed, and the remaining two were not covered by a valid legal professional privilege claim (Resolution Application at [69]).

Issues

The parties agreed the following list of issues (at [9]):

- Whether the imposition of the DMF regime and DMF Invoices were authorised under section 9 and section 262(3)(c) of the *Local Government Act 2009* (Qld) (**LGA**).
- Whether the imposition of the DMF regime is within the scope of section 10 of the *Torres Strait Island Regional Council Model Local Law No. 1 (Administration) 2010* (**Model Local Law**).
- Whether the issuing of the DMF Invoices was legally unreasonable.
- Whether the seven day appeal right was legally unreasonable.

Court finds the imposition of the DMF regime and DMF Invoices were not authorised by sections 9 and 262(3)(c) of the LGA

Section 9(1) of the LGA provides that "*A local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area.*"

Section 262(3)(c) of the LGA provides that powers in support of responsibilities which "*… include all the powers that an individual may exercise, including for example … power to charge for a service or facility, other than a service or facility for which a cost-recovery fee may be fixed.*"

The Court identified the following sub-issues when considering whether the DMF Invoices were authorised (at [152]):

> *(a) Is the DMF a penalty for non-compliance with reporting conditions?*
>
> *(b) Does it depart from, and is it inconsistent with, the scheme that the legislature has adopted to address non-compliance?*
>
> *(c) Is the DMF 'for' a service or facility?*

DMF is a penalty

The Court determined that the DMF was a penalty, for the reasons that:

- the Council had ample information to determine actual use from the Preliminary Discovery Proceeding; and
- "*[r]ather than being a fee that reflected or approximated actual use, it was a heavy financial burden imposed for alleged non-compliance with reporting conditions*" (at [158]).

DMF departs from the LGA

Section 28(2) of the LGA prevents the Council from imposing a penalty of greater than 850 penalty units or $63,750 at $75 per penalty unit (at [155]). However, the DMF was set at "*… $106,523.90 per week from 12 September 2016, $109,753.00 per week from 3 July 2017 and $472,032.40 per week from 29 June 2018*" (at [155]).

As the DMF imposed a penalty much higher than that authorised under the law, the Court noted the power to do things that are "*necessary or convenient*" does not confer a power to depart from or vary a scheme that the legislature has adopted (at [160]).

DMF is not a charge for a service or facility

The Court did not accept that the DMF is a charge for a service or facility as it is a charge imposed when the Council is unable to accurately calculate the Standard Maritime Fee, which adopts a different methodology for determining use (at [169]).

The DMF was designed as a proxy for the Standard Maritime Fee in circumstances in which it could not properly be calculated (at [171]).

The Court noted that if the DMF was intended to approximate actual use and being "for" the use of the facility then it might have connection to section 262(3)(c) of the LGA (at [171]). However, the DMF is not designed to reflect actual use, rather it is imposed for non-compliance with reporting requirements (at [171]).

DMF is not "necessary or convenient" in terms of sections 262 and 9 of the LGA

The Court concluded that the DMF is not "*necessary or convenient*" in terms of section 262 of the LGA, read in light of section 9 of the LGA (at [172]). The Court noted the that DMF is a financial penalty which is inconsistent with the legislated scheme that provides for the imposition of a penalty up to a maximum amount (at [172]). The Court added that the DMF was purposely developed to "*… not reflect actual use …*" but as an incentive for operators to report actual use (at [174]).

Court finds the imposition of DMF regime not to be within the scope of section 10 of the Model Local Law

The purpose of the Model Local Law is to "*… provide a legal and procedural framework for the administration, implementation and enforcement of the local government's local laws, subordinate laws and specified regulatory powers under legislation, and to provide for miscellaneous administrative matters*" (at [145] and section 2(1) of the Model Local Law).

The Model Local Law provides for the granting of an approval for a "*prescribed activity*", which includes "*commercial use of local government controlled areas*", being the cargo ship landing facilities in this case (at [146]).

Section 10(1) of the Model Local Law provides that an approval may be granted on conditions the Council considers appropriate, and section 10(2) of the Model Local Law provides that the conditions must relevantly:

> *(a) be reasonably necessary to ensure that the operation and management of the prescribed activity will be adequate to protect public health, safety and amenity and prevent environmental harm; and*
>
> *(b) be consistent with the purpose of any relevant local law.*
>
> *…*

The Applicant submitted that the Council was not authorised to impose conditions it "*considers appropriate*" in accordance with section 10(1) of the Model Local Law since the conditions were inconsistent with a statutory scheme, namely exceeding the maximum penalty allowed under the LGA (at [179]).The Council submitted that the DMF was imposed by way of condition on the Permit, and that section 10 of the Model Local Law empowers the Council to grant approval on conditions (at [183]).

For similar reasons that were given in addressing the authorisation of the DMF under the LGA, the Court found that the DMF departs from the provisions of the Model Local Law, especially in connection with the maximum penalty for not complying with a condition of approval (at [184]).

The Court noted that if the condition had not been an authorised condition it would have been a "*non-standard condition*" which would have required the provision of an information notice, which was not issued (at [186]).

The Court concluded that the imposition of the DMF did not fall within section 10 of the Model Local Law (at [187]).

Court finds it unnecessary to decide whether issuing the DMF Invoices was legally unreasonable

As the Court had previously found that the DMF Invoices were not authorised, the Court considered that it was unnecessary to decide the issue of legal unreasonableness concerning the issuing of the DMF Invoices (at [210]).

However, the Court did note in the context of the legal unreasonableness claim that the DMF Invoices equated to the Applicant having made "*… 60.67 scheduled stops to each island per month*" during the period for which the DMF Invoices were issued, when the average for the Applicant was "*… roughly equivalent to 56 stops per month for all 15 islands*" (see [204] and [95]). The Court noted that if the Council's contention was that the DMFs were based on the Council's best estimate of actual usage, including the number of stops at each island each month, then the figures adopted by the Council could not be justified (at [205]).

However, the Court noted that if the "*… DMFs were in the nature of a penalty (as [the Court has] found them to be), then the fact that they were calculated on the basis of hypothetical, maximum figures is unremarkable and would not render them legally unreasonable*" (at [207]). If the DMF Invoices were a penalty, it would not be unreasonable to greatly exceed actual use in order to impose such a penalty (at [209]).

Seven day appeal period over Christmas holiday period is unreasonable in the legal sense

The Court found the inclusion of a seven day appeal period was unreasonable in the legal sense, given the timing of the DMF Invoices' delivery and the substantial steps that were required to be completed within the seven day period (at [240]).

The inclusion of a seven day appeal period affected the validity of the decision to issue the DMF Invoices. The Court noted that "*… severance of that seven-day period would not save the invoice from invalidity*" (at [241]). Severance would change the DMF Invoices from having an "*inadequate appeal period*" to having "*no appeal period*" (at [241]).

Conclusion

The Court declared that the imposition of the DMF Invoices was beyond the power of the Council and the DMF Invoices are invalid.

Colin Biggers & Paisley

Telecommunication facility sparks debate: Victorian Civil and Administrative Tribunal allows appeal after Council decision to refuse a permit application to construct a telecommunications facility in proximity to a residential area

Evie Atkinson-Willes | David Passarella

This article discusses the decision of the Victorian Civil and Administrative Tribunal in the matter of *Waveconn Operations Pty Ltd v Melton CC* [2024] VCAT 576 heard before Seuna Byrne, Member

July 2024

In brief

The case of *Waveconn Operations Pty Ltd v Melton CC* [2024] VCAT 576 concerned an application to the Victorian Civil and Administrative Tribunal (**Tribunal**) for the review of a decision made by the Melton City Council (**Council**) to refuse a permit for the construction of a 30 metre high telecommunications facility (**Permit Application**), which if granted, would address existing and future service issues in the Mt Atkinson development area.

The Tribunal allowed the appeal and set aside the Council's decision. A permit to construct a telecommunications facility on the subject land was granted at the direction of the Tribunal.

Background

The relevant land is located south of Grand Boulevard in Truganina, Melbourne and is comprised of a series of non-contiguous lots with a total site area of 8.2 hectares (**Land**). The Applicant, Waveconn Operations Pty Ltd (**Applicant**), sought permission for the construction of a 30 metre high slimline monopole telecommunications tower and an associated equipment compound on the eastern-most corner of the Land, which would sit approximately 90 metres east of the nearest residential property (**Permit Application**).

The Council refused to grant the Permit Application on several grounds. Firstly, it considered the proposal to be inconsistent with the Telecommunications Policy under Clause 19.03 of the *Melton Planning Scheme* (**Planning Scheme**). Relevantly, the policy seeks to preserve "*… a balance between the provision of important telecommunications services and the need to protect the environment from adverse impacts arising from telecommunications infrastructure*" (at [1]).

Secondly, the Council believed that the proposal was inconsistent with the wider planning policy framework under the Planning Scheme relating to urban design, siting, and amenity, and fails to contribute positively to local urban character without causing detrimental impact on neighbouring properties (at [1]).

The Applicant contested the Council's decision on the basis that there was sufficient demand for the facility to improve 5G technology coverage in the area, and that no alternative location was available for the necessary essential infrastructure (at [4]). It submitted that, in any event, the proposed facility would be adequately separated from the nearby residential area to avoid any detrimental impact to neighbouring properties.

In making its determination, the Tribunal considered the following two primary issues (at [9]):

- whether the development was an acceptable response to policy?; and
- whether the development would cause detriment to residential properties and proposed public open space through unacceptable visual impact?

Tribunal finds that the proposal must be considered in the context of the future needs of the community

In considering the surrounding policy relating to the Permit Application, the Tribunal considered the Future Urban Structure Plan in the *Mt Atkinson and Tarneit Plains Precinct Structure Plan* (**PSP**). The plan identifies the Land for "business" uses, being bordered by land for "business/large format retail" to the east and "residential" uses to the west, and forms part of a strategically integral component in achieving greater diversity of employment opportunities within the area in the coming years (at [18]).

The relevant policy pertaining to Telecommunications Facilities in the Planning Scheme is found under Clause 52.19. The purpose of the Clause is to facilitate the implementation of telecommunications services effectively while maintaining the amenity of the area and meeting community needs. Whilst the Tribunal acknowledged that the 30 metre high monopole would be conspicuous within the open landscape of the Land, and therefore posed some visual amenity impact, it also found that the consideration of "community needs" extends to the future community (at [34]).

Accordingly, the Tribunal took into account that the proposed development was an important telecommunications service and that the anticipated increase in employment opportunities in the growth corridor will demand additional telecommunications infrastructure to ensure the accessibility and reliability of network coverage for existing households and prospective businesses in the area (at [34]).

In light of this, the Tribunal was satisfied that, despite its high visibility, the proposed development would strike an acceptable balance between the provision of telecommunications infrastructure and the need to protect the environment from adverse impacts relating to it. Accordingly, the Tribunal found the proposal to be consistent with the relevant policies (at [36]).

Tribunal finds the siting and scale of the proposed telecommunications facility to be acceptable given its relatively remote location to the residential interface

If constructed, the proposed development would sit in an exposed area in proximity to the nearby residential area to the west of McKinley Drive. Given the context of the Land and the relative height of the monopole to its surroundings, it was contested that the structure would cause an unreasonable visual amenity impact to those residential properties (see [37] and [38]).

The Tribunal emphasised that Clause 52.19 only requires any amenity impact caused by any telecommunications facility to be "minimal" rather than non-existent (at [44]). In its assessment, the Tribunal also took into account that a permit for the construction of the Mt Atkinson Hotel had been granted and, if built, would partially conceal the prominent monopole's visual impact upon the residential properties beyond McKinley Drive (see [42] and [43]). Notwithstanding whether the hotel permit is acted on or not, the Tribunal held that the proposed development would be remote enough from the residential interface to ensure that there would be a sufficient buffer to any significant amenity concerns (at [44]).

Tribunal finds there is not sufficient evidence to establish that the proposal is untenable for the development of future public open space

Further to the above, the broader policy framework for the surrounding precinct is the *Hopkins Road Business Precinct Urban Design Framework* (**Framework**) (at [20]). The Framework specifically provides for public open space and, in particular, an allocated part of the land opposite the proposed development for a local park (at [21]).

Despite direction in the Framework, as it is not part of the Planning Scheme, it warrants less weight than the PSP (at [22]). Further to this, the proposed location of the park had not been confirmed and, at the relevant time, the Council did not own the relevant land and would not acquire it and deliver the park until five to ten years in the future (at [57]). Irrespective of the Framework's weight on the matter, the Tribunal was not persuaded that there was sufficient evidence to establish that the interface between the facility and the prospective local park would be unacceptable (at [59]).

Conclusion

The Tribunal allowed the appeal and granted a permit subject to conditions.

Colin Biggers & Paisley

Victorian Government endorses future route for Melbourne Metro 2 to Fishermans Bend and Docklands

Evie Atkinson-Willes | David Passarella

This article discusses the question of possible funding arrangements for a prospective underground rail network for Melbourne Metro 2 to Fishermans Bend and Docklands

July 2024

In brief

A recent announcement by the Victorian Government confirming the preferred route for a prospective underground rail network to Fishermans Bend has sparked conversation about the question of possible funding arrangements for the project. Our Melbourne Planning, Infrastructure and Environment team consider the proposal and the importance of providing certainty for landowners and tenants across the precinct.

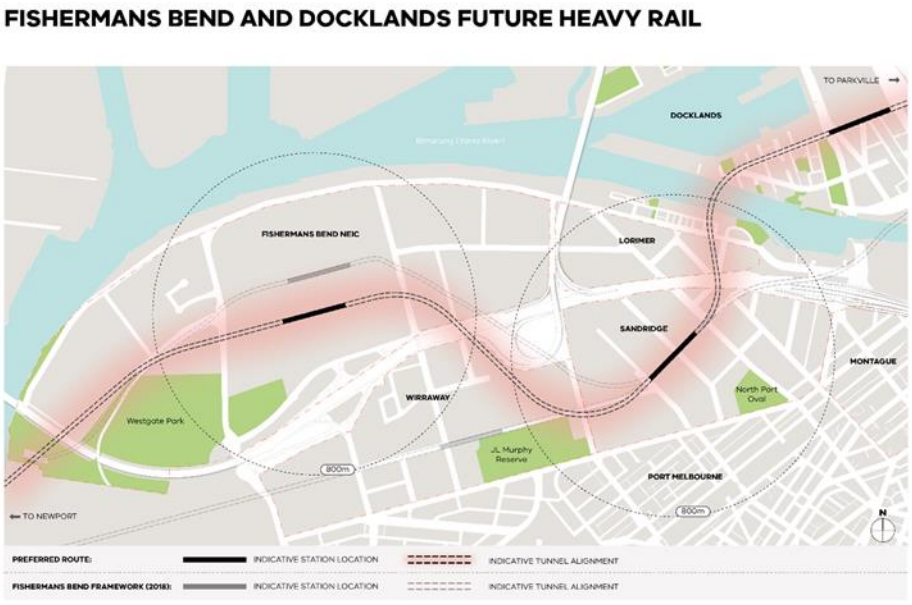
Background

The Fishermans Bend Framework (**the Framework**) was endorsed by the Victorian Government in 2018 to set in motion the vision of urban renewal for Melbourne's Fishermans Bend precinct as home to 80,000 people, a source of employment for 80,000 workers, and a destination for 20,000 tertiary students by 2050.

Under the Framework, the Government aspires to achieve 80% of transport movements to and from the precinct via sustainable transport (ie public transport, walking or cycling) by 2050. Currently, the area is serviced by two tram routes and several bus routes, with the Victorian Government recently delivering additional weekly bus services to Fishermans Bend to increase public transport coverage to the area.

Nonetheless, a key issue belabouring the major urban renewal is the lack of high capacity public transport to accommodate the expected growth in population as the precinct continues to develop. As a result, development within the precinct to date has stagnated as landowners, businesses and developers call for greater transparency and certainty as to how the Victorian Government intends to finance any supporting public infrastructure.

'Melbourne Metro 2', an underground rail network, has been flagged as a long-term objective of the Framework to deliver the necessary public infrastructure to connect the precinct to the rest of Melbourne. Seven years on and the Department of Transport and Planning has endorsed the preferred route for the rail network, which will involve the construction of a rail tunnel system and three new metro stations at Southern Cross, Sandridge, and Fishermans Bend.



Source: 'Future train route and station locations for Fishermans Bend and Docklands', Victoria State Government website.

Funding the Underground Rail Network

In our view, the delivery of this critical infrastructure is integral to improve the accessibility and liveability of Fishermans Bend. However, the prospective rail network remains in its embryonic stages as details regarding the required planning work and funding for the project are yet to be determined.

Since the creation of the Fishermans Bend Urban Renewal Area (**FBURA**) in July 2012, the Victorian Government has sought to establish an appropriate funding plan to ensure the delivery of essential infrastructure in the precinct. After several iterations to develop a suitable funding arrangement, in November 2023, we saw the Department of Transport and Planning (**DTP**) release the FBURA Draft Development Contributions Plan (**DCP**).

In theory, the draft DCP aims to streamline three separate funding sources to cover the charges associated with delivering infrastructure required for transport, among other things. In turn, developers will be required to make contributions, calculated at an equitable rate based on proportional 'share of usage'. However, the DCP only has regard to surface public infrastructure, in particular, widening projects to accommodate additional bus and tram routes in the area.

Accordingly, the question remains as to how the State Government intends to fund it. In the absence of further clarifying information, it remains in the hands of the State Government to deliver an ample heavy rail network to aid the precinct in its development. While confirmation of the preferred train route and station locations provides greater clarity to landowners and developers that will be affected by the eventual rail network, the project will demand substantial works and planning.

Colin Biggers & Paisley

Victorian Government unveils draft housing targets to implement 2.5 million new homes across Victoria by 2051

Ashleigh Pope | Amar Singh | David Passarella

This article discusses the recent draft housing targets of 2.5 million additional homes statewide by 2051 announced by the Victorian Government and the implications of the proposed plans for local councils and members of the community

July 2024

In brief

The Victorian Government has announced ambitious draft housing targets of 2.5 million additional homes statewide by 2051. The targets have been released for community consultation and, when finalised, will form part of a new strategic plan for Victoria.

The Victorian Government has recently announced the release of its statewide draft housing targets for 2051, which will increase housing stock to over four million by the 2050s. Subject to local government consultation, these figures will form part of a new housing plan for Victoria. The draft targets seek to double the existing number of dwellings across Victoria by implementing two million dwellings in Metropolitan Melbourne and 500,000 new homes in regional areas including Geelong, Ballarat, and Bendigo.

The draft targets

The draft housing targets were released last week in the form of interactive maps displaying the distribution of new homes across the state. These maps show that:

- among the inner suburbs, Melbourne City Council is expected to accommodate 134,000 new homes by 2051, more than doubling the existing dwellings in that area;
- inner city local councils such as Yarra, Stonnington, and Port Phillip will see an increase of 85-90% in existing dwellings; and
- outer municipalities such as Melton, Wyndham, and Casey City Councils, have significant targets of 132,000, 120,000 and 104,000 respectively.

This targeted expansion purportedly responds to the need for greater housing diversity with access to jobs, transport, and services in each municipality and is said to reflect current development trends, access to existing and planned public transport, and flood and bushfire risks.

Reportedly, the Government will rely on local council powers to unlock space for new homes by facilitating changes to planning rules across the state to encourage new development. However, in absence of further details as to how the Government will support the delivery of these planning outcomes, it is difficult to picture what these changes will look like and how they will be administered in such a short timeframe.

Further to this, while targets are useful for councils and developers in providing an indication of where the Government intends to facilitate new residential developments over the next three decades, the question remains as to how economically feasible these proposed figures will be in practice. In light of the current market forces at play, increasing constructions costs, stilted supply chains, and high interest rates, it remains to be seen what measures will be put in place to support development applications through the approval, construction, and occupancy stages to ensure these housing targets are met in the near future.

Public consultation

At this stage, the Government is seeking the cooperation of local councils and members of the community to inform the feasibility and practicalities of meeting such targets. Submissions will be open to the public and local councils from 1 July 2024 to 30 August 2024, which will inform the final targets to be released at the end of 2024.

Two is a crowd: Planning and Environment Court of Queensland allows a submitter appeal against the approval of a development application for a development permit for a material change of use for a bulky goods sales complex due to the lack of demonstrated need for the proposed development

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Kelly Consolidated Pty Ltd v Ipswich City Council & Anor* [2024] QPEC 12 heard before Kefford DCJ

August 2024

In brief

The case of *Kelly Consolidated Pty Ltd v Ipswich City Council & Anor* [2024] QPEC 12 concerned a submitter appeal by Kelly Consolidated Pty Ltd (**Submitter**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Ipswich City Council (**Council**) to approve an impact assessable development application (**Development Application**) for a development permit for a material change of use for a bulky goods sales complex and a development permit for operational works for advertising devices (**Proposed Development**) in respect of land at Yamanto, Ipswich (**Subject Land**).

The Court considered whether the Proposed Development is a land use that is explicitly supported by the *Ipswich Planning Scheme 2006* (version 03/2017) (**Planning Scheme**), whether there is a need for the proposed development, whether the proposed development is consistent with relevant assessment benchmarks in the Planning Scheme, and relevant matters relied on by the parties under section 45(5)(b) of the *Planning Act 2016* (Qld) (**Planning Act**) (at [23]).

The Court allowed the appeal, set aside the Council's decision to approve that part of the Development Application in respect of the development permit for a material change of use, and replaced it with a decision to refuse that part of the Development Application (at [277]).

Background

The Subject Land, an 18.33-hectare vacant parcel of land comprising 140 lots, is located 100 metres from land designated by the Planning Scheme as the Yamanto Major Centre, which comprises a mix of retail, commercial, and community uses (see [1] to [5] and [8]). The Planning Scheme designates the Subject Land as being in Sub Area LB6 - Yamanto of the Local Business and Industry Zone, which is to support the intended business functions of the Yamanto Major Centre (at [8]). The Subject Land is also mapped as part of the Urban Areas locality on Strategic Framework Figure 1-1 (at [66]).

In July 2021, the Council approved the Development Application lodged by Yamanto Holdings Pty Ltd (**Co-Respondent**) in respect of the Subject Land subject to conditions (**Development Approval**) (see [9] and [11]). During the public notification of the Proposed Development the Submitter, which was granted a development permit for a material change of use for a shopping centre in the Yamanto Primary Business Area of the Yamanto Major Centre Zone in October 2022 (**Yamanto Shopping Centre Approval**), objected to the Development Application (see [6] and [10]).

The Submitter appealed against the Council's decision to grant the Development Approval, insofar as it approved a development permit for a material change of use of premises on part of the Subject Land and not in respect of the proposed operational works, on the basis that there is no need for the Proposed Development and that it does not comply with the provisions of the Planning Scheme pertaining to the proper functioning and support of the Yamanto Major Centre (at [12]).

The Court decided that, whilst it may fit the definition of "*Shopping Centre*" as contended by the Submitter, the Proposed Development more accurately falls within the definition of "*Bulky Goods Sales*" in the Planning Scheme (at [61]).

The Co-Respondent bore the onus of establishing that the appeal should be dismissed (at [15]).

Court finds that the Proposed Development is contemplated in certain circumstances by the Planning Scheme

The Submitter argued that the Proposed Development is inconsistent with the specific outcome for the Urban Areas as a whole in section 4.3.3(1)(a)(iii) of the Planning Scheme, the overall outcomes for the Local Business and Industry Zone in sections 4.11.2(2)(c) and (e) of the Planning Scheme, and the specific outcome for Sub Area LB6 - Yamanto in section 4.11.4(6)(g) of the Planning Scheme (**Disputed Assessment Benchmarks**) for the reasons that it constitutes an "*out of centre*" development, it would compromise the viability of higher order centres and the function of the Yamanto Major Centre, it does not support the Yamanto Major Centre, and it does not cater to the needs of just the local community (see [64] to [65]).

The Co-Respondent argued that the Disputed Assessment Benchmarks, when considered in conjunction with the Strategic Framework, the desired environmental outcomes, overall outcomes and specific outcomes for the Urban Areas as a whole, and overall outcomes and specific outcomes for the Local Business and Industry Zone, demonstrate that the Proposed Development is explicitly supported by the Planning Scheme (see [68] and [73]).

The Court observed that the specific outcome in section 4.11.4(6)(g) of the Planning Scheme contemplates the use of land in Sub Area LB6 - Yamanto for "*bulky goods retailing*" provided that it supports the intended business functions of the Yamanto Major Centre (see [95] to [100]). The Court stated that "*… it is not determinative of this issue that the proposed development does not provide all the envisaged land uses*" (at [103]).

The Court held that, whilst the Planning Scheme does not explicitly support the Proposed Development on the Subject Land, it does contemplate in certain circumstances use of the Subject Land for bulky goods retailing and whether there is support from the Planning Scheme is determined as a question of fact having regard to the parameters of the Proposed Development and the need for, and the economic impact of, the Proposed Development (at [104]).

Court is not satisfied that there is a demonstrated need for the Proposed Development

In determining whether there is a need for, and an absence of adverse economic impact occasioned by, the Proposed Development, the Court had regard to expert evidence (at [114]).

Given the Court's doubts regarding the accuracy of the experts' opinions on what retail traders fit the definition of "*bulky goods sales*" - and therefore their respective quantitative assessments - the Court was uncertain about the extent of the demand for bulky goods sales uses (see [159] to [165]).

In considering the supply of retail facilities to address the demand, the Court did not accept the assumption made by the experts engaged by the Co-Respondent and the Council that the Yamanto Shopping Centre Approval will provide only 5,000 square metres of bulky goods sales retail uses (at [202]). For this reason, the Court was not prepared to accept their respective opinions that "*… there is a high level of need for the proposed development …*" and that "*… there is a modest level of community, economic and planning need for the proposed development …*" (see [203] to [207]).

In respect of the potential impact of the Proposed Development, the Court did not accept the opinion of the experts engaged by the Co-Respondent and the Council that the Proposed Development "*… would not compromise or jeopardise the Yamanto Major Centre and other higher order centres or compromise or undermine the centres hierarchy*" (at [209]). The Court preferred the evidence of the expert engaged by the Submitter that "*… there is insufficient demand to support both the proposed development and the [Yamanto Shopping Centre Approval]*" (see [210] and [212]).

Despite assuming that the Proposed Development would provide an additional choice of facilities, increased convenience and amenity for large format retail shopping, and the diversification of the economic base in the Yamanto area (at [214]), the Court was "*… not satisfied that there is sufficient latent unsatisfied demand to ensure the success of both the proposed development and the [Yamanto Shopping Centre Approval]*" (at [217]), especially in light of the uncertainty of the scale of the retail facility required to address the demand (at [216]).

Court finds that the Proposed Development is inconsistent with certain relevant assessment benchmarks

In respect of the Disputed Assessment Benchmarks, the Court made the following conclusions:

- The specific outcome for the Urban Areas as a whole in section 4.3.3(1)(a)(iii) of the Planning Scheme provides that "*[a] network of centres is established which … supports and provides for the distribution of neighbourhood centres and local shopping areas which mainly cater for convenience shopping and local services …*" (see [70] and [221]). The Submitter alleged that the Proposed Development is an "*out of centre development*" that is not a suitable use in the Local Business and Industry Zone (at [222]). The Court held that, whilst the Proposed Development is not "*… of a scale that will support the intended business functions of the Yamanto Major Centre …*", this did not render it inconsistent with section 4.3.3(1)(a)(iii) of the Planning Scheme (at [224]).

- The overall outcome for the Local Business and Industry Zone in section 4.11.2(2)(c) of the Planning Scheme states that "*[u]ses and works do not compromise or jeopardise the intended retail and service functions of the City Centre and designated Major or Neighbourhood Centres*" (see [71] and [225]). The Court held that the Co-Respondent had not demonstrated that the Proposed Development would not compromise or jeopardise the intended retail and service functions of the Yamanto Major Centre (at [226]).
- The overall outcome for the Local Business and Industry Zone in section 4.11.2(2)(e) of the Planning Scheme states that "*[u]ses and works cater to the needs of the local community*" (see [71] and [227]). The Submitter argued that the Proposed Development will serve an area wider than the "*local community*", and is therefore non-compliant (at [228]). The Court was not persuaded that the Proposed Development would cater to the needs of the local community because there is "*… a degree of latent unsatisfied demand for large format retail uses …*" which can be adequately met by the new Yamanto Shopping Centre Approval without a need for the Proposed Development (at [234]).
- The specific outcome for Sub Area LB6 - Yamanto in section 4.11.4(6)(g) of the Planning Scheme provides that "*[t]he Sub Area supports the intended business functions of the Yamanto Major Centre by providing for … bulky goods retailing and retail warehouses …*" (see [72] and [235]). The Submitter argued that non-compliance is demonstrated by the Co-Respondent's failure to establish a need for the Proposed Development, the evidence of its town planner who opined that the Proposed Development would compete with the planning aspirations of the Yamanto Major Centre, and the absence of any integration or connection between the Proposed Development and the Yamanto Major Centre (at [236]). The Court was not satisfied that the Proposed Development complied with the specific outcome in section 4.11.4(6)(g) of the Planning Scheme (see [239] and [240]).

Court considers relevant matters relied upon by the Co-Respondent

In respect of the relevant matters relied upon by the Co-Respondent in support of approval under section 45(5)(b) of the Planning Act, the Court made the following conclusions:

- *Appropriate and well-located in a planning sense* – The Co-Respondent contended that the Proposed Development is appropriate and well-located in a planning sense (at [251]). The Court accepted that the Subject Land is identified as a preferred location for bulky goods retailing, but was not satisfied that the Subject Land is a preferred location for the Proposed Development, nor that it would not have an adverse impact on the Yamanto Shopping Centre Approval (see [252] to [255]).
- *Social and economic benefits for the local community* – The Court accepted the Co-Respondent's argument that the Proposed Development would present positive social and economic benefits to the local community by creating employment opportunities, encouraging the retention of spending within the Ipswich local government area, enhancing the amenities enjoyed by the community, and contributing to public art (see [257] to [259]).
- *Good planning and community expectations* – The Co-Respondent contended that the Proposed Development is consistent with good planning and the reasonable expectations of the community on the basis of its alleged compliance with the Planning Scheme (at [260]). The Court held that, contrary to the Planning Scheme, the Co-Respondent had not established that the Proposed Development would not compromise or jeopardise the intended retail and service functions of the Yamanto Major Centre (at [266]).

Conclusion

The Court held that it was not satisfied to the requisite standard that the Proposed Development on the Subject Land is explicitly supported by the Planning Scheme, that there is a demonstrated need for the Proposed Development, nor that it would not compromise the intended retail, service, and business functions of the Yamanto Major Centre (see [272] and [275]).

The Court allowed the appeal, set aside the Council's decision to approve the Development Application for a development permit for a material change of use, and replaced it with a decision to refuse that part of the Development Application that sought a development permit for a material change of use (at [277]).

Colin Biggers & Paisley

Dual occupancies dressed up as dwellings houses: Planning and Environment Court of Queensland dismisses an attempt to regularise dual occupancy uses on premises approved for dwelling houses

Mary Do | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Glen Machado & Ors v Council of the City of Gold Coast* [2024] QPEC 22 heard before Everson DCJ

August 2024

In brief

The case of *Glen Machado & Ors v Council of the City of Gold Coast* [2024] QPEC 22 concerned five appeals by the Applicants to the Planning and Environment Court (**Court**) against the decisions of the Council of the City of Gold Coast (**Council**) to refuse five development applications for development permits for a material change of use for a dual occupancy (**Development Applications**) in respect of existing dwelling houses on premises situated at 7, 12, 13, 16, and 19 Boydaw Road, Gold Coast (**Premises**).

The Development Applications were impact assessable, and the assessment benchmarks were the relevant provisions under the *Gold Coast City Plan 2016* (Version 8) (**Planning Scheme**) and *Planning Regulation 2017* (Qld) (**Planning Regulation**) (at [12]).

The Court dismissed the appeals for the reason that the planning outcome is not consistent with the outcomes the Planning Scheme seeks for the use of a dual occupancy (at [41]).

Background

Each of the Development Applications relates to an existing dwelling house. Each dwelling house has the appearance of a single dwelling house from the street, but is comprised of two dwellings divided by an internal wall being of one of two different types of configurations (**Proposed Developments**) (see [2] and [5]).

The Type A Proposed Developments are comprised of a one-bedroom dwelling and four-bedroom dwelling and are at 12 and 16 Boydaw Road, Ormeau (at [3]).

The Type B Proposed Developments are comprised of a two-bedroom dwelling and three-bedroom dwelling and are at 7, 13, and 19 Boydaw Road, Ormeau (at [4]).

Both dwelling configurations have a 1.8m high fence dividing the backyards (see [3] to [4]).

A building certifier approved each of the Proposed Developments as a dwelling house (at [9]). The Council alleged that each of the Proposed Developments was being used unlawfully as a dual occupancy, and therefore gave Show Cause Notices to the relevant Applicants resulting in the Development Applications being made (at [9]).

Statutory framework

The Court considered section 31(1)(f) of the Planning Regulation and the following provisions in the Planning Scheme as being relevant to the assessment of the Development Applications (see [22] to [26]):

- Low Density Residential Zone Code (**LDRZ Code**) – Purpose 1, Overall Outcomes 2(a)(i), 2(1)(iii), 2(a)(vii), and 2(b)(i), Performance Outcome (**PO**) PO1, and PO5.
- Dual Occupancy Code – Purpose 1, Overall Outcomes 2(2)(c), 2(d), and 2(f), PO1, PO4, and PO7.

Court finds that each of the Proposed Developments is not a lawful use as a dwelling house

Section 31(1)(f) of the Planning Regulation requires that impact assessment must be carried out having regard to, "*… inter alia 'any development approval for, and any lawful use of, the premises or adjacent premises*"' (at [28]). The lawful use of each of the Premises is a dwelling house (at [28]).

Under schedule 24 of the Planning Regulation, the definition of a dwelling house extends to two dwellings, one of which is the secondary dwelling (at [28]). Schedule 24 of the Planning Regulation states that the secondary dwelling must be "*… used in conjunction with, but subordinate to, the other dwelling on the lot*" (at [28]).

The Council argued that the secondary dwelling for each of the Proposed Developments is neither used in conjunction with nor is it subordinate to the other dwelling (at [29]).

The Court found that the secondary dwelling is subordinate to the other dwelling as only the larger dwelling has a front door providing access to Boydaw Road and the secondary dwelling is significantly smaller than the other dwelling (at [29]).

The Court acknowledged that "*used in conjunction*" involves a functional integration even though they need not be related to or associated with each other (see [30] to [31]).

The Court found that the shared use of infrastructure connections and the shared front driveway of each of the Premises fell short of demonstrating that the secondary dwelling is being used in conjunction with the other dwelling (at [31]). The Court also held that the partitioning off of parts of the backyards with continuous 1.8m high fences created a level of separation which precludes the two dwellings from being used in conjunction with each other (at [31]).

The Court therefore found that the use of each of the Premises is not a lawful use as a dwelling house (at [32]).

Court finds non-compliance with Planning Scheme is not offset by minor improvements

The Applicants argued that any non-compliance with the Planning Scheme is not material and that benefits will arise from the delivery of the proposed built form outcome, increased driveway width, a concreted side access, and a more clearly defined pedestrian entry for the smaller dwelling in each of the Proposed Developments (at [33]).

The Court observed that the minor improvements to the built form and functionality of the Premises are largely cosmetic and found that such minor improvements do not offset the significant detriment of enshrining the permanent partitioning of the backyards of each of the Premises (at [33]).

Court finds compliance with the Strategic Framework

Strategic Outcome 3.3.1 of the Strategic Framework in the Planning Scheme mandates that housing is to be attractive and well-designed (at [35]). Specific Outcome 3.3.3.1 of the Planning Scheme states that low-rise residential environments should retain and enhance local character and amenity.

The Court found that the Proposed Developments are of "*a dispersed or gentle-scattering effect*" where the Proposed Developments are in relatively low concentrations in the street and not adjoining each other (at [35]).

Court finds non-compliance with LDRZ Code

The Court found as follows with respect to the LDRZ Code:

- The Proposed Developments are "*low intensity*" as is required in Overall Outcome 6.2.1.2(2)(a)(i) and there is compliance with the general locational requirements in Overall Outcome 6.2.1.2(2)(a)(iii) (at [36]).
- The Proposed Developments do not comply with the specific design outcomes in section 6.2.1.2(2)(a)(iii) which relate to a dual occupancy occurring in low concentrations where they achieve a dispersed or gentle-scattering effect. In particular, the Proposed Developments are not lots with a dual frontage nor are the lots appropriately identified on the Residential Density Overlay Map (at [36]).
- The Proposed Developments do not comply with Overall Outcome 6.2.1.2(a)(vii) or the purpose of the LDRZ Code because the partitioning of the backyards detracts from the residential amenity of the area (at [36]).
- The Proposed Developments do not comply with Overall Outcome 6.2.1.2(b)(i), because even though the Proposed Developments are of similar character to the detached dwelling houses in the street, they are not set amongst generous landscaping (at [36]).
- The Proposed Developments do not comply with PO1 because the partitioning of the backyards prevents access around the buildings (at [36]).
- The Proposed Developments comply with PO5 which relates to a requirement for low intensity development to complement the existing residential development of the neighbourhood and protect its dwelling house character (at [24]).

Court finds non-compliance with the Dual Occupancy Code

The Court considered the purpose and overall outcomes of the Dual Occupancy Code, which relate to an individual dual occupancy, and noted that a dual occupancy is to be appropriately located, achieve a high level of comfort and amenity for the occupants, overlook streets, and contribute positively to the local character and city image (at [37]).

The Court observed that the smaller dwellings for the Type A Proposed Developments have no street frontage and no capacity to overlook the street and that the larger dwelling merely overlooks the street. The Court observed the Type B Proposed Developments have only the master bedroom of the larger dwelling overlooking the street and the smaller dwelling has no connection with the street (at [37]).

The Court observed that the contribution of the Proposed Developments was neutral and did not contribute positively to the local character and city image (at [37]). The Court thus found non-compliance with the purpose and overall outcomes of the Dual Occupancy Code.

The Court held as follows with respect to the relevant Performance Outcomes of the Dual Occupancy Code (see [26] and [38]):

- In respect of PO1, which requires "*... the provision of sufficient frontage for pedestrian and vehicular access and parking, and 'adequate' landscaping*", the Court observed that the driveway and covered parking spaces dominate the property frontage, and that the landscaping adjacent to the road frontage was inadequate, and therefore found there is non-compliance.
- In respect of PO4, which requires "*… adding of visual interest through articulation and the provision of differentiation between dwellings*", the Court observed that there is minimal building articulation between the gates and each smaller dwelling, that there was not clearly delineated pathways and separated letterboxes, and that there is minimal differentiation between dwellings, and therefore found there is non-compliance.
- In respect of PO7, which requires "*… the building to be orientated to facilitate casual surveillance by addressing the street*", the Court observed that one bedroom in a building overlooking the street is insufficient to facilitate casual surveillance and therefore found there is non-compliance.

Conclusion

The Court found that the Proposed Developments were designed as single dwelling houses and do not comply with the outcomes that the Planning Scheme seeks for a dual occupancy. The Court confirmed the Council's decision to refuse the Development Applications and dismissed the appeals (at [41]).

Natural justice requires joinder: Submitters who were parties to a judgment giving a development approval entitled to be parties in subsequent change application

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wyandra St Developments Pty Ltd v Brisbane City Council* [2024] QPEC 28 heard before Kefford DCJ

August 2024

In brief

The case of *Wyandra St Developments Pty Ltd v Brisbane City Council* [2024] QPEC 28 concerned an application to the Planning and Environment Court of Queensland (**Court**) seeking that parties be joined (**Joinder Application**) in the substantive proceedings relating to a change to a development approval that is a development permit for a material change of use for a multiple dwelling and a food and drink outlet (**Development Approval**).

The Development Approval, with conditions, was given by the Court with the consent of the parties in 2022 in an appeal against the deemed refusal of a change application. The applicants for the Joinder Application had made a properly made submission in respect of that change application and were Co-Respondents by Election in that appeal (**Submitters**).

The application to the Court under section 78 of the *Planning Act 2016* (Qld) reprint dated 10 June 2022 (**Planning Act**) to change the Development Approval (**Change Application**) did not name the Submitters as respondents, and the Applicant for the Change Application opposed the Joinder Application.

The Court held that, to give effect to the doctrine of natural justice, an originating application seeking to change a development approval given or changed by a judgment of the Court is to name the individuals who were a party to the Court's original judgment (at [29]).

Accordingly, the Court ordered the Applicant to file and serve an amended Change Application in which the Submitters, as well as other parties to the Court's original judgment, are named as respondents (at [30]).

Statutory requirement and doctrine of natural justice

At the hearing of the Joinder Application the parties addressed whether the Submitters were entitled to be joined as respondents to the Change Application under rule 8(1) of the *Planning and Environment Court Rules 2018* (Qld) (**Court Rules**) which states that "*An originating application must name as a respondent the entity directly affected by the relief sought.*"

The Court observed at [12] that the requirement in rule 8(1) of the Court Rules is explained by the common law doctrine of natural justice stated in the case of *Kioa & Ors v West & Anor* [1985] HCA 91 as follows:

> *It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it … The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.*
>
> *… the concept of 'legitimate expectation' extends to expectations which go beyond enforceable legal rights provided that they are reasonably based … The expectation may be that a right, interest or privilege will be granted or renewed or that it will not be denied without an opportunity being given to the person affected to put his case.*

The Court held that the duty of natural justice does not extend to those indirectly affected as a member or class of the public and requires a consideration of the relevant statutory framework to determine if an obligation to provide a person a fair opportunity to respond to statements prejudicial to the person's view exists. What natural justice requires depends on the circumstances of the case, "*… including, amongst other things, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting …*" (at [13]).

Submitters have a legitimate expectation to be heard

The Court held having regard to the following that the Submitters have a legitimate expectation to be heard in respect of the Change Application (see [14] to [28]):

- The legitimate interests permitted to be considered under the Planning Act are broad having regard to the relevant statutory context, which in this case includes the provisions in the Planning Act relating to making and deciding a change application (see section 78 to section 81A), the definition in schedule 2 of the term "minor change" for a development approval, the provisions relating to advancing the purposes of the Planning Act (see section 5), and the meaning of "impact assessment" stated in section 45(5).
- The Submitters' expectation that the Development Approval will not be changed without them being given an opportunity to be heard is legitimate given that the Submitters participated in the proceedings relating to the giving of the Development Approval and were named as parties to the judgment giving the Development Approval.
- The combined effect of the statutory context and the legitimate expectation of the Submitters demonstrates that the Submitters are directly affected by the proceeding and entitled to be named as respondents. Further, the Submitters' affidavit evidence demonstrates beyond reasonable doubt the nature of their interest and their legitimate expectation.
- There is no statutory intention to exclude the doctrine of natural justice.

Natural justice requires the Submitters to be named as respondents

The Planning Act requires the Court as the responsible entity to consider, amongst other things, the following in assessing and deciding a change application for a minor change:

- Under section 81(2)(b), "*… any properly made submissions about the development application or another change application that was approved*".
- Under section 81(2)(da), "*… all matters the responsible entity would or may assess against or have regard to, if the change application were a development application*".
- Under section 81(2)(e), "*… another matter that the responsible entity considers relevant*".

The Court held that there is no guarantee that the Court will be provided with the evidence it considers relevant under section 81(2)(da) and section 81(2)(e) of the Planning Act, which may legitimately include evidence of the views of a party to the original proceedings in which the Court gave the development approval the subject of the change application. The Court held that without such evidence it may exercise its discretion to refuse the change application (at [28]).

Thus, the Court held that the doctrine of natural justice requires an originating application to change a development approval given or changed by a judgment of the Court to name as a respondent each party to the original judgment (at [29]).

Conclusion

The Court held that the Submitters ought to be named as respondents in the Change Application and ordered the Applicant to file and serve an amended Change Application to that effect.

Out of time: A landowner appeal against a categorisation decision is filed out of time

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Land Court in the matter of *Saville v Council of the City of Gold Coast* [2024] QLC 12 heard before WA Isdale

August 2024

In brief

The case of *Saville v Council of the City of Gold Coast* [2024] QLC 12 concerned an appeal by an owner of land (**Landowner**) located at Coomera (**Land**) to the Land Court of Queensland (**Court**) against the decision of the Council of the City of Gold Coast (**Council**) to categorise the Land as category "*2T Residential 2*".

The Landowner's Notice of Appeal was filed in the Court more than two years after the date of the Council's letter in respect of the rates category for the Land. The Notice of Appeal relevantly alleged that the Land ought to have correctly been categorised as category "*1T Residential 1*".

The Court ultimately did not consider the correct rating category for the Land, because the Court held that it did not have jurisdiction to hear the appeal on the basis that the Notice of Appeal was filed after the 42-day appeal period and the Court does not have the power to extend the appeal period.

Accordingly, the Court dismissed the appeal.

Rating categories

The Council's decision categorised the Land as category "*2T Residential 2*", which is defined in the Council's Rating Category Statement as follows:

> ***A residential lot:***
>
> *(1) created on a Building Units Plan or Building Format Plan that is part of a community titles scheme (vertical orientation); and*
>
> *(2) located up to and including 4 levels above ground; and*
>
> *(3) either:*
>
> *(a) used to provide rental accommodation to permanent residents at any time during the rating period; or*
>
> *(b) not used as a principal place of residence.*

The Landowner alleged that the Land's correct rating category is "*1T Residential 2*", which is defined in the Council's Rating Category Statement as follows:

> ***A residential lot:***
>
> *(1) created on a Building Units Plan or Building Format Plan that is part of a community titles scheme (vertical orientation); and*
>
> *(2) located up to and including 4 levels above ground; and*
>
> *(3) not used to provide rental accommodation to either permanent residents or itinerants at any time during the rating period; and*
>
> *(4) used as a principal place of residence by at least one of the owners.*

Appeal period

The appeal period in respect of a local government's categorisation decision is stated in section 92(2) of the *Local Government Regulation 2012* (Qld) to be "*… within 42 days after the day when the owner received notice of the decision*".

The Court estimated, based on the evidence before it, that the period between the date of the Council's letter in respect of the rates category for the Land and the filing of the Landowner's Notice of Appeal was in the order of 686 days (at [8]).

The Landowner submitted that its appeal must be given fair treatment, but did not dispute that the appeal was filed outside of the appeal period (at [5]).

Court does not have jurisdiction to hear the appeal

The Court held that in the circumstances where the appeal was filed out of time and the Court does not have the power to extend the appeal period, the Court does not have jurisdiction to hear and decide the appeal (see [9] to [11]).

Conclusion

The Court held that it does not have jurisdiction to hear the Landowner's appeal because it was filed out of time.

Reaching new heights: A submitter appeal against the approval of a change application is dismissed because the benefits outweigh any adverse impact relating to building height

Mary Do | Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *McEnearney v Council of the City of Gold Coast & Anor* [2024] QPEC 32 heard before McDonnell DCJ

September 2024

In brief

The case of *McEnearney v Council of the City of Gold Coast & Anor* [2024] QPEC 32 concerned a submitter appeal by a landowner (**Submitter**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Council of the City of Gold Coast (**Council**) to approve a change application (**Change Application**) in respect of a development approval that is a development permit for a material change of use (**Development Approval**) for a site located at 3 Rutledge Street, 2-18 Marine Parade, and 119 Musgrave Street, Coolangatta (**Site**).

The Change Application proposed a number of changes, including most relevantly, a change to height of the proposed development (at [6]).

The Court considered whether the Change Application complied with the *Gold Coast City Plan 2016* (Version 8) (**Planning Scheme**) and whether there were sufficient relevant matters to warrant approval of the Change Application despite any non-compliance with the relevant assessment benchmarks in the Planning Scheme (see [31] and [130]).

The issues in dispute included those relating to community expectations, building height, built form, scale, and character, amenity including noise, visual amenity, shadow impacts, views, privacy, mix of uses, and need (at [36]).

The Court dismissed the appeal for the reason that the benefits of the Change Application outweigh any adverse impact arising from the non-compliance with the relevant assessment benchmarks relating to height (at [135]).

Background

The Site is located at the eastern end of the Kirra foreshore area (at [12]) and is included in the Neighbourhood Centre Zone under the Planning Scheme (at [33]). The Development Approval is a development permit for a material change of use for multiple dwellings, short-term accommodation, resort complex, food and drink outlet, shop, office, health care services, service industry, and hotel (at [3]).

The proposed development that is the subject of the Development Approval comprises the following four stages (at [3]):

- *Stage 1* – Building 1 (16 storeys) comprises multiple dwellings and the hotel use (**Building 1**).
- *Stage 2* – Building 2 (10 storeys) comprises multiple dwellings and retail uses (**Building 2**).
- *Stage 3* – Building 3 (4 storeys) comprises a resort complex and retail uses (**Building 3**).
- *Stage 4* – Building 4 (3 storeys) comprises multiple dwellings (**Building 4**).

The Change Application sought the following changes (at [6]):

- *Storeys and height* – An increase from 10 storeys to 14 storeys, with an increase in the overall building height of 11.2 metres for Building 2 by 11.2 metres and an increase from four storeys to seven storeys, with an increase in overall building height of approximately 5.1 metres for Building 3.
- *Architectural design* – A change to the architectural design of Building 2 and Building 3.
- *Retail/commercial gross area* – An increase in the retail/commercial gross floor area of the development from 2,947m^2 to 4,360m^2.
- *Car parking, floor layout, tenancies, and laneways* – An increase of car parking from 540 to 621 car parks, and internal amendments to the ground floor layout, tenancies, and laneways.

- *Indoor sport and recreation use* – An introduction of an indoor sport and recreation use.
- *Dwelling units and hotel suites* – An addition of seven dwelling units to Building 2 and an addition of 14 hotel suites to Building 3.
- *Removal and consolidation of stages* – The removal of Building 4 and consolidation of Stages 2 and 3.

The Submitter appealed against the Council's decision to grant the Change Application on the basis that the change would be unacceptable having regard to its impacts on character and amenity arising from the changes in the built form and height (at [9]).

The Co-Respondent, being the Applicant for the Development Approval, bore the onus of establishing that the appeal should be dismissed (at [22]).

Court finds the community submissions and Submitter's statement do not establish reasonable expectation as to the nature of the built form on the Site

The Court observed that the Planning Scheme and Development Approval inform the community's reasonable expectations as to the development that may occur on the Site, the character of the Site, and its contribution to the character of the locality (at [40]).

The Court found that the properly made submissions and Submitter's statement do not give sufficient weight to the Development Approval, and therefore "*… do not establish a reasonable expectation about the nature of the built form on the Site against which the Change Application should be considered*" (at [40]).

Court finds non-compliance as to height of the proposed development is not determinative

The Submitter argued that the proposed height of the buildings do not comply with the three storey limit for development on the Site specified on the Building Height Overlay Map (at [51]).

The Court observed that non-compliance as to building height would warrant significant weight in the exercise of the Court's discretion regarding the approval of a development application (at [52]). However, the following matters are relevant in respect of the non-compliance (see [53] to [58]):

- Building 1 has 16 storeys, which does not comply with the Building Height Overlay Map and influences the character of the Site and locality (at [53]).
- The Development Approval far exceeds the maximum of 50% above the Building Height Overlay Map that is required in specific outcome 3.3.2.1(10) of the Strategic Framework in the Planning Scheme (**Strategic Framework**) (at [54]). The Court observed this should not be applied in an inflexible or unyielding way where the lawful use of land far exceeds the planned maximum building height (at [56]).
- The Change Application must be assessed and decided "*in the context of the development approval*" (at [57]). The existing and approved built form on the Site is highly relevant to the Court's assessment. The context provided by the fact that both the existing and approved built form on the Site far exceed the planned maximum building height must be considered (at [58]).

Thus, the Court found that the non-compliance with the Building Height Overlay Map should not be determinative of the appeal (at [58]).

Court finds refusal of the Change Application is not warranted for reasons related to built form, scale, and character

The Court found the following provisions in the Strategic Framework and Neighbourhood Centre Zone Code are relevant in finding that the Site may accommodate a more intense development outcome:

- Specific outcome 3.3.2.1(9) which states the planning rationale for increases in building height up to 50% above the Building Height Overlay Map (at [63]).
- Strategic outcome 3.4.1(8) which encourages more intense development in neighbourhood centres provided it sensitively transitions to surrounding residential areas and does not undermine the centres' hierarchy (at [60]).
- Specific outcome 3.5.4.1(4)(b) which recognises that the Kirra locality is intended to provide tourist accommodation and facilities that appeal to family holiday makers and those wishing to stay in a less intensive tourist environment. Kirra is not suggestive of a low intensity outcome (at [61]).
- Performance Outcome (**PO**) 3 of the Neighbourhood Centre Zone Code which reveals the intent of the Building Height Overlay Map and requires a consideration of qualitative matters of character and impact on amenity when determining the appropriateness of a more intense development (at [62]).

The Court found the proposed development meets the qualitative objectives of specific outcome 3.3.2.1(9) of the Strategic Framework with respect to the following:

- The heights in the Change Application complement the "*desired future appearance*" of the surrounding neighbourhood as required in specific outcome 3.4.5.1(5) because the proposed heights are consistent with the building heights in the local context, the emerging character of the Kirra neighbourhood centre, and the Kirra high-rise "*spine*" along the coastal strip (at [69]).
- The Change Application results in improvements to Building 2 and Building 3 compared to the Development Approval as there is a more interesting form and façade appearance that mitigates the visual impact of its bulk, a more cohesive visual relationship with neighbouring dwellings, and a more cohesive local urban structure and character (at [73]).
- The Change Application complies with overall outcome 2(d)(i) of the Neighbourhood Centre Zone Code because the additional land use and increase in intensity through increased commercial gross floor area, number of hotel rooms, and residential density is acceptable (see [79] to [83]).
- The Change Application complies with PO11 of the High-rise Accommodation Design Code and PO10 of the Multiple Accommodation Code because users of communal open spaces have views of the beach and surrounding areas, and the open space areas have opportunities for breezes and sunlight. Additionally, the nature of these spaces will "*provide opportunities for social interaction*", create pleasantly shaded outdoor areas, enhance the attractiveness of the Site, and will be accessible, useable, and safe (at [86]).
- The Change Application will result in an improved development outcome through the architecturally meritorious features mitigating the visual impact of the bulk of the Site (see [87] to [88]). The improved architectural outcome from the Change Application will more positively contribute to the current and emerging built form and character of the locality (at [89]).

The Court found that there is compliance with the relevant assessment benchmarks and refusal of the Change Application is not warranted for reasons related to built form, scale, and character (at [92]).

Court finds refusal of the Change Application is not warranted for reasons of amenity

The Court found as follows with respect to the relevant assessment benchmarks related to amenity:

- The additional shadow impacts will not detract from a comfortable living and ground level environment as required in PO8 of the General Development Provisions Code because the additional shadowing is limited to the morning in winter months, the Site is already impacted from shadowing from existing tall trees, and the shadows are fast moving (at [95]).
- The Change Application will not cause the obstruction of public views (see [99] to [100]). The Court found that the changed Building 3 will obstruct marginally more of the distant view of the beach from the building in which the Submitter resides. This is not unreasonable because the view will be dominated by views of the coastline. Compared to the Development Approval, the changed Building 3 will provide a greater glimpse of Kirra Beach and greater permeability (at [98]).
- The setbacks proposed are compliant with Acceptable Outcome 1 of the Neighbourhood Centre Zone Code, except for the setback of Building 2 at levels two and seven only. This setback was assessed as acceptable in the Development Approval and is not substantially altered in the Change Application (at [101]). The Court found compliance with overall outcome 2(c) of the High-Rise Accommodation Design Code because the improved architectural merit and compliant setbacks mitigate the negative visual and physical impacts of Building 2 (at [105]).
- The Change Application complies with PO1 and PO2 of the General Development Provisions Code in respect of visual amenity and privacy because the slight reduction in separation distances between buildings do not have substantial effect and residences near the Site still have significant separation (see [103] to [104]).
- The Change Application complies with overall outcomes 9.4.13.2(2)(a)(i), 9.4.13.2(2)(a)(ii), and 9.4.13.2(2)(e)(ii) and PO1 and PO22 of the Transport Code because the proposed car parks exceed the requirement (at [110]). The Change Application provides adequate end of trip facilities as required in PO10 of the Transport Code (at [111]).
- The increase in traffic generated by Change Application would unlikely have a significant adverse impact on local traffic operations, safety, and residential amenity as required in overall outcomes 9.4.13.2(2)(e)(i) and 9.4.13.2(2)(e)(ii) of the Transport Code because the streets would have ample spare capacity to accommodate this (at [113]).
- The Change Application complies with the appropriate noise criteria at surrounding noise sensitive uses, subject to the imposition of conditions provided by the Council (at [120]).

Court finds a demonstrated need for the proposed development that is the subject of the Change Application

The Court recognised that need is "*… widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community …*" (at [122]).

The Court recognised that the Change Application better meets the demands of the market and addresses the issue of construction costs because of the improved facilities, small scale retail providing convenience for the day-to-day needs of the immediate neighbourhood, and good location in terms of infrastructure (see [124] to [126]). This results in the increased viability of the proposed development and facilitates the Development Approval to enable it to contribute to housing supply (at [128]). This small mix of land uses is not dominated by the large built form and do not detract from residential amenity (at [129]).

The Court observed that the contribution to housing supply weighs in support of approval where the proposal does not cause unacceptable character or amenity impacts (at [128]). Thus, the Court found that the refusal of the Change Application is not warranted for reasons of amenity (at [129]).

Court finds benefits of the Change Application outweigh adverse impact of non-compliance as to height

The Submitter argued that the previous planning decisions are far beyond the Planning Scheme, that the peer review of the visual impact assessment which determined the development was too intense, and that the Council's information request point to a refusal of the Change Application (at [131]). The Court found that these matters are not relevant to the present assessment (at [132]).

The Court acknowledged that the Change Application does not comply with the Building Height Overlay Map but accepted that the Planning Scheme supports more intense development on the Site (at [133]).

The Court observed that the Planning Scheme supports a building height which complements the surrounding neighbourhood and that the Change Application will complement the character of the neighbourhood, provide convenience for the needs of the neighbourhood, have no unacceptable impacts on amenity, and result in an improved architectural outcome (at [133]).

The Court accepted that the Change Application involves positive factors which arise from the additional tourist accommodation, the change to the residential product to better meet the target market, the improved site activation, a more integrated and cohesive development, and a proposal consistent with the broader planning principle of intensification of the coastal "*spine*" (at [134]).

The Court found that the overall benefits provided by the Change Application outweigh the adverse impact arising from the non-compliances as to building height (at [135]).

Conclusion

The Court determined that the Co-Respondent had discharged its onus (at [136]). The Court therefore confirmed the Council's decision to approve the Change Application and dismissed the appeal (at [137]).

Valid environmental protection: Development conditions requiring an environmental protection zone imposed having regard to an updated version of the relevant planning scheme stands

Marnie Robbins | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Alexander Jason Elks v Brisbane City Council* [2023] QPEC 33 heard before Kefford DCJ

September 2024

In brief

The case of *Alexander Jason Elks v Brisbane City Council* [2023] QPEC 33 concerned an originating application to the Planning and Environment Court of Queensland (**Court**) by Alexander Jason Elks (**Applicant**) for declarations under section 11(1)(a) and section 11(1)(b) of the *Planning and Environment Court Act 2016* (Qld) (**PEC Act**) in respect of a decision by the Brisbane City Council (**Council**) to impose two conditions, having regard to an updated version the *Brisbane City Plan 2014* (version 17) (**Planning Scheme**), requiring the establishment of an environmental protection zone as part of the approval of the Applicant's development application for a development permit for reconfiguring a lot into five lots (**Development Application**) at Everton Park, Queensland (**Subject Land**).

The originating application sought declarations invalidating the decision to impose the conditions on the basis that the development assessment process did not accord with the *Development Assessment Rules* (version 1.2) (**DA Rules**). The Applicant also sought compensation for loss suffered as a result of an alleged adverse planning change.

The primary issues for the Court were as follows:

- Whether the Council's decision was invalid because of defects in the development assessment process.
- Whether the Council's decision to impose the relevant conditions was invalid by reason of section 65 of the *Planning Act 2016* (Qld) (**Planning Act**).
- Whether the Court should grant the relief sought by the Applicant with respect to an adverse planning change and compensation.

The Court found that the Council was entitled to have regard to the updated Planning Scheme and to impose the conditions requiring the establishment of the environmental protection zone as part of the approval of the Development Application and that the Court did not have jurisdiction to consider the matters related to the alleged adverse planning change. Thus, the originating application was dismissed.

Background

Version 16 of the Planning Scheme was in effect when the Applicant made the Development Application on 1 November 2019 (at [1]).

On 22 January 2021, the Council gave the Applicant a decision notice approving the Development Application subject to a number of conditions including conditions requiring "*… the establishment of an environmental protection zone in which no may occur and an environmental covenant to ensure the management and protection of the environmental protection zone*" (**Conditions**) (at [3]).

The environmental protection zone coincided with what was described as the "ecological significance overlay area" on proposed lots 4 and 5. The Applicant was dissatisfied with the Council's decision to impose the Conditions and commenced this proceeding on 18 January 2022.

The Applicant alleged that there were defects in the development assessment process followed by the Council and that "*… the imposition of the [Conditions] are the result of the Council's unauthorised attempt to manipulate timelines in the development assessment process to justify the imposition of the [Conditions] by reference to version 17 of the [Planning Scheme]*" (at [6]). Version 17 of the Planning Scheme relevantly took effect on 29 November 2019.

The Applicant sought relief for alleged losses suffered as a result of the inclusion of the Subject Land in the High Ecological Significance Strategic Sub-Category of the Biodiversity Areas Overlay in version 17 of the Planning Scheme, which resulted in the Council's imposition of the Conditions (at [7]).

Court finds the Council's decision was not invalid because of defects in the development assessment process

The Court considered each of the following stages in the development assessment process as follows:

- *Application stage* – The Court found that the Council complied with its obligations under sections 2.1 and 2.2 of the DA Rules but had not complied with section 2.3 in respect of the giving of the confirmation notice as the Council did not provide the confirmation notice within the confirmation period. The Court held that the confirmation notice was not invalid because "*… there is no legislative purpose to invalidate a confirmation notice …*" for failure to comply with section 2.3 of the DA Rules (at [93]).
- *Information request stage* – Whilst there was an error in the Council's information request which stated that an assessment against the Biodiversity Areas Overlay Code was "required", the evidence before the Court indicated that the Development Application was to be assessed against version 16 of the Planning Scheme (at [114]). The Court also held that the Council's failure to give the information request within the timeframe stipulated in section 12.2 of the DA Rules did not invalidate the information request (at [118]) and that the Applicant had, by an email from a consultant engaged by the Applicant, provided a valid response to the Council's information request under section 13.1 of the DA Rules.
- *Public notification stage* – The Development Application required public notification under section 53 of the Planning Act (at [127]). The Court noted that there was no direct evidence regarding when public notification occurred, but inferred compliance with the public notification requirement by reference to a number of documents in which the satisfaction of the requirement was mentioned (at [129]).
- *Decision stage* – Between 27 May 2020 and 22 January 2021 the Council made several requests for further information to which the Applicant responded. The Court disagreed with the Applicant's contention that these exchanges were of no relevance to the development assessment process (see [131] to [143]). The Court also noted that the Council had a discretion under section 45(8) of the Planning Act to have regard to the amendments in version 17 of the Planning Scheme and to give the amendments "*… the weight that the Council considered appropriate on the understanding that version 17 is not a vehicle for displacement or modification of version 16 …*" (at [101]). The Court was not persuaded by the Applicant's argument that the decision notice was invalid for reasons including that the Applicant had not demonstrated a defect in the development assessment process, that the Council was required to obtain the Applicant's consent to impose the Conditions, and that the Conditions were invalid having regard to section 65 of the Planning Act (at [180]).

Accordingly, the Applicant did not demonstrate that the process followed by the Council involved any deliberate delay in an effort to enable the assessment of the Development Application against the new version of the Planning Scheme. Any non-compliances or defects did not render the process followed by the Council invalid.

Court finds the Council's decision to impose the Conditions was not invalid by reason of section 65 of the Planning Act

The Court observed that the Applicant's allegation that the decision to impose the Conditions was invalid involved a "challenge to the merit's of the Council's decision" and that because this proceeding was not a merits appeal the Court had no power to review the correctness of the Council's decision (see [196] to [197]).

The Court was not satisfied that the Council had considered irrelevant matters so as to make the imposition of the Conditions unreasonable (at [199]). In this regard, the Court considered a number of authorities regarding the appropriate exercise of discretion when imposing conditions, the recommendations contained in an ecological assessment report, and other material provided by the Applicant, and found that the Conditions were not unreasonable or invalid (at [209]).

The Court was satisfied that the decision to impose the Conditions was legally and factually justifiable.

Court finds the relief sought by the Applicant with respect to an adverse planning change and compensation should not be granted

The Applicant acknowledged that the relief sought in respect of the alleged adverse planning change may not be within the Court's jurisdiction under section 11 of the PEC Act (at [221]).

The Court held that it does not have jurisdiction to consider the allegation of an adverse planning change under section 11 of the PEC Act nor does it have original jurisdiction in respect of the associated claim for compensation (see [225] to [228]). Thus, the Court was not prepared to grant the relief sought by the Applicant.

Conclusion

The Applicant failed to discharge the onus and the originating application was dismissed.

Disingenuous and ineffective: Application for a declaration as to the type of assessment applicable to a change application seeking to exceed the building height limit is dismissed

Erin Schipp | Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Leeward Management Pty Ltd v Sunshine Coast Regional Council* [2024] QPEC 31 heard before Cash DCJ

September 2024

In brief

The case of *Leeward Management Pty Ltd v Sunshine Coast Regional Council* [2024] QPEC 31 concerned an originating application to the Planning and Environment Court of Queensland (**Court**) seeking a declaration as to the type of assessment applicable (**Declaration Application**) to a change application made to the Sunshine Coast Regional Council (**Council**) in respect of a development approval for a development permit for a material change of use of land located in Buddina, Kawana Waters (**Land**) for a two-storey dwelling house with a building height limit of 8.5 metres (**Development Approval**).

The Applicant submitted the change application to change the development the subject of Development Approval to include a habitable rumpus room above the second storey which would result in a building height of 10.2 metres (**Change Application**), in circumstances where the Land has a building height limit of 8.5 metres (**Height Limit**) under the *Sunshine Coast Planning Scheme 2014* (**Planning Scheme**).

The Council issued a not properly made notice (**Notice**) to the Applicant as the Change Application exceeded the Height Limit and triggered impact assessment under the Planning Scheme which the Change Application did not address (at [2]). The Applicant argued that the Council was wrong to categorise the Change Application as requiring impact assessment and sought a declaration that the Change Application be subject to code assessment, as well as an ancillary order that the Notice be set aside (at [2]).

The Court held that the Change Application was correctly subject to impact assessment and dismissed the Declaration Application.

Issues

The Court considered the following three questions in determining the Declaration Application (at [22]):

- What is the development approval to which the Change Application applies?
- What is the categorising instrument which applies to the Change Application?
- What is the category of assessment required by the categorising instrument?

Applicant's construction of the legislation is rejected by the Court

The Applicant submitted that the change the subject of the Change Application amounts to "building work" as that term is defined in the *Building Act 1975* (Qld) (**BA**) which is categorised as code assessable under schedule 9, part 1 of the *Planning Regulation 2017* (Qld) (**PR**) (see [2] and [28]). The Applicant's argument was that any contrary position in the Planning Scheme is of no effect as it is inconsistent with the higher-order provisions found in the PR. The Applicant relied on section 43(4) of the *Planning Act 2016* (Qld) (**PA**) which states that "*[a] regulation … applies instead of a local categorising instrument, to the extent of any inconsistency*" (at [2]).

The Court noted that "*curious results would follow*" if the Applicant's submission was correct, because on the Applicant's construction of the BA and PR a change application to add four or even ten storeys would also be code assessable (at [3]). The Court noted that this would be "*… contrary to common sense, good planning, and the [PA], the BA and the [P]lanning [S]cheme*" (at [3]).

The Court stated that "*[w]hether such absurdity is alone a sufficient reason to dismiss the application need not be decided*" as there are other reasons for rejecting the Declaration Application (at [3]).

Court finds the approval to which the Change Application applies is the Development Approval

The Court found that the Applicant's submissions misunderstood the effect of the PA and BA and the distinction between a development permit for a material change of use and a development permit for building work necessary to give effect to that use (at [4]). Further, the Council had given an early indication to the Applicant that any application for a development permit for building work required referral and would be subject to the conditions attached to the Development Approval (at [10]).

The Court found that that the Development Approval was for a material change of use and was not concerned with building work (at [24]). The Court noted the "building work" section in the development application for the Development Approval was left blank which could show that the Applicant intended to seek permission for a material change of use and not building work (see [6] to [7]).

As there is no development approval for building work for the Land, and the Development Approval is for a material change of use, the Court found the latter was the only development approval which the Change Application could relate to (at [25]). The Court stated that the Applicant's attempt in the Change Application to recast the approval as one concerning building work was "*disingenuous and ineffective*" (at [25]).

Court finds the Planning Scheme to be the only categorising instrument that applies to the Change Application

The Applicant acknowledged that the Planning Scheme categorises the Change Application as impact assessable, however in reliance on section 43(4) of the PA contended that because of an inconsistency between the Planning Scheme and the PR the relevant categorising instrument is the PR which categorises "building work" as code assessable (see [16] and [29]).

The Court found that the Applicant's reliance on section 43(4) of the PA to be incorrect as there was no inconsistency or conflict between the PR and Planning Scheme for the PA to resolve (at [26]).

The Court reiterated that the Change Application related to the Development Approval which was for a material change of use and not "building work" and that the PR was irrelevant in the circumstances (at [28]).

Court finds the category of assessment for the Change Application to be impact assessment

As the Court found that the Planning Scheme was the correct categorising instrument, the category of assessment was determined to be impact assessment (at [29]).

The Court noted that the Council was correct to identify that the Change Application was deficient as it wrongly proceeded on the basis of code assessment where the category of assessment was impact assessment.

Conclusion

The Court dismissed the Declaration Application and will hear the parties as to costs.

Not legally right: Appeal against convictions for contravention of enforcement notices and a local law is dismissed

Marnie Robbins | Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland District Court in the matter of *Mathews v Ipswich City Council* [2023] QDC 21 heard before Devereaux SC CJDC

September 2024

In brief

The case of *Mathews v Ipswich City Council* [2023] QDC 21 concerned an appeal by a landowner (**Appellant**) to the District Court of Queensland (**Court**) against convictions brought by the Ipswich City Council (**Council**) in the Magistrates Court of Queensland at Ipswich for the contravention of enforcement notices and a local law.

On 7 January 2021, the Appellant was convicted of three charges including two counts of the contravention under section 168(5) of the *Planning Act 2016* (Qld) (**Planning Act**) of an enforcement notice and the contravention of section 36(a) of the *Ipswich City Council Local Law No 1 (Administration) 2013* (**Local Law**) for the use of language that is insulting, offensive, or threatening in relation to an authorised person.

The Appellant was unwell on the day of the hearing of the convictions and was unable to attend however did not request an adjournment. The Appellant was therefore convicted of the charges in the Appellant's absence under section 142A(4)(a) of the *Justices Act 1886* (Qld) (**Justices Act**). The Appellant appealed against the convictions under section 222 of the Justices Act.

In determining the appeal, the Court considered the following:

- Whether the procedure prescribed by section 142A(4) of the Justices Act was followed by the Magistrate who decided the Appellant's convictions (**Magistrate**) in the Appellant's absence.
- Whether the procedure prescribed by section 142A(12) of the Justices Act was followed by the Appellant.
- Whether it was open to the Magistrate to conclude that each of the charges against the Appellant could be proved beyond reasonable doubt.
- Whether any of the grounds of appeal could be successfully relied on by the Appellant.

The Court found that the appeal had no prospects of success and must be dismissed.

Court finds the procedure prescribed by section 142A(4) of the Justices Act was followed by the Magistrate

Section 142A(4)(a) of the Justices Act prescribes a procedure to be followed by the court before which the complaint comes for hearing where there has been a "*simple offence*", being an offence that is punishable summarily, and the complaint was made by a public officer, both of which were present in these circumstances (at [6]).

The defendant, which in this case is the Appellant, must also have been "*… required to appear at a time and place fixed for the hearing of the complaint …*" and received notice, yet failed to appear (see section 142A(4)(b) of the Justices Act). The Court was satisfied of these elements as the Appellant's actions indicated that the Appellant had notice of the hearing date (at [7]).

The Court found that the Magistrate correctly observed the procedure prescribed by the Justices Act in proceeding in the Appellant's absence (at [8]).

Court finds the procedure prescribed by section 142A(12) of the Justices Act was not followed by the Appellant

The Court noted that the Appellant did not observe the procedure under section 142A(12) of the Justices Act which required the Appellant to apply for a rehearing within two months after the Magistrate's decision, if the Appellant intended to challenge its merits (at [9]).

Whilst the appeal could have been dismissed for this reason, the Court nonetheless considered the matter as if the correct procedure for a rehearing under section 222 of the Justices Act had been followed by the Appellant (at [13]).

The Appellant also filed the Notice of Appeal out of time, which could be explained by the Appellant's incarceration, and an extension of time was allowed by the Court, subject to there being any merit in the grounds of appeal (at [14]).

Court finds it was open to the Magistrate to conclude that the charges against the Appellant could be proved

The first and third charges against the Appellant related to the contravention of enforcement notices which the Appellant had been given for signage erected at the front of the Appellant's house, as well as multiple shipping containers which had been repurposed for habitation by the Appellant. These both constituted assessable development for which a development approval was required, but which had not been obtained.

The Appellant was given show cause notices and subsequent enforcement notices in respect of the first and third charge, and the Appellant did not appeal or comply with those notices. The Court was satisfied that the Magistrate correctly concluded that the first and third charges were proved beyond reasonable doubt.

The second charge related to the Appellant's use of language that is insulting, offensive, and threatening in relation to an authorised person, being a Council officer, who was inspecting the Appellant's land after becoming aware of the shipping containers and obtaining a warrant under section 130 of the *Local Government Act 2009* (Qld) (**LG Act**) in order to measure them for compliance (at [25]).

The Court was satisfied that the Appellant had verbally abused the Council officer in contravention of section 36(a) of the Local Law which prohibits the use of such language against an authorised person. The Court therefore found that the Magistrate was correct in concluding that the second charge had also been proved beyond reasonable doubt (at [26]).

Court finds the grounds of appeal could not be successfully relied on by the Appellant

The Appellant sought to rely on a constitutional right to freedom of political communication in relation to the signage and argued that it was "*political communication and election advertising*" (at [35]). The Appellant also argued that under section 36(5) of the LG Act any law which seeks to prohibit or regulate the placement of election signs or posters must not be made by a local government as provided under section 36(1) of the LG Act.

The Court did not accept that the signage constituted "*election signs or posters*" and noted that the laws governing them were, in any event, not local but State laws (see [38] to [39]). The Court was also not satisfied that the charges involved any matters arising under the *Australian Constitution* (at [40]).

Conclusion

The Court concluded that the appeal had no prospects of success. The application for an extension of time to file the Notice of Appeal was refused and the appeal was dismissed.

Let me ask you a question: Adjudication of a question under the Acquisition of Land Act 1967 (Qld) about the limits of a claim for compensation

Victoria Knesl | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Land Court in the matter of *Genamson Holdings Pty Ltd v Moreton Bay Regional Council* [2024] QLC 8 heard before JR McNamara

September 2024

In brief

The case of *Genamson Holdings Pty Ltd v Moreton Bay Regional Council* [2024] QLC 8 concerned an application to the Land Court of Queensland (**Court**) by Genamson Holdings Pty Ltd (**Applicant**) for the separate and preliminary determination of two questions regarding the proper construction of section 16(1A) of the *Acquisition of Land Act 1967* (Qld) (**ALA**) pursuant to rule 483(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**).

The Applicant owns land in Caboolture Queensland, where there is a commercial shopping centre. The land is periodically affected by flooding due to catchment flows and stormwater so the Council sought to resume part of the land for the purpose of creating a regional detention basin in order to assist with flood mitigation.

The two questions posed by the Applicant were as follows (at [13]):

1. *On the proper construction of s.16(1A) of the Acquisition of Land Act 1967 (Qld) (**ALA**), is a claim for compensation pursuant to that provision limited to:*
    - (a) *out of pocket costs and expenses in the nature of legal, valuation and other professional fees:*
        - (i) *reasonably incurred;*
        - (ii) *themselves reasonable; and*
        - (iii) *which are incurred in connection with the consideration of and/or in the preparation of a claim for compensation following the resumption of land foreshadowed by the notice of intention to resume; and*
    - (b) *any actual damage done to the land by the constructing authority.*
2. *If the answer to question 1 is "No", does a "claim for compensation for costs and expenses incurred", within the meaning of those words as used in s16(1A) of ALA, extend to a claim for the financial loss claimed to have been suffered by the applicant as pleaded?*

The Court considered the relevant principles from the case of *Reading Australia Pty Ltd v Australian Mutual Provident Society* [1999] FCA 718; (1999) 217 ALR 495 which relate to the circumstances in which an order for a separate question may be determined and found that Question 1 should proceed to a preliminary determination whereas Question 2 should not (see [18], [62], and [63]).

Background

The Applicant is claiming compensation from the Council for costs and expenses, including a range of costs and expenses in addition to the usual legal, valuation, and other professional fees, which it claims were incurred as a result of the two notices of intention to resume issued by the Council (at [8]). In particular, the Applicant is claiming the following costs and expenses (at [9]):

1. *A claim for increased development application costs …;*
2. *A claim for increased tenancy costs and losses …;*
3. *A claim for lost holding costs …;*
4. *A claim for legal and other costs ...*

The Council is disputing the Applicant's claim and argues that the costs and expenses claimed by the Applicant are not causally connected to the discontinuance of the two notices of intention to resume issued by the Council, and that the Applicant's claim goes beyond the ambit of a claim for compensation under section 16(1A) of the ALA (see [10] and [11]).

The Applicant, by its application, sought to have the two questions resolved by way of separate and preliminary determinations because they are characterised as "*… pure questions of law*" (at [16]). The Council argued that the two questions are "*… 'ultimately questions of mixed fact and law' … which the [Council] says is relevant to the prospects of appeal*" (at [16]).

Relevant principles

The Court identified the following principles as being pertinent to deciding whether the questions are separate and preliminary questions for determination (at [19]):

1. *the judicial determination of a question … must involve a conclusive or final decision based on concrete and established or agreed facts for the purpose of quelling a controversy between the parties;*
2. *care must be taken in utilising the procedure … to avoid the determination of issues not 'ripe' for separate and preliminary determination;*
3. *factors which tend to support the making of an order … include that the separate determination of the question may contribute to the saving of time and cost by substantially narrowing the issues for trial, or even lead to the disposal of the action or contribute to the settlement of the litigation;*
4. *factors which tell against the making of an order include that the separate determination of the question may give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial, may result in significant overlap between the evidence adduced on the hearing of the separate question and at trial, or prolong rather than shorten the litigation.*

Court finds factors in support of separate and preliminary determination of Question 1

The Court was satisfied that Question 1 is a question "ripe" for separate and preliminary determination because it is a question of law which is capable of being answered conclusively and without reference to any assumptions or findings of fact with respect to the issues in dispute, and that the overall impact on time and costs will potentially be cost neutral (see [58] to [62]).

Court finds limited factors in support of a separate and preliminary determination of Question 2

The Court found that Question 2 is not a question "ripe" for a separate and preliminary determination because there is a potential for the hearing with respect to this question to descend into disputed factual issues which may result in an overlap between the evidence given at the hearing and at the trial, and therefore may prolong the efficient resolution of the matter (at [63]).

Conclusion

The Court held that Question 1 should proceed as a preliminary question for determination and that Question 2 should not proceed as a preliminary question for determination (at [63]).

Trouble in Paradise: Conditions requiring the delivery of development infrastructure are not able to be imposed as necessary trunk infrastructure conditions

Matt Richards | Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Homeland Property Developments Pty Ltd v Whitsunday Regional Council* [2024] QPEC 30 heard before Williamson KC DCJ

October 2024

In brief

The case of *Homeland Property Developments Pty Ltd v Whitsunday Regional Council* [2024] QPEC 30 concerned an appeal by Homeland Property Developments Pty Ltd (**Applicant**) to the Planning and Environment Court of Queensland (**Court**) against 34 conditions (**Appealed Conditions**) and two advisory notes imposed by the Whitsunday Regional Council (**Council**) on a suite of development approvals facilitating the development of land south of Bowen, the Whitsundays (**Subject Site**), with a staged master planned community intended for residential, retail, and commercial uses (**Whitsunday Paradise**).

The Court had to determine whether the Negotiated Decision Notice (**NDN**) containing the Appealed Conditions, which pertain to sewerage and water supply infrastructure (at [2]) and were imposed under section 145 of the *Planning Act 2016* (Qld) (**Planning Act**), should be amended so that each Appealed Condition be imposed as a "*necessary infrastructure condition*" under section 128 of the Planning Act (see [3] and [60]).

The Court found, adverse to the Applicant, that section 128 of the Planning Act could not be exercised to impose the Appealed Conditions and later dismissed the appeal against the Appealed Conditions in so far as it sought to have the Appealed Conditions identified as necessary trunk infrastructure conditions (see [62], [92], and [114] to [115] and the Judgment of the Court dated 31 July 2024).

Background

On 15 June 2018, the Applicant submitted a properly made impact assessable development application seeking a suite of development approvals and variations to version 3.5 of the *Whitsunday Planning Scheme 2017* (**Planning Scheme V3.5**) for development of the Whitsunday Paradise (**Development Application**) (at [6]). Planning Scheme V3.5 did not include a "*LGIP (local government infrastructure plan)*" (**LGIP**) as defined in schedule 2 of the Planning Act. However, the Council did have an adopted infrastructure charges resolution (at [7]).

On 29 June 2018, the Council's planning scheme was amended to include a LGIP, being part 4 and schedule 3 of version 3.6 of the *Whitsunday Planning Scheme 2017* (**Planning Scheme V3.6**) (at [8]). The LGIP included the Subject Site in the Priority Infrastructure Area "*… which is prioritised for the provision of trunk infrastructure to service existing and assumed future development growth up to 2031*" (at [8]). Amendments to the LGIP to remove an item of trunk infrastructure took effect on 30 November 2020, and the amended LGIP did not identify future trunk infrastructure for water supply and sewerage works servicing the Subject Site (see [9] and [10]).

On 28 October 2020, the Council approved the Development Application subject to conditions requiring the delivery of water and sewerage infrastructure at the Applicant's expense (**Development Approval**), and issued a decision notice accompanied by 15 infrastructure charges notices (see [11] and [13]). On 11 March 2021, the Council granted the Applicant the NDN but refused the Applicant's request for negotiated infrastructure charges notices (at [14]).

Advisory Notes 17.1 of Part A (Preliminary Approval) and 14.6 of Part B (Reconfiguring a Lot) of the NDN (**Advisory Notes**) state the following (see [16] and Annexure A) [our emphasis]:

> *Development infrastructure required to be provided in implementing this development approval is **non-trunk development infrastructure** as described under **section 145 of the Planning Act 2016**.*

The Court accepted that the effect of the NDN "*… is to require [the Applicant] to … (1) fully fund and deliver water supply infrastructure … that services the proposed development and existing development to the north …; and (2) fully fund and deliver sewerage infrastructure that services the proposed development and existing development to the north …*" (at [17]).

The Applicant's reliance on section 128 of the Planning Act was intended, according to the Court, to secure it future credits and offsets for the development infrastructure required to be delivered under the Appealed Conditions (at [101]).

Legislation framework

Under section 45(5)(a) and section 45(7) of the Planning Act, the Court was required to assess the Development Application against the assessment benchmarks in the Council's planning scheme in effect when the Development Application was properly made, being Planning Scheme V3.5, which did not include a LGIP (see [26] to [30]). Section 45(8) permits the Court to give appropriate weight to an amended statutory instrument, including a planning scheme (at [31]).

Section 60(3)(b) of the Planning Act permits the Court to approve an application subject to "*development conditions*" (see [35] to [38]). However, section 66(1)(c)(i) of the Planning Act prohibits the imposition of a "*development condition*" that "*… requires a monetary payment for the establishment, operating or maintenance costs of, works to be carried out for, or land to be given for … infrastructure*" (at [42]).

An exception to this prohibition applies where a condition is imposed under chapter 4, part 2 of the Planning Act (at [48]). Pursuant to section 111, chapter 4, part 2 "*… applies to a local government only if the local government's planning scheme includes a LGIP*" (at [49]) [our emphasis].

Section 145, in chapter 4, part 2 of the Planning Act, was relied upon by the Council to impose the Appealed Conditions, and to include the Advisory Notes (at [51]). It permits a "*development condition*" to be imposed about "*non-trunk infrastructure*" provided that it states the infrastructure to be provided and when the infrastructure must be provided (at [52]).

Section 128, in chapter 4, part 2 of the Planning Act, relied upon by the Applicant, provides the power to impose a "*necessary infrastructure condition*" where section 127(1) is satisfied (see [53] to [54]). Section 127(1) states the following (at [54]):

> *(1) This subdivision applies if—*
>
> *(a) trunk infrastructure—*
>
> *(i) has not been provided; or*
>
> *(ii) has been provided but is not adequate; and*
>
> *(b) the trunk infrastructure is or will be located on—*
>
> *(i) premises (the subject premises) that are the subject of a development application, whether or not the infrastructure is necessary to service the subject premises; or*
>
> *(ii) other premises, but is necessary to service the subject premises.*

Section 304 of the Planning Act, which applies in relation to a local government's planning scheme that did not include a LGIP before 4 July 2014 and does not include a LGIP on the commencement of the planning scheme, also enlivens the power to impose a "*necessary infrastructure condition*" (at [56]). Section 304(4)(c) empowers a local government to "*impose conditions about trunk infrastructure under section 128 or 130*" (at [57]). However, section 304(5)(a)(i) provides that section 304 relevantly ceases to have effect the day that the local government amends the planning scheme to include a LGIP (at [58]).

Court finds that the conditions power in section 128 of the Planning Act cannot be exercised

The Court considered whether it could exercise the conditions power in section 128 of the Planning Act directly or through section 304 of the Planning Act to impose the Appealed Conditions (at [62]).

The Court observed that to engage section 128 of the Planning Act the following pre-conditions must be satisfied: "*… (1) the assessment manager, who is a local government, must seek to impose a condition otherwise prohibited by s 66(1)(c)(i) of the [Planning] Act; (2) s 111 or ss 304(1) and (3) of the [Planning] Act must be satisfied; and (3) s 127(1) of the [Planning] Act must also be satisfied*" (at [63]).

Court not satisfied that the first pre-condition is met

The Court was not satisfied, as was assumed by both parties, that all of the Appealed Conditions satisfied the first pre-condition (at [64]). The Court observed that some of the Appealed Conditions do not require a monetary payment, works, or land for infrastructure, and do not state when the required infrastructure must be provided (at [111]).

Court satisfied that the second pre-condition is met

In respect of the second pre-condition, the Court first considered whether the "*planning scheme*" referred to in section 111 of the Planning Act is "*… the planning scheme in force at the time the development application was properly made …*" as argued by the Council, or "*… the planning scheme in force at the time the power conferred by s 128 is exercised …*" as argued by the Applicant (at [72]).

Relevantly, Planning Scheme V3.5, being the planning scheme in force at the time the Development Application was properly made, did not include a LGIP, whereas Planning Scheme V3.6, being the planning scheme in force at the time the appeal was heard included a LGIP (see [70] and [71]).

The Court held that, for the purposes of section 111 of the Planning Act, the "*planning scheme*" is the planning scheme in force at the time the power conferred by chapter 4, part 2 is exercised, that is, Planning Scheme V3.6, for the following reasons (see [73] to [78]):

- Planning Scheme V3.6 satisfies the matters stated in section 4(c) of the Planning Act, as required by section 111 of the Planning Act, and includes a LGIP as defined in the Planning Act.
- Section 111 of the Planning Act does not include a temporal element qualifying the phrase "*planning scheme*", which observation is explained by the context provided by section 110 of the Planning Act and the content of section 112 to section 145 of the Planning Act.
- The emphasis placed by the parties on the context provided by section 45(6) and section 45(8) of the Planning Act were of only limited relevance.
- For section 111 of the Planning Act to be construed in the manner asserted by the Council it would require the insertion of words to the effect of "*in force at the time a development application was properly made*" or a meaning to be given to "*planning scheme*" for section 111 which is different to that in schedule 2 of the Planning Act. These insertions are not supported by section 110(1) and section 45(6) to section 45(8) of the Planning Act, and section 4 and section 32AA of the *Acts Interpretation Act 1954* (Qld).

Accordingly, the Court found that section 111 of the Planning Act was satisfied and that chapter 4, part 2 applied (at [79]).

Applying the same meaning of "*planning scheme*", the Court held that section 304 of the Planning Act was not satisfied on the basis that it ceased to apply, pursuant to the operation of section 304(5)(a)(i), when the Council amended Planning Scheme V3.5 to include a LGIP (at [82]).

Court not satisfied that the third pre-condition is met

The Court observed that section 127(1) of the Planning Act is engaged and that section 128 would be available for the imposition of a necessary infrastructure condition where the Applicant could identify "*trunk infrastructure*", as defined in the Planning Act (at [44]), that has not been provided, or inadequately provided, on the Subject Site or other premises necessary to service the Subject Site (at [87]).

The Court was not satisfied that the Applicant had identified development infrastructure that was either in the LGIP in force at the time of the hearing, that is trunk infrastructure by reason of a conversion application, or is trunk infrastructure by reason of a condition of approval imposed under section 128(3) of the Planning Act (see [88] to [90]).

Having found that the Applicant failed to identify "*trunk infrastructure*" as defined by the Planning Act, the Court held that section 128 of the Planning Act was not engaged and therefore was not available to condition the Development Approval sought, and obtained, by the Applicant (at [90]).

The Court further held that, even if section 128 of the Planning Act was available to impose the Appealed Conditions, it would not, in the exercise of its discretion, do so because it was not prepared to afford significant weight to amendments made to a planning scheme after the Development Application was properly made (see [93] to [107]).

Court deletes the Advisory Notes and finds that amendments are required to the conditions

The Court held that any final approval granted by the Court should effect amendments to several of the Appealed Conditions in order to ensure compliance with section 145(a) of the Planning Act (see [108] to [111]).

The Court stated that the Advisory Notes are "*unhelpful*" because "*[t]hey do not speak to any specific condition …*" (at [112]). The Court held that they should be deleted from the Development Approval and that each Appealed Condition imposed under section 145 "*… will need to be identified as such on a condition-by-condition basis to avoid ambiguity*" (at [112]).

Conclusion

The Court found that section 128 of the Planning Act could not be exercised to impose the Appealed Conditions (see [92] and [114] to [115]).

Colin Biggers & Paisley

Where there is a need there is a way: Out-of-centre local centre approved with no unacceptable trading impacts on other centres and clear demand

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *North Harbour Holdings Pty Ltd v Moreton Bay Regional Council & Anor* [2024] QPEC 21 heard before Kefford DCJ

October 2024

In brief

The case of *North Harbour Holdings Pty Ltd v Moreton Bay Regional Council & Anor* [2024] QPEC 21 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) by North Harbour Holdings Pty Ltd (**Submitter**) against the decision of the Moreton Bay Regional Council (**Council**) to approve a development application made by Lancorp Pty Ltd (**Applicant**) for a material change of use to facilitate a local centre (**Development Application**) on land located in Burpengary East, Queensland.

The Court was satisfied that the Applicant had discharged its onus, and set aside the Council's decision to approve the Development Application and replaced it with a decision to approve the Development Application subject to conditions with necessary amendments to reflect particular conditions and plans referred to in the Court's judgment.

Background

The Development Application relates to land located at 116-122 Buckley Road and 137-143 Uhlmann Road in Burpengary East, which is approximately 230 metres west of the Bruce Highway, and has an area of 21,812 square metres (**Land**) (see [1] and [20]). The Land is located within the Rural Residential Zone under the Council's planning scheme (at [5]).

The Applicant made the Development Application to facilitate a new use on the Land being a local centre including a shopping centre, food and drink outlet, indoor sport and recreation, office, service industry, shop, and veterinary services (**Proposed Development**) (at [33]). The uses included a 3,300 square metre full-line supermarket and 1,445 square metres for specialty shops (see [33] and [253]).

The Submitter is the developer of a residential estate approximately two kilometres north of the Land (**North Harbour Estate**), which is also seeking approval for a local centre (at [5]). At the time of this appeal, the Submitter had an active appeal with respect to the Council's deemed refusal of its development application for a local centre (**North Harbour Estate Appeal**) (at [134]).

The Development Application was properly made on 31 August 2021 when the *Moreton Bay Regional Council Planning Scheme 2016* Version 4 was in effect (**Planning Scheme**). The Court noted that the Planning Scheme, although superseded, was a categorising instrument containing assessment benchmarks called for by section 45 of the *Planning Act 2016* (Qld) (**Planning Act**) (at [49]).

Issues

The Court considered the following six issues (at [43]):

- Use of the Land under the Planning Scheme.
- Character impacts.
- Traffic impacts.
- Relevant matters.
- Need.
- Whether the Proposed Development should be approved in the exercise of the planning discretion.

Court finds the Proposed Development is not an inappropriate use of the Land

The Court found that the purpose and overall outcomes in the Rural Residential Zone Code in the Planning Scheme (**Rural Residential Zone Code**) are "*complementary*" and that "*[t]hey seek to limit non-residential uses in the Rural residential zone to those that are low intensity and that will have minimal adverse impacts on the amenity and character of the zone*" (at [71]).

The Court noted that if it only assessed the Development Application against the Rural Residential Zone Code it would be "*easy to accept*" the Submitter's case that the Development Application should be refused (at [75]). However, the assessment process under section 45 of the Planning Act requires assessment "*… against all relevant assessment benchmarks*", which relevantly includes provisions in the Planning Scheme about (at [75]):

> *(a) the creation of a new local centre on land that is not in the Centre zone; and*
>
> *(b) the settlement pattern and walkable communities.*

The Court considered the Strategic Framework in the Planning Scheme (**Strategic Framework**) in respect of settlement pattern, walkable communities, and the creation of new local centres, which are considered in Themes 3.5, 3.6, 3.10, and 3.14 of the Strategic Framework.

Theme 3.5 Strong Communities

Theme 3.5 seeks "*[a] range of appropriate housing types, community facilities and services and safe public spaces are provided across the Region to meet community needs and lifestyle expectations, promote cultural, recreational and social interaction and community identity*" (at [84]).

The Planning Scheme notes three key challenges informing Theme 3.5, being the health impacts associated with longer daily commutes, the structural aging of the population, and the increasing cost of housing requiring greater diversification for dwelling types (see [86] to [89]).

The Court noted that although Theme 3.5 seeks to increase the population living near services and to bring services and facilities closer to where people live, this does not support increased urbanisation without regard to the situation of the relevant community (at [93]).

Theme 3.6 Settlement Pattern and Urban Form

The Submitter relied on two provisions of Theme 3.6, being 3.6.1, in particular section 3.6.1(1)(c) and section 3.6.1(4).

Section 3.6.1(1)(c) requires "*… new development to be integrated into existing neighbourhoods in a spatially cohesive manner to help create walkable communities with an emphasis being placed on active transport and access by transit*".

The Court accepted that the Proposed Development is not in a walkable location, with relatively few households defined by a 10-15 minute walk catchment and that future staff and customers will access the Proposed Development by car until the rural residential catchment intensifies and a new public transport route is introduced (at [120]).

Section 3.6.1(4) requires that "*… Council will consolidate and maintain rural residential development in the identified rural residential areas …*". The Submitter accepted that this strategic outcome is not a central provision to the appeal, and thus the Court found it unnecessary to address this in any detail, other than to observe that the Proposed Development is not a form of rural residential development (at [127]).

Theme 3.10 Integrated Transport

The Submitter argued that there was non-compliance with two provisions of Theme 3.10, being sections 3.10.1(3) and (8).

Section 3.10.1(3) relates to reducing the length and frequency of car trips. The Submitter argued that the Proposed Development supports travel by private vehicle and that it would result in longer car trips for residents of the North Harbour Estate (at [130]). The Submitter also argued that, on the balance of probabilities, a local centre will be operating in North Harbour Estate by the second half of 2025 (at [137]). Whilst the Court had reservations about this assumption, noting that even if the North Harbour Estate Appeal is resolved, this will not result in an extant right to develop a local centre. The Court held that the Proposed Development does not comply with, or does not materially advance, the strategic outcome in section 3.10.1(3) (see [138] to [140]).

Section 3.10.1(8) requires that new development ensures that it is serviced with new public transport routes (at [142]). As the Land is not currently serviced by public transport, the Court found that the Proposed Development "*… does not sit comfortably …*" within this strategic outcome (at [142]).

Theme 3.14 Council Place Model

When determining the weight that ought to be attributed to the non-compliance with sections 3.6.1(1)(c), 3.6.1(4), 3.10.1(3), and 3.10.1(8), the Court noted a "*… useful approach … is to examine the evil that it seeks to avoid*" (at 146]). The Court found that the "*evil to be avoided*" by these sections is reliability on travelling by car to a local centre, and that the creation of walkable neighbourhoods is to be encouraged, noting that this "*… strategy is deserving of respect*" (at [150]).

However, the Court noted that non-compliance with these provisions "*… does not necessarily follow that the [P]roposed [D]evelopment should be refused*" (at 151]). The Court considered the relevant Theme more closely.

Theme 3.14 relates to the Council's Place Model, which identifies and describes a series of broad scale place types each with a distinguishing mix and intensity of uses, development forms, character, function, and special qualities to guide the planning and development of the diversity of the places across the region (at [106]).

The Court noted that Theme 3.14 confirms that the rural residential areas throughout the Council region are not regarded as homogenous, and that it is important to have regard to the distinctive attributes of the community in question (at [110]). The Court further noted that "*[t]he Planning Scheme also expressly recognises that a rural residential neighbourhood may include a local centre …*" (at [110]).

When considering the distinctive attributes of the community, the Court noted that the community of which the Land is a part already contains uses not encouraged in the Rural Residential Zone, including a commercial tennis facility and a convenience centre with a mix of commercial, retail, and community uses, including medical centres, dentist, childcare centre, shops, and take away food stores (**Hub Convenience Centre**) (see [180] and [4]).

The Court identified that the non-compliances with the Strategic Framework when weighed against Theme 3.14 are not matters that should stand in the way of approval of the Proposed Development (at [191]).

The Court found that the Proposed Development is not an inappropriate use of the Land (at [223]).

Court finds that the character impacts can be mitigated

The Court firstly determined the character of the locality and the design attributes of the Proposed Development. The Court then determined the following issues:(at [231]):

- Whether the Proposed Development will have a detrimental impact on the character and amenity of the Rural Residential Zone.
- Whether the Proposed Development will maintain a distinct and recognisable transition between urban and rural areas.

Character of the locality and design attributes of the Proposed Development

The following matters were relevant to the Court's determination about the issues of detrimental impact and transition between urban and rural areas:

- The existing lawful use of the Land and adjacent premises as required under section 45(5)(a)(i) of the Planning Scheme, which include the Hub Convenience Centre (see [236] and [244]).
- The Proposed Development has a roofed site cover of approximately 25%, an acoustic barrier, landscaping, screening of facilities, and painted graphics and textured finishes (see [261] to [276]).

Detrimental impact on the character and visual amenity of the rural residential zone

The Court noted that the roofed site cover of approximately 25% does not reflect the low density, low-rise built form and open area environment generally anticipated in performance outcome 8 of the Rural Residential Zone Code (at [280]). With this in mind, the Court then considered whether the roofed area appears "*dominant or overbearing*" (at [283]). The Court had regard to the distance of the Proposed Development from the boundary of the Land, distance to the neighbouring property, and landscaping (see [291] and [299]).

The Court was satisfied that the combined effect of these design features, viewed in the context of the surrounding area, is that the Proposed Development will not appear overbearing, but will rather have an appearance of greater dominance than one would expect of land included in the Rural Residential Zone (at [299]).

Distinct and recognisable transition

The Court recognised that the Land is included in an urbanised locality, and that the Proposed Development will change the existing transition between urban and rural areas more recognisable (see [311], [314], and [315]).

The Court recognised that the design and appearance of the Proposed Development is not fully compliant with the requirements of the Rural Residential Zone Code, however the Court was satisfied that the non-compliance is mitigated by many factors (at [316]).

Court finds that the Proposed Development will not give rise to unacceptable traffic impacts if conditions are imposed

Prior to the hearing of the appeal, the Applicant notified the Submitter and Council that it would be content for the Proposed Development to be approved subject to conditions relating to traffic that would require updated plans, alternate access arrangements, a road dedication to the Council, lights, signage, and a detector loop (**Proposed Traffic Conditions**) (at [329]). The Submitter accepted the Applicant's proposal and consequently withdrew reliance on issues in relation to parking (at [334]).

Instead, the Submitter argued that alternative access arrangements provided by the Submitter's traffic expert should be adopted (at [336]). In response, the Court found that it is not the Court's function to refuse a design advanced by a developer because it is not the best possible design, rather "*[t]he issue is whether the proposed design is acceptable*" (at [337]). The Court was presented with traffic designs from the traffic experts for each of the parties. The Court found it unnecessary to determine which design is preferable, and accepted that the design of the Applicant's and Council's traffic experts were acceptable, and that the proposed conditions put forth in the Proposed Traffic Conditions were appropriate (at [360]).

Court finds relevant matters for consideration support approval

The Applicant argued the following relevant matters for consideration under section 45(5)(b) of the Planning Act (at [364]):

- The Proposed Development furthers the outcomes sought in the Strategic Framework, which are set out above.
- The Proposed Development is consistent with the outcomes sought by the Planning Scheme.
- The Proposed Development achieves outcomes sought by the Rural Residential Zone Code.

The Court found that collectively these are relevant matters to support approval (at [369]).

Court finds that there is a need for the Proposed Development

The Applicant argued that there is a town planning, community, and economic need for the Proposed Development (at [375]). To determine whether there is a need, the Court considered evidence from the economic experts, a proposed tenant regarding interest in a tenancy, the Applicant regarding other tenancy interest that had been received, and the Submitter with respect to their intention to develop a local centre at North Harbour Estate (at [380]).

The Court then considered the well-settled principles of need, as summarised in the case of *Isgro v Gold Coast City Council & Anor* [2003] QPEC 2 wherein the Court held at [21] as follows:

> *Need in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community … Of course, a need cannot be a contrived one. It has been said a basic assumption is that there is a latent and unsatisfied demand which is either not being met at all or not being adequately met.*

The Court noted that the existence of other sites where the Proposed Development is permitted under the applicable code may be a relevant matter, depending on the circumstances of the case (at [388]). The Court also noted that there is no extant right for a local centre to be delivered on land within the North Harbour Estate (at [384]).

When assessing need, the Court recognised the long standing approach of the Court in the case of *Parmac Investments Pty Ltd v Brisbane City Council & Ors* [2008] QPEC 7, being "*… when, as here, the need to be satisfied involves the daily essentials of ordinary life, the bar should not be set too high …*" (at [391]).

All three of the parties' need experts agreed that there is a need for a full-line supermarket (at [415]). The Submitter argued that the Proposed Development would have an impact on the viability of existing centres in the area, including the Hub Convenience Centre, and would disrupt the hierarchy of centres under the Planning Scheme (at [441]). The Court was satisfied that there will be an impact on existing centres, however the impact will not be sufficient to undermine the overall trading viability of competing centres (at [443]).

The Court was satisfied that there is a need for the Proposed Development that weighs in favour of its approval (at [456]).

Court finds approval of Proposed Development does not require exercise of planning discretion

The Court noted that planning schemes are generally an embodiment of the public interest (at [457]). The Court noted the Submitter's case against approval of the Proposed Development was founded on the following four factors (see [459] to [462]):

- The Proposed Development does not comply with the land use intentions of the Planning Scheme as it is an out-of-centre development.
- There is a catchment overlap with the Hub Convenience Centre.
- The Proposed Development does not comply with the Planning Scheme provisions with respect to character and amenity.
- The Proposed Development results in unacceptable traffic impacts.

The Court found that these matters were not established on the evidence (at [464]). The Court noted that "*[w]hat rings with finality is that the [P]proposed [D]evelopment will deliver a local centre that provides essential convenience shopping and community facilities to residents who do not otherwise have convenient and appropriate access to a full-line supermarket*" (at [466]). The Court found the Proposed Development to be "*meritorious*" and should be approved subject to reasonable and relevant conditions (at [468]).

Conclusion

The Court was satisfied that the Applicant had discharged its onus, and set aside the Council's decision to approve the Development Application and replaced it with a decision to approve the Development Application subject to conditions with necessary amendments to reflect particular conditions and plans referred to in the Court's judgment (at [470]).

Wasted effort: An appeal against the refusal of two claims seeking compensation for the removal of property from "junk yard" premises is dismissed

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland District Court in the matter of *Kenefick & Ors v Lockyer Valley Regional Council* [2023] QDC 249 heard before McGinness DCJ

October 2024

In brief

The case of *Kenefick & Ors v Lockyer Valley Regional Council* [2023] QDC 249 concerned an appeal to the District Court of Queensland (**District Court**) against the decision of the Magistrates Court of Queensland (**Magistrates Court**) to refuse two claims for compensation made by the Appellants in respect of the removal of property by the Lockyer Valley Regional Council (**Council**) from the First Appellant's premises in Plainland (**Premises**).

The District Court considered the following five grounds of appeal raised by the Appellants (at [49]):

> *Ground 1: The Magistrate erred in not allowing evidence from Mr Robert Eric Lee.*
>
> *Ground 2: The Magistrate did not conduct the trial by law and should have allowed new evidence to be heard.*
>
> *Ground 3: The Magistrate erred in fact in relation to an alleged 20-metre exclusion zone around the residence on the property.*
>
> *Ground 4: The Magistrate erred by not addressing all the claimed items in the statement of claim in M292/18 and M77/20.*
>
> *Ground 5: The Magistrate erred in failing to address documents contained in the first appellant's List of Documents.*

The District Court did not find that any of the grounds were made out and dismissed the appeal (at [144]).

Background

The First Appellant was the owner of the Premises, located in the rural residential zone under the *Laidley Shire Council Planning Scheme 2003* (**Planning Scheme**), upon which he stored a variety of items belonging to him, the Second Appellant, and the Third Appellant (see [1] and [12]).

In March 2005, the First Appellant applied for, and was granted, a development approval to build a house on the Premises. After the development approval expired in March 2007, the First Appellant did not apply for a new development permit but continued to build and store building materials, scrap metals, used tyres, deteriorating vehicles, and other scrap materials on the Premises (at [12]).

The proceedings in the Magistrates Court ensued from the following events:

- **25 March 2015:** The Council issued the First Appellant with a show cause notice (**Show Cause Notice**) which stated that the Council believed that the First Appellant was committing a development offence, being a contravention of section 582 of the now repealed *Sustainable Planning Act 2009* (Qld) (**SPA**), by using the Premises for an unlawful use specifically for use as a "*junk yard*" as defined in schedule 1 of the Planning Scheme (see [7] and [13]).

  The Show Cause Notice asked the First Appellant to show cause why an enforcement notice should not be issued. The First Appellant did not show cause or apply for a new development approval (at [14]).

- **2 February 2016:** The Council's officers entered and inspected the Premises and found a "*large number of tyres, scrap metals, machinery, vehicles and other scrap materials*" (at [15]).

- **26 February 2016:** The Council issued the First Appellant with an enforcement notice under section 590(1) of the SPA (**Enforcement Notice**). The Enforcement Notice stated that the Council believed that the First Appellant was committing a development offence by contravening section 578(1) of the SPA "*… by carrying out assessable development without an effective development permit for the development …*" in respect of the Premises, and by contravening section 582 of the SPA by using the Premises for an unlawful use (at [16]).

The Enforcement Notice stated that the First Appellant's response to the Show Cause Notice failed to address "*the issue of carrying out assessable development namely the use of the 'land' as a 'junk yard' (the storage of tyres, scrap metals, machinery, vehicles, and other scrap materials on the land)*" (at [17]).

The Enforcement Notice required the First Appellant to refrain from committing the offence and to remedy the commission of the offence (at [18]).

- **2 June 2016:** The Council issued a notice of entry to check compliance with the Enforcement Notice (at [19]).
- **7 September 2016:** The Council issued the First Appellant with a remedial action notice which advised that the failure to comply with the remedial action notice would entail removal of the property stored on the Premises by the Council, at the First Appellant's expense (at [20]).
- **25, 26, and 28 October and 1 November 2016:** The Council undertook works on the Premises to cease the allegedly unlawful use of the Premises as a "*junk yard*" (at [21]) by removing property that was then either disposed of, sold as scrap metal, or made available for collection (at [1]).

The Appellants made two claims, M292/18 and M77/20 (**Claims**), in respect of the Council's removal of property from the Premises, in which they detailed numerous items alleged to have been removed unlawfully by the Council (at [3]), and claimed that they were entitled to compensation (at [2]).

The Council contended that the removal of the property was undertaken lawfully pursuant to an enforcement action taken under the *Local Government Act 2009* (Qld) (at [4]).

At the original hearing in the Magistrates Court, the Council accepted that the property was removed from the Premises but argued in its defence that the First Appellant was using the Premises for an unlawful use as a "*junk yard*" without the necessary development approvals, constituting offences under sections 578 and 582 of the SPA (at [7]).

On 12 April 2022, the Magistrates Court dismissed the Claims. The Appellants appealed the decision of the Magistrates Court pursuant to section 45 of the *Magistrates Court Act 1921* (Qld).

District Court finds that further affidavit material was not admissible

The District Court refused to grant leave to the Appellants to lead new evidence, specifically four affidavits alleged to contain evidence obtained after the original hearing, on the basis that it was not evidence that met the following criteria (at [87]):

> *(a) could not have been obtained with reasonable diligence for the original hearing;*
>
> *(b) is such that, if given, it would probably have an important influence on the result of the case; and*
>
> *(c) is apparently credible.*

District Court upholds the Magistrates Court's findings

Before considering the specific grounds of appeal, the District Court held that "*[t]here was no error in the Magistrate's findings that the [Council] was legally entitled to remove the appellants' property pursuant to the [Local Government Act 2009 (Qld)], the appellants consequently suffered no loss or harm, and the claim should be dismissed*" (at [75]).

District Court finds that ground 1 fails

The Appellants argued that the Magistrate erred in not allowing evidence from Mr Lee, who worked as a sub-contractor on the Premises for the duration of the Council clean-up (see [79] and [97]).

The Council opposed this argument on the basis that the Appellants failed to comply with a pre-trial order requiring the parties to provide any summaries of evidence upon which they intended to rely at the trial on or before 9 August 2021 (**April 2021 Order**) (at [99]). The Appellants did not provide Mr Lee's summary of evidence which, the Council asserted, failed to put it on notice that Mr Lee would be called as a witness and denied it the opportunity to undertake any investigations in relation to what Mr Lee might say at trial (see [99] and [100]).

The Council submitted that the Magistrate had the discretion to refuse the admission of Mr Lee's evidence because the Appellants' failure to produce a summary of evidence would constitute a breach of the April 2021 Order (at [103]).

The District Court accepted the Council's submissions, and stated that there was nothing in the First Appellant's submissions to suggest that he was unaware of, or did not understand, the April 2021 Order (see [104] and [105]). The District Court found that the Council "*… would have been unfairly taken by surprise if Mr Lee had been allowed to give evidence*" and noted that "*[i]t is an important aspect of procedural fairness that the parties in a proceeding are notified of the case against them*" (at [107]).

District Court finds that ground 2 fails

The Appellants submitted that the Magistrate did not allow new evidence to be heard, which the District Court deemed to refer to one or two groups of witnesses mentioned by the First Appellant at trial who were unable to appear for various reasons (see [110] to [111]).

The District Court observed that these witnesses were never identified by the Appellants at the original trial and, accordingly, that there was no basis for arguing that the Magistrate did not allow for new evidence to be heard (at [111]).

District Court finds that ground 3 fails

The Appellants submitted that the Magistrate erred when considering evidence about an alleged 20 metre "*exclusion zone*" around the residence on the Premises, in particular by not finding that property should not have been removed from within that "*exclusion zone*" (at [112]).

The Council's witness gave evidence to the effect that the perimeter of the "*exclusion zone*" was informally denoted to represent that part of the Premises, and the property thereon, which could reasonably be associated with a rural residential use (at [113]). The Council's witness maintained that the Council was legally entitled to enter into the "*exclusion zone*" and remove property thereon, but refrained from doing so out of fairness (at [114]).

The District Court observed that the First Appellant had misconstrued the reference to the "*exclusion zone*" in the Council's evidence to mean a legally-imposed 20 metre exclusion zone which the Council's workers could not enter (at [115]). The District Court recognised that the "*exclusion zone*" did not resemble "*… a legal requirement or precondition for undertaking the work*", but merely a proposed procedure for the Council workers to observe (at [115]).

District Court finds that ground 4 fails

The Appellants submitted that the Magistrate erred by not addressing all the claimed items in the Claims (at [116]).

The Council submitted that the Magistrate's decision included "*… a very broad sort of catchall of the property dealt with by [the Council] which is sufficiently wide to address any of the matters that may not have been mentioned expressly*", and that it was unnecessary for the Magistrate to particularise each item listed in the Claims (at [118]).

The District Court observed that the onus lay on the Appellants to prove that each item in the Claims was present on the Premises and removed by the Council (at [133]). The District Court found that the Appellants had not demonstrated that the Magistrate was unfounded in finding that the Appellants had failed to prove the following (at [136]):

> *(a) that some of the property listed in the claims was on the premises at the relevant time, and that therefore all property listed in the claims was removed by the [Council].*
>
> *(b) the value of any of the property removed …*

District Court finds that ground 5 fails

The Appellants submitted that the Magistrate failed to consider the Appellants' List of Documents which was filed as part of the pre-trial discovery process and alleged to contain evidence pertaining to the value of the items removed from the Premises. The First Appellant claimed that he was unaware that the List of Documents would not form part of the evidence at trial and that it would have to be introduced as evidence during the trial (at [138]).

The Council submitted that the List of Documents did not constitute evidence and that "*[t]he Magistrate was not required to read and interpret discovery documents that were not drawn to his attention during trial*" (at [139]).

The District Court agreed that the List of Documents did not constitute evidence in the trial and that it was not incumbent upon the Magistrate to read through the discovery documents (at [140]). The District Court also observed that the Magistrate, on several occasions, gave the Appellants the opportunity to introduce evidence to demonstrate the value of the items (at [140]).

Conclusion

The District Court did not find that any of the grounds were made out and dismissed the appeal (at [144]).

Colin Biggers & Paisley

Not registered: Church removed from the Queensland Heritage Register as it does not satisfy requirements for entry

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Uniting Church in Australia Property Trust (Q.) v Queensland Heritage Council* [2024] QPEC 25 heard before Williamson KC DCJ

October 2024

In brief

The case of *The Uniting Church in Australia Property Trust (Q.) v Queensland Heritage Council* [2024] QPEC 25 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Queensland Heritage Council (**Heritage Council**) to enter the Trinity Grove Church by reference to its former name being the "*Wilston Methodist Memorial Church (former)*" (**Church**) into the Queensland Heritage Register (**Register**).

The Court was satisfied that the Appellant advanced a positive case against entering the Church into the Register and decided the Church did not meet the requirements to be entered into the Register, setting aside the decision of the Heritage Council, and removing the Church from the Register.

Background

The Church is located in Wilston on a corner site with three road frontages to Kedron Brook Road, Hawdon Street, and Dibbey Avenue (**Subject Site**), and includes the Church, an associated tower, columbarium, hall, and toilet block (at [6]).

In 1913, a small gothic inspired church was constructed on the Subject Site which was later replaced in 1956 with the Church following population growth and increased congregation size (see [21], [26], and [39]). The Church closed in 2019 following a decline in congregation numbers (at [45]).

In December 2020, a development application was made to the Brisbane City Council to demolish the hall component of the Church, which was refused in February 2021 (at [46]). The refusal was followed by an application by the Heritage Council to enter the Church and tower as a "*place*" in the Register (**Place**) (see [46] and [7]). A "*place*" may be entered into the Register if it satisfies one or more of the criteria for entry in the Register contained in section 35 of the *Queensland Heritage Act 1992* (Qld) (**QHA**).

Entry of the Place into the Register was opposed by the Appellant (at [55]). However, on 12 November 2021 the Heritage Council decided to enter the Place into the Register on the basis that it satisfied sections 35(1)(a), (d), and (e) of the QHA, which state as follows (at [1] and [49]):

> *(1) A place may be entered in the Queensland heritage register as a State heritage place if it satisfies 1 or more of the following criteria—*
>
> *(a) the place is important in demonstrating the evolution or pattern of Queensland's history;*
>
> *…*
>
> *(d) the place is important in demonstrating the principal characteristics of a particular class of cultural places;*
>
> *(e) the place is important because of its aesthetic significance; …*

The Court noted that for a "*place*" to meet the cultural heritage criterion of relevance, it is to be "*important*" (at 51]). The Court noted that it has previously held that "*important*" in the context of section 35 of the QHA, "*… takes the relevant criterion beyond the common place, but not so as to require something out of the ordinary or exceptional …*" (at [51]).

Section 161 of the QHA confers the right to appeal a decision of the Heritage Council, and section 162 of the QHA states that an appeal can only be made on the ground the "*place*" does not satisfy at least one of the "*cultural heritage criteria*" which is defined as the criteria contained in section 35 of the QHA (see [2] and [49]).

Under section 173 of the QHA, the Chief Executive published a guideline titled "*Assessing cultural heritage significance*" (**Guideline**) which both parties referred to extensively in the proceedings (at [56]). The Court accepted that the Guideline is relevant, however that it should be approached with "*considerable caution*" citing inconsistencies and stating that "*[t]he Guideline is after all, just that – it is a 'guideline'*" (at [58]). Inconsistencies included defining words by reference to the Macquarie Dictionary where the term has already been defined in the QHA, and stating a method for determining cultural heritage significance that does not appear in section 35 of the QHA (at [57]).

The Court noted that the statement of significance submitted with the entry of the Place in the Register, as required by section 31(3)(e) of the QHA, is an important document in the appeal (**Statement of Significance**) (at [61]). The Court also noted that is "*… open for the Court … to be satisfied the cultural heritage criteria are met for reasons founded on the evidence, even though the reasons may be different to what is articulated in the [S]tatement of [S]ignificance*" (at [61]).

Issues

The Court considered the following four issues (at [62]):

- Is the Place important in demonstrating the evolution or pattern of Queensland's history?
- Is the Place important in demonstrating the principal characteristics of a particular class of cultural place?
- Is the Place important because of its aesthetic significance?
- Should the Place be included in the Register in the exercise of the discretion under section 53 of the QHA?

As the Court concluded that the Place does not satisfy the cultural heritage criteria in section 35(1) of the QHA, the Court found it unnecessary to deal with the discretion issue in issue four above (at [64]).

Court found the Place was not important in demonstrating the evolution or pattern of Queensland's history

This issue related to section 35(1)(a) of the QHA.

The Court noted that the Place is an example of a mid-1950 modernist church in Queensland, which expresses a soft or transitional aesthetic (at [68]).

The Court assessed the importance of this criterion in regard to the following four factors emphasised by the Heritage Council (at [69]):

- The Place is highly intact.
- The Place is the first modernist Methodist church constructed in Queensland.
- The Place has influenced the design of Methodist churches and churches constructed for a range of Christian denominations.
- The Place demonstrates community involvement in, and commemoration of, major world events.

Court did not accept the Place is highly in tact

The Court was satisfied that the external appearance of the Place could be described as highly intact, but was not so satisfied with respect to the internal presentation of the Place (at [70]). The Court noted that the Place was no longer identifiable as a former Methodist church due to the removal of fittings and furniture when the church ceased use in 2019 (see [13] and [70]).

Court was not satisfied the Place was the first modernist Methodist church constructed in Queensland

The Court noted that on the evidence presented to it that there were three modernist churches constructed prior to the Place, which explains why the Heritage Council contended the Place is the first modernist "Methodist" church (see [74] to [75]). The Court noted that there were a number of Methodist churches constructed in Queensland during 1956 which each exhibit modern design elements (see [77] to [78]).

The Court concluded that the Place does not "*… [stand] out as a marker, or point of transition from traditional to modern Methodist church design …*", and further "*… that the timing of construction of the Place [does not have] any particular import when considered in the context of the evolution of the contemporary church design*" (at [79]).

Court accepts that the Place may have influenced subsequent Methodist churches

The Court accepted that the Place may have influenced subsequent Methodist churches, however that this alone does not satisfy the assessment of "*importance*" (at [80]).

Court was not satisfied the Place reaches the level of importance for demonstrating community involvement in and commemoration of major world events

The Court noted that the commemoration or memorialisation of World War I and II is not a strong feature of the building fabric of the Place (at [81]). Further, the Court noted that for the time, it was not uncommon for a facility, such as a new church, to be identified as a memorial to raise money to finance construction, which also allowed for tax relief to be obtained where a facility was a memorial (at [81]).

The Court was satisfied that the Place did not meet the cultural heritage criterion in section 35(1)(a) of the QHA.

Court was not satisfied the Place is important in demonstrating the principal characteristics of a particular class of cultural place

This issue related to section 35(1)(d) of the QHA.

The Court accepted that a church is a particular class of cultural place (at [92]). The Heritage Council contended that the particular class of cultural place of relevance is a "*1950s modernist church*" (at [92]).

The "*principal characteristics*" of the cultural place identified in the Statement of Significance includes a combination of building fabric, fixtures, and fittings (at [93]). The evidence of an architecture expert confirmed that fixtures and furniture were equally as important as the exterior of the Place and its design (at [93]).

For the earlier reasons given about the Place not being "*entirely intact*" by reference to the removal of fixtures and furniture from the internal of the Place, the Court was not satisfied the importance of the "*principal characteristics*" of the Place is satisfied (at [98]).

The Court was satisfied that the Place did not meet the cultural heritage criterion in section 35(1)(d) of the QHA.

Court was not satisfied the Place is important because of its aesthetic significance

This issue related to section 35(1)(e) of the QHA.

The phrase "*aesthetic significance*" is defined in the schedule of the QHA as "*… of a place or artefact, includes visual merit or interest*". The Statement of Significance provides that aesthetic importance is derived from its architectural qualities (at [103]).

The Court did not accept the Heritage Council's submissions that the architectural qualities of the Place are expressive of "*Methodism's expansionist outlook post-World War II*" or "*… a desire to remain relevant to Queensland society at the time*" (see [103] to [104]). The Court noted that the architectural qualities of the Place are found in numerous churches constructed in the 1950s, and architecture expert evidence opined that the Place is a "*… commonplace example of a 1950s modernist church*" (at [104]).

The Court was satisfied that the place does not meet the cultural heritage criterion in section 35(1)(e) of the QHA.

Conclusion

The Court was satisfied that the Church does not satisfy the cultural heritage criteria stated in section 35(1) of the QHA, and that the power to enter the Church in the Register is therefore not engaged (at [5]). The Court removed the Place from the Register.

Consequences of double dipping refunds through the NSW Return and Earn Scheme

Audrey Wu | Bethany Burke | Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Environment Protection Authority v Clarence Valley Metal Recyclers Pty Ltd* [2023] NSWLEC 96 heard before Moore J

October 2024

In brief

The case of *Environment Protection Authority v Clarence Valley Metal Recyclers Pty Ltd* [2023] NSWLEC 96 concerned Class 6 proceedings (**LEC proceedings**) in the Land and Environment Court of New South Wales (**Court**) commenced by the New South Wales Environment Protection Authority (**EPA**) against Clarence Valley Metal Recyclers Pty Ltd (**Company**). The LEC proceedings were commenced to appeal the sentencing of the Company by Coffs Harbour Local Court (**Local Court**) because the EPA considered there was a "*… manifest inadequacy of three fines (each $15,000) imposed on … the Company …*" (at [1]) for three breaches of the *Waste Avoidance and Resource Recovery (Container Deposit Scheme) Regulation 2017* (NSW) (**Regulation**).

The Court considered the following issues:

- whether the trial judge correctly considered the Local Court's jurisdictional limit;
- whether the trial judge correctly applied the jurisdictional limit to all three offences; and
- whether the penalty imposed reflected the seriousness of the conduct that the Company engaged in.

The Court held that the penalties imposed by the Local Court were "manifestly inadequate" and ordered that the Company pay $149,000 which was a significant increase from the Local Court penalty of $45,000.

Three guilty pleas in the Local Court

In the Local Court proceedings, the Company pleaded guilty to three breaches of the Regulation, namely that the Company unlawfully presented material containers for container deposit scheme (**CDS**) refunds, contravening section 44(1)(c) and section 44(1)(d) of the *Waste Avoidance and Resource Recovery Act 2001* (NSW). The offences concerned the Company being paid approximately $57,000 for 66 tonnes of recyclable containers that had already been returned and refunded. The Company was fined $15,000 for each offence, amounting to a total of $45,000.

Alleged errors

In the LEC proceedings, the EPA argued that the Local Court made three errors which resulted in a manifestly inadequate sentence. The first being that the Local Court's jurisdictional limit was conflated with the maximum penalty for the offences. The second was the Local Court's finding that the limit of $110,000 applied collectively to three offences rather than for each offence. The third was that the sentences imposed were manifestly inadequate.

First error: jurisdictional limit

The EPA argued that the Local Court erroneously considered the Local Court's jurisdictional limit ($110,000) as the relevant "yardstick" to assess the range of appropriate penalties, as opposed to the maximum sentences contained in the Regulation.

The Court disagreed and said that the Prosecutor failed to establish that the Local Court had not had proper regard to the maximum penalty. Rather, the following extract from the transcript highlighted that the Local Court considered the "starting point" for the penalty based on a number of factors and that the starting point was within the range of the maximum penalty (at [42]):

> *Having identified that the maximum amount of the penalty is $110,000 in this jurisdiction, having identified that the objective seriousness must sit at no less than mid-range, it is my view that the starting point for the financial penalty should be in the region of $40,000 to $50,000.*

Second error: the limit applies to each offence, not the collective total of the offences

The Court agreed with the EPA that her Honour in the Local Court proceedings appeared to have misapprehended the jurisdictional limit applicable to the three offences. That is, the Local Court misapplied the jurisdictional limit and understood it to apply to all three offences collectively, rather than each offence.

The outcome of this finding was that the starting point for the financial penalty should be in the region of $40,000 to $50,000 **for each offence**, instead of the collective total for the three offences.

Third error: manifestly inadequate sentences

The EPA successfully argued that the sentences were manifestly inadequate in light of the seriousness of the Company's conduct. Sentences are guided by principles set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW).

The EPA advanced the following four reasons why the Court should consider that the sentencing principles were misapplied, leading to an inadequate sentence:

- The Company's offending conduct resulted in significant financial gain and the Company had not repaid any of that gain.
- The objective seriousness of the Company's offending conduct was "high" due to the financial gain and because the offences were committed in circumstances where the guiding mind of the Company knew that the CDS refunds had already been paid for the containers which the Company subsequently submitted for further refund.
- A significant penalty was warranted to deter other potential offenders.
- There was no evidence as to the Company's financial circumstances and ability to pay a significant penalty.

Revisiting the sentence

As the EPA was successful in arguing the second and third errors, the Court considered that intervention was warranted and the sentencing process needed to be undertaken afresh.

After considering aggravating and mitigating factors, the Court concluded that the starting penalty for each of the three offences should be $72,000 given the sentencing discretion it was to exercise was confined to the Local Court's jurisdictional limit of $110,000 for each of the offences. The maximum 25% discount for early guilty pleas was applied reducing the $72,000 to $54,000. The Court also moderated the second and third penalties after considering the principles of totality and accumulation, given the offences were carried out as a single course of offending conduct.

Ultimately, the Court upheld all three appeals and sentenced the Company to pay a total of $149,000 for the three offences ($54,000, $50,000, and $45,000). The Company was also ordered to pay the costs of the EPA.

Conclusion

This case serves as an important reminder for those operating under the container deposit scheme or anyone who is regulated by the EPA, that the EPA is robustly prosecuting offences under the legislation it powers. Indeed, where the EPA is not satisfied with a penalty imposed by a Local Court, it may take steps to seek to have the penalty increased to ensure deterrence.

Character trumps luxury again: Queensland Court of Appeal upholds refusal of luxury resort development in Port Douglas

Victoria Knesl | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* [2024] QCA 153 heard before Flanagan JA, Brown AJA, and Bradley J

November 2024

In brief

The case of *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* [2024] QCA 153 concerned an application for leave to appeal to the Queensland Court of Appeal (**Court of Appeal**) by Chiodo Corporation Operations Pty Ltd (**Applicant**) against the decision of the Planning and Environment Court of Queensland (**Planning and Environment Court**) to dismiss an appeal in respect of the refusal by the Douglas Shire Council (**Council**) of a development application for a development permit for a material change of use to facilitate the development of a luxury resort (**Proposed Development**).

The case of *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* [2023] QPEC 44 relates to the decision of the Planning and Environment Court, which was summarised in our July 2024 article. In short, the Planning and Environment Court did not accept the Applicant's arguments that regard should be had to the economic need and other benefits of the Proposed Development and the Proposed Development should be approved in the face of some alleged non-compliances with the relevant assessment benchmarks under section 60(2)(b) of the *Planning Act 2016* (Qld) (**Planning Act**).

The Planning and Environment Court upheld the Council's decision to refuse the development application and dismissed the appeal because of the unacceptable impact of the Proposed Development on the character and amenity of Port Douglas, the unacceptable scale of the Proposed Development, and the limited relevant matters for approval in the exercise of its planning discretion.

On application to the Court of Appeal for leave to appeal, the Applicant argued that the Planning and Environment Court erred in exercising its planning discretion and that the alleged errors materially affected the decision of the Planning and Environment Court to refuse the Proposed Development.

The Court of Appeal did not agree and found that none of the proposed grounds of appeal had merit and therefore dismissed the application for leave to appeal with costs.

Background

The Applicant sought to rely on four grounds of appeal, if the Court of Appeal granted leave to appeal. The issues raised by the four grounds of appeal concern the following alleged errors (see [7] to [9]):

- *First Alleged Error* – The Planning and Environment Court failed to give separate consideration as to whether the Proposed Development complied with Performance Outcome (**PO**) PO4 of the Local Plan Code of the *Douglas Shire Planning Scheme 2018* (version 1) (**Planning Scheme**).
- *Second Alleged Error* – The Planning and Environment Court failed to apply the correct test in construing four provisions of the Planning Scheme.
- *Third Alleged Error* – The Planning and Environment Court failed to recognise an inconsistency between a provision of the Tourist Accommodation Zone Code and a provision of the Access, Parking and Servicing Code in the Planning Scheme.

The Third Alleged Error concerns carparking and therefore is only a relevant consideration if the Applicant is successful in respect of the First Alleged Error and Second Alleged Error and the Proposed Development is approved (at [10]).

Court of Appeal finds no error in respect of the First Alleged Error

In respect of the First Alleged Error, the Applicant asserted that the Planning and Environment Court conflated the consideration of PO4 with the Overall Outcome in section 7.2.4.3(3)(d) of the Local Plan Code of the Planning Scheme (at [35]).

The Court of Appeal recited the Planning and Environment Court's reasoning which demonstrated that the Planning and Environment Court considered whether the Proposed Development complied with PO4 (see [52] to [57]).

Therefore, the Court of Appeal found no error in respect of the First Alleged Error.

Court of Appeal finds no error in respect of the Second Alleged Error

In respect of the Second Alleged Error, the Applicant asserted that the Planning and Environment Court failed to apply the correct test in construing the following four provisions of the Planning Scheme by reason of the Planning and Environment Court's failure to refer to a line of authority in its construction and application of those provisions (see [67], [69] and [70]):

- Section 3.5.5.1(1) and section 3.5.5.1(2) of the Strategic Framework.
- PO1(a) of the Tourist Accommodation Zone Code.
- The Overall Outcome in section 9.4.6.2(2)(a) of the Landscaping Code.

In its written submissions, the Applicant submitted the following test (at [77]) [emphasis in original]:

> *This case turns largely on questions related to character and amenity. In respect of character and amenity, it has been recognised by this Court that proposed development will often affect existing amenity. What the Court considered to be unacceptable, is a detrimental effect to an unreasonable extent according to the reasonable expectation of other land holders in the vicinity given the sorts of uses permitted under current town planning controls, answered according to the standards of comfort and enjoyment which are expected by ordinary people of plain, sober and simple notion not effected by some special sensitivity or eccentricity.*

The Court of Appeal observed that the Applicant did not refer the Planning and Environment Court to the relevant line of authority or make a submission by reference to that line of authority as to how the four provisions of the Planning Scheme ought to be construed or applied (at [76]).

The Court of Appeal held that the "*… notion of reasonableness in a consideration of amenity (and character) is informed more generally by the principle of construction of planning provisions, that they be read in a way that is practical and as intending to achieve balance between outcomes. That is, courts will endeavour to adopt a commonsense approach …*" (at [80]).

The Court of Appeal recited the Planning and Environment Court's reasoning and found that it correctly appreciated the principles and canons of statutory interpretation in interpreting the relevant provisions of the Planning Scheme, which involved the adoption of a commonsense approach that implicitly encompassed the asserted test identified by the Applicant (at [84]).

Therefore, the Court of Appeal found no error in respect of the Second Alleged Error.

Unnecessary for the Court of Appeal to consider the Third Alleged Error

It was unnecessary for the Court of Appeal to consider the Third Alleged Error given that it found no error in respect of the First Alleged Error and Second Alleged Error.

Conclusion

The Court of Appeal concluded that the Applicant failed to establish the First Alleged Error and Second Alleged Error (at [11]). Thus, the Court of Appeal dismissed the Applicant's application for leave to appeal with costs (see [101] to [103]).

Happy camper: Planning and Environment Court allows appeal against the refusal of a development application to facilitate a camping ground

Mary Do | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cheep Stays Pty Ltd v Ipswich City Council* [2024] QPEC 34 heard before Kent KC DCJ

November 2024

In brief

The case of *Cheep Stays Pty Ltd v Ipswich City Council* [2024] QPEC 34 concerned an appeal by Cheep Stays Pty Ltd (**Applicant**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Ipswich City Council (**Council**) to refuse a development application (**Development Application**) for a development permit for the proposed use of land as a camping ground (**Proposed Development**) in respect of land located at 84 Chubb Street, One Mile (**Land**).

The Court considered whether the Development Application complied with the *Ipswich Planning Scheme 2006* (**Planning Scheme**) and the draft *Ipswich Planning Scheme 2024* (**Draft Planning Scheme**), and whether there were sufficient relevant matters to warrant approval of the Development Application despite any non-compliance with the relevant assessment benchmarks in the Planning Scheme (see [3] and [11]).

The issues in dispute included those relating to flood risk, amenity, land use, need, and the Draft Planning Scheme (at [5]).

The Court allowed the appeal for the reason that the issues do not amount to reasons for refusal.

Background

The Land is a large parcel of approximately 6.6 hectares and the Proposed Development relates to a use of approximately 15,222 square metres of the Land (**Site**) (at [2]). The Land is partly within the residential zone and the Site relates to land within the recreation zone (at [14]).

The Proposed Development includes 46 camping sites, 16 of which include power supply, an internal road network, a detached building for a communal area and amenity facility, a separate office building, outdoor communal recreation areas, and a formalised playground (at [2]).

The Land is enclosed by the arc of the Bremer River and is subject to flooding (see [6] and [8]).

Court finds that flood risk does not amount to a reason for refusal

The Applicant asserted that the Council's experts unfairly characterised the Proposed Development as a residential use which is not suitable as the Land is subject to flooding and argued that the issues relating to the Proposed Development are more nuanced than a residential house as occupants are mobile and lack connection with the Site (at [20]).

The Court found that the Proposed Development is for a residential use, but appreciated the distinctions from a normal residential housing subdivision (at [20]).

The Court agreed with the Applicant's argument that it will take a considerable period to respond to rainfall and for flooding to occur because of the relatively large catchment area of the Bremer River, such that there is significant warning time to respond to a potential flood (at [21]).

The Development Application seeks to mitigate the flood risk by the following measures (at [22]):

- The permanent buildings are to be above the level of the defined flood and otherwise flood resistant.
- The occupants and their possessions are required to be movable at short notice.
- Evacuation of the Site in a flood event is required to be in accordance with the Flood Emergency Plan (**FEMP**). The FEMP includes that there is to be a warning sign at the entrance of the Site, which electronically operates to indicate the current status of a flood event, a loudspeaker system, a notice handed to occupants upon entry about the potential problem of flooding, arrangements for the alert, warning, and evacuation stage, and trigger levels for varying stages based on the actual river levels.

Although the Council's flood expert agreed with the proposed trigger levels and accepted the approach set out in the FEMP, he opposed the FEMP because the trigger levels would be exceeded frequently and lower the effectiveness of the FEMP (at [24]).

The Applicant argued that the Proposed Development mitigates the risk to people and property to an acceptable level and is consistent with the relevant assessment benchmarks (at [25]).

The Court accepted that the Proposed Development intensified the residential uses into a floodplain (at [34]). However, the Court accepted the evidence of Applicant's flood expert that the time available for preparation and evacuation is sufficient (at [35]).

The Court found that the risk to property of a failed evacuation is low because people are not permanent residents and can take possessions with them (at [35]). Although there is a risk to life due to a failed evacuation, flood risks are mitigated to an acceptable level by the Proposed Development (at [35]). Therefore, the Court found that flood risk is not a reason to refuse the proposal (at [37]).

Court finds that amenity does not amount to a reason for refusal

Both parties' experts agreed that the Proposed Development can operate without adversely impacting on the noise amenity of nearby sensitive uses (at [38]). The experts recommended conditions of the approval which include restricting the hours of refuse collection, the hours of guest check-in, and acoustic barriers (at [38]).

The Council's visual amenity expert accepted that the visual amenity is addressed by installing a new solid front fence and removing housing pads to promote and blend the visual qualities of the existing streetscape and neighbourhood. The Council's expert asserted that there is no detrimental unacceptable impacts because the Proposed Development is compatible with other uses and works without detracting from the residential character and amenity of the area (at [39]).

The Council argued that although noise or visual amenity are not of themselves reasons for refusal, they should be considered cumulatively (at [41]). The Council's town planning expert opined that the Proposed Development tends to contrast with the amenity and character of the area as it represents high intensity activity (at [42]). The Council also argued that detrimental unacceptable impacts on amenity "*… would manifest in adverse impacts upon neighbouring uses …*" (at [42]).

The Court found that although some local residents may be discomfited by the camping ground in their suburb, it is difficult to conclude amenity is a reason for refusal because noise amenity and visual amenity do not negatively impact surrounding properties (at [43]).

Court finds that land use does not amount to a reason for refusal

The Court accepted that the Proposed Development is within the definition of "*camping ground*" and "*… is one of a number of provisionally consistent uses that may be accommodated within the zone of a type and scale appropriate for the prevailing nature of the area and the particular circumstances of the site and its surrounds …*" specified in specific outcome 4.17.5(2)(p) of the Planning Scheme (at [45]).

The Applicant argued that the Proposed Development is appropriate with regard to specific outcome 4.17.5(2)(p) of the Planning Scheme because the Proposed Development appropriately deals with flood risk and the Proposed Development complements the proposed sporting facilities (at [51]).

The Court found that the Proposed Development is consistent with the outcomes sought for the recreation zone (at [71]).

Court finds that the Draft Planning Scheme does not amount to a reason for refusal

The Court accepted the Council's argument that the Draft Planning Scheme is relevant to the appeal as it is in a relatively advanced stage and strengthens some relevant planning themes involving flood risk and hazards (see [17], [18], and [53]).

The Council argued that the Proposed Development is inconsistent with the land use and planning envisaged by the Draft Planning Scheme (at [53]).

The Applicant considered the Coty principle restated in the case of *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253 (at [19]). The Court accepted the Applicant's argument that the approval of the Proposed Development would not hinder the Council's ability to implement the Draft Planning Scheme and there is no new planning direction regarding flooding in the Draft Planning Scheme (see [54], [55], and [72]).

Court finds a need for the Proposal Development is not a reason for refusal

The Court recognised that need "*… must be a genuine and not a contrived one, but does not necessarily amount to a pressing or critical need or even a widespread desire …*" (at [57]).

The Applicant's economic expert analysed the number of sites per capita of population as a benchmark and opined that the Ipswich local government area is significantly less than the Queensland average which supports a need for this type of development (at [58]). The Applicant's economic expert also gave evidence that the camping industry is growing and contributed to a growing need for accommodation facilities (at [58]).

The Council's economic expert noted that the Council has strategies to increase outdoor recreation and physical activity (at [60]). The Council's economic expert gave evidence that the occupancy rates are anticipated to remain relatively low and the Proposed Development could have significant impacts on other facilities (at [61]). As a result, the expert opined that the Proposed Development will more likely underperform (at [61]).

The Court acknowledged that the evidence of the two experts is finely balanced and it is difficult to resolve the differences between them. The Court accepted that need for the type of development was not pressing, critical, nor widespread desire. The Court found that need is slightly, not strongly, in favour of approval and does not represent a reason to refuse approval (at [65]).

Court finds discretionary matters favour approval

The Applicant argued that even if there is non-compliance with an assessment benchmark, the discretionary matters broadly favour approval (at [66]).

The Applicant asserted the following discretionary matters (at [67]):

- The intensification of residential uses in a flood hazard area is acceptably managed by the FEMP.
- The intent of the Planning Scheme is confused as the part of the Land planned to contain a future sporting facility is not in the recreation zone, but the Site is. The Proposed Development will not frustrate the future use of the Land.
- The Proposed Development will support tourism activity throughout the local government area.
- The Proposed Development will improve accessibility to surrounding sporting and recreation facilities.
- The Site is not needed for specific future sport or recreation trunk infrastructure.
- The Site is not proposed to be in recreation zone in the Draft Planning Scheme.
- The Proposed Development is an efficient use of privately-owned flood constrained land.
- The Proposed Development is complementary and will support the use of surrounding sport and recreation facilities.

The Court found that the balance of discretionary matters favours acceptance of the Proposed Development because the discretionary matters ameliorate the flood risk to a sufficient extent (see [70] and [73]).

Conclusion

The Court allowed the appeal and approved the Development Application (at [74]). The Court will hear the parties as to concluding the appropriate conditions of approval (at [74]).

What a waste: Application seeking to restrict waste facility operations pending odour nuisance proceedings is dismissed

Erin Schipp | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Chief Executive of the Department of Environment & Science v Nugrow Ipswich Pty Ltd* [2024] QPEC 8 heard before Williamson KC DCJ

November 2024

In brief

The case of *Chief Executive of the Department of Environment & Science v Nugrow Ipswich Pty Ltd* [2024] QPEC 8 concerned an application to the Planning and Environment Court of Queensland (**Court**) by the Chief Executive of the Department of Environment and Science (**Chief Executive**) seeking interim orders (**Interim Application**) that a waste facility operator (**Respondent**) cease operation of waste facility activities pending the outcome of an originating application against the Respondent for an alleged odour nuisance (**Originating Application**).

The Court held that it was appropriate to have regard to established principles relating to an interlocutory injunction when deciding this matter, and considered the following two issues (at [37]):

- Whether there is a serious question to be tried.
- Whether the balance of convenience favours the interim relief being granted.

The Court held that the Originating Application involves a serious question to be tried and that the balance of convenience does not weigh in favour of granting the interim relief sought.

The Court was not satisfied that it would be proper to make the orders sought by the Chief Executive and dismissed the Interim Application and allocated expedited hearing dates to the determination of the Originating Application.

Background

The Respondent operates a large waste recycling and compost manufacturing facility in Swanbank, Ipswich (**Facility**) (at [6]). The Facility is surrounded mainly by industrial uses, with two residential developments located approximately 1.4 kilometres and 1.5 kilometres from the Facility boundary (at [7]). Given the Facility's activities, there is a potential for adverse odour impacts on surrounding areas (at [8]).

On 3 April 2019, the Respondent was granted an amended development approval and environmental authority (**EA**) for the use of the Facility which includes a condition that "*[o]dours or airborne contaminants must not cause environmental nuisance to any sensitive place or commercial place*" (at [6]).

The Respondent conceded that it had exceeded the odour impacts authorised by the EA and on 7 May 2019 submitted a program notice to the Department of Environment and Science (DES) under section 350 of the *Environmental Protection Act 1994* (Qld) (**EP Act**), which stated that a "transitional environmental program" would be prepared and submitted to the DES (see [9] and [14]). A "transitional environmental program" is defined in section 330(1) of the EP Act as "*… a specific program that, when complied with, achieves compliance with this Act for the activity to which it relates by doing 1 or more of the following—*

(a) reducing environmental harm caused by the activity;

…

(c) detailing the transition of the activity to comply with—

(i) a condition of an environmental authority for the activity; or

…"

On 22 August 2019, the application for a transitional environmental program was made to the DES, which was refused and later approved subject to conditions by the Court on 4 September 2020 (at [16]). One of the conditions required the construction of "*… purpose-built compost tunnels … with concrete hardstand between for vehicle access*", with a compliance date of by 4 September 2023 (**Compliance Date**) (see [16] to [17]).

The Respondent sought an amendment to the approved transitional environmental program to abandon the in-vessel tunnels in favour of an alternative composting system, which was refused and is the subject of a separate appeal before the Court (see [17] to [18]).

Two weeks prior to the Compliance Date, the DES engaged a consultant to conduct a "Field Ambient Odour Assessment Investigation Study" in relation to the Facility (**Odour Study**) (at [19]). The Court summarised the key findings of the Odour Study as follows (at [20]):

- Frequent odour characters are present in the study area.
- Frequent odour characters were detectable and attributable to the Respondent.
- Off-site impacts were detectable more than 5 kilometres from the Facility.
- The operation of the Facility will continue to lead to high to extreme odour impact risks if modifications and upgrades are not adopted.

On 1 December 2023, the Chief Executive filed the Originating Application relating to an alleged breach of section 440(2) of the EP Act, which states "*[a] person must not unlawfully cause an environmental nuisance*" (see [26] to [27]).

The term "environmental nuisance" is defined in section 15(a) of the EP Act as "*… unreasonable interference or likely interference with an environmental value caused by … aerosols, fumes, light, noise, odour, particles or smoke …*". The term "environmental value" is defined in section 9 of the EP Act as relevantly including "*… a quality or physical characteristic that is conducive to ecological health or public amenity or safety; or … another quality of the environment identified and declared to be an environmental value under an environmental policy or regulation*".

The Originating Application sought an order restraining the construction of an in-vessel composting system capable of handling the Respondent's composting operations (at [23]). The Respondent affirmed that it was open to a solution of the type sought by the Chief Executive, and that it has been pursuing such a solution for a number of years (at [24]).

Although it may appear that there is no dispute between the parties, the Court confirmed the dispute the subject of the Originating Application has two parts. Firstly, whether the alternative composting system proposed by the Respondent is an acceptable alternative to the in-vessel composting system, and secondly, the timeframe that the alternative system is to be constructed and commissioned by (at [24]).

Court determined there is a serious question to be tried

The Court noted that it may make orders it considers appropriate under section 505(5) of the EP Act if it is satisfied of either of the two limbs, being an offence against the EP Act had been committed or an offence against the EP Act will be committed unless restrained (at [41]).

The Court noted that it was unnecessary for it to make findings on whether the "*voluminous*" body of evidence is accepted, accepted in part, or rejected (see [44] to [45]). The Court was instead satisfied that the evidence provided by both parties establishes a case that "*… there is a genuine risk that an offence against the EP Act will be committed unless restrained*", with the offence being "*environmental nuisance*" (at [47]).

The Court determined that there is a serious question to be tried in the Originating Application (at [49]).

Court determined the balance of convenience does not favour the restraint proposed

The Court accepted that three of the eleven matters raised by the Respondent attract sufficient weight to impact on the "*… balancing exercise at hand*" (at [58]). Firstly, the financial distress to the Respondent as a result of having to cease certain Facility operations (at [59]). Secondly, the Chief Executive offered no undertaking for damages in support of the relief sought (at [62]). Thirdly, the Respondent is committed to implementing further interim, and final, measures to manage the odour impacts of the Facility as supported by a waste industry expert (see [64] to [65]).

The Court was not satisfied that the balance of convenience favours granting the interim relief sought by the Chief Executive, for the following three reasons (see [67] to [71]):

- Granting the interim relief sought "*… has the very real potential to frustrate the final relief sought by the Chief Executive*" (at [69]).
- Granting the interim relief sought "*… is likely to lead to significant financial distress*" for the Respondent to cease Facility operations, and in conjunction with the absence of an undertaking as to damages by the Chief Executive is "*… a step too far*" (at [70]).
- The Originating Application can be allocated expedited hearing dates to allow the parties to work toward resolving the key issues in dispute (at [71]).

The Court was not satisfied that the balance of convenience favours granting the relief sought by the Chief Executive (at [72]).

Conclusion

The Court dismissed the Interim Application, and allocated the Originating Application expedited hearing dates.

Colin Biggers & Paisley

Political placard prohibited: Contraventions of a Local Law for the communication of political advertising matter on Adelaide Street

Marnie Robbins | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland District Court in the matter of *Pavlou v Brisbane City Council* [2024] QDC 73 heard before Smith DCJA

November 2024

In brief

The case of *Pavlou v Brisbane City Council* [2024] QDC 73 concerned an appeal by a party convicted of offences in the Magistrates Court of Queensland (**Appellant**) to the District Court of Queensland (**Court**) against those convictions, which were brought by the Brisbane City Council (**Council**) for contraventions of a local law.

On 3 October 2023, the Appellant was convicted of two charges being the failure to obtain a consent to carry out a regulated activity contrary to section 68 of the *Public Land and Council Assets Local Law 2014* (**Local Law**) and the failure to comply with an oral direction contrary to section 72(1) of the Local Law.

The Appellant appealed those convictions and in determining the appeal the Court considered the following issues:

- Whether the Magistrate erred in the approach to the matter.
- Whether the elements of Charge 1 could be proved.
- Whether the elements of Charge 2 could be proved.

The Court found that the convictions were valid and dismissed the appeal.

Background

On 17 May 2022, the Appellant had been sitting at a foldaway table obstructing the walkway outside of 79 Adelaide Street, Brisbane City, and displaying placards in support of a political campaign, including a sign which read "*nothing happened June 4 1989 change my mind*" (**Placard**), a Senate sign, and a political brochure (see [10] to [11]).

The first charge against the Appellant was in respect of a failure to obtain a consent to carry out a regulated activity under section 68 of the Local Law (**Charge 1**). Communicating advertising matter by means of any placard, board, banner, or article of a similar nature is a regulated activity stated in schedule 1 of the Local Law and requires consent from the Council. No consent had been obtained by the Appellant (at [6]).

The second charge against the Appellant was in respect of a failure to comply with an oral direction contrary to section 72(1) of the Local Law (**Charge 2**). The Appellant had been directed by an authorised person, being a Senior Customer Liaison with the Council, to stop communicating the advertising matter by means of the Placard. The Appellant did not comply with the authorised person's oral direction (at [7]).

The Appellant was convicted of Charge 1 and Charge 2 and appealed against that decision.

Court finds that the Magistrate erred in the approach to Charge 1

The Magistrate observed that there may have been an issue of duplicity in relation to Charge 1 because there were a number of signs involved in the charge (at [18]). As a result, the prosecution elected to rely only on the Placard in relation to Charge 1.

Despite the prosecution's election, the Magistrate proceeded on the basis that the initial drafting of Charge 1 was not duplicitous and found that *"… there was evidence supporting a guilty verdict in light of the fact that the case involved all of the placards …*" (at [24]).

The Court found that the Magistrate's reliance on all of the placards to convict on Charge 1 was an error of law which constitutes a denial of natural justice (at [30]). The Court approached the rehearing in respect of Charge 1 on the basis that the charge only related to the Placard [51].

Court finds that the elements of Charge 1 were proved

The Appellant submitted, amongst other things, that the Placard could not be "advertising matter" for the purpose of the Local Law as it "*… conveyed no intelligible information and was not 'advertising'*" (at [31]). The Appellant also submitted that the Appellant's conduct was protected by section 21(2) of the *Human Rights Act 2019* (Qld) (**Human Rights Act**) and the implied freedom of political communication under the Australian Constitution (at [34]).

The Council submitted that the meaning of "advertising matter" is a matter of statutory construction and there is no requirement for proof of a commercial aspect, as indicated by the case law (at [40]). The Council also submitted that the Local Law did not impose unnecessary or unreasonable restrictions on the Appellant's human rights or implied freedom of political communication and the Appellant simply needed to obtain the Council's consent in accordance with the Local Law (at [41]).

The Court found that the Placard was "*capable of communicating*" (at [54]). The Court also considered the meaning of "advertising" as discussed in the relevant case law and found that the term only requires the bringing of a matter to the attention of the public (see [62] to [65]).

The Court also considered the context of the Local Law and found that it serves the important purpose of regulating activities in or abutting the Queen Street Mall for the safety and amenity of the public (at [68]). Whilst the Local Law imposed a restriction on rights under section 21(2) of the Human Rights Act, the Court held that the restriction was reasonable and appropriate to serve a legitimate end (see [88] and [94]). The Local Law was valid and there was no breach of the Appellant's human rights or implied freedom of political communication (at [89]).

The Court found that the elements of Charge 1 were proved beyond reasonable doubt and the conviction was valid (at [97]).

Court finds that the elements of Charge 2 were proved

The Appellant submitted that the Appellant was only directed to "pack up" which did not constitute an oral compliance direction under section 59 of the Local Law. The Appellant also submitted that the Appellant "*… complied with a direction by placing any advertising material face down*" (at [35]).

The Council submitted that the evidence made clear that the oral direction was given to cease displaying the material, which the Appellant did not do, and that being told to "pack up" sufficiently falls within section 59 of the Local Law.

The Court found, after having listened to the recording of the interaction, that a lawful direction was given by the authorised officer for the Appellant to cease displaying the advertising material, which the Appellant did not comply with (at [99]).

The Court found that the elements of Charge 2 were proved beyond reasonable doubt and that the conviction was valid (see [100] to [101]).

Conclusion

The convictions made by the Magistrate were upheld and the appeal was dismissed.

Costs decision

The case of *Pavlou v Brisbane City Council (No. 2)* [2024] QDC 108 concerned an application by the Council seeking costs above the ordinary scale of costs following the Court's decision uphold the Magistrate's convictions and dismiss the appeal.

The Council submitted that the grant of costs should be more commensurate with the actual costs rather than the scale costs (at [3]) and that the case was a matter of difficulty and complexity for various reasons (at [2]).

The Appellant submitted that there was a "profligate expenditure" on the part of the Council and noted that the procedural fairness issue was allowed on appeal (at [4]). The Appellant also submitted that "*… costs orders should not serve as a disincentive for members of the community to bring before the Court arguable cases where fundamental rights are in play*" (at [5]).

The Court was cognisant of the public interest considerations raised by the Appellant but did not afford them great weight (at [8]) and agreed with the Council that there was "*… some special difficulty, complexity or importance in this case*" (see [14] to [17]).

The Court observed that it was difficult to determine if the Council's costs of $72,000 is reasonable or not and that it does seem high and should be the subject of a costs assessment (at [21]).

The Court ordered that the Appellant pay 66% of the Council's costs of and incidental to the appeal on the Court scale on the standard basis as agreed or assessed (at [22]).

The Court allowed the parties seven days to decide whether the amount of $20,262, which was 66% of the following, should be fixed as the Council's costs (at [24]):

- *Senior counsel and junior counsel costs* – A combined cost of $19,800 for 1 day preparation, including drafting an outline of submissions, and 1 day appearance.
- *Solicitors costs* – A cost of $9,900 for 2 days preparation and 1 day appearance.
- *Outlay costs* – Outlay costs in the amount of $1,000.

Nothing to hide: Dispute over inspection of the situation and operation of a quarry plant in Kin Kin

Victoria Knesl | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cordwell Resources Pty Ltd ACN 066 294 773 v Noosa Shire Council* [2024] QPEC 18 heard before Long SC

November 2024

In brief

The case of *Cordwell Resources Pty Ltd ACN 066 294 773 v Noosa Shire Council* [2024] QPEC 18 concerned an application by the Noosa Shire Council (**Council**) in appeal proceedings in the District Court of Queensland (**Court**) commenced by Cordwell Resources Pty Ltd (**Appellant**) against an enforcement notice given by the Council (**Enforcement Notice**) seeking that the Council's experts be allowed to inspect the situation and operation of a plant (**Subject Site**) at the Appellant's quarry in Kin Kin, Queensland.

The Council's application in this proceeding was made pursuant to rule 250 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) and rule 4 of the *Planning and Environment Court Rules 2018* (Qld) to allow its experts to conduct an inspection of the Subject Site to obtain evidence for the appeal (at [2]).

The Subject Site is where the issues the subject of the appeal allegedly arise, and the proposed inspection was for each of the Council's experts, including a town planner, an engineer specialising in acoustics, air quality, and environmental management, a geologist with extensive experience in the quarrying industry, and an expert in traffic and vehicle movement issues (at [1]).

The Court concluded that, in the circumstances, it was appropriate to allow the Council's experts to inspect the Subject Site but only in accordance with the following orders (at [1]):

> 1 *Subject to paragraphs 2 and 3, the Appellant must allow the [Council's] retained experts Mr Christopher Buckley, Mr Donald Reed, Mr Paul King and Mr Stuart Holland to access the land which is the subject of this proceeding during business hours and within 7 days of the [Council] giving notice of the preferred dates and times of its experts to undertake that inspection.*
>
> 2 *The Appellant may elect to have one of its representatives accompany the [Council's] experts on the inspection of the land and may require the [Council's] experts to comply with workplace health and safety requirements while on the land, including by completing an on-site safety induction at the start of the inspection.*
>
> 3 *All observations and information obtained but the experts from the site inspection to be conducted in accordance with paragraph 1 must only be used for the purposes of this proceeding.*

Background

On 17 January 2023, the Appellant received the Enforcement Notice from the Council requiring the Subject Site be removed or relocated to the Approved Fixed Plant Area as identified in the Approved Quarry Management Plan, where the approved use was supposed to be conducted (at [3]). Significantly and importantly, it is a development offence to contravene a condition of a development approval.

On 15 February 2024, the Appellant filed an appeal against the Council's giving of the Enforcement Notice (at [3]). As the enforcement authority, the Council must establish that the appeal should be dismissed and satisfy the Court that there is reasonable belief that the Appellant has committed or is committing a development offence (see [5] and [14]). However, and as the Appellant and the Council accepted, the question is not actually as to whether such an offence has been committed but rather the establishment of reasonable grounds for such belief (see [13] and [14]).

Details of the Enforcement Notice

The Council's Enforcement Notice was issued on the premise that the Appellant had contravened the development approval under which the Subject Site was permitted to operate. The alleged contravention relates to a condition of the approval that required the Subject Site to operate generally in accordance with the Approved Quarry Management Plan. More particularly, that the Subject Site has been constructed and located outside of the Approved Fixed Plant Area identified in the Approved Quarry Management Plan (at [7]).

Details of the Notice of Appeal

The Appellant's Notice of Appeal asserted that the Enforcement Notice should be set aside for the following reasons (see [8] and [9]):

- The Subject Site is not a fixed plant for the purposes of the Approved Quarry Management Plan.
- The Approved Quarry Management Plan does not provide for advances in technology or science relevant to quarrying or environmental management that may be adopted over time.
- The Subject Site is utilised to further refine the product and reduce noise, dust, and waste in accordance with the Approved Quarry Management Plan.
- The condition of approval relates only to the operation of the Subject Site "generally" in accordance with the Approved Quarry Management Plan.
- The operation of the Subject Site is not a continuation of the alleged contravention because a development permit for the Subject Site was obtained on 31 August 2024.

Relevant issue

The Council and the Appellant reached agreement with respect to settling upon "*… a test of demonstration of 'sufficient grounds for intruding on the [Appellant's] property*'" but even so the Appellant argued that "*… mere relevance of information sought to be obtained by such inspection, may not be sufficient …*" (at [12]).

The Court found that the relevant issue was whether the Council demonstrated sufficient grounds for its belief which could be supported by the presentation of evidence that proves the commission of an offence (at [14]).

Court finds no prejudice to Appellant in allowing the inspection

The Appellant raised concerns regarding the possibility that the inspection, for evidence gathering purposes, could give rise to prosecution under section 168(5) of the *Planning Act 2016* (Qld) (**Planning Act**) which states "*A person must not contravene an enforcement notice*".

The Court acknowledged that whilst evidence gathered during an inspection pursuant to rule 250 of the UCPR may assist the Council's position with respect to the alleged contravention, it is the subsequent violation of the Enforcement Notice, rather than the orders in this proceeding, that could potentially give rise to prosecution under section 168(5) of the Planning Act (at [15]).

Therefore, the Court found that the process of gathering evidence for the appeal does not, by itself, subject the Appellant to prosecution under section 168(5) of the Planning Act.

Conclusion

The Court held that the appropriate conclusion is to allow an inspection of the Subject Site as it would promote the efficient and economical conduct of the appeal by facilitating the gathering of evidence by each of the Council's experts in relation to the identified issues in the Appellant's Notice of Appeal (at [22]).

Application does not fly: Planning and Environment Court of Queensland has dismissed an application seeking non-party disclosure

Mary Do | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Noosa Shire Council v Noosa Airfield Pty Ltd & Anor (No. 2)* [2024] QPEC 38 heard before Long SC

November 2024

In brief

The case of *Noosa Shire Council v Noosa Airfield Pty Ltd & Anor (No. 2)* [2024] QPEC 38 concerned an application in pending proceedings by the Noosa Shire Council (**Council**) to the Planning and Environment Court of Queensland (**Court**) seeking non-party disclosure (**Disclosure Application**) from some identified commercial aircraft operators at Noosa Airfield (**Airfield**) and the regulatory authorities, being the Civil Aviation Safety Authority (**CASA**) and Airservices Australia (**AA**).

The Court considered the following issues:

- Whether the Disclosure Application is premature pursuant to Practice Direction 5 of 2023 (**Practice Direction**).
- Whether there is sufficient evidence to demonstrate direct relevance to an allegation in issue in the substantive proceeding pursuant to rule 242 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**).

The Court dismissed the Disclosure Application finding that there is an "*… absence of sufficient identification of the availability of any document, or type of document, which would be amenable to the non-party disclosure …*" (at [40]).

Background

The Council commenced proceedings in the Court relevantly seeking the following (**Enforcement Proceeding**):

- *Declarations* – Declarations under section 11(1)(c) of the *Planning and Environment Court Act 2016* (Qld) that a town planning consent for a private airstrip issued on 7 July 1975 be taken to have lapsed and that a rezoning approval issued on 5 August 1994 has not taken effect.
- *Enforcement Orders* – Enforcement orders under section 180(3) of the *Planning Act 2016* (Qld) (**Planning Act**) in respect of restraining the First Respondent and Second Respondent (Respondents) from committing a development offence under section 163 of the Planning Act for carrying out assessable development without a development permit and under section 165 of the Planning Act for the unlawful use of premises.

The Respondents made an application for a stay of the Enforcement Proceeding, pending the determination of an appeal brought by the First Respondent against the Council's decision to give it an enforcement notice (at [1]). The Court dismissed the application to stay the Enforcement Proceeding (at [1]).

The Council made the Disclosure Application seeking disclosure from the Airfield, CASA and AA for the following classes of documents to support the issues which arise in the Enforcement Proceeding (at [3]):

- Those which detail the number and type of aircraft using the land from 1 January 2010 to 16 February 2024.
- Those which detail any safety incidents or other complaints concerning aircraft using the land from 1 January 2010 to 16 February 2024.

Court finds the Disclosure Application is not necessarily premature pursuant to the Practice Direction

The Respondents argued that the Disclosure Application is premature, having regard to the Practice Direction (at [15]).

The Court acknowledged that the requirement in the Practice Direction for the party alleging the development offence to file its material before allowing the election of a responding party may be a recognition of privileges against self-crimination and self-exposure to a penalty, and considered whether those privileges are relevant to the First Respondent which is a corporation (at [20]).

The Court observed the following in respect of the Practice Direction (at [30]):

- Privileges against self-incrimination and against exposure to a penalty are important rights relating to individuals.
- Despite the absence of the legal recognition of the privilege against self-incrimination and self-exposure to a penalty for corporations, the Practice Direction applies to a corporate respondent.

The Court stated that there has been no attempt to discriminate the position between the Respondents, and therefore "*… each of them point to their common position pursuant to the Practice Direction*" (at [31]).

The Court accepted that the Disclosure Application does not infringe any privilege of the Second Respondent against self-incrimination and self-exposure to a penalty, and found that the Disclosure Application "*… is not necessarily to be regarded as premature because of the position of the [Respondents] …*" under the Practice Direction (at [32]).

Court finds there is insufficient evidence to demonstrate direct relevance to an allegation in issue in the Enforcement Proceeding under rule 242 of the UCPR

Rule 242 of the UCPR states as follows (at [6]):

> *(1) A party (the applicant) to a proceeding may by notice of non-party disclosure require a person who is not party to the proceeding (the respondent) to produce to the applicant, within 14 days after service of the notice on the respondent, a document—*
>
> *(a) directly relevant to an allegation in issue in the proceeding; and*
>
> *(b) in the possession or under the control of the respondent; and*
>
> *(c) that is a document the respondent could be required to produce at the trial of the matter.*
>
> *(2) The applicant may not require production of a document if there is available to the applicant another reasonably simple and inexpensive way of proving the matter sought to be proved by the document.*
>
> *(3) The respondent must comply with the notice but not before the end of 7 days after service of the notice on the respondent.*
>
> *(4) Disclosure under this division is not an ongoing duty.*

The Amended Originating Application for the Enforcement Proceeding alleges that there is no valid development approval which exists for the Respondents to use the land for purpose of air services and therefore, the use of land for air services is not a lawful existing use of the land (at [13]).

The Council argued that non-party disclosure was required for the purposes of establishing in the Enforcement Proceeding (at [3]) "*… that the land has been and is used for the purposes of air services but also as to the nature scale and intensity of that use, as may be particularly relevant to the contention as to an unapproved material change of use of land and also to discretionary issues as may arise …*", and further that CASA is responsible for the safety regulation of civil air operations in Australia and AA is responsible for the provision of air navigation services and facilities (at [37]).

The Respondents argued that there is an absence of an explanation as to why documents extending back to 2010 are sought (at [15]).

The Court recognised that the notice requiring non-party disclosure under rule 242 of the UCPR is not a "*fishing expedition*" and "*… must be 'founded on a legitimate forensic purpose' and 'represent a genuine attempt to obtain evidence to support the party's pleaded case as opposed to what might be though to be speculation or general intelligence gathering.*'" (at [8]).

The Court observed that the Council did not identify any particular obligation or expectation by the non-parties regarding records for particular use of any aerodrome (at [37]), and that the submissions of the Council show an absence of an identified basis upon which there could be an expectation by the non-parties to keep records and give the clear appearance of speculation and intelligence gathering (at [38]).

The Court found that the Council did not demonstrate how a limited approach from seeking non-party disclosure from only some operators could be directed at evidence in establishing proof of the material change of use related to the Enforcement Proceeding (at [39]).

The Court held that the essential problem with the Disclosure Application is that it lacks the sufficient identification of the availability of any document which would be amenable to non-party disclosure in allowing the Council to prove an allegation in issue in the Enforcement Proceeding (at [40]).

Conclusion

The Court dismissed the Disclosure Application (at [41]).

NSW Court of Appeal overturns Sydney Light Rail nuisance case against TfNSW

Bethany Burke | Anthony Landro | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Transport for NSW v Hunt Leather Pty Ltd; Hunt Leather Pty Ltd v Transport for NSW* [2024] NSWCA 227 heard before Bell CJ, Leeming JA, and Mitchelmore JA

November 2024

In brief

The NSW Court of Appeal has overturned the decision of the Supreme Court in *Hunt Leather Pty Ltd v Transport for NSW* [2023] NSWSC 840, which we discussed in our August 2023 article that highlighted the significant implications the decision had for infrastructure projects.

The Supreme Court at first instance found Transport for NSW (**TfNSW**) liable for private nuisance to business owners along the Sydney light rail corridor (**SLR**) from Circular Quay to Kingsford/ Randwick.

The Court of Appeal overturned that decision based on the first ground of appeal, which centred on whether there was a private nuisance due to contractors occupying so called 'fee zones' along the SLR route beyond the times set out in a delivery program. It held there was no private nuisance as the delivery program was not a reasonable estimate of the relevant timeframes, and there was insufficient evidence to show that there was a form of pre-construction investigation that would have temporarily reduced the interference with the use of land.

Background

The Supreme Court proceedings were commenced as a class action against TfNSW on behalf of all persons who suffered loss or damage by reason of the interference with their enjoyment of their interest in the land. The two lead plaintiffs were a luxury handbag store, and a restaurant.

The primary judge considered that a person could not complain about some measure of disruption caused by the construction of the SLR. Indeed the initial judgment found there were some substantial interferences with enjoyment which were not actionable. However, the Court at first instance stated that there comes a point in time after which TfNSW would be liable for damage caused by the ongoing disruption. In this regard, the primary judge accepted that private nuisance would arise from delays which exceeded the timeframes in a document known as an amended Initial Delivery Program. This amended document was prepared by the Plaintiff's planning and programming expert, based off TfNSW's Initial Delivery Program (**IDP**), a document which was attached to the Project Deed and the timeframes of which were also reflected in a media release. As a result of the exceedance, the Court at first instance held the disruptions to the plaintiffs amounted to a substantial and unreasonable interference with the plaintiffs' enjoyment of their property.

The outcome at trial for the private nuisance claim meant that TfNSW had been found liable for the financial damage suffered by the two businesses during the construction of the SLR, with the possibility of further liability to other class action members. The public nuisance claims brought by two other plaintiffs were dismissed.

The initial decision had obvious implications for infrastructure planning and delivery throughout the State, as it showed how similar private nuisance claims might be brought by disrupted businesses trading in proximity to an infrastructure project.

Appeal

TfNSW appealed the decision on 11 grounds.

The ground of central importance was the challenge to the finding that the plaintiffs had suffered an interference that was both substantial and unreasonable for which TfNSW was responsible, on the basis that it was not open to the trial judge to have had regard to the amended IDP prepared by the plaintiffs as a reasonable estimate of the timeframe for the completion of the relevant stages of the SLR. This ground challenged the underlying factual premise of the primary Judge's reasoning. The Court of Appeal unanimously upheld this first ground, which was sufficient to resolve the appeal in favour of TfNSW. An order for costs in favour of TfNSW followed.

In its reasoning, the Court of Appeal (Bell CJ, Leeming JA, and Mitchelmore JA) found that the IDP could not on its face be regarded as anything like a reasonable estimate of construction time in a particular zone, given it made no allowance for inclement weather, and no allowance for the discovery of unknown utilities and various other contingencies ([85]).

Whilst the amended IDP prepared by the plaintiffs' expert witness addressed some of these deficiencies, for example, inclement weather, it proceeded on the basis that no construction would commence until there was complete knowledge of the numerous subsurface utilities along the route ([86]). It did not explain how that could practically occur. If that were to be the basis of liability, the Court of Appeal held (at [92]) that the plaintiffs needed to establish:

> …
>
> (1) *first, that it was possible in some rational way to obtain complete knowledge of the utilities prior to construction, and*
>
> (2) *secondly, assuming it were possible to do so, how much interference would that investigation cause.*

The Court of Appeal considered it "conspicuous" (at [94]) the lack of evidence as to how in some rational way complete knowledge of the utilities could be obtained in advance of construction without also causing further substantial interference with occupiers' enjoyment of their property noting the thousands of subsurface utilities underneath to road reserve.

In other words, the plaintiffs had not produced evidence that there was a form of pre-construction investigation which would have reduced the interference with the plaintiffs' enjoyment of their land ([94]-[95)].

The Court of Appeal went on to state that even with a complete knowledge of the utilities, given the complexity of the SLR project, it "cannot be the case that construction authorised by statute becomes actionable nuisance if it takes a month or two months or three months longer than scheduled" [96].

The remaining 10 grounds of appeal raised by TfNSW were rejected by the Court of Appeal.

Important parts of the first instance decision preserved

Whilst ground 1 was successful, as the ground rested on a challenge to a factual premise (see [84]), much of the trial judge's detailed analysis on the law of private nuisance has not been disturbed by the Court of Appeal's unanimous judgment.

In particular, the Court of Appeal confirmed that it was not strictly necessary for a plaintiff in an action for nuisance to prove that the defendant failed to take reasonable care, and there was no such exception for "construction cases" (paragraphs [135] - [153]).

In dismissing three of TfNSW's other grounds, the Court of Appeal also confirmed that there was no error by the trial judge in holding that the attenuated standard of care for public authorities in section 43A of the *Civil Liability Act 2002* did not apply to a claim for private nuisance (paragraphs [161] to [181]).

The cross-appeal

The plaintiffs (the cross-appellants) also brought a cross-appeal against TfNSW (the cross-respondent) regarding the decision that dismissed their claim that damages should include a 40% commission they were liable to pay to a litigation funder in *Hunt Leather Pty Ltd v Transport for NSW (No. 4)* [2024] NSWSC 140 (**primary decision**). Litigation funders are companies that pay the cost of the litigation and accept the risk of paying the other party's cost.

The trial judge found that the litigation funding costs were not recoverable as a head of damages for the following reasons:

- the claimed loss was too remote (see paragraphs [100-102] of the primary decision); and
- the cross-appellants, freely and willingly entered into the litigation funding agreement (see paragraphs [103 - 111] of the primary decision).

The cross-appellants submitted that the funding was necessary to bring the proceeding, and that TfNSW was liable, as the damage, including the cost of litigation, was reasonably foreseeable. Further, the "real benefit" of the proceedings was not avoidance of the cost of litigation but rather the prosecution of the proceedings (paragraph [188]).

TfNSW argued that they could not have reasonably been expected to foresee the events that followed, in particular the litigation and the type of funding the cross-appellants would select (paragraphs [191 - 192]).

The Court of Appeal agreed with the primary judge's decision and ultimately dismissed the cross-appeal. It found that the "real benefit" was not the prosecution of the proceedings, but an indemnity of incurring legal costs and ensuring that costs could be paid in the event TfNSW prevailed (in other words, the cross-appellants could provide security for costs if required) (at [197]). The Court of Appeal ultimately viewed this as a voluntary act of the cross-appellants opposed to a foreseeable loss. It was observed by the Court of Appeal that if the 40% commission was viewed as a "head of damages", then there would be "no downside for any group member" (paragraph [199]) who enters into a litigation funding agreement.

Implications

The Court of Appeal's decision will provide some comfort to infrastructure providers during the project planning and delivery phases, as it considers that delays in the order of weeks to months for complex projects are not sufficient to create a nuisance.

It is important to note that the decision does not close the door on future nuisance claims being brought against public authorities developing infrastructure that is disruptive to adjoining occupiers of land, whether they own or lease land. If part of the liability is to be anchored to project timeframes, it is important that those timelines be reasonable and accurate and the assumptions underlying them be appropriate in the context of the relevant infrastructure project. The critical question for future potential claims over similar infrastructure projects will be whether the relevant interference is "substantial and unreasonable.

The Court of Appeal's judgment also made an incisive comparison between what the proceedings were and were not, noting at [46] that "*TfNSW was not sued for negligently compiling the IDP. Nor was it sued for misleading and deceptive conduct in issuing the press release which stated the durations for which ALTRAC would occupy each fee zone. Instead, TfNSW was sued for nuisance.*" Other legal avenues might therefore be considered by those disaffected by prolonged infrastructure works.

In relation to litigation funding, the result on the cross-appeal reinforces the position that litigation funding commissions must be paid by successful plaintiffs, and the payment of such a commission is not claimable against the defendant.

Colin Biggers & Paisley

Compulsory acquisition of a development site: The implications of hitting 'pause'

Anthony Landro | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5 heard before Payne JA, Kirk JA, and Griffiths AJA

November 2024

In brief

The NSW Court of Appeal's decision in *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5 will encourage landowners to continue pressing on with their redevelopment plans in the shadow of a compulsory acquisition, despite the fact that such expenditure could generate considerable waste.

2024 has seen a number of NSW Court of Appeal decisions handed down with significant implications for how compensation is determined for compulsory acquisitions of land.

The first decision which this article focuses on involved an appeal brought by Sydney Metro: *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5.

Summary

In *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5, the Court of Appeal unanimously allowed Sydney Metro's appeal, and ordered the remitter of the proceedings to the Land and Environment Court. The decision has prompted calls for amendments to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) to discourage landowners seeking to ensure that market value is not compromised from continuing with development plans for land blighted by a proposed acquisition, given that such expenditure will ultimately be (in one sense) wasted if the acquisition requires demolition of what was being constructed.

The background in Drivas

In December 2023, our year in review article examined the Land and Environment Court decision in *G & J Drivas Pty Ltd v Sydney Metro* [2023] NSWLEC 20.

The key fact in the case was that, upon learning of the upcoming compulsory acquisition, the landowners decided to slow down work, and then stop work on a 25 storey office development, some 17 months before the compulsory acquisition occurred.

At first instance in the Land and Environment Court, the landowners argued that the decrease in the value of land caused by the abandonment of the development must be disregarded under section 56(1)(a) of the Just Terms Act, as the decisions to discontinue and stop works were caused by the proposal to carry out the public purpose. Therefore, the site warranted a higher market value at the date of acquisition, as if the abandoned development had proceeded.

Duggan J ultimately found in favour of the landowners on this issue, by finding that the decisions to slow and then abandon the development caused a decrease in the value of the acquired land at the date of acquisition compared to what the value would have been 'but for' those decisions. Her Honour found that 'but for' those decisions, the development would have been progressed by the date of acquisition, and this would have increased the value of the site. Total compensation was awarded in the amount of some $190 million for market value and disturbance.

The Appeal

The Court of Appeal's decision has implications to those deciphering the "cause" of an increase or decrease in value caused by the public purpose.

Kirk JA's decision (which Payne JA and Griffiths AJA agreed with) carefully analyses section 56(1)(a), specifically the requirement to disregard any increase or decrease in the value of land caused by the carrying out of, or the proposal to carry out, the public purpose in question. His Honour held the s56(1)(a) involves a "causative inquiry". The decision is helpfully structured first by considering "Text and context", and then the "Purposive considerations".

Kirk JA held that the decision of the claimants to discontinue and stop work on the project arose from the suspicion and eventual knowledge that Sydney Metro would acquire the site. In other words, the loss of value "was indirectly caused by the possibility of the acquisition and the subsequent acquisition was itself the consequence of the public purpose of the project" (emphasis added). Kirk JA reasoned at [32] that "[i]n that sense, there is a "but for" causal link between the public purpose and the relative loss in market value of the kind found by the primary judge".

However, Kirk JA then reasoned at [33] that "establishing causation in a legal context typically involves attribution of legal responsibility. It is "always purposive"", and that "[a]ssessing legal causation commonly involves considerations beyond a purely factual "but for" inquiry."

His Honour held at [39] that:

> *… the question needs to be directed to the effects on the value of the land of the carrying out or proposal to carry out the public purpose, not to the effects of the proposed acquisition of the particular land. That focus on what has been caused by the actual or proposed carrying out of the public purpose stands in contrast to losses attributable to disturbance, which involve costs or fees of various kinds incurred in connection with the acquisition (see s 59(1)…).*

Turning to the specific facts of this case, Kirk JA found at [40] that:

> *… The public purpose here – the undertaking of the Sydney Metro West project – did not itself directly cause the relevant effect on the value of the land. Rather, it was the two decisions of the respondents. Further, those decisions were not taken in response to the public purpose itself. The respondents were acting in response to the possible acquisition of their land, regardless of the nature of the purpose for which it was being acquired. Thus the effect on the value of the land was two stages removed from Sydney Metro's carrying out of the public purpose. It involved independent decisions of the owners, in a freely chosen (if entirely rational) response to the possibility that their land would be acquired, where that acquisition was occurring in order for Sydney Metro to continue carrying out the public purpose. It strains the reasonableness of legal attribution for the free choices of the owner, responding to the proposed acquisition as opposed to the public purpose itself, to affect the amount that the acquirer has to pay.*

Under the heading "Purposive considerations", Kirk JA commented at [64]:

> *In aiming to provide just recompense for the loss of land compulsorily acquired there is no good reason why an owner should receive the benefit of any increase in the value of the land caused by the public purpose which led to the acquisition. Conversely, it would be unfair to owners to ignore the fact that the value of their land had been driven down (or "blighted") by the public purpose. This intent of just compensation involves disregarding the effects on value of the actual or proposed carrying out of the public purpose. It does not require disregarding the effects of choices made by owners in response not to the public purpose itself but to the fact that their land may or will be acquired.*

He also concluded at [86] that purposively, the fact that the claimant's construction of s56(1)(a) would enable former owners in their position – being a position which is far from unique – to obtain a windfall gain, also pointed against that construction of s56(1)(a). The windfall involved getting compensation for construction costs potentially not actually expended.

Implications

The landowner's application for special leave to the High Court was unsuccessful, which means that the Court of Appeal's decision remains undisturbed.

The immediate practical implication of the Court of Appeal's decision in *Drivas* is that owners of land seeking to prudently optimise compensation may need to continue their development project even in the shadow of an acquisition, until the land is actually acquired through the legal process. This applies even if the development, whether complete or partially constructed, might need to be demolished following an acquisition.

Decisions like this that narrow what applicants can claim may lead applicants to explore whether the special value head of compensation might be utilised in a manner similar to that eluded to by Basten JA in *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41 at [102] and in *Roads and Maritime Services v Allandale Blue Metal Pty Ltd* [2016] NSWCA 7 at [36].

Colin Biggers & Paisley

Reach for the sky: Planning and Environment Court allows appeal against refusal of a high-rise development

Mary Do | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *S & S No. 4 Pty Ltd v Council of the City of Gold Coast & Ors* [2024] QPEC 42 heard before Williamson KC DCJ

December 2024

In brief

The case of *S & S No. 4 Pty Ltd v Council of the City of Gold Coast & Ors* [2024] QPEC 42 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by S & S No. 4 Pty Ltd (**Applicant**) against the refusal by the Council of the City of Gold Coast (**Council**) of a development application (**Development Application**) for a development permit for a material change of use for an 18-storey mixed use development with a building height of 59 metres (**Proposed Development**) on a site located towards the middle of the Palm Beach district centre, on the south-western corner of the intersection of Gold Coast Highway and Palm Beach Avenue (**Site**).

The Site is relevantly located in the Palm Beach district centre under the *Gold Coast City Plan 2016* (Version 8) (**Planning Scheme**) in which buildings are not to exceed the maximum height of 39 metres as indicated on the Building Height Overlay Map (**BHOM**) (at [60]). The Planning Scheme provides the opportunity for a building height uplift if the provisions of Specific Outcome 3.4.4.1(5) of the Strategic Framework in the Planning Scheme (**uplift provision**) is satisfied (at [4]).

The issues in dispute were as follows (at [80]):

- Whether the Proposed Development complies with the uplift provision.
- Whether the Proposed Development gives rise to unacceptable traffic impacts, including safety impacts.
- Whether the Proposed Development should be approved or refused having regard to the relevant matters, including need, nominated by the parties.

The Court allowed the appeal because the examination of the disputed issues demonstrates that an approval of the Development Application with conditions will achieve compliance with the uplift provision which is a matter that significantly weighs in favour of approval (at [181]).

Background

The Proposed Development comprises multiple dwellings, short-term accommodation, a food and drink outlet, a function facility, indoor sport and recreation, and a hotel (at [30]).

The Council refused the Development Application due to non-compliance with the assessment benchmarks in the Planning Scheme relating to building height and traffic safety (at [3]).

The appeal by the Applicant was opposed by the Council and the Co-Respondents by Election who made properly made submissions to the Council adverse to the Development Application (**Submitters**) (at [3]).

Court finds the Proposed Development complies with the uplift provision

The uplift provision states as follows (at [67]):

> *(5) Increases in building height occur in mixed use centres and specialist centres where all the following outcomes are satisfied:*
>
> *(a) a reinforced local identity and sense of place;*
>
> *(b) a well managed interface with, relationship to and impact on nearby development, including the reasonable amenity expectations of nearby residents;*
>
> *(c) a varied, ordered and interesting local skyline;*
>
> *(d) an excellent standard of appearance of the built form and street edge;*

(e) *housing choice and affordability;*

(f) *protection for important elements of local character or scenic amenity, including views from popular public outlooks to the city's significant natural features;*

(g) *deliberate and distinct built form contrast in locations where building heights change abruptly on the Building height overlay map; and*

(h) *the safe, secure and efficient functioning of the Gold Coast Airport or other aeronautical facilities.*

The Council and Submitters contended that the Proposed Development does not satisfy the Specific Outcomes stated in subparagraphs (a), (b), (c), (d), and (f) of the uplift provision (at [83]).

Court finds the Proposed Development complies with Specific Outcome 3.4.4.1(5)(a)

The Court observed that local identity and sense of place are split into two categories of natural features and existing built environment (at [88]).

With respect to natural features, the Court observed that the Proposed Development will not remove, alter, or detract from the natural environment of the beach, coastal edge, and natural landscape of Palm Beach. The Court found that the activation of the two streets in the district centre will improve pedestrian comfort and access to the beach, and therefore promotes local identity and sense of place (at [89]).

With respect to the existing built environment, the Court observed that the existing built environment is informed by the presence of the highway, the predominance of existing low-rise and small-scale built form which is subordinate to new development on the Gold Coast Highway, and the predominance of street frontages which indicate a busy, highway-orientated centre with a built environment ripe for redevelopment (at [90]).

The Court found that the Proposed Development will reinforce the sense of place in respect of the built environment features for the following reasons, and thus complies with Specific Outcome 3.4.4.1(5)(a) (see [91] and [134]):

- The Proposed Development is to be located in the centre of the district centre, which reinforces the importance of the centre in land use terms.
- The Proposed Development when contrasted with the existing built environment reinforces that the district centre is ripe for redevelopment, and that the district centre accommodates the tallest and most intense land uses in Palm Beach.
- The Proposed Development will likely act as a catalyst for the redevelopment of other land within the district centre.
- The Proposed Development will not interfere with the parts of the district centre that exhibit appropriate levels of pedestrian amenity.

Court finds the Proposed Development complies with Specific Outcome 3.4.4.1(5)(b)

The Court disagreed with the Council's submission that the Proposed Development does not comply with Specific Outcome 3.4.4.1(5)(b) because the tower has a reduced setback and would cause reduced space between towers and breaks between cumulative shadows (at [136]), for the reason that it assumes an appropriate separation distance is unable to be achieved between the Proposed Development and the future development on adjoining and adjacent sites (at [137]).

The Court held that the Proposed Development is well considered with a meritorious design, and is consistent with the intended character of the Palm Beach district centre (at [138]).

Thus, the Court found that the Proposed Development complies with Specific Outcome 3.4.4.1(5)(b) (at [140]).

Court finds the Proposed Development complies with Specific Outcome 3.4.4.1(5)(c)

The Applicant's town planning expert opined that the Proposed Development would contribute to a varied, ordered, and interesting skyline (at [141]).

The Council argued that "*… the proposed development would be 'out of place in the local skyline', 'unlike anything in its immediate vicinity', 'out of alignment with the height contemplated for the centres hierarchy' and 'a highly conspicuous punctuation above 29m' when only a 'modest variation' to the desired building height profile is intended*" (at [142]).

The Court preferred the evidence of the Applicant's expert because they appropriately gave weight to the character planned for the Palm Beach district centre and the visual prominence of the Proposed Development, whereas the Council's expert erroneously assumed that only "*modest punctuations*" above the height identified on the BHOM accords with an ordered skyline (see [144] and [145]).

Thus, the Court found that the Proposed Development complies with Specific Outcome 3.4.4.1(5)(c) (at [146]).

Court finds the Proposed Development complies with Specific Outcome 3.4.4.1(5)(d)

The Applicant's architect expert opined that the product of a number of design elements such as the design of the ground floor and podium, transition from podium to tower, design elements of the tower, and proposed treatment of the walls which respects the existing character achieves an excellent standard of appearance (at [147]). The architect experts engaged by the Council and the Submitters were critical of the design of the Proposed Development (at [148]).

The Court preferred the opinion of the Applicant's architect expert because he considered the Specific Outcome by reference to the design of Proposed Development as a whole and his views were supported by the photomontages (at [149]).

Thus, the Court found that the Proposed Development complies with Specific Outcome 3.4.4.1(5)(d).

Court finds the Proposed Development complies with Specific Outcome 3.4.4.1(5)(f)

The Court observed that the Proposed Development will not have an adverse effect on public views or access to the important natural features of the beach, ocean, headland, and Currumbin Creek (at [151]). Thus, the Court found that the Proposed Development complies with Specific Outcome 3.4.4.1(5)(f) (at [151]).

Court finds the Proposed Development does not give rise to unacceptable traffic impacts

The Council argued as follows in respect of the Proposed Development's compliance with the relevant assessment benchmarks in the Transport Code (at [153]):

- In respect of Performance Outcome (**PO**) PO2 and PO5, the proximity of the porte-cochere driveway to the intersection gives rise to safety and operational issues for traffic, cyclists, and pedestrians (at [154]).
- In respect of PO5 and PO6, the traffic experts engaged by the Council and the Submitters raised concerns about the adequacy of on-site serving arrangements for vehicles larger than an ordinary sedan (at [166]).
- There are insufficient car parks provided because Acceptable Outcome 1 requires 196 spaces, but the Proposed Development includes 102 carparks and 12 motorcycle spaces (at [161]).

The Court found as follows with respect to the Transport Code, and that the traffic impacts do not warrant the refusal of the Development Application (at [171]):

- The design and siting of the porte-cochere and access will not give rise to any unacceptable safety risk for vehicles, pedestrians, and cyclists because the traffic experts engaged by the Council and the Submitters did not convince the Court that such risks exist. The Court stated that this materially undermined the Court's confidence in the evidence of the traffic experts engaged by the Council and the Submitters (at [159]).
- The Court preferred the evidence of the Applicant's traffic expert who prepared swept diagrams which demonstrated that a coaster bus and trailer combination can manoeuvre in a manner that achieves compliance with PO5, PO6, and PO7 (at [168]).
- The Proposed Development would adequately cater to the parking demand because the Court accepted the evidence of the Applicant's traffic expert who calculated a parking demand of 92 to 115 spaces (at [163]). The Court disagreed with the Council's expert's carpark calculation because it assumed that the car parking rate applied to the multiple dwelling units also applies to the hotel suites (at [162]).

Court finds the Proposed Development should be approved having regard to the relevant matters

The Applicant argued that the Proposed Development will result in the redevelopment of an underutilised site in a manner consistent with the Planning Scheme, act as a catalyst for the redevelopment of the Palm Beach district centre as a whole, introduce high-level quality hotel accommodation for visitors, have no adverse traffic impacts, have no adverse amenity or character impacts, and have no adverse town planning consequences (at [182]).

The Court held that its findings in respect of the uplift provision and the traffic issues, as well as the relevant matters put forward by the Applicant, are "*more than sufficient*" to satisfy the Court that the Proposed Development is highly meritorious and should be approved subject to conditions (at [183]).

Court finds the community submissions do not attract significant weight

The Court found that the 1,863 community submissions against the Proposed Development do not attract significant weight in the exercise of its discretion because the submissions related to an earlier iteration of the Proposed Development which included a taller building than now proposed and the assessment of sense of place and local identity in the community submissions did not reference the Planning Scheme and planned character (see [78] and [79]).

Conclusion

The Court found that the Applicant had discharged its onus and that orders will be made allowing the appeal and approving the Development Application subject to conditions (at [184]).

Colin Biggers & Paisley

New Farm Neighbourliness: Approval of a multiple dwelling residence is here to stay after leave to appeal is refused

Marnie Robbins | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Clarry & Anor v Brisbane City Council & Anor* [2024] QCA 39 heard before Mullins P, Bond JA, and Flanagan JA

December 2024

In brief

The case of *Clarry & Anor v Brisbane City Council & Anor* [2024] QCA 39 concerned an application by submitters in a planning appeal (**Submitters**) for leave to appeal to the Queensland Court of Appeal (**Court**) against the decision of the Planning and Environment Court (**P&E Court**) to approve a development application made by 4005 Properties Pty Ltd (**Applicant**) for a development permit for a material change of use for a multiple dwelling comprising an eight-unit building (**Proposed Development**) on land adjacent to the Submitters' residence at Maxwell Street, New Farm (**Subject Land**).

The P&E Court's decision in the case of *Clarry & Anor v Brisbane City Council & Anor* [2022] QPEC 49 (**Reasons**) was the subject of our March 2023 article. In short, the P&E Court found that the height, scale, and form of the Proposed Development satisfies the relevant qualitative assessment benchmarks in version 20 of the *Brisbane City Plan 2014* (**Planning Scheme**), that a minor non-compliance with the Planning Scheme in respect of refuse collection did not justify the refusal of the development application, and that there were no relevant matters justifying the refusal of the development application. The P&E Court allowed the appeal only to the extent that new conditions of approval could be prepared.

The Submitters' application for leave to appeal was based on four errors of law that they asserted had been made by the primary judge (at [36]). It was asserted that the primary judge erred in the following respects:

- The proper construction of the relevant assessment benchmarks applying to the Subject Land, namely the Low-medium density residential zone code (2 or 3 storey mix) (**LMDR Zone Code**), the New Farm and Teneriffe Hill neighbourhood plan code (**NP Code**), and the multiple dwelling code (**MD Code**).
- The conclusion that the community expectations about the development of the Subject Land are not reasonable.
- The decision that there is both a community need and an economic need for the Proposed Development within the meaning of those terms in Overall Outcome OO3(m) in section 7.2.14.1.2 of the NP Code (**OO3(m)**).
- The decision to allow the appeal only to the extent of imposing development conditions to give effect to minor changes to the approved plans.

The Submitters did not succeed on the alleged errors of law and leave to appeal was refused by the Court.

Assessment benchmarks

The following assessment benchmarks in the Planning Scheme are relevant to the Proposed Development and the alleged errors of law (see [15] to [19]):

- OO3(m) which requires development to be "*… of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development*".
- Performance Outcome PO1(b) in Table 7.2.14.1.3.A of the NP Code (**PO1(b)**) which requires development to be "*… of a height, scale and form that achieves the intended outcome for the precinct, improves the amenity of the neighbourhood plan area, contributes to a cohesive streetscape and built form character and is…b. aligned with community expectations about the number of storeys to be built …*".
- Acceptable Outcome AO1 in Table 7.2.14.1.3.A of the NP Code (**AO1**) which requires that development "*… complies with the number of storeys and building height set out in Table 7.2.14.1.3B*", and Table 7.2.14.1.3.B of the NP Code which states that the maximum building height for the low-medium density living precinct is 2 storeys or 9.5 metres.

- Overall outcome OO7(b)(i) of the LMDR Zone Code (**OO7(b)(i)**), overall outcome OO2(h)(v) of the MD Code (**OO2(h)(v)**), and acceptable outcome AO4.1(a) in Table 9.3.14.3.A of the MD Code (**AO4.1(a)**), which also contemplate a 2 to 3 storey height for multiple dwelling developments of this kind in the low-medium density residential zone.

Court finds that there is no error of law in respect of the construction of the relevant assessment benchmarks

The Submitters' first ground of appeal was that the primary judged erred in considering that the NP Code incorporated only qualitative provisions about the height of buildings (at [37]).

The Proposed Development is six storeys tall, however appears as though it is five storeys due to a slope on the Subject Land. It is 4.7 metres higher than the existing four-storey multiple dwelling building on the Subject Land (at [20]).

The Court rejected the Submitters' argument that the quantitative restriction contained in AO1 affects community expectations and is therefore incorporated in PO1(b) as a quantitative consideration for the reason that the restriction in AO1 was one of many factors which may influence community expectations, however it "*... does not affect the proper characterisation of [OO3(m)] and [PO1(b)] as qualitative provisions which do not prescribe height limits …*" (at [37)].

The Submitters also relied on OO7(b)(i), OO2(h)(v), and AO4.1(a) to submit that the qualitative provisions such as OO3(m) and PO1(b) should be "*construed harmoniously*" with the quantitative provisions imposing height restrictions on developments of this kind (see [39] to [40]).

The Court held that such an approach would not give effect to the express terms of the Planning Scheme which contemplate that particular provisions should be prioritised in the event of inconsistencies, and that, for example, AO1 is only one means, among many others, by which PO1(b) could be satisfied (at [40]).

The Court found that there was no error of law in respect of the primary judge's construction of the NP Code, LMDR Zone Code, and MD Code (at [41]).

Court finds that there is no error of law in respect of the finding that the community expectations are not reasonable

The Submitters argued that the primary judge erred in concluding that the community expectations are not reasonable because "*… those provisions of the [NP Code] apply to the extent of any inconsistency in terms of any quantitative measure giving rise to such expectations*" (at [42]).

The Court noted that in light of the finding in relation to the first issue, the only matter left for consideration in respect of this ground of appeal was "*… whether the primary judge failed to have regard to the common material … and other relevant matters ... when carrying out the assessment of the development application*" (at [42]).

The Court found that it was clear from the primary judge's rejection of the submissions and lay witness statements regarding height expectations that the primary judge had regard to that material and was entitled to give it no weight in the context of an impact assessment of the Proposed Development (at [47]).

The Court found that there was no error of law in respect of the primary judge's finding that the community expectations are not reasonable (at [48]).

Court finds that there is no error of law in respect of the decision that there is both a community need and economic need for the Proposed Development

The primary judge's finding that there was an economic and community need for the Proposed Development was based on the evidence of an economic analyst expert called by the Applicant (at [49]).

The Submitters argued that the expert evidence did not specifically address the Proposed Development and merely considered economic and community need in the suburb of New Farm in a generic manner and thus did not assist in relation to the requirements of OO3(m) (at [49]).

The Court found that OO3(m) did not require a narrow consideration of the Proposed Development but allowed for a consideration of "*... the community need and economic need for a development of that type in that community*" (at [53]).

The Court found that the community need and economic need for the Proposed Development is a finding of fact and concluded that there was no error of law in respect of that finding (at [53]).

Court finds that there is no utility in engaging with the final ground of appeal

The Submitters argued that the order of the P&E Court did not reflect the Reasons and that the primary judge erred in finding that the appeal should be allowed only to the extent of imposing development conditions to give effect to minor changes to the approved plans (at [54]).

The Court found that this ground of appeal had been "*overtaken by events*" given that the Applicant had filed an application in the P&E Court in respect of a dispute about the development conditions, which was adjourned until the determination of the Submitters' application for leave (at [55]).

The Court concluded that there is no utility in engaging with this ground of appeal (at [56]).

Conclusion

The Court refused to grant leave to appeal and ordered that costs be reserved to be determined on the papers.

In the rough: Planning and Environment Court of Queensland dismisses appeal concerning a senior's living community and golf course

Victoria Knesl | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *GTH Project No. 4 Pty Ltd v Noosa Shire Council & Ors* [2024] QPEC 26 heard before Kefford DCJ

December 2024

In brief

The case of *GTH Project No. 4 Pty Ltd v Noosa Shire Council & Ors* [2024] QPEC 26 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by GTH Project No. 4 Pty Ltd (**Applicant**) against the decision of the Noosa Shire Council (**Council**) to refuse a development application (**Development Application**) seeking a development permit for a material change of use to facilitate a seniors' living community and golf clubhouse and a development permit for reconfiguring a lot (boundary realignment and access easement) in respect of land described as Lot 33 on MCH 2281 and Lots 1, 2, and 3 on SP 115864 located at 30, 114, 122, and 144 Myall Street, Cooroy, Queensland (**Subject Site**).

The relevant planning scheme applicable to the Development Application is the *Noosa Plan 2006* (**Noosa Plan 2006**). However, the *Noosa Plan 2020* (**Noosa Plan 2020**) came into effect soon after the Development Application was properly made, and thus, with the endorsement of both parties, it was given considerable weight by the Court in its exercise of the planning discretion under section 60 of the *Planning Act 2016* (Qld) (**Planning Act**). Significantly and importantly, the material change of use aspect of the Development Application is impact assessable whereas the reconfiguring a lot aspect is code assessable (see [106] and [111]).

The Court considered each of the 13 issues in dispute, broadly relating to significant adverse impacts on the Subject Site's natural environment and landscape and non-compliance with the relevant assessment benchmarks in the Noosa Plan 2006, and ordered that the Development Application be refused and the appeal be dismissed (see [529] and [530]).

Background

The Subject Site, which is located outside the mapped urban boundary and urban growth boundary for the township of Cooroy, spans 38.1654 hectares whereby part of the Subject Site is an existing golf course operated by the Cooroy Golf Club and the remainder of the Subject Site is largely undeveloped and has a history of use for small-scale agricultural activities (see [1] to [3] and [141]).

The Development Application proposes the following (**Proposed Development**):

- That Lot 3 and a small portion of the existing golf course fairways on Lots 1 and 2 be developed for a seniors' living community comprised of "*… 214 detached dwelling units, a manager's unit, a community clubhouse and other communal facilities …*" and a new golf course clubhouse (see [69(a)] and [69(b)]).
- That the remainder of the Subject Site be reconfigured to facilitate, among other things, "*… a single, internal access road that will provides access from Myall Street to the new golf course clubhouse and seniors' living community*" (at [5(c)]).

Court finds non-compliances relating to the proposed location of the proposed seniors' living community

The Applicant alleged that the proposed location of the seniors' living community use complied with the relevant assessment benchmarks in the Noosa Plan 2006 and that any non-compliances identified are without substance (at [178]). The Council contended that the seniors' living community was not an appropriate use of the Subject Site and relied on three key assessment benchmarks of the Noosa Plan 2006 (at [122]).

The Court identified that the proposed location of the seniors' living community use does not comply with relevant sections of the Strategic Framework, overall outcomes and specific outcomes of the Cooroy & Lake Macdonald Locality Code, and a specific outcome of the Residential Uses Code within the Planning Scheme (at [177]).

The Court found that the Proposed Development was at odds with the outcome sought to be achieved in the Strategic Framework, and as a result "*… would undermine the Noosa community's confidence that population growth and associated change will not adversely impact upon the character, lifestyle and environment enjoyed by its residents*" (at [148]).

Court finds unacceptable visual amenity and character impacts relating to the proposed seniors' living community

The Council alleged that the Proposed Development, and in particular the proposed seniors' living community, would have an unacceptable impact on the character of the locality and is inconsistent with assessment benchmarks in the Noosa Plan 2006 relating to built form, density, and visual amenity and character impacts (see [208] and [217]). The Applicant contended that a dense vegetation buffer could be planted to screen the proposed seniors' living community from Myall Street and that it would not have a detrimental impact on the character of the locality (at [271]).

The Court recognised that the Subject Site "*… materially contributes to the visual cue that the township of Cooroy sits in a broader rural context*" having regard to its frontage onto Myall Street which is a major road corridor to the town centre of Cooroy, and its positioning at the southern edge of Cooroy which forms part of the landscape that is the gateway to the town centre (see [234] and [236]).

The Court, having regard to the Noosa Plan 2006 and Noosa Plan 2020, found that the Subject Site is not intended to be used for urban development, the proposed seniors' living community does not comply with specific outcomes of the Cooroy & Lake Macdonald Locality Code, and that even with the proposed vegetation buffer it would have an unacceptable and detrimental impact on the character of the locality (see [242], [262], and [287]).

Court finds Noosa Plan 2020 tells against approval of the Proposed Development

The Court gave considerable weight to the Noosa Plan 2020 as it came into effect soon after the Development Application was properly made. The Council contended that the Proposed Development does not comply with several provisions of Noosa Plan 2020, including in the Strategic Framework, Recreation and Open Space Zone Code, performance outcomes of the Rural Residential Zone Code, performance outcomes of the Cooroy Local Plan Code, and performance outcomes of the Special Residential Code (at [351]). The Applicant conceded that the Proposed Development does not comply with the relevant provisions of the Strategic Framework, Cooroy Local Plan Code, and Special Residential Code (at [352]).

The Court held that the Applicant's concessions were "*… hardly surprising given the [S]ubject [Site] is entirely outside the mapped urban boundary*", and ultimately found that the "*… Noosa Plan 2020 maintains, and possibly even strengthens, the strategic policy position reflected in Noosa Plan 2006 that urban development should not occur on land outside the mapped urban boundary*" (see [352] and [390]).

Court finds insufficient need for the proposed seniors' living community

The Applicant asserted there was a very strong need for the proposed seniors' living community on the basis that "*… there are well-established principles associated with considerations of need, particularly for seniors' accommodation*", and that these principles are recognised in the Noosa Plan 2016 and Noosa Plan 2020 (see [396], [399], and [400]). The Applicant also asserted that the "*… Noosa Plan 2020 has very substantially underestimated the size of the population that requires facilities of the type proposed*", "*... that all existing similar facilities in the catchment area are full …*", and "*... that there is an absence of suitable alternative sites*" (see [401] to [403]).

The Council submitted that the need to deal with the aging population does not warrant an approval of the Proposed Development (at [406]). Further, the Council argued "*... that the existence of that need … does not remove the role of the town planning scheme to seek to distribute the location of such competing needs within its planning area*" and "*... that there is insufficient need to warrant setting aside the important planning strategies in Noosa Plan 2006*" (see [407] and [410]).

The Court found that both the Noosa Plan 2006 and Noosa Plan 2020 sufficiently provide for the growth required to address the need for additional housing, including seniors' housing, by way of urban infill and redevelopment rather than establishing new development on vacant land outside of the urban growth boundary and urban boundary (at [427]).The Court did acknowledge that the proposed relocation and improvement of the golf clubhouse and the improvement of the golf course facilities would be a material benefit to the community but this on its own was insufficient to persuade the Court that there is a need for the Proposed Development as a whole (see [467] to [469]).

Furthermore, the Court found that the Proposed Development would not improve the diversity of housing in the area as there are already two manufactured home parks in Cooroy (at [458]). To that end, the Court held that the Applicant had not persuaded the Court to the requisite standard that there is a need, let alone a strong need, for the proposed seniors' living community (at [460]).

Court finds exercising the planning discretion to approve the Proposed Development would be inappropriate

The Court found that the Proposed Development's partial compliance with the relevant assessment benchmarks in the Noosa Plan 2006 and Noosa Plan 2020 in conjunction with the matters in support of approval do not form a sound town planning basis to approve the Development Application because that would be contrary to the "*… formally expressed planning strategy to preclude urban development on the [S]ubject [Site]*" (see [510] and [511]).

Conclusion

The Court ordered that the appeal be dismissed and the Development Application refused (at [530]).

Colin Biggers & Paisley

Off limits: Access to a State-controlled road is not permitted due to poor traffic and engineering outcomes

Victoria Knesl | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Capital 22 Pty Ltd v Chief Executive, Department of Transport and Main Roads; Capital 22 Pty Ltd v Sunshine Coast Regional Council & Anor* [2024] QPEC 35 heard before Williamson KC DCJ

December 2024

In brief

The case of *Capital 22 Pty Ltd v Chief Executive, Department of Transport and Main Roads; Capital 22 Pty Ltd v Sunshine Coast Regional Council & Anor* [2024] QPEC 35 concerned two appeals to the Planning and Environment Court of Queensland (**Court**) by Capital 22 Pty Ltd (**Applicant**) against decisions of the Department of Transport and Main Roads (**DTMR**) and Sunshine Coast Regional Council (**Council**) in respect of development conditions imposed in a development approval which relevantly includes that direct vehicle access to the site (**Subject Site**) via a State-controlled road, being Aerodrome Road, is not permitted and requires certain works to be undertaken in respect of existing road access (**Relevant Conditions**).

The decisions made by DTMR and the Council under the *Transport Infrastructure Act 1994* (Qld) (**TI Act**) and *Planning Act 2016* (Qld) (**Planning Act**) respectively, shared a common element in that they both restricted vehicle access to a local road and therefore the Court heard the two appeals together for convenience (at [1]).

The Court considered the following matters:

- The Subject Site and surrounding road network.
- The statutory decision making framework.
- The reasons for refusal.
- The evidence within a traffic engineering report.
- The planning discretion to approve the proposed development.

The Court was not satisfied that the Applicant had discharged its onus and as a result dismissed the appeal against the DTMR's decision (see [66] and [67]). The appeal against the Council's decision was adjourned to allow the parties to prepare amended plans and a suite of development conditions (see [68] and [69]). The Court allowed the appeal against the Council's decision in part and amended conditions, which did not relate to the Relevant Conditions, were imposed.

Background

The Subject Site's frontage to Aerodrome Road resulted in the development application being referred to the Chief Executive under the Planning Act (at [2]). The proposed development relevantly sought to permanently close one of the two existing crossovers from the Subject Site to Aerodrome Road, reconfigure the remaining crossover to accommodate a left-in and left-out vehicle access, establish a new crossover for access to a local road, and dedicate land along the Subject Site's frontage for a future bus lane (**Proposed Development**) (at [3]).

Significantly and importantly, any proposed change to the Subject Site's access to Aerodrome Road requires permission by way of an application to the Chief Executive under section 62(1) of the TI Act (**Access Application**) (at [4]).

The Relevant Conditions in the decision notice for the Access Application included among other things that "*[d]irect vehicle access is not permitted between Aerodrome Road and the [S]ubject [S]ite*" (at [5]). The Applicant sought an internal review of this decision under section 485 of the TI Act which was unsuccessful and subsequently appealed the reviewed decision to the Court (at [6]).

Once the Access Application had been decided and reviewed, the Council approved the Proposed Development subject to conditions which included those specified in respect of the Access Application (at [8]). The Applicant's appeal against the Council's decision was, in essence, an appeal against the access conditions imposed in respect of the Access Application and the Council on the development approval. Hence the overlap between the two appeals (see [9] and [10]).

Court finds adverse traffic and safety impacts

The Court considered the traffic engineering evidence and found the following grounds in favour of refusing the Access Application under section 62 of the TI Act (see [32] to [39]):

- The Proposed Development could adequately rely on access via the local road only.
- Limiting access to the Subject Site via the local road only will improve the efficiency of Aerodrome Road and safety for pedestrians, cyclists, and vehicles given the expected increase in pedestrians, cyclists, and vehicles along the road.
- The absence of any traffic engineering imperative or requirement for vehicle access to the Subject Site from Aerodrome Road.
- The Proposed Development is contrary to a well-established matter of traffic engineering principle and practice that vehicle access to a site is to be from the lowest order transport corridor.
- The Proposed Development represents poor traffic planning with respect to the access function.
- Finally, that the Proposed Development would be unlikely to operate safely and efficiently if approved.

The Court also considered the impact that the Proposed Development would have on the implementation of and timing for the *CoastConnect* project if approved as "*[t]he forward planning for Aerodrome Road includes the CoastConnect project*" (at [16]). The *CoastConnect* project is aimed at improving public transport on the Sunshine Coast and "*[i]f it is assumed the CoastConnect project is implemented, a kerbside bus priority lane would be provided along Aerodrome Road, including the frontage of the [Subject] [S]ite*" (at [43]). Vehicles accessing the Subject Site via Aerodrome Road would be required to cross the priority bus lane. While this manoeuvre is lawful, the Court was of the view that it would create delay and friction to Aerodrome Road (at [43]).

Finally, the Court accepted evidence "*… that the existence of a bus lane creates a speed differential between buses and the general traffic*" travelling along Aerodrome Road (at [46]). The safety concern raised in the traffic engineering evidence is that a vehicle accessing the Subject Site via Aerodrome Road "*… may do so too quickly to avoid the pressure of a bus bearing down upon it … [which] may put the safety of pedestrians and/or cyclists at risk*" (at [46]).

Court finds considerable weight against exercising the discretion

The Court held, having regard to the evidence, that if vehicle access is limited to the local road only there would be no adverse safety or traffic impacts from the Proposed Development. Consequently, the Court found that "*[t]he adverse impacts attract considerable weight in the exercise of the discretion once it is appreciated that: (1) the redevelopment of the site could acceptably rely on access from [the local road] only; and (2) there is no traffic engineering imperative that requires access to be provided to the redevelopment via Aerodrome Road*" (at [65]).

Conclusion

The Court concluded that the Applicant had not discharged its onus and dismissed the appeal against the DTMR's decision and confirmed the review decision (see [66] and [67]).

As a result, it was unnecessary for the Court to consider the issues raised in the appeal against the Council's decision. The Court adjourned that appeal to a later date for the purpose of setting a timetable for the preparation of amended plans and a suite of development conditions (see [68]) and [69]). The Court also allowed the appeal against the Council's decision in part and amended conditions were imposed.

Colin Biggers & Paisley

Right to light: Application for the extinguishment of an easement for the access and enjoyment of light and air is dismissed

Matt Richards | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Litfin v Wenck* [2024] QSC 170 heard before Williams J

December 2024

In brief

The case of *Litfin v Wenck* [2024] QSC 170 concerned an application to the Supreme Court of Queensland (**Court**) for orders pursuant to section 181(1)(b) and section 181(1)(d) of the *Property Law Act 1974* (Qld) (**PLA**) that an easement over the Applicant's property in Windsor in favour of the Respondent be wholly extinguished, or alternatively, partially extinguished or modified.

The Court considered whether the Applicant established the grounds in section 181(1)(b) and section 181(1)(d) of the PLA, and if either ground was established or both grounds were established, whether the Court should exercise its discretion to extinguish the easement in whole or in part or otherwise modify the easement (at [24]).

The Court ordered that the application be dismissed (at [175]).

Background

The Applicant is the registered owner of land located at 21 Mackay Street, Windsor (**Burdened Land**) that is more particularly described as Lot 27 on SP192398 (**Lot 27**) and Lot 28 on SP192398 (**Lot 28**) (at [6]). The Respondent is the registered owner of the immediately adjoining land located at 25 Mackay Street (**Benefitted Land**) that is more particularly described as Lot 29 and Lot 30 on RP19852 (at [7]).

The Burdened Land has the benefit of a development approval for the reconfiguration, and ultimate extinguishment, of Lot 27 and Lot 28 to create a vacant lot and a lot at the rear of the Burdened Land, where an existing dwelling and pool are located (**ROL Approval**) (see [8] to [9]).

Both the Burdened Land and Benefitted Land are located within the CR1 Character Residential Zone and subject to the Traditional Building Character Overlay, under version 28 of the *Brisbane City Plan 2014* (**City Plan**) (at [11]).

The Respondent was previously a registered owner of the Burdened Land and, in September 2010, registered an easement benefitting the Benefitted Land (**Easement**) (at [12]).

Clause 1 of the Easement provides as follows (at [13]):

> *The Grantor hereby grants and transfers to the Grantee full right to the unimpeded access and enjoyment of light and air to through and for the Dominant Tenement and the windows, lights and apertures of the existing building or later building (or any building erected after the date hereof and any alteration to the existing or the alter building) on the Dominant Tenement over the Servient Tenement…for the use and enjoyment of the said building without any obstruction or interruption caused by or subsequent upon the erection, construction, reconstruction, rising, making or suffering to stand or any building structure or thing whatsoever upon the said Servient Tenement to have and to hold as an easement the said right of light and air hereby granted unto the Grantee.*

The Applicant became the joint registered owner of the Burdened Land in June 2012, and since December 2021, has been its sole owner (at [14]). The Applicant sought to improve the dwelling on the Burdened Land by building an extension to the rear of the dwelling (**Proposed Extension**), which was precluded by the Easement without the Respondent's consent or a court order (at [16]).

Court finds that the Applicant did not establish the ground in section 181(1)(b) of the PLA

The Court said, in respect of section 181(1)(b) of the PLA, that the Applicant must establish the following (at [28]):

> (a) *That the continued existence of the Easement would impede a reasonable use of the applicant; and*
>
> (b) *Either:*
>
> (i) *The Easement, in impeding the applicant, does not secure to…any practical benefits of substantial value, utility, or advantage to the respondent; or*
>
> (ii) *The Easement is contrary to the public interest; and*
>
> (c) *Money will be adequate compensation for the loss or disadvantage (if any) which the [Respondent] will suffer from the extinguishment of the Easement.*

Court finds that the Easement is an impediment to the reasonable use of the Burdened Land

The Applicant contended that the Easement impedes the reasonable use of the Burdened Land because it "*… prevents the development of the land to realise its potential or the maximum economically feasible extent as possible*" (at [31]), and that the reasonable use of the Burdened Land extends beyond its use a residential lot to any proposed change that is consistent with a reasonable use of the Burdened Land (at [33]). The Applicant relied on the fact that the Proposed Extension is permitted by the City Plan and the existence of the ROL Approval (see [122]).

The Respondent argued that the Easement does not significantly impede the reasonable use of the Burdened Land as a residential lot or for residential purposes and that the prevention of the Burdened Land from realising "*… its potential or the maximum economically feasible extent as possible*" is not the test prescribed in section 181(1)(b) of the PLA (at [32]).

The Court held that the correct approach "*… is to consider whether the Easement hinders or obstructs to a real and sensible degree the use of the [Burdened] Land as a residential lot*" (at [77]). The Court concluded that the Easement hinders the use of the Burdened Land being reasonably used to a real and sensible degree despite alternative development options available to the Applicant, because its nature and scope preclude the area the subject of the Easement (**Easement Area**) from being used as a residential lot or in ways that would be consistent with residential use (see [128] and [140(a)]).

Court finds that the Easement secures practical benefits to the Respondent

The Applicant contended that the "*practical benefits*" contemplated in section 181(1)(b)(i) of the PLA are confined to those expressly stipulated in the Easement, being "*unimpeded access to and enjoyment of light and air*", and do not encompass the city views from the Benefitted Land (at [79]). The Applicant alleged that the Respondent's material concerns were with the view from, and the value of, the Benefitted Land "*… rather than the protection of any benefit specifically associated with the Easement*" (at [88]).

The Applicant asserted that the Proposed Extension does not impede the access to and enjoyment of light because the Benefitted Land is to the north of, and elevated from, the Burdened Land and does not impact the access of light (at [82]). The Applicant also contended that the Proposed Extension does not impede the access to or enjoyment of air because it will have no more than a minor effect on the natural ventilation of the Benefitted Land (at [84]).

The Respondent submitted that its expert's evidence established that the extinguishment of the Easement and the Proposed Extension would entail a detriment to the unimpeded access and enjoyment of light and wind through and for the Benefitted Land (see [83], [85], and [130] to [131]).

The Respondent also submitted that "*… the benefit secured by the Easement for light and air includes collateral or incidental advantages which the purpose otherwise provides*" including "*… a sense of openness and spaciousness, unobstructed outlook, an absence of a neighbouring building within the Easement Area, and the view and enjoyment arising therefrom*" (see [81] and [106]).

The Court observed that the terms of the Easement are broad and that the restriction of structures within the Easement Area to achieve the enjoyment of light and air "*… is relevant to the scope of rights under the Easement but also the wider benefits*" (at [105]). The Court concluded that the Easement secures practical benefits to the Respondent being those expressly stipulated in the Easement and the collateral and incidental advantages identified by the Respondent (at [140(b)]).

The Court was satisfied that these practical benefits have substantial value, utility, and advantage to the Respondent (at [140(c)]), especially given the "*… careful and deliberate design of the [house on the Benefitted Land] to take in the breeze, light and amenity, premised on the presence of the Easement*" (at [129(b)].

Court finds that money would not be adequate compensation for loss suffered by the extinguishment of the Easement

The Applicant argued that the value of the benefits secured by the Easement is nil, and alternatively, if the practical benefits secured by the Easement included the Respondent's views, then they could be adequately compensated for with money (see [109] to [111]).

The Respondent submitted that money is not adequate compensation for the practical benefits and collateral or incidental advantages secured by the Easement (see [112] and [132] to [133]).

The Court stated that whether money is adequate compensation depends on the facts and findings made in relation to the extent, if any, of the benefits secured by the Easement (see [119] and [126]). The Court concluded that the loss established by the extinguishment of the Easement, which would include a personal and intangible loss, would not be capable of adequate compensation by money, even where a loss in the value of the Benefitted Land could be compensated (at [140(d)]).

The Court held that the ground in section 181(1)(b) of the PLA was not established (at [141]).

Court finds that the Applicant did not establish the ground in section 181(1)(d) of the PLA

The Court said, in respect of section 181(1)(d) of the PLA, that the Applicant "*… must establish that an extinguishment of the Easement will not substantially injure the [Respondent]*" (at [149]).

The Applicant contended that the extinguishment of the Easement will not substantially injure the Respondent because, if the Proposed Extension is constructed, the dwelling on the Benefitted Land will still receive access to and enjoyment of adequate air and light (see [150] and [157] to [158]).

The Respondent argued that it would be injured by the extinguishment due to the deprivation of the practical benefits in respect of access to and enjoyment of adequate light and air secured by the Easement, including its collateral and incidental advantages (at [152]).

The Court reiterated that the terms of the Easement are broad (at [161]). The Court found that the Respondent would suffer a substantial injury if the Easement was extinguished "*… being the loss of the benefits secured by the Easement, both within the scope of the Easement and the collateral or incidental benefits*" (see [162] and [165]).

The Court stated that the injury would include the loss of: "*a sense of openness and spaciousness*", "*an obstructed outlook*", "*the absence of a neighbouring building within the Easement Area*", "*the view*", and the enjoyment arising from these advantages (at [164]).

The Court held that the ground in section 181(1)(d) of the PLA was not established (at [167]).

Court finds that it should not exercise its discretion to extinguish the Easement

The Court noted that, even if one or both of the grounds in sections 181(1)(b) and 181(1)(d) of the PLA are established, it retains a discretion as to whether it is appropriate to make an order for the extinguishment of the Easement in the circumstances (at [168]).

The Court opined that, even if it had found that one of the grounds were established, it would not exercise its discretion to make the order for reasons including the following (at [174]):

- The Applicant purchased the Burdened Land with knowledge of the Easement in 2012.
- The Applicant's sole motivation for the application was to enhance the Burdened Land for private purposes.
- There are alternative ways for the Applicant to use the Burdened Land consistent with the Easement and the associated benefits to the Respondent.
- The dwelling on the Benefitted Land was designed to take advantage of the benefits of the Easement which would be detrimentally impacted by the extinguishment of the Easement.

Conclusion

The Court ordered that the application be dismissed (at [175]).

One man's trash: Appeal against a finding that the storage of farming material is not waste is dismissed

Erin Schipp | Krystal Cunningham-Foran | Nadia Czachor| Ian Wright

This article discusses the decision of the Queensland District Court in the matter of *Sargent v Goebbels* [2024] QDC 138 heard before Horneman-Wren SC DCJ

December 2024

In brief

The case of *Sargent v Goebbels* [2024] QDC 138 concerned an appeal to the District Court of Queensland (**Court**) by an officer of the then Department of Environment and Science (**Officer**) alleging errors of law in respect of a decision of the Magistrates Court that a respondent company and its executive officer were not guilty of offences under the *Environmental Protection Act 1994* (Qld) (**EP Act**) related to the alleged carrying out of an environmentally relevant activity (**ERA**) without an environmental authority for the operation of a resource recovery and transfer facility for waste.

The Officer alleged that the Magistrate erred in respect of the following (at [39]):

- The legal construction of the term "*waste*".
- The application of section 62 of schedule 2 (ERA 62) of the *Environmental Protection Regulation 2019* (Qld) (**EP Regulation**), and in particular the excusal provision in section 62(2)(h)(i).
- The finding that the Officer had not proven beyond reasonable doubt that the respondent company (**Company**) was carrying out ERA 62.
- The taking into account of irrelevant considerations when determining whether the subject material was "*waste*".

The Court dismissed the appeal having found that the Officer failed to demonstrate an error of law in the Magistrate's decision (at [151]).

Background

The Company operated a business which would buy, sell, and repair farming machinery and equipment, as well as buy and sell components and parts (at [19]). A majority of the items were purchased second hand from farm clearing sales and brought back to the Company's site to be dismantled and stored, sometimes for several years, until they could be on sold at a later time (see [19] and [103]).

The Officer considered this use to be unlawfully operating a resource recovery and transfer facility operation for waste, being ERA 62, and brought three charges against the Company, one for carrying out an ERA without an environmental authority contrary to section 426 of the EP Act and two for failing to comply with a direction notice in respect of carrying out an ERA contrary to section 363E of the EP Act (at [2]). The Company's executive officer was also charged with three offences for failing to ensure that the Company complied with the three contraventions charged against the Company (at [3]).

During the trial, the Magistrate considered the threshold issue of whether the materials the Company received on site were "*waste*" in accordance with the legislation, and whether there was more than 6 tonnes or $6m^3$ of waste on the Company's site (at [21]).

The Magistrate concluded that the Officer had not proven beyond reasonable doubt that the Company had carried out ERA 62 and found the Company and its executive officer not guilty of the alleged offences, and dismissed the charges (at [35]).

Court finds Magistrate did not err in the construction of the statutory meaning of the term "waste"

There are two prescribed relevant activities under ERA 62. The first is section 62(1)(a) of schedule 2 of the EP Regulation which consists of operating a facility for "*receiving and sorting, dismantling or baling waste*", and the second is section 62(1)(b) of schedule 2 of the EP Regulation which consists of operating a facility for "*receiving and temporarily storing waste before it is moved to a waste facility*".

The prescribed relevant activity in section 62(1)(b) of schedule 2 of the EP Regulation was not relevant to the proceedings because there was no evidence before the Court which suggested that the items brought onto the Company's site was stored temporarily (at [48]).

The first error alleged by the Officer related to the Magistrate's construction of the statutory meaning of the term "*waste*" which is defined in section 13(1) of the EP Act relevantly as follows:

> *(1)* ***Waste*** *includes any thing, other than an end of waste resource, that is—*
>
> *(a) left over, or an unwanted by-product from an industrial, commercial, domestic or other activity; or*
>
> *(b) surplus to the industrial, commercial, domestic or other activity generating the waste.*
>
> *…*

The Officer alleged that the Magistrate erred in the construction of the term "*waste*" by accepting two of the Company's submissions being "*… that things with remaining inherent utility or purpose will not be considered waste*" and "*whether something is or was waste required an objective assessment*" (at [69]).

The Officer noted that the Magistrate was not made aware that the objective approach relied on to determine whether material is waste as established in the case of *Environment Protection Authority v Terrace Earthmoving Pty Ltd & Page* [2012] NSWLEC 216 had been set aside and replaced with a subjective assessment as set out in the case of *Environment Protection Authority v Terrace Earthmoving Pty Ltd* [2013] NSWCCA 180 (***Terrace (No 2)***) (see [70] to [71]).

The Court noted that in [27] of Terrace (No 2) the Supreme Court of New South Wales held that the words "*unwanted*" or "*surplus*" in the definition of "*waste*" under the *Protection of the Environment Operations Act 1997* (NSW) require reference to the state of mind of a relevant individual, which could be one of the following three people (see [71] and [78]):

- The owner immediately prior to transportation.
- The person carrying out the transportation.
- The owner of the property to which the substance is transported.

The Court noted that *Terrace (No 2)* related to the definition of the term "*waste*" under New South Wales legislation, and the ways in which that definition is different to the definition of "*waste*" under the EP Act (see [73] to [77]). The Court went on to accept that in the circumstances of this case the relevant state of mind for determining whether an item is an "*… unwanted byproduct from the activity or surplus to it is … that of the person engaged in the activity …*", being the person disposing of the items, or more specifically to this case the farmer conducting the farm clearing sales from which the Company makes the purchase (at [79]).

The Court stated that without direct evidence it could not be inferred that a farmer disposing of the items of machinery during a farm clearing sale would consider the items to be waste (see [80] and [82]). This conclusion was supported by a consideration of the example given in the definition of "*waste*" in section 13(1) of the EP Act which stated "*[a]bandoned or discarded material from an activity that is left over, or an unwanted by-product, from the activity*" (at [83]). The Court noted that "*... material acquired from clearance sales, is neither abandoned nor discarded by the vendor farmer … it is sold by them*" (at [83]).

The Court noted that it could not be concluded on the facts that the viewpoint of the vendor farmer, either objectively or subjectively, was that the material sold to the Company was surplus to the farming activity (at [86]). Furthermore, "*[g]iven that the vendors had not abandoned or discarded that machinery prior to the sale of the farm, it would be readily inferred that they did not subjectively view the machinery to be waste*" (at [87]).

The Court found the same conclusion as the Magistrate, being that the items on the Company's site from farm clearance sales was not "*waste*" (at [106]).

Court finds Magistrate did not err in the application of the six tonne or six cubic metre general waste provision

An exception to the alleged relevant activity is in section 62(2)(h)(i) of schedule 2 of the EP Regulation, which states that "*[t]he relevant activity does not include—(h) sorting or storing—(i) a total quantity of no more than 6t or 6m^3 of general waste at any one time*".

The Court noted that the statement in the Magistrate's reasons that "*the threshold issue … is whether the business received on to site waste [sic] … was more than 6m^3 of such waste stored or sorted on site*" incorrectly used "*sorted or stored*" as the relevant activity the subject of the appeal is the "*… receiving and sorting, dismantling or bailing of waste*" and not storage (see [109] to [110]).

The Court rejected the Officer's submission that at the relevant time of offending there was greater than 6 tonnes or 6m^3 of waste on the Company's site, citing that the Officer did not take into consideration ERA 62 in respect of the manner in which the material was received onto the Company's site (at [112]).

The Court concurred with the Magistrate's description of the case conducted by the Officer as being "*… a broad brush approach without particular identification of items as waste*" (at [120]). In the Court's view, the inferences sought by the Officer for the Court to draw "*… are not open, or at least, certainly not the only inferences open*" (at 125]).

The Court found that the alleged error in respect of the Magistrate's application of the 6 tonne or $6m^3$ general waste provision is not able to be proven on the evidence (at [126]).

Court finds Magistrate did not err in respect of the findings of fact

The third ground of appeal challenged the Magistrate's finding that the Officer had not proven beyond a reasonable doubt that ERA 62 was being carried out on site (at [128]).

The Officer submitted that it was "*[glaringly] improbable*" that the Magistrate had found that the Officer had not proven beyond a reasonable doubt that an ERA was being carried out based on the aerial images, images taken at the site, and body-worn camera footage from a walkthrough of the site presented to the Court (at [131]). The Magistrate concluded that it was not "*glaringly improbable*" when considered in conjunction with the explanation of the items depicted in the imagery by the Company (at [133]).

The Court found that there was no error in the Magistrate's fact finding, conclusions, or reasons (at [140]).

Court finds Magistrate did not have regard to irrelevant considerations

The Officer alleged that the Magistrate had regard to the following two irrelevant matters when determining the meaning of the term "*waste*" (at [142]):

- Whether the Company's business achieved waste management by preventing and minimising the generation of waste.
- The absence of any evidence that the material on the Company's site presented a risk to the environment.

The Court accepted the Officer's submission that "*… [a]ll the prosecution was required to prove was that [the Company] received waste on its site and either dismantled, baled or sorted that waste*" (at [143]). However, the Court also noted that the Magistrate in her reasons "*… was merely referring to submissions which each of the [Officer] and [Company and its executive officer] had made …*" (at [148]).

Further, the Court noted that there was nothing in the Magistrate's reasons that indicated that the alleged irrelevant matters were material to the construction of the term "*waste*" as the ultimate conclusion was that the Officer had failed to prove beyond a reasonable doubt that the Company was carrying out the ERA (at [149]).

The Court found that the Officer failed to prove an error of law in respect of the Magistrate considering allegedly irrelevant matters when determining the meaning of the term "*waste*".

Conclusion

The Court dismissed the appeal.

Colin Biggers & Paisley

No prejudice, no problem: Extension of time allowed for appeal against an infrastructure charges notice

Marnie Robbins | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Jeteld Pty Ltd v Toowoomba Regional Council* [2024] QPEC 36 heard before Kefford DCJ

December 2024

In brief

The case of *Jeteld Pty Ltd v Toowoomba Regional Council* [2024] QPEC 36 concerned an application in pending proceeding to the Planning and Environment Court of Queensland (**Court**) brought by developer Jeteld Pty Ltd (**Applicant**) for an extension of time in relation to the late filing of the Applicant's Notice of Appeal against an infrastructure charges notice (**ICN**) given to it by the Toowoomba Regional Council (**Council**).

On 18 June 2024, the Applicant filed a Notice of Appeal against the ICN pursuant to section 229 and section 230 and Item 4 of Table 1 of schedule 1 of the *Planning Act 2016* (Qld) (**Planning Act**), which was four and a half months after the appeal period had ended (at [46]). The Applicant therefore applied for an extension of time for the filing of its Notice of Appeal pursuant to section 32(2) of the *Planning and Environment Court Act 2016* (Qld).

In determining whether there were sufficient grounds to grant the extension of time, the Court considered the following key issues:

- Is there an adequate explanation for the Applicant's delay?
- Is there any prejudice to the Council because of the delay?
- Is there a public interest consideration that favours the extension?
- Does the appeal have merit?
- Do considerations of fairness support the grant of extension?

The Court found that there were sufficient grounds to allow an extension of time for the Applicant to file its Notice of Appeal.

Background

On 14 December 2023, the Council approved a development application made by the Applicant for a development permit for reconfiguring a lot (6 lots into 35 lots), subject to various conditions relating to the dedication of land and carrying out of works for infrastructure (**Development Approval**) (at [15]).

Conditions 69 and 79 of the Development Approval were purportedly imposed by the Council as non-trunk infrastructure conditions under section 145 of the Planning Act. The Applicant contended that the Council identified the incorrect source of power under the Planning Act to impose those conditions and that those conditions and condition 70 related to trunk infrastructure and could only be imposed as necessary infrastructure conditions under section 128 of the Planning Act.

As a result of this, the Applicant submitted that the ICN issued by the Council in respect of the Development Approval was erroneous (at [24]).

Court finds there is an adequate explanation for the Applicant's delay

The Applicant's evidence indicated that, after receiving the ICN, the Applicant engaged consultant engineers to consider the relevant conditions, sought legal advice when the Council did not accept the Applicant's position, and following receipt of that legal advice, instituted the subject appeal (at [51]).

The Council was critical of the Applicant's material in relation to this issue but did not challenge its correctness (at [47]). The Council had also participated in various discussions with the Applicant in circumstances where it had no statutory power to change the ICN, which contributed to the delay (at [53]).

There was no suggestion that the Applicant "*… simply sat on its hands or otherwise failed to alert the Council …*" of the alleged errors in the ICN (at [48]).

The Court was satisfied that the Applicant had provided an adequate explanation for the delay (at [54]).

Court finds there is no prejudice to the Council because of the delay

In this case, the levied charge in the ICN becomes payable only after the Council approves a plan for the reconfiguration of the lots that, under the *Land Title Act 1994* (Qld), is required to be given to the Council for approval (see [55] and section 122(1)(a) of the Planning Act). This had not yet occurred (at [55]).

The Court found that no prejudice had been caused to the Council or anyone else as a result of the Applicant's delay in filing its Notice of Appeal (at [56]).

Court finds there are public interest considerations favouring the extension

The Applicant submitted that the Development Approval and the ICN related to stage 5 of a master planned community and therefore had relevance for subsequent stages of the Applicant's development. The Applicant argued that, as a result, there was "*… a public interest in having the issue determined at the earliest opportunity …*" (at [57]).

Although the Court acknowledged this, the Court went on to state that it would not attribute it any meaningful weight in the exercise of the Court's discretion, as relevant rights of appeal will nonetheless arise in relation to the future stages if the same contentions were to occur (at [58]).

Court finds the appeal has merit

The Council argued that the Applicant's appeal was fundamentally flawed as the Notice of Appeal did not trigger a right of appeal under section 229 and Item 4 of Table 1 in schedule 1 of the Planning Act, or that the appeal otherwise had no merit (at [25]).

The Council submitted that any appeal against the ICN is limited to an error in respect of an offset or refund under the Planning Act and that "*… the appeal is the wrong vessel by which to resolve the dispute raised by the Notice of Appeal*" (at [31]).

The Applicant submitted that the appeal "*… raises real arguments about the proper characterisation of infrastructure works and the entitlement for a credit or offset in relation to such works*" (at [60]).

The Court found it sufficient that the Applicant had "*… an arguable case that its appeal is within the jurisdiction of the Court …*", and after considering the Council's arguments which involved the making of various assumptions, the Court concluded that there was no assumption that was "*… so patently correct so as to allow [the Court] to conclude that the subject appeal is without merit*" (see [33] and [42]).

The Court was not persuaded that the appeal is without merit and concluded that the Applicant has an arguable case (see [59] to [61]).

Court finds considerations of fairness support granting the extension

The Applicant submitted that the resolution of the dispute regarding the ICN would benefit both parties and assist them and others in respect of future developments where similar questions may arise (at [63]).

The Applicant also argued that the issue should be litigated as the Council may otherwise "*… potentially secure a windfall gain to which it is not legally entitled*" by simultaneously receiving payment for the ICN and requiring the developer to pay the cost of constructing the infrastructure (at [64]).

The Court did not place meaningful weight on the Applicant's first argument as to fairness but was persuaded that the Applicant's second argument supported the granting of the extension (at [65]).

Conclusion

The Court found that there were sufficient grounds for granting an extension of time to the appeal period in respect of the ICN.

Colin Biggers & Paisley

Goldmate decision overturned on appeal: A win for landowners in the Western Sydney Aerotropolis

Bethany Burke | Anthony Landro | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for New South Wales* [2024] NSWCA 292 heard before Gleeson JA, Adamson JA, and Preston CJ

December 2024

In brief

The NSW Court of Appeal has overturned the Goldmate decision in a significant course correction for landowners affected by compulsory acquisitions in the Western Sydney Aerotropolis. In a unanimous judgment, the decision found the notion of a "composite" public purpose to be "legal erroneous", thereby undermining such a purpose from forming the basis of the notional disregard required when determining the market value of land. In practical terms, the recent Aerotropolis rezonings have now clearly been held not to form part of the public purpose to be disregarded in the determination of "market value" for the M12 road acquisitions.

Summary

[Disclaimer: Colin Biggers and Paisley acted for the Appellant, Goldmate Property Luddenham No. 1 Pty Ltd]

Following a hearing held on 27 November 2024, the Court of Appeal has quickly published its judgment overturning the Goldmate Land and Environment Court (**LEC**) decision in less than two weeks: *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for New South Wales* [2024] NSWCA 292. The bench was constituted by Justices Gleeson, Adamson, and Preston CJ of the LEC.

The decision will be welcomed by landowners in the Western Sydney Aerotropolis currently before the LEC in other litigation against acquiring authorities, as well as other landowners in that region negotiating with acquiring authorities.

The Court of Appeal has ended the basis for the recent Aerotropolis rezonings being notionally disregarded in the determination of "market value" for acquired land, which should lead to fairer outcomes for landowners. The decision confirms that the public purpose of a land acquisition must fall within the purpose for which the particular acquiring authority has power to acquire land. In this case, the acquiring authority was Transport for NSW. The power to acquire land was under the *Roads Act 1993* (NSW), and the relevant purpose under it was "to carry out road work".

There is extensive analysis in the judgment on the key provisions in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**), the power to acquire land under the *Roads Act 1993* (NSW), and the key cases to date dealing with the statutory disregard under section 56(1)(a) of the Just Terms Act.

The Court of Appeal has ordered that the determination by Justice Duggan be set aside, and the proceedings be remitted to the Land and Environment Court for determination according to law.

The decision under appeal: *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW* [2024] NSWLEC 39

[Disclaimer: Colin Biggers and Paisley acted for the landowner]

In our 2024 review article, we wrote that the Land and Environment Court decision in *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW* [2024] NSWLEC 39 (**primary judgment**) had attracted considerable interest given it was the first of many cases involving acquisitions of land in the Western Sydney Aerotropolis, and how the statutory disregard in section 56(1)(a) of the Just Terms Act was to be applied given the planning changes in the Aerotropolis area that occurred in late 2020. In essence, that provision requires the disregard of any increase or decrease caused by the public purpose, or the proposal to carry out the public purpose, as at the acquisition date (**statutory disregard**).

The facts in the Goldmate case were that Transport for NSW (**TfNSW**) acquired 46% of a parcel land under the *Roads Act 1993* (NSW) for the M12 Motorway (which is currently midway through construction) in June 2021. Approximately 8 months before the acquisition, the Aerotropolis SEPP commenced, which rezoned vast swathes of land in the vicinity of the Western Sydney Airport for various uses including agribusiness, enterprise, environment, recreation and mixed use. Goldmate's land was one of many parcels rezoned from a rural use to an 'Enterprise' use.

The main implication of the primary judgment was that the public purpose of the TfNSW acquisition had been characterised expansively as a "composite purpose" whereby multiple government authorities had acted "in concert" to achieve a public purpose that was not limited to the scope of influence of a particular acquiring authority (who in this case, was Transport for NSW). The public purpose adopted in the primary judgment was as follows:

> [51] *Having regard to the evidence that there was a unified goal that characterised the actions subsequent to the announcement of the construction of the [Western Sydney Airport (WSA)], that goal was to facilitate the operations of the WSA and to facilitate commercial, industrial and employment uses around the WSA to leverage the economic opportunities provided by the WSA. This was the public purpose (**Public Purpose**).*

Partial acquisitions of land often use the "before and after" valuation approach to determine the amount of compensation payable by an acquiring authority. Because of the broad characterisation of the public purpose, the effect of the rezoning under the Aerotropolis SEPP (ie the Enterprise zoning) was disregarded by the primary judge in the "before" valuation of the Goldmate land. Instead, a hypothetical rural zoning was used. The Enterprise zoning was however taken into account in the "after" valuation of the residue land. This meant that the difference between the "before" and "after" valuations was less than what would otherwise have been the case.

The main ground of appeal – identification of the public purpose

Goldmate's main ground of appeal concerned how the primary judge had interpreted the statutory disregard in characterising the public purpose of the TfNSW acquisition. Goldmate argued that:

- the public purpose of the acquisition needed to align with TfNSW's power to acquire land, which only existed under the *Roads Act 1993* (NSW); and
- the public purpose adopted by the primary judge went beyond the purposes of *Roads Act 1993* (NSW), which did not authorise the acquisition of land to facilitate and leverage land uses around the Western Sydney Airport.

In support of the main ground, Goldmate focused on the text, context, and purpose of the Just Terms Act. Further, in oral submissions, Mr Bret Walker SC (senior counsel for Goldmate) advanced the proposition that there would be a hypothetical *ultra vires* if TfNSW had actually sought to acquire the Goldmate land on the same terms as the public purpose that had ultimately been adopted in the primary judgment.

TfNSW defended the appeal and argued that no error of law arose on the main ground, and that the primary judge's finding on the public purpose was a finding of fact that was open to her. Those findings were described by TfNSW's senior counsel in oral submissions as "clear and unsurprising".

The Court of Appeal judgment

The main ground was unanimously upheld. The primary judge's characterisation of the public purpose was held to be "legally erroneous" at [77] (per Adamson JA) and at [94] and [109] (per Preston CJ of LEC).

The lead judgment was written by Adamson JA. Her Honour pellucidly set out the steps required to be undertaken at [71] in the assessment of market value under s 56(1)(a) of the Act, these being:

> *…*
>
> *(1) the identification of the acquiring authority";*
>
> *(2) the identification, by reference to the empowering legislation, of the public purpose or purposes for which the acquiring authority (identified in (1) above) has the power to acquire land;*
>
> *(3) the identification of the acquiring authority's public purpose in acquiring the land, which must fall within the purpose or range of purposes identified in (2) above; and*
>
> *(4) the determination of the question, which is one of fact, whether there has been any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired, identified in (3) above (any such increase or decrease is to be disregarded).*

Steps 2 and 3 were the focus of the appeal, with the Court finding at [73]:

> *As to step (2), the respondent's power to acquire the land derives from s 177 of the Roads Act. The only purpose in the Roads Act which was identified as supporting the acquisition was s 71: namely, to carry out road work. There is a distinction between power and purpose; however, the respondent's power to acquire land is constrained by the purpose of the acquisition. The respondent could not point to any source of power to acquire land for any broader purpose than that for which the Roads Act provided. Thus, its purpose in acquiring the land, being the sole statutory purpose authorised, was to carry out road work for the M12 (step (3)).*

Preston CJ of LEC added further reasons at [82] - [111] which Gleeson JA agreed with, which provided textual and contextual analysis in support of the narrower public purpose contended by Goldmate. His Honour commented at [84] that:

> *There are numerous textual and contextual indicators supporting this focus on the particular acquisition of the land by the particular acquiring authority exercising the power under the particular law authorising acquisition of land by compulsory process by that authority.*

His Honour emphasised the need for there to be an alignment between the acquiring authority's power to acquire land and the public purpose of the acquisition. At [92], His Honour stated:

> *… **the relevant public purpose** in s 56(1)(a) **is a purpose for which the particular acquiring authority is authorised by law to acquire the land**. Such a purpose not only authorises the acquisition of the land by compulsory process, it also limits the width of the expression in s 56(1)(a) of 'the public purpose for which the land was acquired'.* (emphasis added)

At [94], Preston CJ of LEC was clear in dismissing any basis for a "composite purpose" being formulated, finding that this is not something that is permitted by the Just Terms Act. His Honour stated:

> [94]: *Contrary to the primary judge's finding at [25], **the phrase in s 56(1)(a) does not permit a finding of "a composite purpose"**, involving the bundling together of not only the public purpose for which the acquiring authority acquired the land but also other public purposes of other authorities of the State that did not acquire the land or of the NSW Government itself. **The primary judge's findings that bundled together purposes of different authorities of the State and the NSW Government to form a composite purpose of the NSW Government were in error on a question of law**. These findings include those in [41], [42] and [52]. **These findings impermissibly formulate a rolled-up purpose of the NSW Government that extends far beyond the purpose for which the land was stated in the proposed acquisition notice and the notice of acquisition of land to be, and was authorised by the Roads Act to be, acquired by compulsory process by the acquiring authority of TfNSW**, which was for the purposes of the Roads Act.* (emphasis added)

In reaching its decision, the Court of Appeal undertook an extensive review of the relevant case law, focusing in particular on the High Court in *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, which was described as "the leading case".

Analysis followed on the other relevant cases, and each was found to sit harmoniously with the narrower public purpose contended for by Goldmate: *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603; *Roads and Traffic Authority v Perry* (2001) 52 NSWLR 222; *Barkat v Roads and Maritime Services* [2019] NSWCA 240; *Sydney Metro v G & J Drivas Pty Ltd* (2024) 113 NSWLR 429; and *Coffs Harbour City Council v Noubia Pty Ltd* (2024) 258 LGERA 351.

Observations

The Court of Appeal's decision might on one view be considered unremarkable in that no previous authorities were directly challenged or overturned. However, the reality is that acquiring authorities in the Aerotropolis area have been applying the Goldmate LEC decision to value land at its pre-rezoning value. ABC News have even reported that some acquisitions had been delayed so as to take advantage of the Goldmate LEC decision.

In the course of preparing for the hearing, Goldmate's legal team undertook an extensive analysis of decisions under the Just Terms Act in order to ascertain whether there was any previous judgment of the Court where the purpose of acquisition had ever been determined as something outside the power of the acquiring authority. No such cases were located, with the Goldmate decision being the first of its kind. This submission was ultimately made in the appeal, and was unchallenged by TfNSW.

The Court of Appeal's decision will have significant implications for landowners within the Western Sydney Aerotropolis, and will no doubt be welcomed by most of those owners - some of whom are currently engaged in litigation against acquiring authorities. Other impacted landowners are currently in pre-acquisition negotiations with acquiring authorities who have sought to apply the Goldmate LEC decision.

We consider the decision to be an important course correction in how the statutory disregard operates when determining the market value of acquired land. Looking beyond the Aerotropolis, the decision will be relevant for future acquisitions that coincide with broader land use changes.

The final compensation determination for Goldmate will be determined upon remitter to the NSW Land and Environment Court.

The year in review: New South Wales planning and environment law in 2024

Audrey Wu | Mollie Hunt | Todd Neal

This article discusses some of the key judgments of the Land and Environment Court and the Court of Appeal in relation to planning and environment law in 2024

December 2024

In brief

In this article, we consider some key judgments of the Land and Environment Court and the Court of Appeal in relation to planning and environment law in 2024.

The scrutiny of jurisdictional prerequisites to the grant of consent continues.

There have also been a few shape shifting judgments of the Court of Appeal and from the Chief Justice of the Land and Environment Court which recognise the need for certainty for applicants. These judgments acknowledge the difficulties faced by applicants in development appeals, including distinguishing between a consent authority's or community's perception of a development versus the reality of what is proposed, as well as dealing with contentions that have not been properly particularised.

We have seen some of these issues play out in other matters and anticipate that applicants will rely on these judgments going forward in circumstances where development appeals appear to be being objected to based on misconception, or argued based on unmeritorious contentions.

Court of Appeal highlights

Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Ltd [2024] NSWCA 205 (White JA, Adamson JA, and Price AJA)

This judgment of the Court of Appeal was so significant that a new Bill was quickly introduced to Parliament to overcome it.

The development at the center of this judgment was an open cut silver mine (**Bowdens**), which was assessed as a State significant development (**SSD**).

Consent needs to be obtained for development that may ordinarily be carried out without development consent if it forms "*part of a single proposed development that is State significant development*": Section 4.38(4) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

The Court of Appeal held at [71] that a transmission line formed part of the "single proposed development" for the Bowdens mine:

> *Because the transmission line was not the subject of the development application, the likely environmental impacts of the transmission line were not directly caught by s 4.15(1)(b). But because the proposed mine (which was the subject of the development application) will require electrical power to be delivered through an off-site transmission line, the likely impacts of that transmission line were a mandatory consideration for the IPC.*

As a result, the development consent for the Bowdens Silver Project was declared to be void and of no effect.

The Bill that has been introduced seeks to overcome the uncertainty regarding the assessment of SSD applications arising from this judgment.

Cameron v Woollahra Municipal Council [2024] NSWCA 216 (Payne JA, White JA, and Price AJA)

The background to this judgment involved a development consent being granted for the redevelopment of a house in Bellevue Hill. The consent was subsequently modified, but approval was not given to add a cellar level. The modified plans included a notation which stated "Cellar Level Deleted", and a condition of consent requiring that this area remain unexcavated.

However, when the construction certificate was issued, it included a construction void in the plans, in the same location of the cellar.

Council brought judicial review proceedings challenging the certifier's decision to issue the construction certificate, due to the inconsistency between the condition prohibiting excavation in the cellar location, compared with the construction certificate which permitted excavation of that area for the purposes of building a crane base and installing a crane.

The Land and Environment Court found that the modified consent prohibited the excavation of the cellar level for any purpose, and that it was legally unreasonable for the certifier to determine that the construction certificate was consistent with the modified consent. The primary judge declared that part of the construction certificate to be invalid.

The property owners then appealed that decision to the Court of Appeal, unsuccessfully. The Court of Appeal's judgment sets out a useful summary of the test for legal unreasonableness in the context of the decision to issue a construction certificate.

Lahoud v Willoughby City Council [2024] NSWCA 163 (Meagher JA, Leeming JA, and Preston CJ of LEC)

This Court of Appeal decision related to a challenge by a third party (Mr Lahoud) to the validity of a development consent granted by the Willoughby Local Planning Panel. Mr Lahoud's application was dismissed at first instance, and unsuccessfully appealed to the Court of Appeal.

This judgment contains important considerations for judicial review proceedings relating to the validity of development consents.

Firstly, clause 4.6 requests and jurisdictional facts continue to be complex issues that require careful attention.

The Court of Appeal confirmed that satisfaction of the matters in clause 4.6 is only necessary for the proposed development subject to the conditions imposed. In this case, consent was only granted to part of the proposed development and a condition of consent was imposed requiring part of the upper level to be redesigned, relocated or deleted. Although there was some remaining non-compliance with the height standard, the Court of Appeal found at [37]-[38]:

> *If development consent is granted for the development for which consent is sought except for a specified part or aspect of that development, then **it is that development except for that specified part or aspect**, in respect of which the consent authority must be satisfied of the matters in cl 4.6(4) ... The consent authority **does not need to be satisfied** that the development with that specified part or aspect will meet those matters in cl 4.6(4)(a) because **development consent will not be granted to that development with that specified part or aspect**.*
>
> *… the Panel was satisfied that Helm's written request had adequately addressed the matters required to be demonstrated by cl 4.6(3) (cl 4.6 (4)(a)(i)) and that the development, except for those specified parts which were required to be redesigned, relocated or deleted, will be in the public interest because it was consistent with the objectives of the height standard and the objectives for development within the zone in which the development was proposed to be carried out (cl 4.6(4)(a)(ii)).* (emphasis added)

In relation to jurisdictional facts, the Court of Appeal provided some explanation about the difference between a reviewable jurisdictional error, and a jurisdictional fact. Although a clause of the relevant local environmental plan (which related to whether a building "will have an active street frontage") contained the words "*Development consent must not be granted ... unless the consent authority is satisfied that ...*", the Court of Appeal found that the consent authority's decision as to whether this matter is satisfied was not a 'jurisdictional fact'. The Court of Appeal applied *El Khouri v Gemaveld Pty Ltd* (2023) 256 LGERA 24 at [33] as to what a 'jurisdictional fact' is. It found that it was open to the Panel to have found that the building had an 'active street frontage'. The Court of Appeal found at [60]:

> *The question of whether the building as proposed to be redeveloped will be a building that has an active street frontage within the statutory description in cl 6.7(5) was not a jurisdictional fact: as to what is a jurisdictional fact, see El Khouri ... at [33]. Rather, the question was one for the Panel to decide. That is made plain by the terms of cl 6.7(3): the consent authority is to determine whether it "is satisfied that the building will have an active street frontage" after the erection or change of use of the building. This involves the consent authority **deciding whether the facts found by it fall within or without the statutory description** of "active street frontage" in cl 6.7(5). The consent authority's decision of satisfaction or non-satisfaction as to whether the building will have an active street frontage **is reviewable, not as a jurisdictional fact, but only for jurisdictional error**. As the High Court recently observed in LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor [2024] HCA 12 at [3]:*
>
> *"Jurisdictional error on the part of a statutory decision-maker in making a decision can include: misunderstanding the applicable law; asking the wrong question; exceeding the bounds of reasonableness; identifying a wrong issue; ignoring relevant material; relying on irrelevant material; in some cases, making an erroneous finding or reaching a mistaken conclusion; or failing to observe some applicable requirement of procedural fairness.* (emphasis added)

We expect that the effect of *El Khouri* will continue to be the subject of judicial review proceedings. It was recently considered in *Georges River Council v Eskander* [2024] NSWLEC 98 by Robson J (heard prior to Lahoud), but Robson J rejected the submission by the respondent in those proceedings that the relevant provision of the local environmental plan was not a jurisdictional fact: [64]-[66] of *Eskander*.

This Court of Appeal decision also highlights that strict compliance with notification requirements is essential. If that has not occurred, there is a risk of judicial review proceedings being commenced later than expected, but still 'within time'. There is a three month time period within which to challenge the validity of a consent. Here, the clock did not start until approximately three weeks after the date contended by the consent-holder, which meant that the proceedings were brought within time based on that later date.

Lastly, the decision contains a reminder that the credibility of the person bringing judicial review proceedings is irrelevant to the determination of whether a consent was granted invalidly. The Court of Appeal at [119]:

> *The conduct of the person bringing the proceedings seeking to remedy a breach of the EPA Act, and the credit of that person as a witness, will ordinarily be irrelevant to the exercise of a discretion as to whether to grant a declaration of invalidity.*

M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd [2024] NSWCA 17 (Ward P, Mitchelmore JA, and Preston CJ of LEC)

This case unusually involved a private prosecution in the Land and Environment Court, relating to the disposal of asbestos waste.

The summonses were dismissed in the Land and Environment Court by Justice Pain for not disclosing an offence known to the law, given the date range on the summons that the offence was alleged to have been committed predated the commencement of the relevant provision of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

The Court of Appeal upheld an appeal, confirming that the summonses were not defective on the basis of this timing issue, and explained the Land and Environment Court's power to permit an amendment of the summons that would have corrected the incorrect dates being listed on the summons.

On appeal, the applicant also sought an exclusionary remitter order that the notices of motion be heard by a judge other than the primary judge. The Court of Appeal's judgment explains the circumstances which would lead to an exclusionary remitter order, but found that the primary judge did not demonstrate any conduct that gives rise to a reasonable apprehension of bias.

Land and Environment Court highlights

Australian Wildlife Ark Limited v Secretary, Department of Planning and Environment [2023] NSWLEC 139 (Preston CJ)

This case is important because the Applicant's costs in these Class 1 merit appeal proceedings were awarded against the Department of Planning and Environment (**Department**). As is commonly known, costs in Class 1 proceedings are normally costs neutral, with each party paying their own costs consistent with the non-discouragement principle.

Preston CJ made orders that it was "fair and reasonable" to order costs against the Department at [133]:

> *I consider that the making of an order as to the whole of the costs of both proceedings is fair and reasonable in the circumstances. An order for costs will serve to compensate Aussie Ark for the* ***costs it has had to incur because of the conduct*** *of the Department in the circumstances* ***leading up to*** *the commencement of the proceedings* ***and in the conduct of the proceedings****, which I have found to be unreasonable. As Aussie Ark has been successful in its application for costs, it is also fair and reasonable to make an order for costs of the application for costs.* (emphasis added)

The judgment considers the 'fair and reasonable' test of rule 3.7(2) of the *Land and Environment Court Rules 2007* (NSW).

The circumstances involved Australian Wildlife Ark Limited (**Aussie Ark**) having applied for two biodiversity conservation licences, the Department refusing to determine these, and two subsequent Class 1 appeals against the deemed refusal of these applications.

Preston CJ's judgment recounts the conduct of the Department both before proceedings were commenced, and during the proceedings, and notably placed significant importance on the Department's contentions as drafted. His Honour found at [115]:

> *As I have found, that case, as pleaded in the contentions, was unmeritorious and not established. This is the foundation for the Department's conduct of the proceedings being unreasonable. That unreasonable conduct caused Aussie Ark to incur costs they ought not to have had to incur if the Department had not raised those contentions.*

The Court recognised the reality for Applicants in Class 1 proceedings dealing with unmeritorious contentions, that: "*Aussie Ark was required, until it was abandoned, to meet the contention and incurred costs in doing so.*" ([84]).

Preston CJ also indicated that contentions need to be particularised so as to explain the legal consequence of the point being raised. At [70]:

> *Contention 2 is misguided in that it frames the insufficiency of information only with respect to the application itself and identifies the arbiter of the sufficiency of the information in the application as being the Department and not the Court.* ***Establishment of the contention had no legal consequence for the Court's consideration and determination*** *of the licence application on the appeal. Even if the Department considered that the application the subject of the appeal contained insufficient information in order to be assessed by the Department,* ***the Court could consider that there was sufficient information, in all of the evidence before the Court****, to assess the licence application and grant a licence.* (emphasis added)

This judgment demonstrates that careful drafting of contentions, properly particularised, in Class 1 appeals is necessary.

This would promote more efficient resolution of issues in the proceedings at conciliations, during joint conferencing and at hearings.

Barhom v Randwick City Council [2024] NSWLEC 1357 (Gray C)

The applicant in these proceedings sought development consent to subdivide an existing dual occupancy into two strata lots.

The judgment contains an interesting argument put by the Council, which was rejected by the Commissioner, as to housing affordability, which has been heavily reported on in the media in 2024.

The Council submitted "that there is no evidence that undersized lots will encourage housing affordability, and says that they may increase land values", and "that the proposed development does not increase housing supply, as there is no change to the number of dwellings." (at [58]).

Commissioner Gray found at [78]-[79]:

> *There is no substantive foundation to the Council's assertion, made in the particulars of Contention 2, of an adverse housing affordability impact of a strata subdivision of a dual occupancy.* ***To the contrary, it is axiomatic that it increases housing supply to the market for purchase, with each strata lot at a price point lower than the unsubdivided whole****, consistent with the evidence given by Mr Joannides in cross-examination. Therefore, in the market for purchase, there will be increase in supply (there being two lots rather than one) at a lower price point, which is likely to encourage housing affordability for those in that market. In the rental market, I accept the submission made by on behalf of the applicants that it is difficult to see how there would be any change, since both dwellings could be rented separately even without strata subdivision.* (emphasis added)

Commissioner Gray also provided the following reminder that applies to Class 1 proceedings generally at [78]:

> *I do not accept the Council's position that the Court cannot be satisfied that the proposed development is consistent with the zone objectives by virtue of there being "no evidence" that the strata subdivision would not have an adverse impact on housing affordability in the local area or in the zone. To be satisfied of consistency with the objective to "encourage housing affordability",* ***there is no obligation for the applicants to prepare a market analysis to establish that there is no impact on the property or rental market****. Whilst there exists a persuasive burden of proof on an applicant for development consent to establish that an impact is acceptable (see Australian Protein Recyclers Pty Limited v Goulburn Mulwaree Shire Council [2006] NSWLEC 641 at [2]),* ***this does not give a consent authority a carte blanche to identify so-called impacts without a proper substantive foundation. An applicant for development consent ought only be 'put to proof' on genuine impacts****.* (emphasis added)

C2526 Pty Ltd v Blacktown City Council [2024] NSWLEC 1641 (Miller AC)

This case involved an appeal against the deemed refusal of a development application for a staged Torrens Title subdivision.

The issue was whether the proposed development represented orderly development of land in circumstances where a potential future road widening was proposed.

The development application had been referred by Council to Transport for NSW, which advised:

> *TfNSW has reviewed the submitted information and does not support the application in its current form. TfNSW notes that the subject property is within an area* ***under investigation*** *for the proposed Bandon Road corridor between Richmond Road and Windsor Road.* (emphasis added)

No action had been taken to formally reserve the land for road widening, and the evidence before the Court was that Transport for NSW (**TfNSW**) did not have funding for the detailed design and procurement of this road widening.

Acting Commissioner Miller found at [37]:

> *… there is currently no certainty or imminence that the Bandon Road works will occur and, if so, in what form. Accordingly, there is no certainty regarding whether the subject site, either in total or in part, will be required for the project. The TfNSW investigation area, while known, has no statutory force and should not be given determinative weight in respect of the current application.*

This provides some comfort to applicants that might otherwise have development of their land inhibited for an indeterminate amount of time based on a foreshadowed compulsory acquisition at an unknown future point in time, which may not ever eventuate.

Goldcoral Pty Ltd (Receiver and Manager Appointed) v Richmond Valley Council [2024] NSWLEC 77 (Preston CJ)

Goldcoral has had a long history and is a case that has been widely discussed since the judgment was handed down in July 2024. Without providing a full recap, this judgment has provided some 'back to basics' reminders:

The judgment related to a development application proposing residential subdivision of a site in Evans Head, which has been the subject of numerous other proceedings since around 1988.

Preston CJ recognised in this judgment that opposition to a development is not always founded on reality:

> *The Council's, Ms Barker's and the community's opposition are founded on ideas about the development proposed in the amended development application, the environment affected by the development, and the law applicable to assessing the development application, which are not reflective of the reality of the development, the environment and the law.*

Preston CJ also placed important re-emphasis on the strategic planning undertaken for a site, stating at [14]:

> *The long history of zoning of the land for residential purposes is overlooked in the opposition to any development of the land for the very residential purposes for which the land has been zoned.*

This judgment provides new support for an old proposition, which is often cited by Applicants but which is sometimes seen as trite. It is the statement of McCellan CJ in *BGP Properties Pty Limited v Lake Macquarie City Council* (2004) 138 LGERA 237 at [117]-[118] (citations omitted):

> *In the ordinary course, **where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning** in the resolution of a dispute as to the appropriate development of any site. Although the fact that a particular use may be permissible is a neutral factor, **planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted**. The more **specific the zoning** and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects. Part 3 of the EP&A Act provides complex provisions involving extensive public participation directed towards determining the nature and intensity of development which may be appropriate on any site. **If the zoning is not given weight, the integrity of the planning process provided by the legislation would be seriously threatened**.*
>
> *In most cases it can be expected that the **Court will approve an application to use a site for a purpose for which it is zoned**, provided of course the design of the project results in acceptable environmental impacts.* (emphasis added).

Preston CJ also clarified in this judgment that subdivision of a lot containing land identified as "coastal wetland" under the *State Environmental Planning Policy (Resilience and Hazards) 2021* (**RH SEPP**) does not automatically constitute "*any other development*" "*carried out on land identified as "coastal wetlands"*" (see clause 2.7(1)(d) of the RH SEPP).

The Council argued that subdivision falls within the expansive definition of 'development' in the *Environmental Planning and Assessment Act 1979* (NSW), and because the site included land identified as a "coastal wetland", clause 2.7 applied. There was an argument about transitional provisions relating to that, but Preston CJ found that the clause would not apply anyway for the following reasons:

- At [78]: "*the proposed subdivision does not involve the division **of that part of the land identified as coastal wetlands** under the RAH SEPP into two or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition. The boundaries of the proposed **subdivision run along, but not inside, the outer edge of the line** on the Coastal Wetlands and Littoral Rainforest Area Map under the RAH SEPP identifying the coastal wetlands that encroach slightly into the eastern part of the land (Lot 277). Whilst this effects a subdivision of Lot 277, **it does not subdivide that part of Lot 277 that is "land identified as 'coastal wetlands'** … on the Coastal Wetlands and Littoral Rainforests Area Map." That part of Lot 277 identified as coastal wetlands remains intact, not divided.*" (emphasis added)

- The subdivision did not involve development "carried out on land". See Preston CJ's explanation at [80]:

> *To carry out development on land involves **doing something** on the land. That is evident with the development specified in paragraphs (a) to (c) of cl 2.7(1) – they all involve **physical work** on the land with attendant **impacts** on the land and its **vegetation**. The catch-all category of "any other development" in paragraph (d) of cl 2.7(1) is no different. Development other than the developments specified in paragraphs (a) to (c) must also be "carried out on land". The mere procuring of **the registration of a plan of subdivision** in the Office of the Registrar-General **does not involve the carrying out of any development on land**.* (emphasis added)

Preston CJ's analysis at [80] is useful in relation to any provision that refers to development "carried out on land".

Another useful reminder from this judgment relates to the law that applies when determining a development application. This is particularly important to understand given the constant updates to planning and environmental law. It is frequently the case that the law has changed in between the lodgement of a development application, and the hearing of a Class 1 development appeal. Preston CJ clearly states at [75]:

> *A development application is to be determined by a consent authority, and a court on appeal, on the basis of the law that is **applicable at the time of determination** of the development application …* (emphasis added)

It is still not as simple though as turning to the current version of a particular provision, because the 'applicable law' will usually include current savings and transitional provisions which require one to use an earlier version of a provision, or which say that a new provision does not apply to the relevant development application.

Karimbla Properties (No. 61) Pty Ltd v City of Parramatta Council [2024] NSWLEC 1303 (Pullinger AC)

Although this judgment relates to an agreement reached following a section 34 conciliation conference, the case is a striking example of the power of a clause 4.6 request as it was held to be sufficient to justify height exceedances of up to 125% of the applicable height standard.

We have on occasion seen councils apply a 'rule of thumb' that a 10% variation of the standard is the maximum acceptable and justifiable variation. In fact, there is no set percentage exceedance. It is up to the clause 4.6 to properly justify the exceedance, and this decision provides an example of the circumstances in which a 125% exceedance did that.

Save Bungendore Park Inc v Minister for Education and Early Learning [2023] NSWLEC 140 (Pritchard J)

This judgment serves as a reminder of the importance of obtaining owner's consent. The applicant brought proceedings challenging the validity of a development consent issued for the construction and operation of a new high school in Bungendore.

Pritchard J found that the relevant consent was invalid, and set it aside, on the basis that the consent had been granted in relation to Crown land, but consent had not been obtained from the Minister administering the *Crown Land Management Act 2016* (NSW) on behalf of the Crown.

The Court also found that the failure to obtain owner's consent is not merely a "technical breach" capable of being rectified, "*but were fundamental to the proper exercise of the Commissioner's functions*", citing Preston CJ in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (***Al Maha***).

Thunderbirds Are Go Pty Ltd v Council of the City of Ryde and Transport for NSW [2024] NSWLEC 1558 (Espinosa C)

As mentioned above, provisions requiring a state of satisfaction to be reached before development consent can be granted remain under the microscope.

In this case, Commissioner Espinosa was not satisfied of the matters in section 2.119(2)(b)(i) and (ii) of the *State Environmental Planning Policy (Transport and Infrastructure) 2021* relating to the impact of the proposed development and the certainty of proposed future works on the classified roads, namely the M2 Motorway and Lane Cove Road.

The volume of traffic was found to have an adverse impact on the safety, efficiency and ongoing operation of these roads.

The Commissioner also stated at [168]:

> *I am not satisfied that the design of the vehicular access to the land is sufficiently certain in order to achieve the requisite state of satisfaction that the adverse effect resulting from the nature, volume or frequency of vehicles using the classified road to gain access to the Site will be mitigated in order to result in no adverse effect.*

Applicants and consent authorities need to treat any jurisdictional prerequisites with caution, given the level of scrutiny still being given to these types of provisions since *Al Maha* and *HP Subsidiary Pty Ltd v City of Parramatta Council* [2020] NSWLEC 135.

Winten (No 21) Pty Ltd v Lake Macquarie City Council [2024] NSWLEC 24 (Pain J)

This was the first judgment of the Land and Environment Court which considers the Court's powers where a party lodges a notice of withdrawal (similar but distinct from notice of discontinuance), pursuant to section 8.5(7) of the EP&A Act, which states:

> *If on a **review of a determination** the consent authority **grants development consent** or varies the conditions of a development consent, the consent authority is **entitled** (with the **consent of the applicant** and without prejudice to costs) to have an appeal against the determination made by the applicant to the Court under this Part **withdrawn** at any time prior to the determination of that appeal.* (emphasis added)

The background circumstances involved Winten (No 21) Pty Ltd's (**Winten**) development application for Stage 5 of an approved concept development at Minmi, which was refused by the Hunter and Central Coast Regional Planning Panel (**Panel**). Winten then sought a review of the decision, and then commenced an appeal to extend the time for the review to be completed beyond the time limit of six months which would otherwise apply: [28].

Stage 5 is within the Lake Macquarie City Council local government area but other stages of the concept development are within the City of Newcastle local government area.

The review under section 8.3 of the EP&A Act resulted in the Panel granting approval to the development application.

Lake Macquarie City Council (the respondent in the appeal proceedings, subject to the control and direction of the Panel: s 8.15(4) EP&A Act) then filed a motion seeking for the proceedings to be withdrawn, based on section 8.5(7) of the EP&A Act, because consent had been granted.

Meanwhile, City of Newcastle filed a motion seeking to be joined to the proceedings, due to its concern about the impact of the development on the current and future operation of the Summer Hill Waste Management Centre.

Pain J found there is an entitlement to withdraw proceedings, and because of that it would be inutile to join City of Newcastle.

Her Honour stated at [59]:

> *All these matters suggest that no court order is needed to effect the withdrawal of an appeal under s 8.5(7) provided an applicant consents. The withdrawal of a proceeding is without prejudice to costs and in the absence of agreement about these a separate application to the Court may need to be made before the notice of withdrawal can be effected. However **I do not consider that means the Court must effect the withdrawal by the making of an order**. This conclusion means that there is no need to make the order identified in prayer 1 of the LMCC NOM. My finding is sufficient to found a basis for Winten to file a notice of withdrawal of the Class 1 appeal.* (emphasis added)

The year ahead

The debate over whether the housing crisis is caused by an inflexible and legalistic planning system, such as zoning, or broader economic and tax policies, like negative gearing, seeks to be addressed with pragmatism by the NSW Government. Judging by its actions, the NSW Government acknowledges the contribution of the supply side to the problem and has acted accordingly, introducing new initiatives to increase supply in the market, dissolving the Greater Sydney Commission in January 2024 and announcing the creation a new Housing Delivery Authority in November 2024. This reflects a refocusing on tangible and immediate outcomes rather than more abstract planning with longer terms impacts.

We expect further reforms to the planning system will occur during 2025, possibly more revolutionary than evolutionary, in an attempt to improve supply by removing delay, inefficiency, uncertainty, and costs to getting new developments approved and built.

The road ahead is not straight forward, however. History reminds us of these difficulties, as seen in the significant reforms proposed in 2013 by the then Minister for Planning, Brad Hazard MP, which were also focused on fixing some of these issues, but failed to gain support despite an extraordinary public consultation campaign.

As with any reform, new legal issues will arise. The planning system is a combination of hard law (statutes) and so-called soft law (plans and policies). It has provided in recent years a large body of administrative and public law jurisprudence as well as in criminal law. Each year there are a considerable number of cases that emanate from the NSW Land and Environment Court to the NSW Court of Appeal or Court of Criminal Appeal. Where commercial and other public and private interests are impacted by Government decision making or inaction in this growing field of law, the legal system will be called on to address issues either through merit appeals or through other administrative law remedies.

We therefore expect the year ahead to raise new and interesting legal implications for those interacting with the NSW planning system and the State's environmental laws irrespective of what reform agenda eventuates, whether that be in areas of strategic planning, development assessment, biodiversity, civil and criminal enforcement, and certification or pollution and contamination issues as the asbestos crisis revealed earlier this year.

Colin Biggers & Paisley

The year in review: Court decisions relating to the New South Wales waste industry in 2024

Fynn Evans | Bethany Burke | Katherine Pickerd | Todd Neal

This article discusses a number of decisions from the NSW Land and Environment Court and the NSW Court of Criminal Appeal in 2024 that operators of waste facilities, as well as other types of potential pollution generating activities, should be aware of

December 2024

In brief

In this article, we have briefly outlined some of the key legislative changes directed at increasing environmental protection that impact waste operators. One significant change is the increase in penalty amounts. Offences for corporations that previously attracted a $15,000 penalty notice now attract a $30,000 penalty for the first offence and a $45,000 penalty for a second offence.

We have also reviewed some of the key cases involving the NSW Environment Protection Authority (**EPA**) relating to:

- an air pollution prosecution with wide ranging orders;
- waste tyres;
- special executive liability offences; and
- a prosecution of an employee.

Finally, we have briefly outlined some of the EPA's targeted compliance areas that operators should be aware of moving into the new year.

Changes to legislation in 2024

Earlier in the year, the NSW Legislative Assembly passed the *Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Act 2024*.

Notable changes to the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) include:

- The doubling of penalties for common penalty notice offences as well as identifying an amount for a first offence, and a higher amount for a second offence.
- The doubling of the maximum penalties across the POEO Act. For example, the maximum offence for a corporation who may pollute waters was $1,000,000, and is now $2,000,000.
- The introduction of preliminary investigation notices. Such notices can require certain people to carry out an investigation if the EPA reasonably suspects that there are circumstances that may pose a potential risk of harm to human health or the environment or if a pollution incident, may exist, or has existed.
- Empowering the Land and Environment Court to make an order prohibiting an offender from being involved in scheduled activities (such as waste storage, resource recovery, landfilling, etc) or applying for, or holding an environment protection licence.

As a result of these legislative changes, the Land and Environment Court will likely determine that higher penalties are appropriate for offences under the POEO Act given that judges need to consider maximum penalties when sentencing. The EPA will also no doubt issue penalty notices in the higher amounts in an attempt to deter some operators from considering that penalty notices are a "cost of doing business".

Air pollution prosecution

In *Environment Protection Authority v Dial-A-Dump (EC) Pty Ltd* [2024] NSWLEC 21, the defendant pleaded guilty to the offence of causing or permitting an emission of an offensive odour from a premises to which an environment protection licence (**EPL**) applies. It was alleged that over the course of more than two months, landfill gas was emitted from the defendant's landfill facility. The defendant was ordered to pay $280,000 with $140,000 of that to be paid to Blacktown City Council for the purpose of a sustainability initiative. Other orders by the Land and Environment Court included that the defendant was to publicise the offence and the orders in The Sydney Morning Herald, Inside Waste, Blacktown News, its Facebook page, and its LinkedIn page. In addition, the defendant was ordered to send notices to a number of affected residences, and pay the EPA's legal and investigation costs.

End of life tyres – from priority to prosecution

In 2023, one of the EPA's priority areas was addressing the apparent growing trend of stockpiling waste tyres which creates safety and environmental concerns. Some of the cases relating to waste tyres are mentioned below.

In *Environment Protection Authority v BSV Tyre Recycling Australia Pty Ltd* [2024] NSWLEC 63 (**BSV Tyre case**), the EPA charged the defendant with ten offences associated with improper storage of waste tyres in contravention of its EPL. The contravened conditions related to the maximum amount of waste tyres that could be stored at its premises, the maximum height of any tyre stockpiles, storage in accordance with the NSW Fire Brigades Guidelines for Bulk Storage of Rubber Tyres and the storage locations within the premises. The defendant was ordered to pay a total of $161,200 for the ten offences and $45,000 of the EPA's legal costs.

In *Environment Protection Authority v Bald Hill Quarry Pty Ltd* [2024] NSWLEC 114, the defendant was charged with and pleaded guilty to five offences. Four of the offences related to the company using shredded tyres as a daily cover at its landfill in circumstances where that material was not approved. The EPA had also advised the company that the use of shredded tyres was not appropriate. The defendant was ordered to pay $341,000 as well as $236,250 in the EPA's legal costs.

Special executive liability offences

The EPA has continued its previous trend of prosecuting directors and those involved in the management of a corporation under the special executive liability provisions.

It is first relevant to mention the decision of *Environment Protection Authority v Elmustapha* [2023] NSWLEC 143 which was handed down late in 2023 and saw the sole director and shareholder of a waste disposal company ordered to pay $263,000. The defendant pleaded guilty to six offences for supplying false or misleading information about waste. Prior to commencing proceedings, the EPA undertook covert surveillance of the landfill site, executed a search warrant of the business premises, and conducted two interviews with the defendant, showcasing the broad powers afforded to the EPA to deal with this kind of conduct.

The circumstances that gave rise to the BSV Tyre case mentioned above also led to the prosecution of its director in *Environment Protection Authority v Nath* [2024] NSWLEC 10 (**Nath**). One of the directors was charged with and pleaded guilty to four offences for improperly storing waste tyres in contravention of the company's EPL. The director was ordered to pay $65,000 plus the EPA's legal costs.

In *Environment Protection Authority v Calleija; Environment Protection Authority v Budget Waste Recycling Pty Ltd* [2024] NSWLEC 119, the company pleaded guilty to one offence, and its director plead guilty to two offences for failing to comply with a prevention notice. The company was ordered to pay $234,000 and its director was ordered to pay $100,000 as well as the EPA's legal and investigation costs.

Importantly for councils, the Court of Criminal Appeal delivered judgment in *Environment Protection Authority v McMurray* [2024] NSWCCA 160, and determined that general managers and chief executive officers of a council can be charged with special executive liability offences. In this case, EPA commenced a local court prosecution against the general manager of Cootamundra-Gundagai Regional Council for causing a place to be used as a waste facility without lawful authority.

Employee charged with offences for polluting water and land

While persons responsible for the management of corporations and councils need to be vigilant of the special executive liability provisions, **employees and contractors also need** to be aware that they too can be subject to prosecution for events arising while they work.

On 3 June 2022, a fuel tanker driver caused a diesel spill of approximately 11,500 litres that discharged into Mittagong Creek. This gave rise to two prosecutions by the EPA this year – one against the employer and one against the fuel tanker driver.

The first case dealt with a fuel tank driver, Mr Routledge, in *Environment Protection Authority v Routledge* [2024] NSWLEC 8. Mr Routledge was charged with two offences for polluting water and the land. Mr Routledge was ordered to pay $19,867 as well as the EPA's legal and investigative costs.

In the second case, the EPA brought proceedings against Mr Routledge's employer, Park Pty Ltd as it was vicariously liable. In *Environment Protection Authority v Park Pty Ltd* [2024] NSWLEC 120, the company was charged with the same two offences that its employee, Mr Routledge, had been charged with. The company was ordered to pay $135,000 as well as the EPA's legal costs and investigation costs.

What will 2025 bring for the NSW waste industry?

The 2024/2025 Targeted Compliance Program Projects mentioned on the EPA's website provides an indication as to where resources are likely to be directed in 2025. Some of the projects will focus on:

- Asbestos waste generation and transport. It appears the EPA will be focusing on ensuring that those dealing with asbestos are complying with the relevant requirements.
- Organics and construction and demolition waste processing sectors. The EPA will focus on assessing inputs, processes and output for facilities producing mulch, pasteurised garden organics, compost and recovered fines. This is not surprising given the contaminated mulch issue that arose earlier this year where dozens of sites were found to have mulch that was contaminated with asbestos which involved a large scale investigation and clean up operation. We covered this issue in more detail here. The assessment may lead to further changes to how industry recycles and or tests recovered materials.
- Water quality: erosion and sediment control. The EPA's website mentions that there will be an audit and inspection of sediment basins at licensed premises. Those with sediment basins may want to be on the front foot and identify any issues prior to the EPA's audit.

NSW Compulsory land acquisition cases: 2024 overview and implications for 2025

Charles Dight | Anthony Landro | Todd Neal

This article considers select cases from the NSW Land and Environment Court and the NSW Court of Appeal in 2024, and the outlook for 2025

December 2024

In brief

The caseload reported in the most recent Land and Environment Court (**LEC**) statistics shows class 3 proceedings continuing to increase. Given this trajectory, it is not surprising to see a number of novel legal issues arising from some of these compulsory land acquisition cases. This article considers select cases from the NSW Land and Environment Court and the NSW Court of Appeal in 2024, and the outlook for 2025.

"Public purpose" cases

A number of important decisions were handed down in 2024 which considered how the public purpose of an acquisition is to be determined, and how the statutory disregard in section 56(1)(a) applies when determining compensation for "market value". In essence, that provision requires the disregard of any increase or decrease caused by the public purpose, or the proposal to carry out the public purpose, as at the acquisition date (statutory disregard). The cases explored are:

- *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5.
- *Coffs Harbour City Council v Noubia Pty Ltd* [2024] NSWCA 19.
- *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW* [2024] NSWLEC 39.
- *oOh!media Fly Pty Ltd v Transport for NSW* [2024] NSWCA 200.

Sydney Metro v G & J Drivas Pty Ltd [2024] NSWCA 5

Our previous article reported how the NSW Court of Appeal's decision in *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5 (***Drivas***) will encourage landowners to continue pressing on with their redevelopment plans in the shadow of a compulsory acquisition, despite the fact that such expenditure could generate considerable waste. The key fact in that case was that upon learning of the upcoming compulsory acquisition, the landowner made decisions to slow and then stop work on the redevelopment. This resulted in a loss of value for the claimants, which they said was caused by the public purpose. The Court of Appeal found that those decisions were independent decisions of the landowners, and were not directly caused by the Sydney Metro project. This meant that the claimed decrease in value could not be taken into account.

Coffs Harbour City Council v Noubia Pty Ltd [2024] NSWCA 19

Coffs Harbour City Council v Noubia Pty Ltd [2024] NSWCA 19 was the second Court of Appeal decision this year to consider the statutory disregard following *Drivas*.

The facts were slightly unusual in that they did not involve a compulsory acquisition, but employed compulsory acquisition compensation concepts as part of a land transfer to the Council by a developer. In summary, the landowner had obtained a development consent in 2003 to develop a 160 lot residential estate near Coffs Harbour. One of the conditions in the development consent required the landowner to transfer certain land to Council, on which artificial lakes had been constructed as part of the development. The transfer occurred in 2007. Compensation for the transfer was to be determined by reference to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**), but a dispute arose on how the Just Terms Act was to apply in determining compensation for the transferred land, seeing as this was not a compulsory acquisition.

In the Land and Environment Court, the primary judge had determined the public purpose broadly as "for water quality and stormwater management purposes", and had disregarded a decrease in value caused by the Council's "public purpose". $2,965,000 was awarded in compensation on the basis that the transferred land could have been developed for residential subdivision. The Council appealed the primary judge's decision.

On the causation ground, the Court of Appeal overturned the findings of the primary judge and found that the value of the transferred land (on the basis of the artificial lakes constructed) was a result of the choices made by Noubia Pty Ltd (**Noubia**) in seeking development consent in 2003 (see [88]).

The Court of Appeal went on to find at [109] that the public purpose should have been characterised by the primary judge as being limited to the management of stormwater arising from the developed upstream catchment, and not the management of flows from Noubia's own development or the natural flow of upstream water from undeveloped land. The narrower public purpose favored the Council because it meant that the market value of the transferred land was not ascertained by reference to its hypothetical residential development potential.

Following this, the Court of Appeal made a declaration that the value of the transferred land was $110,000.

Paragraphs [62]-[65] of the judgment stand out for Payne JA's citation of Hogson JA in *Roads and Traffic Authority v Perry* (2001) 52 NSWLR 222; [2001] NSWCA 251, where it was explained that "*… there are no "clear rules" determining how the relevant public purpose at the appropriate level of generality is to be determined. Factors to be taken into account include the degree of continuity and consistency of various elements of what is proposed and done, and fairness to both the claimant and the acquiring authority.*"

oOh!media Fly Pty Ltd v Transport for NSW [2024] NSWCA 200

In *oOh!media Fly Pty Ltd v Transport for NSW* [2024] NSWCA 200, the Court of Appeal applied the decision in *Drivas* to an acquisition of a lease.

In September 2020, Transport for NSW (**TfNSW**) acquired land in Mascot over which oOh!media Fly Pty Ltd (**oOh!media**) had a leasehold interest adjacent to Qantas Drive for advertising billboards. oOh!media had commenced plans to digitise six out of 18 billboards on the land, but abandoned the project in 2016 when it became aware the land may be acquired under the Sydney Gateway Project. In the Land and Environment Court, oOh!media was awarded approximately $2.7 million, which was less than the $3.8 million awarded by the Valuer-General (and a mere fraction of the $52.2 million claimed).

On appeal, oOh!media argued that:

- had the digitisation proceeded, the market value of its lease would have increased; and
- its decision to not pursue the digitisation of the signs was caused by the public purpose and not the proposed acquisition, and thus fell outside the statutory disregard and the Court of Appeal's decision in *Drivas*.

The Court of Appeal dismissed oOh!media's appeal, and determined that the case was "relatively indistinguishable" from *Drivas*. At [74], the Court of Appeal summarised:

> *This is a case, like Drivas CA, where the claimant sought compensation for a putative increase in market value not in fact achieved because of its own choices made prior to the date of acquisition, being choices made because of the possibility or certainty of its interest in the land being acquired. The fact that the market value did not actually increase because of that choice is not required to be disregarded by s 56(1)(a) of the Act. The land was to be valued as it was, including all its potentialities for development.*

Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW [2024] NSWLEC 39

[Disclaimer: Colin Biggers and Paisley acted for the landowner]

The decision in *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW* [2024] NSWLEC 39 (***Goldmate***) has attracted considerable interest given it is the first of many cases involving acquisitions of land in the Western Sydney Aerotropolis, and how the statutory disregard is to be applied given the planning changes in the area that occurred in late 2020.

The facts were that TfNSW acquired 46% of a parcel land under the *Roads Act 1993* (NSW) for the M12 Motorway. That motorway is currently midway through construction. Approximately 8 months before the acquisition, the Aerotropolis SEPP commenced, which rezoned vast swathes of land for various uses including agribusiness, enterprise, environment, recreation and mixed use. Goldmate's land was one of many parcels rezoned from a rural use to an 'Enterprise' use.

The primary judge adopted an expansive characterisation of the public purpose at [51]:

> *Having regard to the evidence that there was a unified goal that characterised the actions subsequent to the announcement of the construction of the [Western Sydney Airport (WSA)], that goal was to facilitate the operations of the WSA and to facilitate commercial, industrial and employment uses around the WSA to leverage the economic opportunities provided by the WSA. This was the public purpose (**Public Purpose**).*

The effect of this was that the rezoning was disregarded when determining the market value of the acquired land, such that it was valued on the basis of a hypothetical rural zoning.

The implications of the *Goldmate* decision being felt by the landowners near Badgerys Creek have been articulated by the State Member for that area before the Legislative Assembly – see New South Wales, Parliamentary Debates, Legislative Assembly, 19 September 2024, 42 (Tanya Davies, Shadow Assistant Minister for Jobs and Small Business).

The *Goldmate* decision was appealed to the NSW Court of Appeal, and the parties await judgment.

Acquisition of Leasehold interests

Sydney Metro v C & P Automotive Engineers Pty Ltd [2024] NSWCA 186

The Court of Appeal's decision in *Sydney Metro v C & P Automotive Engineers Pty Ltd* [2024] NSWCA 186 is yet another decision narrowing the scope of disturbance costs that can be claimed under relocation under section 59(1)(c) of the Just Terms Act.

Following the Sydney Metro acquisition of its lease at Clyde, C & P Automotive Engineers Pty Ltd (**C&P**) relocated its business to alternative premises. The primary judge awarded compensation of approximately $2.5 million which included costs to 'fit out' the new premises and the rental difference between the new and the old premises. Sydney Metro appealed that determination to the NSW Court of Appeal.

Sydney Metro's appeal was successful, and resulted in compensation being reduced to approximately $416,000. The main implication of the Court of Appeal's judgment are that:

- Compensation under the disturbance head of compensation for "relocation" does not extend to replacing the physical characteristics of leased premises (ie the buildings). That is because the buildings belong to the landlord, and are only available for use as part of the lease (see [85]).
- The Just Terms Act does not provide compensation for relocating something that a claimant never had any right to relocate [111].
- The Just Terms Act does not provide for relocation to "like-for-like" premises, and "does not guarantee that the relocation premises will have the same fixtures" [115].
- Compensation is not payable for the difference in market rents between the old premises and new premises. The choice of premises is in the lessee's hands [150].

Other cases of interest

Dibb v Transport for New South Wales [2024] NSWCA 157 (*Dibb*)

The case of *Dibb* concerned compensation for land acquired for the Coffs Harbour Bypass Project. On appeal and cross-appeal, two substantive matters of interest were:

- claims of adversarial bias on behalf of the expert witnesses retained by TfNSW (including its valuer); and
- whether the primary judge's award for stamp duty compensation was consistent with the recently handed down Court of Appeal judgement in *Drivas*. This was the subject of TfNSW's cross-appeal.

Regarding the claims of adversarial bias, the Court of Appeal dismissed this ground (see 128] - [136]). The particulars of this contention were long. One example was that TfNSW's valuer Mr Lunney (who is often retained by acquiring authorities) had selectively avoided using certain properties when assessing comparable sales, and had fabricated evidence about his site inspection. For each witness, the Court of Appeal found that there was no basis for the contentions raised, and no evidence that there had been non-compliance with the Expert Witness Code of Conduct.

Regarding the stamp duty issue, the trial judge had awarded the landowners stamp duty under section 59(1)(f) of the Just Terms Act. The Court of Appeal allowed the cross-appeal on the basis of the Court of Appeal's judgment in *Drivas* at [115]-[121]). The effect of this was that the order for the payment of stamp duty compensation in the amount of approximately $57,000 was deleted.

Pacific Bay Beach and Golf Resort Association Incorporated v Transport for NSW [2024] NSWLEC 9

In this case, TfNSW sought to restrain Pacific Bay Beach and Golf Resort Association Incorporated from accepting an offer of compensation for the compulsory acquisition of land. TfNSW argued that overpayment could ensue if the offer were accepted due to competing interests in the land. However, the Court held that it lacked jurisdiction to grant the interlocutory application, and in any case, there was no legal basis to interfere with the statutory process of accepting a Just Terms Act offer. Citing the lack of jurisdiction and TfNSW's failure to articulate a substantive basis for the competing interests, the injunction was dismissed.

City of Parramatta Council v Sydney Metro [2024] NSWLEC 23 (*City of Parramatta*)

Sydney Metro acquired Council land in Parramatta offering compensation valued at approximately $117 million. The Council then brought proceedings seeking approximately $312 million. This case epitomises the incredible complexities of determining large scale commercial valuations particularly in lucrative financial districts.

At issue was the parties competing perspectives as to what the "highest and best use" of the land was, and thus what market value is to be attributed to the acquired land. Various hypothetical developments were proposed, which the Court partitioned into numbered 'scenarios'. The Court ultimately determined that market value was to be based off 'scenario 3' (redevelopment including two commercial towers) as it was seen as the most realistic development proposal based on achievable land uses under the applicable planning controls (Parramatta Local Environmental Plan). The scenario was seen to best avoid over-speculation of "highest and best use" while still acknowledging potential land use for high-value developments. Compensation by the court was determined by the Court at $201,417,049.

North Sydney Council v Transport for New South Wales [2024] NSWLEC 100

In 2021, TfNSW acquired a leasehold interest over Crown parkland of which North Sydney Council was the crown land manager. North Sydney Council objected to the $35,003 determined as compensation.

The issue was determining the appropriate method for quantifying the reduction in public benefit from the temporary loss of open space. The Court ultimately rejected the Council's cost-benefit analysis and land valuation approach, instead determining compensation based on a "recreational rental value" approach, applying a rate of $3/m² derived from the rental value of the Cammeray Golf Course lease. Disturbance costs under s59(1) of the Just Terms Act were also awarded for legal and valuation fees, but not for replacement of trees and infrastructure given the land would be restored as required under the lease terms. In doing so, the decision clarifies the application of the *Crown Land Management Act 2016* (NSW) in assessing compensation for Crown land managers.

In additional dicta, the Court discussed how there was no obligation to accept an expert's conclusions simply because they were the only expert witness on particular subject matter. In this case, Council provided an expert witness while TfNSW did not. The Court considered that Council's expert witness failed to substantiate many of his claims and lacked a clear rationale as to why the framework he employed applied to the facts. The Court affirmed *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 in holding that evidence must be robust and a representation of foundational opinion rather than a mere collection of pronouncements.

The Year Ahead

The biggest changes in the year ahead will arise from the findings of the Land Acquisition Review. A large body of submissions were prepared including by this Practice built off experience following the last reforms following the Russell and Pratt review.

We expect to see more rural acquisitions proceed through to the Courts due to various linear infrastructure projects taking place for rail and transmission lines. In addition, the next round of Metro acquisitions will impact some Sydney properties, but due to subsurface rights acquired these are less likely to be litigated.

These cases highlight risks on both sides, but particularly for dispossessed landowners who need to carefully consider appealing due to the risk the Court may determine compensation less than what the Valuer-General has determined notwithstanding that generally the acquiring authority will pay costs for the proceedings on the ordinary basis. However, as the *City of Parramatta* case shows, compensation may also be determined by the judicial valuer (the Court) substantially more than what the Valuer-General determined, highlighting the potential upside objecting to the determination can bring for dispossessed owners. Claims therefore need to be carefully prepared, analysed and evaluated pre-acquisition and post-acquisition in light of the latest jurisprudence given what is at stake with compensation increasingly involving vast sums of money.

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