Colin Biggers & Paisley

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Planning Government Infrastructure and Environment group

Colin Biggers & Paisley

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

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

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

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

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

### Infrastructure

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

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

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Legal excellence in all areas of environmental law and policy.

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# Determining the "effective height" of a building for the purposes of the Building Code of Australia

Maysaa Parrino

**This article highlights the recent interpretation of "effective height" under the Building Code of Australia and the implications for owners, builders and developers**

January 2013

## Executive Summary

In *The Owners - Strata Plan No. 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance* [2012] NSWSC 1244, the Supreme Court has interpreted the definition of "effective height" in the Building Code of Australia (**BCA**). This is important because particular buildings have different requirements for fire controls and safety features and systems, depending upon the effective height of a building, as defined in the BCA.

## Definition of the effective height of a building

It was agreed by the parties that under the BCA, a proposed building with an effective height over 25 metres had more onerous fire safety regulatory requirements. Between January-October 2001 (when the consent and construction certificate had been issued for the proposed building), the definition of effective height in the BCA was "the height of the floor of the topmost storey... from the floor of the lowest storey providing direct egress to a road or open space."

## Was the lowest story the lower ground level or the upper ground level?

The court looked at whether "the floor of the lowest storey providing direct egress to a road or open space" of the proposed building was, on the facts:

- the upper ground level, which was the pedestrian entrance to, and exit from, the proposed building (contended by the defendants), giving the proposed building an effective height of 25 metres; or
- the lower ground level, which was the vehicular entrance to, and exit from, the proposed building (contended by the plaintiff), giving the proposed building an effective height of 26 metres.

The court found that the internal configuration of the proposed building did not determine "effective height", and that the distance between the topmost storey of the building and the points of egress (exit) applied to the definition.

## "Egress" defined as point of exit, rather than escape route

The word "egress" implied:

- at least one, and possibly more than one, point at which occupants of the proposed building could exit to a road or open space; and
- the existence within the proposed building of a pathway reasonably accessible from the point of egress to the whole of the building or, at least, a substantial part of it.

As a result, the court found that the word "egress" was a point of exit, rather than an escape route.

## Lower ground level the lowest storey providing direct egress

Based on the facts, the lower ground level of the proposed building was the "lowest storey providing direct egress to a road or open space", because of the definition of "storey" in the BCA. It provided space for parking in excess of three vehicles and it had direct egress to the street.

The upper ground level was not the preferred storey for various reasons, including the fact that the pedestrian entrance to the level was via doors that divided a foyer area from a covered verandah and was several steps up from the footpath on the street. A person was required to pass through the verandah area and down steps before reaching the footpath.

Notwithstanding the above, the court still found that the upper ground level could reasonably have been characterised as "a storey providing direct egress to a road or open space" within the definition of "effective height" within the BCA. The BCA definition of "effective height" was not inconsistent with a building having points of egress at more than one level.

## BCA Guide definition not relevant

The court held that the BCA Guide was not relevant to the proper determination of the definitions in the BCA, as the text of the BCA itself is clear and capable of ready, reasonable application.

## Effective height of the building was 26 metres

On the facts, the lower ground level was "the lowest storey providing direct egress to a road or open space" of the proposed building. Accordingly, the "effective height" of the proposed building was 26 metres.

## Implications for owners, builders and developers

The case has significant implications for owners, builders and developers. It provides a further guide as to how the court will interpret "effective height", which may have significant consequences in terms of regulatory compliance with fire controls and safety measures.

# Sufficient grounds despite a conflict with the planning scheme?

Ronald Yuen

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Szylkarski & Ors v Brisbane City Council & Anor* [2012] QPEC 80 before Robin QC DCJ**

January 2013

## Executive Summary

In this case the Planning and Environment Court was required to consider whether the proposed development on the only vacant parcel in a street overwhelmingly characterised by smaller pre-1946 character houses was in conflict with the performance criterion that "development size and bulk must be consistent with the low to medium density of the locality" in the Residential Design – Low Density, Character and Low – Medium Density Code in the Brisbane's Planning Scheme *City Plan 2000* and whether there were sufficient grounds to overcome conflict.

## Case

This case involved a submitter appeal by local residents against an approval of a development application made by Specialist Developments Pty Ltd as agent for Corneliu Robert Telegaru and Cornelia Telegaru, seeking a development permit for a material change of use for a multi-unit dwelling and for a preliminary approval to carry out building work given by Brisbane City Council in respect of land located at 22 Goodwin Terrace, Moorooka.

## Facts

The land was a 607m$^2$ vacant parcel, with a frontage to Goodwin Terrace of approximately 15.088m in length. In the past a house constructed after 1946 stood on the land. In the City Plan, the land was located in the Low-Medium Density Residential Zone and was also within a Demolition Control Precinct (**DCP**) and the Moorooka District Local Plan, which did not recognise Goodwin Terrace in the way that some other localities were recognised, such as the Clifton Hill War Service Homes Estate. The land was located within a close vicinity to the Moorvale Shopping Centre, a large multi-purpose centre at a MP3 Level within the City Plan, coming next in the hierarchy after the Brisbane CBD and higher order centres such as those at Chermside, Mt Gravatt and Indooroopilly. The DCP, based on substantially intact pockets of pre-1946 housing effectively surrounded the MP3 Centre, including every parcel across Goodwin Terrace.

In 2008, there was a development approval resulting from a code assessable development application, which authorised the construction of a large two storey residence, with a gross floor area exceeding 300m$^2$ on the land and the relevant period for this previous approval lapsed on 31 [sic] November 2012. While section 3.5.5(3)(d) (Impact Assessment) of the *Integrated Planning Act 1997* might not have required much weight be given to the previous approval, the council and the co-respondents made much of the potential for a similar sized (ie larger sized) residential building to be constructed on the land.

The proposed development was for five units in a single building, which was so articulated that it presented as three. Unit 1 being located at the front and was a two-level unit facing the street frontage and consistently with the terrain (as the land falling away to the east from Goodwin Terrance) had its ground floor slightly lower. The street frontage exhibited pre-1946 features, such as multiple gables and finishes having the appearance of chamferboard and natural timber. Behind unit 1, at ground level was the covered parking for six vehicles, being one for each unit and one for visitors. Immediately behind unit 1, above the parking and approximately half a floor higher was unit 2. Unit 2 was a small one bedroom unit of two levels, one of which was described as a mezzanine.

Unit 3 located at the same level as unit 2 and immediately abutting it, was a single storey unit, above parking. Units 4 and 5 were two storey units and shared what presented as a single semi-detached structure adjoining unit 3 and representing the widest part of the built form with a minimum setback of 2m on each side. This build form was divided north-south, as opposed to east-west and the falling terrain meant that the upper levels of units 4 and 5 continued the floor level of unit 3 with the balance of living areas being underneath.

## Submissions

The premise of the appeal by the local residents was that the proposed development was too big, its size and bulk was inconsistent with the "low to medium density" of the locality contrary to performance criterion P1 in section 4.3 of the Residential Design-Low Density, Character and Low-Medium Density Code in the City Plan and that the proposed development was excessive in gross floor area and fell short in the frontage and rear boundary setback.

The appellant's town planning expert contended that the proposed development was simply too big and was trying to shoehorn too much onto the land, in a way that was inevitably out of scale with the surrounding development that was likely to remain in place in the long term.

The council and Specialist Developments' position was that there was no conflict whatsoever with the City Plan and in the event there was, it was "textual only and of no consequence". Further, it was submitted that there were sufficient grounds to justify an approval of the proposed development.

# Decision

The court considered the crux of the appeal was whether the proposed development satisfied the relevant performance criteria in the City Plan. If it did not, the proposed development would be in conflict with the council's planning scheme and the court would then be required to determine whether there were sufficient grounds, within the ambit of section 326 (Other decision rules) of the *Sustainable Planning Act 2009* (**SPA**) to justify an approval of the proposed development despite the conflict.

To this end, the court assessed the proposed development against the relevant sections of the City Plan, including:

- the Desired Environmental Outcomes;
- the Assessment guidance – explanation of traditional character in relation to:
  - building form and scale;
  - street context;
  - materials and detailing; and
  - setting.
- Compliance with the Residential Design – Low Density, Character and Low – Medium Density Code, including the:
  - Intent.
  - Purpose.
  - Performance Criteria and Acceptable Solutions.

Ultimately, the court considered that the proposed development did not comply with section 4.3 of the Residential Design-Low Density, Character and Low-Medium Density Code in the City Plan including:

- P1 regarding gross floor area; and
- P13 and in particular A13.3 regarding the minimum rear boundary setback of 6m.

The court then looked at whether there were sufficient grounds to justify approval of the proposed development despite the conflict.

In the process of doing so, the court acknowledged that the proposed development was in a category of "generally appropriate" development and that the planning objectives of the council's planning scheme and its desire environmental outcomes would be promoted by the proposed development, being: housing choice and diversity, reducing urban sprawl, encouraging use of public transport and land use integration in this particular location.

The court noted that a finding of conflict might have been avoidable if the conflict was related to the dimensions of the land, in particular the frontage, which the co-respondents could not have done anything about.

However, the court considered that there was no need for the "strict" gross floor area limit stated in terms of the percentage of the land area involved, to be exceeded, or to build within the standard rear setback.

While the co-respondents provided a clever design, they failed to comply with P1 and P13 of section 4.3 of the Residential Design – Low Density, Character and Low – Medium Density Code in the council's planning scheme and such failure resulted in a conflict with the council's planning scheme. Consequently, the court found that although valid grounds (as submitted by the council and the co-respondents) existed justifying approval of the proposed development, such grounds were not sufficient to overcome the conflict.

# Held

The appeal be allowed and the development application be refused.

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# Failure to overcome conflict with the planning scheme

Ronald Yuen

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Serafini v Gladstone Regional Council & Anor* [2012] QPEC 83 before Jones SR DCJ**

January 2013

## Executive Summary

This case involved an appeal to the Planning and Environment Court against a decision of the Gladstone Regional Council to refuse a development application seeking a development permit for the reconfiguration of one large rural lot in 16 lots. The court ordered that the appeal be dismissed.

## Case

This case involved an appeal to the court against a decision of the council to refuse a development application seeking a development permit for the reconfiguration of one large lot into 16 lots. The land the subject of the council's decision was located 46 kilometres south of the regional port city of Gladstone, more particularly described as Lot 2 on RP 612473 and comprised of an area just under 935 hectares.

## Facts

On 6 August 2004, Mr Serafini lodged a development application with the council to subdivide the land into 16 lots, varying in size from about 25 hectares through to 68 hectares and in two stages, comprising, stage 1: Lots 1 to 6 and 13 to 16 and stage 2: Lots 7 to 12.

The development was proposed to include the construction of a new road traversing the property in a north-west direction, buffer area for the protection of erosion prone land, building restrictions on the proposed lots and the dedication of a 20 metre public reserve following the creek and inlet frontages.

The council resolved to refuse the development application on 10 February 2009. The grounds for refusal covered a broad range of issues, many of which were not considered in the appeal as it was acknowledged that they would not warrant a refusal of the development application, but would be the subject of conditions of approval.

### Issues in the appeal

The issues which the court was asked to determine were as follows:

- Was the proposed development in conflict with the State Planning Policy 1/92 (Development and the Conservation of Agriculture Land) (**SPP**), dealing with Good Quality Agricultural Land (**GQAL**) and the fragmentation of GQAL?
- Was there a need for the proposed development?
- Was the proposed development in conflict with the council's Transitional Planning Scheme 1999 and in conflict with the council's *Integrated Planning Act 1997* Planning Scheme (**IPA Scheme**)?
- Were there any grounds to justify approval of the development application in the event of conflict with the council's planning regimes?

### Conflict with the SPP

In respect of the alleged conflict with the SPP, the court relied on the evidence provided by Mr Napier (for the appellant) and Mr Waker (for the council) in determining whether the land could be described as "better quality Class C land" or "land suitable for improved or high quality native pasture".

Based on the evidence, the court concluded that the land could not reasonably be described as "better quality Class C Land" or "land suitable for improved or high quality native pasture" and therefore, the land was not GQAL. Accordingly, the proposed development was not in conflict with the SPP or the council's planning schemes insofar as it related to the protection of GQAL.

### Need

In determining whether there was a need for the proposed development, the court relied upon the evidence provided by Ms Bonwick (for the appellant) and Mr Leyshon (for the council). The experts identified two areas for investigation, being:

- the need for rural living in the council area; and
- the need for rural living in the locality of the land.

Having heard the evidence of both experts, the court did not consider the facts and circumstances relied upon by Ms Bonwick justified her conclusions concerning need and favoured Mr Leyshon's evidence that any need in the location for the proposed development was "low level" or "weak".

### Conflicts with the planning schemes

In considering whether the proposed development was in conflict with the council's planning regimes, the court noted the deliberate and legitimate strategy of the council's transitional planning scheme was to preserve rural land for rural activities and further, its general opposition to the fragmentation of larger parcels of land in rural areas. It was noted that the IPA Scheme was, insofar as was relevant to the appeal, "effectively mirror" and consistent with the transitional scheme. The court accepted that, while the land was not GQAL, it was productive rural land currently grazing 100 head of cattle and capable of grazing up to 160 head. Although, as a stand-alone entity, the commercial viability of the current grazing enterprise was questionable, the court observed that, under the transitional scheme, commercial viability was not determinative, which appeared to further reinforce the council's commitment to protect rural land from unwarranted fragmentation.

The court found that any need for the lots produced by the proposed development was at a low to very low level and that such a low level of need was not sufficient to displace the clear planning objective and intention of protecting agriculturally productive rural land from fragmentation. The court therefore concluded that the proposed development was in genuine conflict with the transitional scheme (and the IPA Scheme) and the conflict was significant, not technical or minor.

### Sufficient grounds to justify approval

In considering the sufficient grounds submitted by the appellant, the court did not find them to be sufficient to overcome the conflict and concluded that "while the proposal would add to the choices available to purchasers, the positive impact might be considered insignificant."

## Decision

The court noted that as the development application was lodged under the transitional scheme it was required to be assessed and decided under sections 6.1.29 (Assessing applications (other than against the building assessment provisions)) and 6.1.30 (Deciding applications (other than against the building assessment provisions)) of the *Integrated Planning Act 1997* and, accordingly, the development application was required to be refused if:

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

## Held

The appeal be dismissed.

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# Overwhelming community interest in the future of planning in NSW

Claire Parsons

**This article explores the key themes identified through community feedback on the NSW Government's Green Paper on planning reform**

January 2013

## Executive Summary

On 21 December 2012, the NSW government released the Green Paper Feedback Summary, which summarises the main community and stakeholder feedback on the reform areas proposed in the Green Paper. These reform areas were identified and discussed in our July 2012 article *Green Paper on planning reform in NSW released by government*.

The completion of this review process signifies the final step before the release of the White Paper, which will respond to this feedback and set out the details of how the new planning system will be implemented.

## Enormous interest within the community in the future of planning

The government received a total of 1,220 submissions during the Green Paper exhibition period. The overwhelming majority (61%) were received from the community, 11% from community organisations and 9% from local government, highlighting the importance to the community of the future of planning in NSW.

## Key feedback themes identified

- There is a need to provide adequate resourcing and new methodologies for community engagement at strategic level.
- The shift towards focusing on strategic planning requires appropriate resourcing and a legible policy and legislation framework.
- Streamlined decision making needs to occur at the development assessment level. By planning strategically upfront, with community input, development assessment can be smarter and more timely adopting a risk based approach.
- Integration of land use with infrastructure is imperative and the funding for infrastructure provision and delivery needs to be addressed.
- The Department of Planning and Infrastructure needs to take a leadership role to empower planners to have a 'can do' attitude to execute decisions, and encourage collaboration between all stakeholders.

## Importance of ecologically sustainable development

Many submissions called for the expansion of the objectives of the new planning system to balance development with social and environmental considerations, a concept seemingly lacking in the Green Paper.

The concept of ecologically sustainable development has been identified by a diverse range of stakeholder groups as a necessary overarching objective of the new planning system, to ensure the delivery of long term beneficial outcomes.

## Implementation of the new planning system

The establishment of the planning bodies and the preparation of the suite of planning instruments proposed in the Green Paper will be a process that may take a number of years. Just how the government will deal with the transitional arrangements to facilitate the implementation of the new planning system was an issue raised in many of the submissions received.

It is anticipated that the White Paper will respond to these concerns and address issues such as how long the transition period will last and the interim measures to be implemented to ensure consistency in outcomes from this point into the future.

## White Paper due to be released shortly

The White Paper and "draft exposure bill" are due for release shortly, at which time the true extent of the proposed reforms can be assessed. It is anticipated that many of the key feedback themes identified will be addressed in the draft legislation. However, the ideological shift called for may require more time and further consultation by the government.

# Integration of commercial and residential uses

Ronald Yuen

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stockland Development Pty Ltd v Townsville City Council & Ors* [2012] QPEC 84 heard before Robin QC**

February 2013

## Executive Summary

This case involved a submitter appeal to the Planning and Environment Court by Stockland Development Pty Ltd against the Townsville City Council's decision to approve a development application for an extension to an existing shopping centre known as the 'Willows' and a preliminary approval for building work lodged by Dexus Wholesale Property Limited in respect of land located at 13 Hervey Range Road, Thuringowa Central.

## Case

This case involved a submitter appeal to the court by the appellant against the council's decision to approve the development application lodged by Dexus Wholesale Property in respect of the land. The court had to determine whether the proposed development was in conflict with the City of Thuringowa Planning Scheme and if conflict did exist, whether there were sufficient grounds to justify an approval despite the conflict.

## Facts

In November 2010, Dexus Wholesale Property lodged with the council the development application in respect of the land.

The development application was subject to impact assessment and therefore, was publicly notified. The appellant, which owns and operates another shopping centre close to the land, made a properly made submission to the council objecting to the proposed development.

In February 2012, the council resolved to approve the development application and issued Dexus Wholesale Property with a negotiated decision notice. The appellant commenced an appeal in the court against the decision of the council to approve the development application.

### The issues

The main issue in the appeal was the appropriateness of the location and scale of the largest element of the proposed development, being the proposed expansion of the supermarket under the council's planning scheme.

The land was located within the Commercial 3 (City Centre Support) sub-area under the council's planning scheme, the intent of which was to support *"development that has an integrated commercial and residential focus"*.

This was in contrast to the existing 'Willows' shopping centre, which was located within the Commercial 1 (City Centre Core) sub-area of the council's planning scheme. That particular sub-area supported development, which had a 'dominant commercial focus'.

### Appellant's position

The appellant asserted that the proposed expansion was inconsistent with the intent of Commercial 3 (City Centre Support) sub-area under the council's planning scheme in that no residential component was proposed and Commercial 3 (City Centre Support) sub-area was subordinate to the Commercial 1 (City Centre Core) sub-area and there were no sufficient grounds to justify an approval of the development application despite the conflict (**Issue 1**).

The appellant also asserted that there was no necessity for the proposed expansion to be located on the land, as it could appropriately be located on the land, which contained the existing shopping centre and was located within the Commercial 1 (City Centre Core) sub-area of the council's planning scheme (**Issue 2**).

### Co-respondent and councils' position

Dexus Wholesale Property (supported by the council) submitted that the proposed expansion was not in conflict with the council's planning scheme and if conflict was found to exist, there were sufficient grounds to warrant an approval despite the conflict.

## Decision

The court noted that whilst it was for the co-respondent to persuade the court that the appellant's appeal should be dismissed, typically, the appellant being the submitter would identify the relevant issues and important points for consideration.

In addressing Issue 1, the court, by reference to the decision of *Atkinson v Ipswich City Council* (2006) QPELR 550, noted the general principle that a location that was expressly designed to provide support to another area or for some desired outcome should not be overtaken or supplanted by future development. However, the court did not consider the proposed development offended the general principle. Further, when applying a broad interpretation of the council's planning scheme, the court found that:

- it was unlikely that the intention of the council was to require all future development of land within the Commercial 3 (City Centre Support) sub-area to comprise of both commercial and residential components;
- commercial and residential developments/uses in the Commercial 3 (City Centre Support) sub-area were expected to complement one another and operated harmoniously together;
- the Commercial 3 (City Centre Support) sub-area presently contained both commercial and residential developments;
- the proposed development would not adversely affect the residential and commercial developments currently in the Commercial 3 (City Centre Support) sub-area;
- the proposed development was respectful of the streetscape and the residential uses opposite to it and, to a certain degree, would improve the amenity of the area.

The court therefore found that the proposed development was not in conflict with the council's planning scheme.

In the event that any conflict asserted by the appellant did exist, the court's view was that there were sufficient grounds to warrant the approval of the development application.

The court therefore found that the proposed development was not in conflict with the council's planning scheme.

In light of this finding in respect of Issue 1, no consideration, in a significant way, was given to the matters raised as part of Issue 2.

## Held

The court held that the appeal be dismissed.

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# Can cultural heritage significance be debated?

Ronald Yuen | Jonathan Evans

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cowan v Brisbane City Council & Ors* [2012] QPEC 81 before Rackemann DCJ**

February 2013

## Executive Summary

The Planning and Environment Court heard an appeal against the Brisbane City Council's decision to refuse an application for a development permit to facilitate the demolition of a residential building which was listed in the Council's Register of Heritage Places and Precincts in schedule 1 of the Heritage Register Planning Scheme Policy. The court was required to consider whether the proposed development was in conflict with the provisions of the Heritage Place Code of the *Brisbane City Plan 2000*.

## Case

This case concerned an appeal initiated by Ben Cowan as trustee for the Prates-Cowan Family Trust against the council's refusal of an application for a development permit to facilitate the demolition of a residential building, known as "Gwandoben", located at 42 Maxwell Street, New Farm.

## Facts

Gwandoben was first constructed as a two-storey 1930's mock Tudor style residence. It was designed by the architect James Collin for a local businessman, Mr Mervyn Dodwell. The residence was extended only a few years after its initial construction. The extension was well integrated with the initial construction.

In the mid-1940s, after the Dodwells departed, the building was converted into flats. In the 1960s, a three-storey extension for flats was attached to the south-eastern side of the building. Both the original residence and the later extension had been used as residential units.

The proposed demolition was impact assessable development (generally inappropriate), due to Gwandoben being entered on the heritage register. The proposed demolition attracted a large number of objections and a large proportion of the submitters elected to join the appeal as co-respondents.

The Heritage Place Code was applicable in assessing proposed building work (including demolition) on premises that included a heritage place and therefore, it relevantly applied to the assessment of the proposed demolition.

## Decision

### Could cultural heritage significance be debated?

The court noted that the appellant's case rested, not on the basis of respectful and sympathetic redevelopment of a heritage place, but rather on the assertion that Gwandoben had no cultural heritage significance for the purpose of the Heritage Place Code. On that basis, the appellant contended that either the proposed demolition was not in conflict with the Heritage Place Code (since it only sought to protect cultural heritage significance) or any conflict was "textual" only and that the lack of cultural heritage significance, in fact, provided a sufficient ground to warrant approval notwithstanding any residual conflict.

The co-respondents submitted that it was not appropriate for the court to permit the appellant to use the appeal as a de-facto merits review of council's much earlier decision to enter Gwandoben on the heritage register. They argued that the heritage register should be accepted and that in the absence of any subsequent event which might have reduced, extinguished or lessened the cultural heritage significance applicable to Gwandoben, the application for the proposed demolition should be refused.

The appellant pointed out that the council's planning scheme acknowledged that the heritage register was fallible, in that once an application was lodged over a site listed in the heritage register, the council would prepare a report, to assist in the assessment of the proposal against the Heritage Place Code, which might "demonstrate that the site is not worthy of retention on the Register". If that occurred, the council would initiate the process of removing the site from the heritage register. However, the report would not override the need for addressing the Heritage Place Code as part of the proposal. Whilst the court supported the appellant's assertion regarding the fallibility of the heritage register, the court noted that the Heritage Place Code did not expressly contemplate approval of an application to entirely demolish a place on the heritage register.

The court further noted that whilst the entry of Gwandoben in the heritage register triggered the requirement for an application for demolition, it did not provide conclusive evidence that Gwandoben did indeed have cultural heritage significance, or that the content of any significance accorded with the citation in support of the listing. The court therefore accepted that it was appropriate for the appellant to call into question whether Gwandoben currently possessed the cultural heritage significance.

In that regard, the court observed that, if the evidence established that Gwandoben had no cultural heritage significance, there would be no conflict with the council's planning scheme or that any remaining conflict with the council's planning scheme would be "textual" rather than substantive and there would be a sufficient basis to grant an approval for the application for the proposed demolition.

## The criteria for significance

The following criteria in section 2.1 of the Policy, according to the council's citation, were identified as relevant for the entry of Gwandoben on the heritage register by virtue of its cultural heritage significance for the purpose of the Heritage Place Code:

> *It is important in demonstrating the evolution or pattern of the City's or local area's history;*
>
> *It demonstrates rare, uncommon or endangered aspects of the City's or local area's cultural heritage;*
>
> *It is important because of aesthetic significance;*
>
> *It has special association with the life or work of a particular person, group or organisation of importance in the City's or local area's history.*

In addition to the particulars relied upon in the earlier citation in respect of the fourth criterion, the council submitted that, as well as the association with Mr James Collin, it relied on Gwandoben's "special association" with the Dodwells as an aspect of its cultural heritage significance.

## Was Gwandoben important in demonstrating the evolution or pattern of the city's or local area's history?

After considering the history of Gwandoben and the parties' experts' opinions, His Honour preferred the evidence of the council's expert and concluded that, whilst it might appear that Gwandoben was neither an intact 1930s large residence nor a post-war purpose-built flat, the 1930s core of the building was readily recognisable, despite the alteration and extension, such that it continued to demonstrate that part of the evolution or pattern of New Farm's history and, to the extent it related to the 1960s extension, the extension exemplified the built-form in the 20th Century in New Farm, which included the adaptive conversion and extension of existing houses to facilitate multiple occupancies both before and after World War II.

The court found that the components of Gwandoben had importance in showing the evolution or pattern of New Farm's history and therefore, it was demonstrative of, as opposed to merely a part of, the local history. Accordingly, the court held that the appellant had not demonstrated that Gwandoben failed this criterion.

## Did Gwandoben demonstrate rare, uncommon or endangered aspects of the city's or local area's cultural heritage?

Based on the court's earlier observation that the 1930s part of Gwandoben was readily recognisable, it rejected the appellant's contention that the extensions and alterations destroyed the 1930s part of the building, being the Tudor style, which contributed to Gwandoben demonstrating an uncommon aspect of New Farm's cultural heritage.

The appellant further contended the rarity or uncommonness of Gwandoben could not have been demonstrated given a reasonable number of intact examples remained across Brisbane. Whilst the court accepted that it had not been demonstrated that the type of house like Gwandoben was uncommon on a city-wide basis, the criterion was satisfied if the building demonstrated uncommon aspects of the local area's cultural heritage, which it concluded it did.

The court therefore held that the appellant had not demonstrated that Gwandoben failed this criterion.

## Was Gwandoben important because of its aesthetic significance?

The court observed that the relevant test was whether Gwandoben was important because of its aesthetic significance. A relevant factor in assessing the importance of Gwandoben because of its aesthetic significance (if any) was the extent to which the appearance of the building could be appreciated.

The court noted the vantage point for viewing Gwandoben was from the west, including from the Brisbane River and Kangaroo Point, and agreed with the council's expert that the view provided a "pleasing appearance" to observers. The court further noted that the pleasing nature of its appearance was appreciated in the context of a historical development of a type which was now uncommon, and stood in visual contrast to what otherwise prevailed in the area. Accordingly, whilst it was a marginal case, in its context, Gwandoben did possess some importance in respect of aesthetic significance. The court therefore held that the appellant had fallen short of demonstrating that Gwandoben failed this criterion.

### Did Gwandoben have a special association with the life or work of a particular person, group or organisation of importance in the city's or local area's history?

The court observed that, in this case, the criterion required the identification of the relevant person of importance in either the city's history or the local area's history and, further, a "special association" between the heritage place and either the life or work of that person.

The court first examined whether the architect of Gwandoben, Mr James Collin, was a person of importance in the city's or local area's history. Whilst the court did not accept the appellant's contention that Mr Collin was merely a "minor architect", the court, having regard to Mr Collin's involvement and contributions during his time as a notable architect, did not find Mr Collin to be satisfied as a person of importance in the history of Brisbane or in particular, New Farm.

The court then examined whether Gwandoben had a special association with the Dodwell family. In reaching his conclusion that no special association existed, the court observed that whilst the original owner's father, Mr Alexander Dodwell, could be said to be a person of importance, he lacked the requisite "special association" with Gwandoben, as it was the house of his son, Mr Mervyn Dodwell and daughter-in-law. Conversely, the court found that Mr Mervyn Dodwell might have a special association with Gwandoben but he was not a person of importance in Brisbane's or New Farm's history.

Accordingly, the court was satisfied that Gwandoben failed this criterion.

## Held

The court held that the appeal be dismissed.

# Development in critical habitat?

Ronald Yuen | Elton Morais

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council* [2012] QPEC 70 heard before Andrews SC DCJ**

February 2013

## Executive Summary

This case involved an application filed in the Planning and Environment Court by Traspunt No. 4 Pty Ltd seeking a declaration that its development application for the clearing of vegetation (tree clearing for essential infrastructure) on land located in Rothwell lodged with the Moreton Bay Regional Council was deemed approved, as the council had failed to decide the matter in accordance with the required timeframes set out under the *Sustainable Planning Act 2009* (**SPA**).

## Facts

On 6 February 2012, the applicant lodged the development application with the council.

On 23 May 2012, council advised the applicant by written notice that it had extended the decision making period by 20 business days to 21 June 2012, in accordance with section 318(2) (Decision-making period – generally) of the SPA.

On 20 June 2012, the council requested a second extension to its decision making period pursuant to section 318(4) (Decision-making period – generally) of the SPA. That request was not granted by the applicant. As a result, the decision making period for the development application expired on 21 June 2012.

On 28 June 2012, the applicant sent a deemed approval notice to the council in accordance with section 331(1) (Deemed approval of applications) of the SPA.

The applicant sought a declaration that the development application was the subject of a deemed approval by the council.

### Issues

The issue was whether the applicant had discharged its onus of proof to establish that the development application was not one of the following exceptions (relied upon by the council, in its submissions):

- an application for development in "critical habitat" under the *Nature Conservation Act 1992* (**NCA**) (**Issue 1**);
- an application for development in "an area of major interest" under the NCA (**Issue 2**);
- a vegetation clearing application under the *Vegetation Management Act 1999* (**VMA**) (**Issue 3**)

If the applicant established that the development application did not fall within one of the exceptions, then the applicant would be entitled to the declaration sought that there was a deemed approval.

## Decision

In regard to Issue 1, the applicant submitted that:

- land falling within the meaning of "critical habitat" as defined in the NCA was not a "critical habitat" for the purpose of the NCA unless and until it was registered;
- the subject land did not meet the criteria for "critical habitat" set out under the NCA, as:
  - the land was not 'essential for the conservation of a viable population of protected wildlife or community of native wildlife', by way of affidavit evidence;
  - the mapping relied upon by the council was made under the VMA (rather than the NCA) and therefore, did not operate as a map for the purposes of the NCA in that designations of vegetation made under the VMA were for conservation of vegetation and not for conservation of vegetation for the benefit of a particular animal despite it specifically relating to koalas.

The court noted that:

- the absence of any entry on the register showing any land to be "critical habitat" did not necessarily mean that all land in Queensland lacked the qualities of "critical habitat" and that the subject land lacked the qualities of "critical habitat";
- the applicant did not place before the court any positive evidence to suggest the subject land lacked the qualities, which would meet the criteria for a "critical habitat" area under the NCA.

In the circumstances, the court found that the applicant had failed to discharge its onus that the subject land did not meet the criterion for "critical habitat" under the NCA.

In regard to Issue 2, the applicant relied on a similar argument as Issue 1 and led no evidence to demonstrate the subject land did not meet the criterion for "an area of major interest" under the NCA. The court noted it was unnecessary to consider this issue about which the applicant carried the onus.

In regard to Issue 3, given the nature of the development application and the mapping of the subject land under the VMA, the court considered it was unnecessary to resolve the applicant's arguments relating to this issue.

## Held

The application was dismissed.

# Is it a properly made development application?

Ronald Yuen

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Newcomb & Ors v Brisbane City Council & Anor* [2010] QPEC 71 heard before Searles DCJ**

February 2013

## Executive Summary

This case involved an appeal to the Planning and Environment Court against a decision of the Brisbane City Council to approve a development application by Aspect Property Group Australia Pty Ltd. One of the grounds of the appeal was that the development application was not a properly made application under the *Sustainable Planning Act 2009* (**SPA**). By order of the court, this issue was ordered to be determined as a preliminary point, which was ultimately dismissed.

## Case

This case involved an appeal to the Planning and Environment Court by Simon Newcomb, Jenny Newcomb, Richard Steinberg, Pip Ochre, Camille Smith-Watkins, Barry O'Sullivan and Lara Harland against a decision of the Brisbane City Council to approve a development application by Aspect Property Group Australia Pty Ltd.

One of the grounds of the appeal was that the development application was not a properly made application under the SPA. This issue was ordered by the court to be determined as a preliminary point.

## Facts

On 6 December 2011, JFP Urban Consultants Pty Ltd lodged on behalf of the Aspect Property Group a development application for a development permit for a material change of use, reconfiguration of a lot and preliminary approval for building work in relation to the erection of a new multi-unit dwelling and shop/office/restaurant over land located at 28-32 Morrow Street and 2 Harrys Road, Taringa, more particularly described as Lots 1 and 2 on RP54864 and Lot 36 on SP159242.

The land was within the Medium Density Residential Zone in the *Brisbane City Plan 2000*.

The council approved the development application on 4 July 2012.

The appellants alleged that the development application was not a properly made application under the SPA on the following grounds:

1. The development application failed to address the *Medium Density Residential Code* of the City Plan, in that:
   (a) section 260(1)(c) (Applying for development approval) of the SPA was breached as the development application was not accompanied by mandatory reporting information in relation to the Code;
   (b) section 260(3) (Applying for development approval) of the SPA was breached due to the failure to provide that information and because what was provided, being an assessment against the *Residential Design – High Density Code*, was materially incorrect and in breach of the Aspect Property Group's declaration of compliance.
2. The development application and supporting documents incorrectly described the height of the proposed development.
3. The development application and supporting documents did not include the heights of the retaining walls within the proposed development.
4. The acoustic report accompanying the development application was not adequate in that it failed to comply with the *Code of Practice – Railway Noise Management, Guide for development in a Railway environment and QLD Development Code Mandatory Part 4.4*.
5. The development application and supporting documents did not reference nor did it address the proposed development's compliance with the *Toowong Indooroopilly Local Plan*.

# Decision

## Ground 1

In addressing the issues raised in ground 1, the court noted the following:

- It was clear from the development application, in particular the omission of the reference to the Code, that the co-respondent, Aspect Property Group, considered the High Density Code was applicable given the existence of the draft Taringa-St Lucia Renewal Strategy;
- The council however, was of a different view and sought further information in respect of the Code;
- By letter dated 28 February 2012, JFP Urban Consultants responded to the information request and dealt with the Code in detail. However, due to an oversight, the enclosure of a code assessment checklist addressing the provisions of the relevant code was not included in the letter to the council. The checklist was later sent to the council on 21 March 2012, being the last day of public notification of the development application, but was not posted on the council's website until the following day, which as asserted by the appellants denied potential submitters' access to the checklist.

The court agreed that potential submitters were denied access to the checklist but were not denied access to the development application, the council's information request and the co-respondent's response to the request. However, the court noted that given the contents of those documents, it could not be said that the assessment manager or any prospective submitter was denied access to sufficient information to allow an informed decision to be made as to the approval of the development application or whether or not to lodge a submission such that the development application could not be said to be properly made. The court also noted that the co-respondent had no obligation to provide the checklist.

The court further observed that no reasonably intelligent and diligent prospective submitter could have been under any misapprehension that the Code was, from and after the council's information request, to be regarded as the relevant code in the assessment exercise.

In respect of the alleged breach of the declaration of compliance made by the co-respondent, the court found that the declaration was not one that purported to declare that all mandatory supporting information therein set out did, in fact, accompany the development application, but rather only that what was provided was true and correct. Therefore, there was no breach of the declaration.

The court therefore found that the appellants failed on this ground.

## Remaining grounds

Whilst it was not strictly necessary to deal with the remaining grounds (as conceded by the appellants, they would not in effect have allowed the application), the court dealt with them for the sake of completeness.

### Ground 2

The court noted that the question of the proposed building height turned on ones interpretation of the term "storey".

The court found that differing views or interpretations as to the appropriate characterisation of the number of storeys would not render the development application not properly made.

### Ground 3

The court found that the plans accompanying the development application (at 1:100 scale at A1) showed all of the development sought, including the location and height of any proposed retaining walls. The height was further clarified by the town planning report which accompanied the development application.

### Ground 4

The court found that the non-compliance issues raised by the appellants in relation to the acoustic report were not mandatory requirements in the approved form, and consequently not matters that went to whether the development application was properly made.

### Ground 5

The court found that, given the land was not within any precinct of the Local Plan, any failure to address the Local Plan in great detail was of practically no relevance to the assessment, and would not preclude a prospective submitter from assessing the information needed to lodge a submission.

# Held

The application was dismissed.

# Deemed refusal upheld by the court

Ronald Yuen | Jamon Phelan-Badgery

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Shardlow & Ors v Moreton Bay Regional Council* [2012] QPEC 82 heard before Robin QC DCJ**

March 2013

## Executive Summary

This case was an appeal to the Planning and Environment Court against the deemed refusal by the Moreton Bay Regional Council of a preliminary approval varying the effect of the *Pine Rivers Planning Scheme 2006* pursuant to section 3.1.6 (preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997* (**IPA**) for a "proposed Residential Estate (consistent with the Residential A zone)" relating to a proposal in Samford Village.

The court held that the planning arguments of the appellants, Ross Wayne Shardlow, Judy Mary, Francis Leonard Lippett and Frances Noela Lippett for the proposal, which would allow residential development to occur in a park residential area did not justify the approval of the development application.

## Case

The court was required to determine the development application under section 3.5.14A (decision if application under s3.1.6 requires assessment) of the IPA. This relevantly included a consideration of the planning merits of the proposal, including issues of character and amenity, need, compromising of future planning for the area, efficient infrastructure provision, the effect of the *South East Queensland Regional Plan 2009-2031* (**SEQRP**) and consistency with the planning scheme.

## Facts

### General

The appellants owned two parcels of land totalling approximately 17,000m$^2$ in area, and sought a preliminary approval allowing them to potentially create 20 residential lots. The council did not decide the development application within the prescribed timeframe, placing the appellants in a position to commence the appeal against a deemed refusal.

It was noted that the level of assessment for the uses (being detached house, associated unit and home business) for which the preliminary approval was sought on the use codes was not varied (as those uses would be consistent uses if compliant with the applicable codes in the Park Residential Zone, the Residential A Zone and the Special Residential Zone and self-assessable, code assessable or impact assessable in the relevant zone according to the same criteria and irrespective of the zoning the same use code). However, whilst the uses of the subject site might be unchanged there was a very considerable difference between a total of two detached dwellings exploiting the use.

The court noted that the respondent's inability to determine the application, perhaps due to the weight of submissions, had led to its firm opposition to the development in the appeal.

Unitywater was the authority responsible for water supply and sewerage services for the area, and was inclined to support the proposal as:

- insofar as water supply was concerned, water mains would be upgraded at the appellants' expense;
- insofar as sewerage was concerned, the actual experience in the relevant catchment indicated that the proposal could be accommodated despite the existing sewerage infrastructure, having already reached its theoretical capacity.

The prematurity of the application, and its impact on future planning for the area was considered by the court at [13]:

> *Although the outcome here will not, as a matter of law, constitute a precedent, in practical terms, as was conceded, approval of the proposal will open the way for similar development throughout the enclave...The present situation is one in which, effectively, the planning future of the entire enclave, which would logically be considered as a whole, is up for determination.*

The question of need for residential A-type allotments in the small community of Samford Village, where land was limited and the character of the village could be compromised by large numbers of new allotments, was considered in context, with the court stating at 20 that *"this may be a case of a need which simply cannot be satisfied from the constrained resource available without unacceptable harm to that resource"*.

### Decision under section 3.5.14A of the IPA

In working through section 3.5.14A(2) (decision if application under s3.1.6 requires assessment) of the IPA, the court discussed the following:

- Whether any desired environmental outcomes were compromised by the proposal, with the court preferring the respondents' arguments that the DEOs concerning amenity and community identity were at risk in the enclave if the proposal was carried out.
- Whether it was necessary to compromise the achievement of any DEOs in order to further the outcomes of the SEQRP, which was not reflected in the planning scheme. The SEQRP was not considered to contain any outcomes which justified overriding the relevant DEOs. In discussion of the SEQRP, the court noted that the relevant provisions of the SEQRP were not opposed to the development proposal, but rather that they left the establishment and refinement of urban planning to local government planning schemes.

The court also considered it necessary to identify whether there were other conflicts with the planning scheme, which it accepted that there were, mostly due to the urban density and scale of the development.

The court also accepted the following point regarding the status of the planning scheme made in the planners' joint expert report, quoted at [23] that *"if the current properly held policy of the planning authorities is to be altered this should be the result of an appropriate planning process that may form part of the planning scheme review…there is no need to deviate from the current planning policies prior to the completion of those processes"*.

## Decision

The court expressed some concern about the capacity for infrastructure servicing, noting that the reason why further capacity seemed to exist despite theoretically being reached was somewhat unexplained. In any event, the court considered that the restrictions on capacity would exacerbate the issue of prejudicing the planning for the Samford Village.

On balance, the prejudicial effect on planning, along with the adverse impacts on character and amenity, conflict with the planning scheme, and a lack of sufficient grounds to justify the development application were determinative for the court.

## Held

The appeal should be dismissed.

# Can non-compliance with public notification be excused?

Ronald Yuen | Jonathan Evans

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Multus v Rockhampton Regional Council & Ors* [2012] QPEC 85 heard before Long SC DCJ**

March 2013

## Executive Summary

This case involved the Planning and Environment Court hearing the application commenced by Multus Pty Ltd as trustee for the Multus Trust trading as Maxime in respect of a development application lodged with the Rockhampton Regional Council seeking various declarations and orders excusing the non-compliance with the public notification under the *Integrated Planning Act 1997* (**IPA**). The court determined to excuse the non-compliance.

## Facts

On 9 October 2012 the applicant, Multus Pty Ltd, filed an application in the court seeking various declarations and orders which included:

- a declaration that the Chief Executive of the transmission entity Queensland Electricity Transmission Corporation Limited trading as Powerlink Queensland, was not a referral agency for the development application;
- an order that the applicant's failure to notify the development application for the required notification period of 30 business days be excused;
- an order that the applicant's premature commencement of the notification stage be excused.

On 16 October 2012, the court ordered that the application and the merits appeal (no. D178/2011) in respect of the applicant's proposed development be heard together as the orders sought in the application were necessary in order to make the merits appeal competent.

The council and the Chief Executive of Department of Transport and Main Roads were the only parties which appeared at the hearing of the application and neither of them sought to actively oppose it.

The court summarised the following aspects of non-compliance to which the orders sought on the application were directed:

1. *public notification of the development application commenced prior to the start of the notification stage of IDAS. That is, the applicant had not completed its responses to Information Requests, or had not provided copies of those responses, to council prior to commencement of public notification;*
2. *public notification was not carried out for the required 30 business day period;*
3. *the development application lapsed as a consequence of non-compliance with notification requirements;*
4. *signage on the land identified (for a brief period) different dates for the closing of submissions;*
5. *material which was available for the public to inspect at council during the notification period was incomplete, as it did not include all of the referral agencies' Information Requests, and the applicant's' responses to them; and*
6. *the development application required referral to Powerlink as an advice agency, but was not referred to that entity.*

## Decision

### The excusal power

The court noted the power to excuse non-compliance with a provision of the IPA was found in section 820 (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009* (**SPA**), as the development application was lodged prior to the commencement of the SPA, the merits appeal being required to

be heard and decided under IPA. The court, by reference to the decision in *Maryborough Investments v Fraser Coast Regional Council* [2010] QPEC 113, noted the discretionary power under section 820 (Proceedings for particular declarations and appeals) of the SPA was "broad and untrammelled" and that the explanatory notes of the SPA made express reference to "preserving rights to hearings notwithstanding technicalities concerning processes".

The court further noted that, if a non-compliance was not excused, a development would need to be renewed at significant cost, delay and inconvenience to the parties and that where the non-compliance was in reality an administrative error which, in the end, no party was prejudiced by it and was of the nature of technical oversight, the exercise of discretion relieving non-compliance would be appropriate.

## Premature commencement of public notification

The court first noted that the "notification period" to which sections 3.4.3(3) (When can notification stage start) and 3.4.5(a) (Notification period for applications) of the IPA commenced on 5 February 2010.

However, due to an oversight, the Chief Executive of the Department of Transport and Main Roads was not included as a concurrence agency for the development application until 16 February 2010. The department subsequently made an information request on 19 February 2010 and a response was provided on 5 September 2010.

As the information and referral stage had not ended in accordance with section 3.3.20 (When does information and referral stage end) of the IPA, the public notification of the development application commenced earlier than stipulated by section 3.4.3(3) (When can notification stage start) of the IPA. Further, the material which was available for the public to inspect during the publication notification of the development application was not complete as it did not include the department's information request or the applicant's response.

The court determined to exercise the discretion to excuse this aspect of non-compliance, having regard to the following:

- the information request from the council and other referral agencies, except the department and the applicant's responses were all available on the council's file during the public notification period of the development application;
- the material which was available to potential submitters included a traffic engineering report forming part of the applicant's response to the respondent's information request;
- the department approved the development application subject to conditions;
- the non-compliance did not appear to have an adverse effect on the referral agencies or the council's decision-making role;
- traffic engineering issues were raised by submitters and parties in the appeal had an entitlement to raise traffic engineering issues if it proceeded to the merits appeal.

## Shorter notification period

As the subject land contained or shared a common boundary with a "wetland" at its western boundary, the development application triggered a 30 business day notification period. However, the public notification of the development application only went for 14 business days.

The court determined to exercise the discretion to excuse this aspect of non-compliance, having regard to a range of matters, which included:

- any person sufficiently interested in the proposed development, or the wetland, was unlikely to have been misled, given the existence of the wetland was identified in the development application material as well as the Department of Environment and Resource Management's (**DERM**) information request;
- submissions lodged with the respondent expressly referred to concerns about impacts on the adjoining creek;
- there was no evidence of any unacceptable impact of the proposed development on the wetland and DERM provided suggested conditions of approval as part of its agency response;
- neither the respondent nor the referral agencies had been adversely affected by the non-compliance.

## Alleged lapse of the development application

It was contended by the council that, had the referral to the department been taken into consideration, the development application lapsed on or about 7 October 2010 as public notification of the development application should have commenced within 20 business days after the applicant's response to the department's information request.

The court noted that this aspect of non-compliance arose from the non-compliance relating to the referral to the department and concluded that this aspect of non-compliance was merely technical and considered it appropriate that it be excused.

### Different dates for the closing of submissions on notices on the land

It was submitted by the council that the notice on the subject land contained different dates for the closing of submissions. The notice initially identified the closing date for submissions as 17 February 2010 but was subsequently amended to read 24 February 2010, to align with the closing date identified in the notice in the newspaper and the notice on the subject land remained in that condition until removed on 26 February 2010.

The court did not consider, to the extent that it might amount to non-compliance, any person could have been materially affected by it. Further, given the determination on the non-compliance relating to the "shortened" notification period, the court believed excusal for any non-compliance on this account would be appropriate.

### Powerlink as an advice agency

The council contended that the development application required referral to Powerlink as an advice agency, but the development application was not referred to that entity.

The court noted that it was not necessary or in fact possible on the materials to categorically resolve the issue on whether a referral to Powerlink was required. However, the court observed that Powerlink corresponded with the council by letter dated 12 February 2010, noting that its letter be treated as a properly made submission and that it did not oppose the proposed development based on conditions identified by it.

The court accepted the solution proposed by the applicant being that this issue be corrected by declaration that Powerlink be treated as a submitter, with the necessary consequential orders to enable protection of Powerlink's rights of participation in the appeal.

### Discretionary considerations

The court observed that, when considering whether relief should be granted, the excusatory power under section 820 (Proceedings for particular declarations and appeals) of the SPA was considerably broader than that which previously applied under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA.

Whilst there were various aspects of non-compliance, the court noted that many of them were technical in nature and some arose as a consequence of some other non-compliance and amongst all, the most significant aspect was the shortened notification period.

Relevant to the issue of public notification, His Honour noted that the proposed development was the subject of a "high degree of community awareness". In light of this and in the absence of any evidence of prejudice to any interest, the court considered it appropriate to grant the relief, subject to further determination of the precise form of the orders.

## Held

The application was allowed.

Colin Biggers & Paisley

# Costs, natural justice and cartel provisions

Ronald Yuen | Edith Graveson

**This article discusses the decision of the Queensland Court of Appeal in the matter of *Littleford v Gold Coast City Council & Anor; Moon v Gold Coast City Council & Anor* [2013] QCA 4 heard before Fraser and White JJA and Douglas J**

March 2013

## Executive Summary

This case involved applications for leave to appeal against orders made in the Planning and Environment Court (**P&E Court**) directing that costs ordered against Brian Littleford and Bruce Moon (**applicants**) respectively be assessed by a court appointed costs assessor on the grounds of natural justice and price fixing (and a cartel arrangement). The applicants also applied for an extension of time for filing the applications for leave to appeal. The Court of Appeal determined to refuse the applicants' applications.

## Case

This case involved two jointly heard applications for leave to appeal against orders made by the P&E Court directing that costs ordered against each of the applicants be assessed by a court appointed costs assessor. The applicants also applied for an extension of time for filing the applications for leave to appeal.

## Facts

In March 2010, a costs order was made by the P&E Court in favour of the Gold Coast City Council and National Trust, Queensland (trading as Currumbin Wildlife Sanctuary) against each of the applicants in the court appeal (no. 71/08 and 186/08).

In late September 2010, the applicants filed a notice of objection to the council's cost statement served on each of them in early September pursuant to rule 706 (1) of the *Uniform Civil Procedure Rules 1999* (**UCPR**), but the objection was incomplete.

In December 2010, the council applied for orders appointing a costs assessor and for the costs assessor to undertake the costs assessment pursuant to rules 710 and 713 of the UCPR. The council's application was heard by the P&E Court on 28 January 2011 where the applicants sought and were granted an extension of time to complete their objections to 30 April 2011.

In January 2011, the council served costs statements on the applicants. In early February 2011, the applicants served a notice of objection in relation to two of the four costs statements.

In May 2011, the council sought the applicants' agreement to the appointment of a costs assessor. The applicants responded in early June 2011 indicating that it was premature to appoint a costs assessor.

In late June 2011, the council applied for orders appointing a costs assessor and that its costs against the applicants be assessed.

Both of the council's and Currumbin Wildlife Sanctuary's applications for costs assessment were heard by the P&E Court on 29 July 2011 and 7 November 2011 where on each occasion, the applicants repeatedly sought an extension of time to complete their objections and were granted an extension.

On 14 December 2011, the council's and Currumbin Wildlife Sanctuary's applications were again heard by the P&E Court. The applicants' objections were not completed at that time and affidavit material was relied upon, which provided that *"it would not be before August 2012 that he would be in a position to complete the assessment in full and make an offer to each party"*.

The primary judge in the P&E Court heard the arguments about the reasons for the delay and noted that *"he was 'going to put a stop to it' that 'we've been having this argument back and forwards for a year now' and 'we're no further advanced', and that 'I have no confidence that it'd be resolved… were I to give you another couple of months'"*. The primary judge further explained that *"little would be achieved by giving the appellants further time to specify their objections"* and therefore, ordered that the council's and Currumbin Wildlife Sanctuary's costs be assessed and that the nominated costs assessor carry out the costs assessment. In addition, the primary judge made orders to the effect that the applicants be afforded an opportunity of making further objections to the costs statements.

The applicants made an application to the Court of Appeal for leave to appeal against the orders made by the primary judge in the P&E Court on the following grounds:

- the applicants were denied natural justice by the orders of the P&E Court on 14 December 2011 (**First Ground**);
- the orders for the costs assessment and the appointment of a costs assessor "erred by endorsing price fixing and a cartel arrangement in contradiction of" the *Competition Policy Reform (Queensland) Act 1996* (**Second Ground**).

The applicants also applied for an extension of time for filing the applications for leave to appeal.

# Decision

## Denial of natural justice

In respect of the First Ground, the applicants contended that the order for costs assessment made by the primary judge in the P&E Court was contrary to their reasonable expectation, based on representations purportedly made by the primary judge, particularly those at the hearing on 7 November 2011, that such an order would not be made without further notice and the making of the order denied them an adequate opportunity to respond.

The Court of Appeal noted that *"the primary judge's orders allowing successive adjournments and the order extending the time yet further at the last hearing were generous to the Applicants"*.

The Court of Appeal further noted that ample opportunity was given to the applicants to argue the orders sought by the council and Currumbin Wildlife Sanctuary.

Accordingly, it was determined that the applicants were not denied natural justice by the making of the order by the primary judge on 14 December 2011 and the First Ground could not succeed.

## Contrary to the Competition Act

In respect of the Second Ground, the applicants contended that:

- schedule 2 to the UCPR, which fixed costs for specific items of work in relation to litigation in the District Court, was a cartel provision within the meaning of section 44ZZRD of the Competition Code as *"it was an arrangement or understanding made between the Court and solicitors whose clients' entitlement to recover costs were affected by Sch 2 of UCPR which had the purpose or effect of fixing, controlling or maintaining prices"*;
- schedule 2 was also prohibited by sections 45 and 45A of the Competition Code.

The Court of Appeal rejected the applicants' contention that schedule 2 to the UCPR constituted *"an anti-competitive arrangement or understanding between the Court and solicitors"*. The Court of Appeal further noted that there was no provision in schedule 2 which would suggest a purpose or effect of limiting competition between legal practitioners for litigious work. Instead, in the context of orders for costs assessment, schedule 2 would operate to limit the amount of money a beneficiary of an order, by way of a partial indemnity against the beneficiary's liability to pay costs to its lawyer, could recover from the other party.

The Court of Appeal also observed that the applicants raised the matters associated with the Second Ground for the first time. Accordingly, it was determined that the Second Ground could not succeed.

Whilst it was not necessary to decide the question, which was disputed, whether an extension of time was required for the applicants' applications for leave to appeal, given the refusal of both the First Ground and Second Ground, it was determined that this part of the applicants' applications should also be refused.

# Held

- The applications for an extension of time for filing the applications for leave to appeal be refused.
- The applications for leave to appeal be refused.
- The applicants pay the council's and the Currumbin Wildlife Sanctuary's costs of the applications on the standard basis.

Colin Biggers & Paisley

# Minor change of development application

Ronald Yuen

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Canungra Commercial Pty Ltd v Scenic Rim Regional Council & Ors* [2013] QPEC 1 heard before Andrews SC DCJ**

April 2013

## Executive Summary

In this case the Planning and Environment Court was required to consider whether the proposed change involving a new parcel of land not in the original development application was a minor change.

## Case

This hearing involved two proceedings being:

1. An appeal by the applicant, Canungra Commercial Pty Ltd against conditions imposed on a development approval for a material change of use for a shopping centre (business use) issued by Scenic Rim Regional Council which included submitters, being Tuan Nguyen, Anne Nguyen, and Canungra Foodworks Pty Ltd; and
2. An appeal by Tuan Nguyen, Anne Nyugen, Sien Van Nguyen and Thao Phuong Thi Pham against an approval for a material change of use for a shopping centre (business use) issued by the council,

in respect of land located at 10-16 Finch Road, Canungra.

## Facts

On 27 August 2009, the appellant's consultants lodged a development application for a material change of use for a shopping centre (business use).

On 27 July 2010, the council approved the application subject to conditions.

Consequently, the appellant commenced the conditions appeal (Appeal No. 2465 of 2010) and the submitters commenced the submitter appeal (Appeal No. 813 of 2011).

On 17 June 2011, the court ordered both appeals be heard together.

The appellant, after discussions with the council, wished to amend the original proposal which involved the inclusion of a 3 metre wide footpath providing additional pedestrian access from the proposed development to Christie Street. The footpath would be on property which had not been part of the land and more properly described as Lot 8 on RP231328.

Lot 8 at the relevant time carried overland flow from the upstream catchment on the southern side of Christie Street, which passed through culverts under Christie Street. It was proposed that 3 x 1350mm underground pipes be constructed to carry water from the Christie Street culverts through Lot 8 to the pipes proposed under the shopping centre on the land and then to discharge to the north into Canungra Creek. The 3 proposed pipes under Lot 8 would be accompanied by infilling of an open grassed drainage channel on Lot 8 and the construction of the footpath with landscaping.

The appellant, with the support of the council, sought declarations from the court that the proposed change was a minor change within the meaning of section 350 (Meaning of *minor change*) of the *Sustainable Planning Act 2009* (**SPA**).

The issue for consideration by the court was whether the proposed change would result in a *"substantially different development"*, having regard to whether the change *"introduce[d] new impacts or increase[d] the severity of known impacts"* and the fact that it applied to a new parcel of land.

The submitters submitted that the proposed change caused traffic impact and loss of car parks, loss of sensitive vegetation, pedestrian security issue, pedestrian safety issue from stormwater on the proposed footpath and tailwater impact.

## Decision

The court noted, in the context of determining whether a change to development application resulted in a *"substantially different development"*, it would be appropriate to have regard to the Statutory Guideline 06/09 (Substantially different development when changing applications and approvals).

However, the court, by reference to *Heritage Properties Pty Ltd v Redland City Council* (2010) QPELR 510 noted that:

> *... the list provided in the guideline is a list of those changes which "may" result in a substantially different development. It is not the case that a change of the kind there listed is necessarily to be judged to be substantially different. It may also be noted that the list is not intended to be exhaustive. There may be other changes not listed in the guideline which, in a particular case, can be judged to be more than minor, in that it involves a substantially different development. It may also be noted that the focus of the list in the guideline is, in some respects, on changes that would involve new, additional or increased impacts, rather than on changes which tend to ameliorate impacts… It has often been said that the question of whether a development constitutes a minor change ought to be considered broadly and fairly. In my view, that same approach is still appropriate under the definition in the SPA.*

After having heard the evidence of the experts (some of which involved lengthy cross-examination) and a member of the owner of Lot 8, the court's findings in respect of the issues raised by the submitters were as follows:

- traffic impact and loss of car parks – the new access point and loss of car parks would not create an adverse impact of any significance;
- loss of sensitive vegetation – the proposed change would not create an adverse impact of any significance with respect to vegetation;
- pedestrian security – there was insufficient security impact from the pedestrian use of the proposed footpath to result in a substantially different development;
- pedestrian safety from stormwater on the proposed footpath – there was insufficient risk to pedestrian safety from the risk of overland flow velocities on the proposed footpath to result in a substantially different development;
- tailwater impact – the proposed change would not create any material adverse impact from changed water flows.

The court held that the issue in question was whether the proposed change would result in a substantially different development and not whether there would be a consequence which had significance (such as its impact on Lot 8).

Given that the proposed change did not create adverse traffic, vegetation, pedestrian safety or stormwater impacts and further, the appellant still proposed to develop a shopping centre of the same scale, gross floor area, retail offering and style and did not propose to add new uses or new shopping facilities or offerings, by looking at it broadly and fairly, the proposed change would not result in a "substantially different development".

## Held

- It was declared that the proposed change was only a minor change within the meaning of the term as used in section 350 (Meaning of *minor change*) of the SPA.
- The appeals be heard and determined on the basis of the amended plan the subject of the proposed change.
- Costs be reserved.

Colin Biggers & Paisley

# Excusal of non-compliance with statutory requirements

Ronald Yuen | Elton Morais

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Morgan & Griffin Pty Ltd v Fraser Coast Regional Council & Parmac Investment Pty Ltd* [2013] QPEC 2 heard before Jones DCJ**

April 2013

## Executive Summary

This case involved the Planning and Environment Court hearing an application commenced by a commercial competitor Morgan & Griffin Pty Ltd challenging the lawfulness of a preliminary approval granted by the Fraser Coast Regional Council in favour of Parmac Investments Pty Ltd and the status of, and level of assessment for, a related development application lodged by Parmac Investments. The court determined to refuse the application.

## Case

This case involved the court hearing an application commenced by the applicant challenging the lawfulness of a preliminary approval granted by the council in favour of Parmac Investments and the status of, and level of assessment for, a related development application lodged by Parmac Investments.

## Facts

On 13 July 2011, Parmac Investments lodged a development application with the council for a preliminary approval for material change of use overriding the council's planning scheme for "commercial uses" on land located at Torquay. On 13 February 2012, the council issued a decision notice approving the development application.

On 21 August 2012, Parmac Investments lodged a related development application with the council for a development permit for a material change of use for a shopping centre on the land.

On 23 August 2012, the council issued an acknowledgement notice stating that the related development application was code assessable and that the Department of Transport and Main Roads was a concurrence agency. On 14 December 2012, the council issued a decision notice approving the related development application.

On 11 September 2012 (some three months prior to approving the related development application) the applicant filed an application in the court and commenced these proceedings.

### Issues

The applicant raised three separate issues in respect of the preliminary approval and two associated issues in respect of the related development application.

In respect of the issues associated with the preliminary approval, the court summarised them as follows:

- "*whether the first respondent had the power to approve the application for a preliminary approval given the failure to refer it to the relevant administering authority under the Environmental Protection Act 1994 (EPA) as a concurrence agency, namely the Department of Environment and Heritage Protection (DEHP)*";
- "*whether the preliminary approval exceeded the scope of the application by approving a shopping centre in circumstances where, on the face of the application, the Parmac Investments sought approval for "commercial uses*"; and
- "*whether there was a failure on the part of the Parmac Investments to provide sufficient public notification of the application*".

In relation to the two issues associated with the related development application, one was not pursued by the applicant and the other one was decided against the applicant (but the court did not set out any reasons).

# Decision

## Referral issue

The applicant contended that the preliminary approval was invalid and of no effect as Parmac Investments:

- failed to refer the development application to the Department of Environment and Heritage Protection (**DEHP**) in accordance with section 272 (Applicant gives material to referral agency) of the *Sustainable Planning Act 2009* (**SPA**);
- did not avail itself of any of the opportunities provided under SPA to rectify the non-compliance and therefore the development application had lapsed pursuant to section 273(1) (Lapsing of application if material not given) of the SPA.

The court was of the view that, on a proper construction, the development application was required to be referred to the DEHP and therefore, concluded that the development application had lapsed.

Consequently, the relevant question was whether the non-compliance could be excused by the court pursuant to section 440 (How court may deal with matters involving non-compliance) of the SPA.

In essence, the applicant submitted that, by reference to the High Court decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 and other authorities including *Queensland Cement Queensland v United Global Cement Pty Ltd & Ors* (1999) QPELR 167, in circumstances where the court was concerned with a decision made beyond power (such as the decision of the council giving the preliminary approval), the discretionary powers of the court pursuant to sections 440 (How court may deal with matters involving non-compliance) and 456 (Court may make declarations and orders) of the SPA should be exercised strictly or narrowly.

In considering the applicant's proposition, the court had regard to a number of decisions given after Queensland Cement in the context of the operation of section 4.1.5A (How court may deal with matters involving substantial compliance) of the *Integrated Planning Act 1997* (**IPA**) and the circumstances in which it might be exercised.

The court noted the remarks by Senior Judge Skoien in *Metrostar Pty Ltd v Gold Coast City Council* (2007) 2 Qd R 45 that:

> *Section 4.1.5A should be given a wide interpretation, not for the purposes of driving a horse and cart through the requirements of IPA, but for the purpose of allowing reason to prevail when IPA or another relevant Act has been breached. To put the matter very broadly initially one asks, 'what was the breach?' then, most importantly, 'what are the consequences of the breach?' and because the law should not allow the deceitful or the greedy to profit from a breach, it is relevant to ask whether it was a wilful breach, why it was done, whether there would be a material profit from the breach, whether there has been any pain suffered by the developer because of the breach and, of course, would the exercise of the discretion in favour of the developer be likely to shut out some submitter with a legitimate case to put.*

The court further noted that:

> *…in cases such as these involving referral/concurrence agencies, it would also be necessary to enquire whether the broader public interests might have been prejudiced by the non-compliance.*

By reference to some of the important statements in *Stevenson Group Investments Pty Ltd v Nunn & Ors* [2012] QCA 351 (a decision of which was heavily relied upon by Parmac Investments) and having regard to excusatory powers of the court under section 440 (How court may deal with matters involving non-compliance) of the SPA (which the court noted were even wider than they were under the IPA), the court concluded that it was not a purpose of the SPA that a breach such as the non-compliance would necessarily result in invalidity.

The court was satisfied that it was appropriate to exercise its discretion given under section 440 (How court may deal with matters involving non-compliance) to excuse the non-compliance, particularly where:

- Parmac Investments had not acted in a deceitful or even reckless manner;
- the development application was supported by the council who was responsible for orderly development within its local government area;
- no genuine prejudice had been caused to the applicant and there was no evidence of prejudice to DEHP or the public;
- had the non-compliance not been excused the development application would have to start again in which case, it would unnecessarily cause Parmac Investments additional costs and further delay in the provision of services and amenities for which a demonstrated need had been shown to exist.

## Use Issue

The applicant contended that the council exceeded its jurisdiction under section 324(1) (Decisions generally) of the SPA in granting the preliminary approval which included an approval of a shopping centre which was not applied for.

Whilst, as the court observed, the public notices and the development application could have been couched in clearer terms, the court dismissed the applicant's contention, in particular having regard to the following matters:

- given the term 'shopping centre' was not a defined use in the council's planning scheme, Parmac Investments used 'commercial uses' in the development application, which was an identified use under the scheme; and
- there could be no doubt that the development application was for a shopping centre on any objective reading of the development application (comprising the relevant IDAS forms and accompanying planning report).

## Public notification issue

The applicant contended that the public notification process was deficient for two reasons being that it did not:

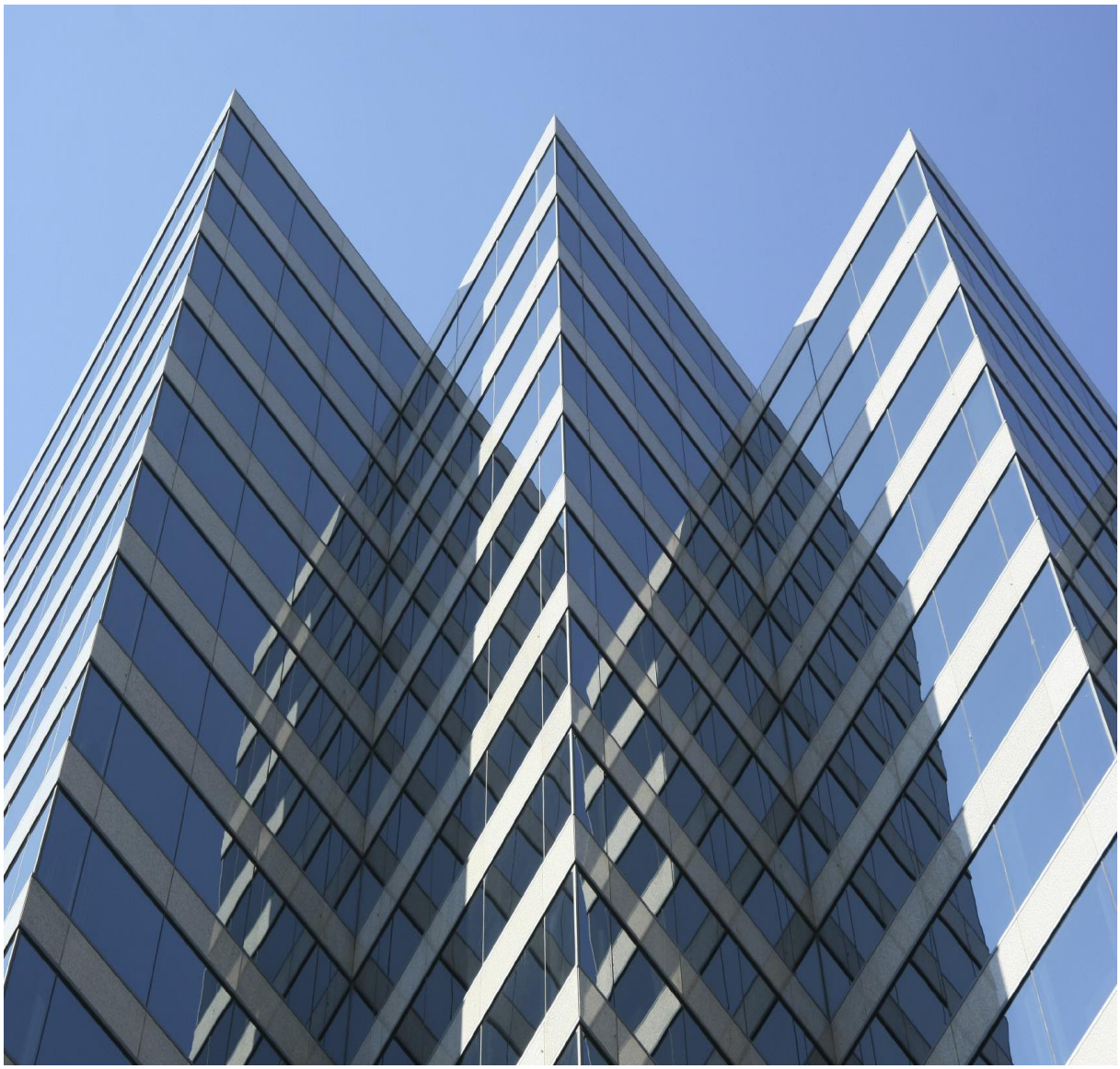
- identify the nature, scale and density of the development the subject of the development application; and
- properly identify the eventual use of the land as a shopping centre, by its failure to use the words "shopping centre" to describe the development.

The court acknowledged that the public notices did not specifically refer to the land being developed as a shopping centre. However, the court, by reference to *Rathera Pty Ltd v Gold Coast City Council & Ors* [2000] QCA 506, dismissed the applicant's contention having regard to a number of matters which included:

- it was made clear that a large commercial development was proposed which would cover a significant portion of the land;
- the development application was made available for inspection at the council's office and the details of the development could be learnt from an inspection of the development application;
- details of the development in terms of its nature, scale and intensity were identified in the planning report accompanying the development application and any objective reading of the report would make it abundantly clear that the proposed development was for a shopping centre designed to accommodate numerous and a variety of commercial/retail activities;
- the public notices provided sufficient opportunity for interested members of the public to make submissions and the opportunity to secure the right to appeal against the council's decision;
- as submitted by Parmac Investments, it was highly unlikely that the applicant, who was a commercial competitor, would have been confused or misled by the public notices.

# Held

- The application be refused.
- Any application for costs be made on or before 13 March 2013 and be accompanied by the applicant's written submissions on costs.
- Any submissions in reply be delivered on or before 27 March 2013.



Colin Biggers & Paisley

# Blow torch applied to land valuation system in NSW

Anthony Perkins

**This article explores the systemic failure to provide transparency in land valuation methodologies in NSW, identified through a parliamentary inquiry**

May 2013

## Executive Summary

Submissions received by the Parliamentary Land Valuation Inquiry have highlighted a systemic failure to provide transparency around land valuation methodologies and to treat landholders with respect, dignity and fairness.

## Inquiry's intention to conduct comprehensive overhaul of land valuation system

The chairman of the NSW land valuation system inquiry, Mr Matt Kean MP, was reported in January 2013 to have said: "I am determined to apply the blow torch to the entire [valuation] process in order to safeguard the public's confidence." (See *Millions may have overpaid land tax, rates*, Sean Nicholls, Sydney Morning Herald, 28 January 2013).

Mr Kean has now well and truly delivered on that promise.

The final report in the inquiry was tabled in Parliament on 2 May 2013 after the inquiry considered more than 130 submissions including a submission made by Colin Biggers & Paisley. (Please see the executive summary and recommendations of the inquiry report for more information.)

Some of the "blow torch" changes recommended in the report might be considered radical, given the perhaps natural reluctance of Parliament to tinker with the basis on which land tax and council rates are assessed.

## Key recommendations of the Land Valuation Inquiry

Some of the key recommendations of the Land Valuation Inquiry are summarised below.

- The office of the Valuer General of NSW should be abolished and a new independent Valuation Commission (with three Valuation Commissioners) established.
- The new Valuation Commission should adopt a rules based approach including, importantly, issuing public guidelines on appropriate valuation methodologies to be applied by valuers for different types of land.
- The circumstances in which landowners can seek a review of land values should be expanded and should include the ability to seek a review of a Valuation Commissioner's decision from the Administrative Decisions Tribunal (to be renamed the NSW Civil and Administrative Tribunal from 1 January 2014), in addition to the Land & Environment Court.
- A new valuation review mechanism and compulsory acquisition value process should be introduced. There are various recommendations made to improve the fairness of those processes to landowners.
- Council rates should be determined on the average of the last three years' land valuations to dampen fluctuations in land values, in a similar way to the current averaging mechanism used to calculate land tax.
- In response to a specific submission made by Colin Biggers & Paisley, the Attorney General should consider whether the Land & Environment Court should be vested with jurisdiction to grant administrative law remedies in land valuation appeals, particularly in light of the decision in *Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v The Valuer General (No. 2)* [2011] NSWLEC 34.

It is expected that Parliament will consider the report shortly in the context of the introduction of a new land value based fire and emergency services levy.

# Filling in the watercourse

Ronald Yuen

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Logan City Council v Poh & Anor* [2013] QPEC 003 heard before Searles DCJ**

May 2013

## Executive Summary

This case involved an application by the Logan City Council to the Planning and Environment Court for a declaration that Kim Quan Poh and Maria Ellen Poh have carried out development (filling and excavation) in excess of the prescribed amount under the *Beaudesert Shire Planning Scheme 2007*, without a development permit. The Planning and Environment Court held that a development offence had occurred and ordered remedial and rehabilitation works be undertaken.

## Facts

The council contended that between 2010 and 2012, the respondents carried out filling and excavation works, without obtaining the necessary development permit for operational work on land located at 2397–2407 Waterford Tamborine Road, Tamborine and more particularly described as Lot 6 on RP 135397.

The council called expert evidence from Mr Neil Collins, a hydraulic engineer. Mr Collins analysed council's aerial laser survey data from 2009 against the site survey data from December 2012 and determined that an amount of 2,790m$^3$ of fill had been imported onto the land. Mr Collins concluded that the filling represented a significant loss of floodplain storage but that the filling on the land was unlikely to have a significant adverse impact of flooding beyond the land. However, Mr Collins recognised the cumulative potential to adversely impact on flooding elsewhere in the floodplain.

The respondents put forward the following defences to the council's contention:

- that Mr Poh honestly believed that the filling undertaken by him on the land was covered by a Riverine Protection Permit issued by the State;
- the filling and excavation was carried out in the watercourse and was beyond the jurisdiction of the council to regulate;
- the filling and excavation was lawful because it was associated with an existing lawful use, namely agriculture;
- the filling and excavation was protected by schedule 4 (Development that cannot be declared to be development of a particular type – Act, section 232(2)) of the *Sustainable Planning Regulation 2009*, being exempt from being made assessable by a Planning Scheme;
- that the respondents would suffer potential financial hardship if the orders sought by the council were made.

## Decision

### Development offence

Firstly, the court accepted:

- that the carrying out of the filling and excavation by the respondents was assessable development;
- the evidence of the council's expert, Mr Collins and in particular, recognising the potential cumulative adverse impact and the importance of having balanced cut and fill which would maintain floodplain storage.

Secondly, the court accepted the council's arguments against the respondents contentions in respect of the necessity for the respondents to obtain a development permit prior to carrying out the filling or excavation, which included:

- The alleged honest belief held by the respondents that the Riverine Protection Permit dated 13 February 2002 authorised the filling or excavation constituted a mistake as to the law and not as to a fact. As any defence under section 24 (Mistake of fact) of the *Criminal Code Act 1899* was only available for a mistake of fact, the respondents would not be able to rely on it as a defence for this action.
- The respondents bore the onus of establishing any asserted existing lawful use which if demonstrated, would negate the necessity for a development permit for the filling and excavation work undertaken. However, the respondents failed to prove the existence of any lawful use.

- The council was the appropriate *assessment manager* for development applications in respect of the filling and excavation work undertaken, including the work within the watercourse of Clutha Creek. As indicated above, given that the work was assessable development, the respondents were obliged to submit a development application to the council and obtain an approval, but failed to do so.

### Enforcement order sought by the council

In exercising his discretion when determining whether an enforcement order should be made:

- The court dismissed the respondent's contention that an honest belief was held that the filling of the land was authorised by law, particularly having regard to the number of repeated warnings given to the respondents by the council in relation to the filling and excavation work;
- The court recognised the importance of community interest in ensuring compliance with the law and did not consider the potential financial hardship on the respondents would outweigh such importance.

The court further noted that the respondents blatantly breached the law despite being given numerous opportunities to correct their misconduct.

## Held

The court made the following orders:

- A declaration that the respondents had committed a development offence pursuant to section 578 (Carrying out assessable development without permit) of the SPA, in that they have undertaken or caused to be undertaken, operational work, namely filling or excavation on the land without an effective development permit.
- An enforcement order pursuant to section 604 (Making enforcement order) of the SPA that the respondents, by themselves, their servants or agents:
  - cease all filling and excavation work on the land;
  - be restrained from bringing onto the land soil and other materials used for the purpose of filling or excavating the land, without an effective development permit;
  - remove all fill that was introduced, for which there was no effective development permit;
  - carry out such remediation and rehabilitation works as necessary to restore the land as close as practicable to the condition it was in immediately prior to the filling or excavation taking place.

# Fetter on future exercise of council's discretion

Ronald Yuen | Phoebe Bishop

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *BM Carr Holdings atf The Carr Farming Trust v Southern Downs Regional Council & Anor* [2013] QPEC 4 heard before Judge Searles DCJ**

May 2013

## Executive Summary

This case involved two applications by BM Carr Holdings Pty Ltd as trustee for the Carr Farming Trust following on from judgment delivered on 14 November 2012 for orders that (a) a condition, from the otherwise agreed conditions package with the Southern Downs Regional Council be deleted on the basis that it was void and of no effect as constituting a fetter on the future exercise of the council's discretion, and that (b) certain reserved costs be paid by the council. The Planning and Environment Court found that the condition in its entirety was void as a fetter on the future exercise of the council's discretion and invited the parties to accept an alternative wording of the condition. As to the application for costs, the court ordered the council to pay the appellant's costs on a standard basis of its appearances at three of the four directions hearings.

## Case

The issues before the court were whether a condition of approval was void and of no effect as constituting a fetter on the future exercise of the council's discretion and whether the council should pay the appellant's costs of and incidental to its appearances at several directions hearings.

## Facts

The appellant brought two applications before the court following on from judgment delivered on 14 November 2012 and sought the following orders:

- Condition 4 of the conditions package otherwise agreed by the appellant and the council be deleted on the basis that it was void and of no effect as constituting a fetter on the future exercise of the council's discretion; and
- the appellant's costs of and incidental to its appearances at directions hearings on 21 September 2012, 26 September 2012, 3 October 2012 and 20 December 2012 be paid by the council.

Condition 4 of the conditions package provided:

> *Those parts of lots 1 and 2 on RP 36824, Lot 1238 on CP M34534 and Lot 1 on SP 214513 within the 2.5 odour unit contour as shown on Figure 8 of the Second Joint Report of the Air Quality Experts dated 7 September 2012 (all within a 2.5 odour unit contour determined from time to time in accordance with the Queensland Government Guideline Odour Impact Assessment from Developments as amended or any subsequent document prepared for a similar purpose) are to be maintained as buffers to the approved development on pads 1, 4 and 5 ("the Development Buffer"). No dwelling other than a caretaker residence is to be developed in the Development Buffer.*

The appellant argued that the condition was void and of no effect because it would place an unlawful fetter on the council's discretion with respect to all future development applications for the lots listed in the condition. In support of its argument the appellant relied upon *Hall-Bowden v Pine River Shire Council* (2006) QPELR 546 and *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth of Australia & Ors* (1977) 139 CLR 50 which evidenced the well-established principle making unlawful any attempt to fetter future exercise of discretion by a decision maker.

The council in response argued that the condition would not fetter the douncil's discretion in its consideration of any future application, in particular, given that:

- sections 313 (Code assessment – generally) and 314 (Impact assessment – generally) of the *Sustainable Planning Act 2009* (**SPA**) set the parameters for the exercise of the assessment manager's discretion when considering an application in which discretion was not at large;
- the assessment manager was required to take into account any existing development approval which included any conditions attaching to it (see section 244 (Development approval includes conditions) of the SPA);
- a condition on any such extant approval operated as a fetter on the future discretion of the assessment manager, but that such a fetter was lawful and formed part of the terms on which the discretion was granted in sections 313 (Code assessment – generally) and 314 (Impact assessment – generally) of the SPA; and

- the relevant decision rules did not require the council to form a particular view about any future development application merely because of the existence of the condition under consideration but rather the condition would merely be a factor to be considered, albeit an important one.

# Decision

## Condition 4

The court accepted that sections 313 (Code assessment – generally) and 314 (Impact assessment – generally) of the SPA operated upon the discretion to be exercised by the assessment manager in the consideration of any development application, and any extant approval was but one of the matters to be taken into account in the consideration of a later application. However, the court noted that nothing in those sections or other provisions of the SPA had the effect of elevating an otherwise unlawful condition to a lawful one so as to entitle it to be properly taken into consideration in the exercise of the relevant discretion. The court further noted that, an unlawful condition of approval, to which the assessment manager must have regard in its assessment of a future application, could not be taken in consideration by the assessment manager in arriving at a lawful decision.

The court went on to observe that, under both sections, the assessment manager was obliged to assess a development application "having regard to" any development approval.

As part of the court's consideration of whether a provision in a statute was to attract the designation of "fundamental element", "focal point" or something of a similar kind, the court referred to *Zhang v Canterbury City Council* (2001) NSWCA 167; *R v Hunt ex parte Sean Investments* (1979) 180 CLR 322 and *Evans v Marmont* (1997) 42 NSWLR 70 and observed that, as each of those cases demonstrated *"…before a particular provision in a statute is to attract the appellation of "fundamental element", "focal point" or any other synonym, the context must allow of it"*.

Whilst the court did not find it necessary to determine the point in relation to sections 313 (Code assessment – generally) and 314 (impact assessment – generally) of the SPA, the court doubted whether the requirement "to have regard to a development approval" could be said to be a "fundamental element" or a "focal point" in the decision making process of the assessment manager in any future development application.

The court considered that it was one of several matters to be taken into account and any extant development approval would not be determinative of any future application. In any case, the court did not believe it altered the fact that the decision of any future decision-maker would be at risk of being miscarried if consideration was given to an unlawful condition.

Having considered the definition of "buffer" in the *Southern Downs Regional Planning Scheme* and that the imposition of a buffer did not prohibit future development within the buffer zone, the court found that the final sentence of Condition 4 caused it to be void. More specifically it, in effect, prohibited residential development other than a caretaker's cottage and consequently, fettered the council's later discretion to decide a future application. Recognising the concern of protecting the amenity of any future sensitive receptors, the court agreed that the alternative condition proposed by the appellant would be appropriate and lawful if the prohibitory final sentence of Condition 4 were deleted.

## Costs

The appellant sought orders that the council pay its costs of and incidental to its appearances at directions hearings on 21 September 2012, 26 September 2012, 3 October 2012 and 20 December 2012.

The court considered the circumstances giving rise to each of the directions hearings and found that the first three directions hearings were reasonable or necessary due to the council's failure to meet various obligations under the court orders. It was therefore appropriate, that the council pay the appellant's costs on a standard basis for its appearances on the first three hearings.

As to the directions hearing on 20 December 2012, despite the appellant's contention that the council should have been in a position on 19 December 2012 to sign off on the site based management plan, the court agreed, as submitted by the council, the timeframe was too short to allow it to do justice to the necessary requirement of checking all documents prior to the final sign off with the appellant. The court therefore was not persuaded that the appellant was entitled to its costs in relation to the 20 December 2012 appearance.

# Held

It was held that:

- Condition 4 as proposed by the council was void as a fetter on the future exercise of the council's discretion, and was deleted from the otherwise agreed conditions package.
- Judgment in accordance with the draft judgment submitted on behalf of the appellant at hearing, with the insertion in the otherwise agreed conditions package of Condition 4 set out hereunder unless within seven days of today, the parties either notify agreement on an alternative Clause 4 or either party notifies the court that it wishes to make further submissions on an appropriate alternative Clause 4:

*Those parts of Lots 1 and 2 on RP 36824, Lot 1238 on CP M34534 and Lot 1 on SP 214513 within the 2.5 odour unit contour as shown on Figure 8 of the Second Joint Report of the Air Quality Experts dated 7 September 2012 (or within a 2.5 odour unit contour determined from time to time in accordance with the Queensland Government Guideline Odour Impact Assessment from Developments as amended or any subsequent document prepared for a similar purpose) are to be maintained as buffers to dwellings from the approved development on pads 1, 4 and 5 ('the Development Buffer').*

- The appellant's costs on a standard basis of its appearances on 21 September 2012, 26 September 2012, and 3 October 2012 be paid by the council.

Colin Biggers & Paisley

# Court's powers to extend the relevant period of a development approval

Ronald Yuen | Edith Graveson

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cleveland Power Pty Ltd v Redland Shire Council* [2013] QPEC 9 heard before Andrews SC DCJ**

May 2013

## Executive Summary

This case involved an appeal by Cleveland Power Pty Ltd against the Redland Shire Council's decision to refuse its request to extend the relevant period of a development approval.

The Planning and Environment Court was required to consider the operation of section 388(1) (Deciding request) of the *Sustainable Planning Act 2009* (Qld) (**SPA**) where the council withdrew its opposition to the extension in the appeal.

The court concluded that, despite the council's position in the appeal, the court must have regard to the matters identified in section 388 (Deciding request) of the SPA but ultimately allowed the appeal and extended the period of the development approval.

## Case

The court had to determine whether it needed to consider the matters identified in section 388 (Deciding request) of the SPA in circumstances where the council withdrew its opposition to the extension in the appeal. The court also had to consider the relevance of the council not opposing the proposed extension in the appeal and whether it was appropriate to allow the appeal and extend the relevant period of the development approval.

## Facts

The development the subject of the appeal was a bio-mass power plant proposed to be built on land at Mount Cotton. The appellant applied for a development approval for a material change of use and a related environmental approval for Environmentally Relevant Activity No 17 which was subject to impact assessment.

More than 300 submissions were made opposing the development. The development application was approved by the council and a submitter appeal was commenced in relation to the council's decision to approve the development application.

The submitter appeal was resolved between the parties and the court made orders granting a development approval on 7 November 2007. The relevant period of the development approval was four years.

On 7 November 2011, the appellant lodged a request with the council pursuant to section 383 (Request to extend period in s 241) of the SPA requesting an extension of the relevant period of the development approval. The council refused the appellant's request and the appellant lodged an appeal against that refusal. At a review, the appellant sought an order with a provision for allowing the appeal and extending the relevant period of the development approval. The council did not oppose the order.

The court identified the issues in the appeal as follows:

- whether the court was required to have regard to the matters identified in section 388 (Deciding request) of the SPA where the council had withdrawn its opposition to the extension for the relevant period of the development approval (**First Issue**);
- the relevance of the council not opposing to the order allowing the appeal and extending the relevant period of the development approval (**Second Issue**); and
- whether it was appropriate to allow the appeal and extend the relevant period of the development approval, where further rights to make submissions would be available if a further development application was lodged and such rights were likely to be exercised by members of the public (**Third Issue**).

# Decision

## First Issue

The appellant contended that the matters in section 388 (Deciding request) of the SPA did not need to be established in order for the court to hear the appeal in circumstances where the council did not oppose the order allowing the appeal.

The court accepted that the matters in section 388 (Deciding request) of the SPA did not need to be satisfied in order for the court to hear the appeal, but the court was still required to consider the matters in section 388 (Deciding request) of the SPA.

## Second Issue

The appellant contended that it was relevant that the council did not oppose the order and that its decision not to oppose should be given more weight as the council acted to protect public rights.

In considering the appellant's submissions, the court noted that it seemed sensible that the court should have regard to the fact that the council no longer opposed the extension of the relevant period of the development approval.

However, the court emphasised that in its capacity as the assessment manager under section 388 (Deciding request) of the SPA, the court "must only have regard to" the matters identified in that section. None of the matters in section 388(1) (Deciding request) of the SPA required the court to have regard to the "views" of the council (where it was not a concurrence agency).

Accordingly, the court concluded that the council's "views" in the appeal were not a matter to which the court could have had regard.

## Third Issue

Having regard to the following matters, the court believed it was appropriate to allow the appeal:

- the development approval was consistent with current laws and policies;
- given that the public notification process for the development application attracted more than 300 submissions, any submission made in response to the development application, if remade, was unlikely to raise any new issue not already raised by submissions in the initial application process;
- whilst there could be new residents arriving after the public notification of the development application, given that the development approval was consistent with the planning documents, those residents should have a reasonable expectation that development as proposed could occur in the area.

Accordingly, the court found that:

> *there would be little utility in forcing the developer to undergo an extensive impact assessment process for the purpose of obtaining a development approval that would be, for all intents and purposes, consistent with the existing development approval and which would be unlikely to provoke a public submission that would raise any new issue for consideration*.

# Held

- The appeal be allowed.
- The relevant period of the development approval be extended for two years from the date of judgment.

Colin Biggers & Paisley

# Permissible change allowed despite likelihood of submissions

Ronald Yuen | Jamon Phelan-Badgery

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cleveland Power Pty Ltd v Redland City Council & Ors* [2013] QPEC 7 heard before Jones DCJ**

May 2013

## Executive Summary

In a permissible change application regarding a development approval for a biomass power plant, the Planning and Environment Court accepted that the proposed changes did not result in a substantially different development, and whilst submissions were likely to be received given the controversial nature of the development itself, no new facts, matters or circumstances would result from the proposed changes.

In a related application by a third party seeking to be joined in the permissible change application, the court was not satisfied that the party was a necessary party nor, would it be desirable and just to enable the court to adjudicate effectively and completely on the matters in the issue, given that the central concern of the third party was whether or not the biomass power plant should have been approved in the first place, which was largely irrelevant for the permissible change application.

## Case

This case was concerned with two applications. The first application was a permissible change application under section 367 (What is a *permissible change* for a development approval) of the *Sustainable Planning Act 2009* (**SPA**) which was brought by Cleveland Power Pty Ltd. The second related application was brought by the Birkdale Progress Association Inc (**BPAI**) who sought to be joined as a party to the permissible change application.

## Facts

On 7 November 2007, the court granted an approval for a material change of use and an environmentally relevant activity for a biomass power plant on land situated in Mt Cotton, Queensland.

The approval was subject to a number of conditions, including conditions imposed by the then Environmental Protection Agency as a concurrence agency.

As the power plant would involve the use of significant amounts of sawdust and chicken manure as fuel, the development application attracted a significant amount of negative local attention and opposition. Of particular concern to the submitters were issues of amenity, specifically air quality, noise and visual amenity.

The BPAI was not a submitter in respect of the development application, nor had it sought to be joined as a party at any time prior to the permissible change application.

## Decision

### The Related Application

The court noted that BPAI's main concern was not whether the proposed changes to the approval constituted a permissible change under section 367 (What is a permissible change for a development approval) of the SPA but that the approval should never have been given in the first place.

Since the subject proceeding was primarily concerned with the permissible change application, the court noted that his jurisdiction was a limited one, namely to decide whether or not the proposed changes should be regarded as permissible changes under the SPA. As such, the court did not have the jurisdiction to go back and revisit the merits as to whether or not the biomass power plant should have been approved in the first place.

Whilst BPAI placed affidavit evidence of an environmental scientist before the court, none of the matters raised were concerned with the proposed changes and, consistent with the underlying concerns of BPAI, they addressed matters which might have been relevant at the development application stage.

Accordingly, the court concluded that due to the limited jurisdiction and having regard to the court's power to enable a party to join a proceeding under rule 61(1)(b) (Application of div 2) of the *Uniform Civil Procedure Rules 1999*, it was unpersuaded that BPAI was either a necessary party or a party which would be desirable, and just to enable the court to adjudicate effectively and completely on the matters in issue and therefore, the related application was refused.

### The permissible change application

The proposed changes to the approval were described as falling into three broad categories as follows:

- physical changes by reference to dimensions, areas and heights;
- changes relevant to or necessitated by discrepancies between various design drawings and plans when compared with other plans and particularly, the approved plans;
- changes involving the issues of noise, air quality and wildlife.

The permissible change application was not opposed by the council, nor the Department of Environment and Heritage Protection and a number of changes involved the input of the Department, in particular those involved environmental sensitivity.

Of the requirements set out in section 367(1) (What is a *permissible change* for a development approval) of the SPA, the main concern was whether the changes would result in a substantially different development (see section 367(1)(a) (What is a *permissible change* for a development approval) of the SPA), and whether it would be likely to cause a person to make a properly made submission objecting to the proposed changes (see section 367(1)(c) (What is a *permissible change* for a development approval) of the SPA).

Having considered the applicant's affidavit material, the court noted that the various changes:

- were a consequence of various experts in various fields of expertise coming together to arrive at a superior result;
- if considered in totality, did not result in any material change to the dimensions or bulk of the proposal.

Although there was considerable opposition to the development, the court concluded that *"the changes, either singularly or collectively, do not result in a substantially different development, nor would they be likely to agitate a person, or persons, to make a properly-made submission. Put simply, the changes do not raise new facts, matters or circumstances. They go to addressing those that have already existed, and… by and large overall result in a number of significant improvements"*.

## Held

- The related application be refused.
- The permissible change application be allowed.

Colin Biggers & Paisley

# Need for school outweighs loss of good quality agricultural land and conflict with Far North Queensland Regional Plan

Ronald Yuen

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mulgrave Central Mill Co Ltd v Cairns Regional Council & Anor* [2013] QPEC 6 heard before Everson DCJ**

May 2013

## Executive Summary

The Planning and Environment Court considered an appeal relating to a development approval for an educational establishment and other uses on a site located outside the urban footprint in the *Far North Queensland Regional Plan 2009-2031* and identified as good quality agricultural land and potential strategic cropping land.

## Case

This case concerned an appeal by Mulgrave Central Mill Co Ltd to the Planning and Environment Court in respect of a decision of the Cairns Regional Council to grant the Seventh-Day Adventist School – Northern Australian Conference a preliminary approval for a material change of use pursuant to section 242 (Preliminary approval may affect a local planning instrument) of the *Sustainable Planning Act 2009* (**SPA**) which made educational establishment (not exceeding 2,500m$^2$ of gross floor area), place of assembly, indoor sport and entertainment and outdoor sport and entertainment uses self-assessable development on land located in the Regional Landscape and Rural Production Area under the *Far North Queensland Regional Plan 2009–2031*, identified as Good Quality Agricultural Land (**GQAL**) and potential strategic cropping land (**SCL**) under the *State Planning Policy 1/12 Protection of Queensland's strategic cropping land* (**SPP 1/12**). The subject site was located 350 metres outside the Gordonvale town boundary, surrounded by land used for sugar cane production, interspersed with rural lifestyle lots, and immediately opposite a cane railway line. The subject site was a historical cane block used for the production of sugar cane. However, in more recent times, it had been used for the agisting of horses.

## Facts

The primary use for which the co-respondent, the Seventh-Day Adventist School, sought a development approval was educational establishment, so that it could establish a new school on the subject site.

The appellant's grounds of appeal related to conflict with the Regional Plan and the planning scheme for the former Cairns City adopted on 25 February 2009 on the basis that the subject site was outside of the urban footprint identified in the Regional Plan and the proposed development would result in the loss and permanent alienation of GQAL and SCL.

The *Far North Queensland Regional Plan 2009–2031 State Planning Regulatory Provisions* applied to the proposed development and provided that a material change of use for an educational facility in the Regional Landscape and Rural Production Area did not require assessment by the referral agency for the Regional Plan where the gross floor area would not exceed 2,500m$^2$.

Relevantly, the development approval stated that the gross floor area of the educational establishment must not exceed 2,500m$^2$.

Notwithstanding that the co-respondent sought a development approval for other uses in addition to educational establishment, in its submissions to the court during the appeal it sought orders that the appeal be allowed in part, and an approval be granted for lesser uses for a lesser currency period than that granted by the council. It was on this premise that the court approached the assessment of the issues and made its determination.

## Decision

The court considered the following matters for determination:

- whether the proposed development would result in the loss and permanent alienation of GQAL, and to the extent relevant, SCL;
- whether the proposed development would be incompatible with, adversely affect, and compromise, surrounding rural uses and in particular, the efficient functioning of cane farming in the area;

- whether the proposed development would have unacceptable traffic impacts, in particular, upon the safe and efficient operation of the adjoining cane railway sidings;
- whether the proposed development conflicted with the Regional Plan and the Regulatory Provisions;
- whether there was conflict with the Cairns Plan and what weight should be given to the draft Mount Peter Structure Plan;
- whether the proposed development conflicted with the SPP 1/12.

### GQAL and SCL

On the evidence of an agricultural scientist, it was indicated that whilst the subject site was GQAL class A and met the criteria for SCL, any alienation of GQAL or SCL would be restricted to the developed area and the balance of the subject site could be used for cane farming or other crops. On this basis, the court concluded that the proposed development would result in a minor loss and permanent alienation of GQAL and SCL.

### Effect on surrounding rural uses

The court accepted the expert evidence which provided that appropriate conditions could be imposed to satisfactorily buffer the proposed development from surrounding uses and as such, that the proposed educational establishment would not be incompatible with, adversely affect, or compromise, surrounding rural uses.

### Traffic impacts

The court took the view that notwithstanding that the cane farms in the vicinity of the proposed school would generate a significant amount of activity at harvest time, including tractors hauling cane bins to the cane rail sidings opposite the subject site, the traffic impacts caused by the proposed development could be satisfactorily addressed by way of conditions.

### Regional Plan and Regulatory Provisions

The court found that given that the Regional Plan permitted limited small scale community activities in the Regional Landscape and Rural Production Area, notwithstanding that urban development was not generally encouraged outside the urban footprint, and the Regulatory Provisions contemplated an educational establishment having a gross floor area no greater than 2,500m$^2$ in the Regional Landscape and Rural Production Area, an educational establishment on the scale proposed by the co-respondent did not conflict with the Regional Plan or the Regulatory Provisions.

The court went on to indicate that if it was wrong in respect of conflict with the Regional Plan, it was satisfied that there were sufficient grounds to justify the approval of an educational establishment of no more than 2,500m$^2$ on the subject site, despite a conflict, given the community need for an educational establishment of the type proposed in the area.

### Cairns Plan

Whilst the Regional Plan prevailed over the Cairns Plan, the court considered conflict with the Cairns Plan and the extent of weight to be given to the draft Mount Peter Structure Plan at the Appellant's request. Dealing with the latter issue, the court noted that the draft Mount Peter Structure Plan was still in the early stage of the plan making process and had not been subject to public notification, and as such, had been insufficiently progressed for it to be given any weight. The court noted the conflicts with the Cairns Plan were minor, and despite the minor conflicts, the community need for a school in the area was sufficient to justify the approval of an educational establishment of no more than 2,500m$^2$ on the subject site.

### SPP 1/12

The court found that as the size of the proposed educational establishment was limited to 2,500m$^2$ in gross floor area, the policy outcomes sought by SPP 1/12 would not be compromised by the proposed development.

## Held

The appeal be allowed in part that the development approval be limited to an approval for an educational establishment having a gross floor area of no more than 2,500m$^2$ and no other uses, with a standard currency period of 4 years.

# From ecological sustainability to economic sustainability – What is the role of planning?

Ian Wright

**This article discusses the concepts of ecological sustainability and economic sustainability in relation to urban and regional planning**

May 2013

## Ecological sustainability

It is best to start at the beginning. In 1987 the United Nations released the Brundtland Report which endorsed the concept of "*sustainable development*" being development that meets the needs of the present without compromising the ability of future generations to meet their needs.

During the early 1990s the concept of sustainable development was refined to comprise three interdependent and mutually reinforcing pillars being economic development, social development and environmental protection.

The concept of "*ecologically sustainable development*" was subsequently coined to refer to the environmental protection component of sustainable development. This concept was subsequently shortened to "*ecological sustainability*".

In essence, ecological sustainability requires the effective integration of economic and environmental components in decision making processes through the application of principles that include:

- the precautionary principle;
- intergenerational equity;
- biodiversity and ecological diversity, and
- improved economic valuation including environmental factors.

The concept of ecological sustainability was subsequently incorporated as the object of the *Integrated Planning Act 1997* and was retained in the *Sustainable Planning Act 2009*.

## Economic sustainability

The concept of ecological sustainability as the object of urban and regional planning is now under direct challenge with increasing calls for "*sustainable economic development*" or "*economic sustainability*" to be adopted as the object of urban and regional planning.

The concept of economic sustainability relates to the economic development component of sustainable development. In essence, economic sustainability seeks long term economic growth which does not compromise social (which includes both the community and cultural elements) and environmental attributes of a region.

The notion of economic sustainability therefore involves two related but distinct concepts:

- Economic development, which is the development of the overall wellbeing of the citizens of a region including matters such as their living standard, self-esteem, freedom from oppression and level of choice. As such it is a normative concept defined by the values and culture of citizens.
- Economic growth, on the other hand, is a narrower concept than economic development. It is the increase in the value of goods and services produced by every sector of a region.

As such economic sustainability is concerned with improving the wellbeing of citizens of a region (economic development) through an increase in the value of goods and services produced by that region (economic growth) without compromising the community, cultural and environmental attributes of the region.

In essence, economic sustainability is based on a different philosophical and ideological perspective to ecological sustainability in that it emphasises the value and agency of "*human beings*" individually and collectively as opposed to the value of the environment and its constituent elements.

## Rise of economic sustainability

The concept of economic sustainability has gained increasing credence for a number of reasons:

- *Economic uncertainty* – The economic slowdown and resulting uncertainty of the Great Recession has caused citizens to reappraise their own personal circumstances and to become more focussed on their future wellbeing and less concerned with the environment more generally.

- *Political failure* – The apprehended failings, both perceived and real, of progressive political parties (in Australia's case the Labour Party) has led to conservative political parties coming to power or existing Labour governments being severely weakened.
- *Ideological* – Neo-liberal ideology has become increasingly more dominant amongst leaders as the economic uncertainty of the Great Recession and the political failings of progressive governments have called to question the sustainability and success of the post-modernist ideology of the last 30 years.
- *A time of reason* – The failings of pragmatic short term solutions to complex social and ethical issues, illustrated most recently by the Great Recession, has caused a greater focus on reason and scientific method and the importance of technocrats such as scientists, engineers and technologists as decision makers instead of politicians.

## What role then for urban and regional planning?

As a result of these changes, there is an increasing call for urban and regional planning to be integrated with economic development to achieve sustainable growth.

It is therefore argued that the object of a planning authority should be to ensure sustainable economic development where economic enterprises are facilitated and allowed to function and expand in a spatial form and pattern that is sustainable in environmental, social and economic terms.

As a minimum this involves the following:

- Planning instruments which provide an enabling environment for economic development such as the provision of sufficient land supply for development and limited development controls on economic enterprises.
- A development approvals process that is as efficient and effective as possible.

It also involves urban planning policies and activities beyond the regulatory functions of planning schemes and development assessment to improve a region's investment appeal and consequently its economic development prospects, such as:

- development infrastructure provision that focuses on economic enterprises;
- industrial land use surveys;
- best practice guidelines for development;
- a one stop shop for development;
- the use of project facilitators;
- economic development agencies.

From this perspective the role of urban and regional planning changes from that of ecological sustainability, involving the balancing of economic, social and environmental elements, to that of economic sustainability, involving the facilitation of economic development of a region to achieve economic growth in a manner that does not compromise the community, cultural and environmental values of the region.

## Response of governments

The implications of the change from ecological sustainability to economic sustainability at the state government level are becoming increasingly apparent:

- The former Department of Infrastructure and Planning has been reconstituted as the Department of State Development, Infrastructure and Planning.
- Planners have been right sized and replaced with technical specialists such as engineers, scientists and technologists skilled in scientific method and reason.
- Economic Development Queensland has been created to drive economic development in the State.
- Greentape reductions have been implemented.

Similar changes can be anticipated within local governments although to a lesser extent as community, cultural and environmental values are more pronounced and sensitive than at the state government level, resulting in an inherent conservatism at the local government level.

## Opportunities for planners

A focus on economic sustainability, whilst presenting challenges for some planners, will offer significant opportunities for others including the following:

- the development of broader skill sets including economic and financial analysis;
- the redesign of planning instruments from a pure regulatory tool to an instrument of economic facilitation;

- the consideration of a broader range of economic and market issues in strategic planning and development assessment;
- economic development projects such as economic clusters, industrial planning and economic infrastructure projects which have traditionally not been the domain of planners.

Indeed a greater focus on economic development tools and methodologies may even allow planners to start addressing some of the most intractable problems affecting our cities and regions such as urban sprawl, housing affordability and infrastructure deficits, and in respect of which planning has had limited success in solving.

## Concluding thoughts

On balance, it is considered that economic sustainability does offer greater opportunities than ecological sustainability did to resolve the critical issues affecting our cities and regions.

However, I remain to be convinced that it is the panacea for urban and regional issues that its protagonists suggest. It is a necessary but not sufficient condition to address the issues affecting our cities and regions.

In my view we will not be able to sustainably address these issues until there is real community and cultural change. That is, whilst ecological sustainability and economic sustainability is necessary; in the end social sustainability is likely to be the key to unlocking real change. But that agenda is at least two decades hence and well beyond my working life.

# Unlawful earthworks

Ronald Yuen | Elton Morais

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Kube & Anor* [2013] QPEC 11 heard before Robertson DCJ**

June 2013

## Executive Summary

This case involved an application commenced by the Sunshine Coast Regional Council in the Planning and Environment Court seeking declarations and enforcement orders for alleged unlawful works carried out by John Kube and Gillian Kube on land located at 76 Wharf Road, Bli Bli.

## Facts

The land, at all material times, was within a Rural Precinct under the *Maroochy Plan 2000* and located within a Special Management Area "Flood Prone and Drainage Constraint Areas".

In August 2007, the respondents, John Kube and Gilian Kube, purchased the land (which was vacant at the time) which had previously been used for cane growing for a number of years prior. The respondents, prior to purchasing the land, obtained flood searches, which revealed that the land was flood prone and was the "end of the line" for stormwater flowing, whilst it was "not in a drainage deficient area" (which was later explained during the proceedings that that was not the case).

Shortly after the purchase, the respondents complained about flooding of the land for which the council was blamed, essentially for not properly conditioning upstream developments to mitigate the effects of stormwater flow from those developments within the catchment onto and over the land.

From 2007, the respondents commenced to excavate and fill the land. In association with the excavation and filling works, the respondents carried out significant works on the land which included:

- construction of building pads for the purpose of erecting a house and an industrial shed;
- construction of a driveway into the land;
- raising the levels in and around the dams including the south-east area of the land.

It was not disputed that the earthworks involved more than $50m^3$ of material. No development approvals were given for the works and there was no creditable evidence which suggested that the works were approved explicitly or implicitly by the council.

In March 2011, the council resolved to address the stormwater run-off issue by compulsorily acquiring drainage easements over 3 properties including the land.

In the subsequent 12 months and probably more extensively in 2012, the respondents carried out extensive earthworks in the northern and north-eastern parts of the land.

In August 2012, the council commenced proceedings against the respondents by way of an originating application, effectively seeking declarations that the earthworks constituted assessable development where no permit had been given and therefore, the respondents had committed development offences.

## Decision

### Development offence

The court noted that the planning scheme provided that filling activities involving more than $50m^3$ of fill constituted operational work that was *assessable development* on flood prone land that was within a Special Management Area.

Under both the IPA and SPA regimes, operational work (which included filling activities) associated with "*management practices for the conduct of an agricultural use…"* was, in effect, exempt development. However, despite the respondents' assertions to the contrary, there was no evidence which would support the proposition that any of the works carried out by the respondents were operational works associated with management practices for the conduct of an agricultural use.

The respondents also sought to rely on various propositions to defuse their alleged wrongdoing, which included that:

- they did not know at the time of purchase that the land was subject to the relevant planning controls;
- the council officers failed to advise them if and when approvals were required;
- the council failed to properly condition subdivisional approvals in respect of the upstream properties to provide for drainage of water from those properties that had a "no worsening" effect on downstream properties including the land.

The court, having regard to the evidence, dismissed the respondents' propositions respectively as follows:

- their state of mind at the date of purchase was irrelevant;
- it was incumbent on the landowner to comply with the law;
- the parties' water experts opined that at worst, upstream developments might have contributed an increase of 10% in flows over the land and therefore, any suggestion that the carrying out of the works was to respond to the applicant's failure to properly condition upstream developments which caused flooding on the land could not be accepted.

In light of the above, the court was satisfied that the respondents committed a development offence by undertaking, without a valid development approval, the works associated with the house building platform, the driveway to the house, the excavated dam system down the eastern boundary, the use of spoil for the building platform and to raise levels around the dams, and the earthworks thereafter.

### Enforcement orders

The court noted that it was a matter of discretion whether to grant the enforcement orders being sought by the applicant and the leading authority bearing upon the exercise of the discretion was *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335. Such discretion was a broad one, which involved the balancing of matters of both public and private interest.

The court observed that the following matters were relevant to the exercise of discretion:

- the delay in the applicant taking actions against the respondents, particularly in relation to the earlier earthworks (which the applicant made concessions to them at the hearing);
- the notions of enforcement of public duty in the public interest in orderly development and equal justice;
- the flooding and other impacts of the work undertaken by the respondents on the land and adjoining properties;
- the likely expenditures or inconvenience for complying with the enforcement orders being sought by the Applicant.

Taking the above matters into account, the court did not consider there was any justification for undertaking the unlawful works and therefore, the applicant should be entitled to the enforcement orders it sought.

## Held

The court ordered that, subject to final submissions upon delivery of judgment as to the form of orders and costs:

- declarations in terms of paragraphs (a) and (c) of the amended application were made;
- the enforcement orders sought in paragraphs (b), (d) and (e) of the amended application were made, save that:
  - the removal of dam spoil around the excavated dams should be limited to spoil around the western and southern side of the southernmost excavated dams; and
  - the requirement to remove the driveway should be stayed, pending the prompt making of, and diligent prosecution of, and determination of a development application seeking a development permit for operational work for the driveway, with the question of the continuation or modification of that requirement then able to be revised following the assessment and decision in respect of that development application.

The application was allowed, with the parties to return back with a final form as to orders and costs.

# Construction of a town planning consent permit

Ronald Yuen | Jonathan Evans

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Owners of Lots 1-40 on SP115731 at Noosa Lakes Resorts & Anor* [2013] QPEC 13 heard before Robertson DCJ**

June 2013

## Executive Summary

This case was concerned with an application by the Sunshine Coast Regional Council in which a number of preliminary legal issues arising from a town planning consent permit granted by the former Noosa Shire Council (now the Sunshine Coast Regional Council) for the Noosa Lakes Resort were raised and required the court's determination. The court was generally content with the council's submissions in respect of the preliminary legal issues and granted the orders on terms substantially similar to those sought by the council.

## Case

This case was concerned with an application by the council for: a declaration that the use by any lot owner in the Noosa Lakes Resort was unlawful if the ground floor of that lot had kitchen facilities: a declaration which related to classification of the buildings within each lot; and enforcement orders.

A number of preliminary legal issues arising from a town planning permit given by the council in 1998 were identified and the court was asked to determine them as its determination would influence the conduct of the council's application.

The court summarised the preliminary legal issues as follows:

> ***a.*** *Whether it is a requirement of the development approval applying to the Lots that the ground floor of each Lot cannot lawfully contain kitchen facilities.*
>
> ***b.*** *Whether the development approval is for;*
>
> *(i) 94 Lots (each has an additional permitted use, the use of the downstairs area for the accommodation of parties unrelated to the users of the upstairs area); or*
>
> *(ii) 188 self-contained dwellings.*
>
> ***c.*** *Whether condition 8 of the development approval;*
>
> *(i) is relevant and reasonably required within the meaning of the repealed Local Government (Planning and Environment) Act 1990 ("the P&E Act");*
>
> *(ii) applies to the whole of the whole of (sic) each Lot or only to the downstairs portion.*

## Facts

The initial development application approved by the council in 1997 was for 94 town houses with each town house to be occupied by a single family unit.

Subsequently, the council consented to an amendment to the initial approval in 1998 which allowed separate occupation of the downstairs area and "dual key" entry to each town house so that the downstairs bedrooms could be separately let to people attending the nearby conference centre.

The plans referenced in condition 7 of the current approval allowed for 94 town houses with generally 1 or 2 bedrooms, a living area, a kitchen and ensuite upstairs and 1 bedroom, a living area and an ensuite downstairs. They were built as 24 blocks of 4 town houses each. Each town house had 1 water connection, 1 power connection, a single water meter for upstairs and downstairs, a single waste receptacle located outside, and a shared laundry on the ground floor and bathroom and toilet on each floor.

Since the town houses were completed, owners had either:

- lived-in or let the whole town house as one family unit;
- used the top floor for long term accommodation and let the downstairs area for conference or other short term accommodation use; or
- let the downstairs for use by long term tenants as a place of residence, independently of the upstairs use.

Some of the long term tenants who occupied the downstairs area installed or used cooking facilities and fires had occurred.

# Decision

## Issue a

The court, by reference to the Macquarie Concise Dictionary definition of "kitchen", observed that the current approval, including the plans referred to in condition 7, when read as a whole, did not provide for kitchens in the downstairs unit while ablution facilities were. Such observation was further reinforced by the court's construction of the approved use as set out below.

## Issue b

The court noted that the plans forming part of the current approval clearly provided for 94 town houses with 1 or 2 bedrooms, a kitchen, an ensuite and living area upstairs and 1 bedroom and ensuite and living area downstairs. Having considered the plans and the definitions of "accommodation building", "multiple dwelling", "accommodation unit" and "dwelling unit" in the *Noosa Planning Scheme* in force at the time of the current approval, the court observed that the use provided for in the current approval could not sensibly be construed as relating to 188 dwellings as part of 94 lots. The court believed the approved use should be construed as *"Resort, indoor entertainment/function room (conference centre) and ancillary facilities (94 multiple dwellings each containing an accommodation unit)"*.

## Issue c

The court observed that condition 8 of the current approval was imposed in response to the dual key arrangement forming part of the amendments to the initial approval, given that the initial approval was for 94 standard Class 1 town houses for use by 1 family unit and did not contemplate separate occupation of the downstairs area. On that basis, the court believed condition 8 was an appropriate planning response and was not in conflict with the *Building Act 1975*.

# Held

The court ordered that:

- It was a requirement of the current approval applying to the lots that the ground floor of each lot could not lawfully contain kitchen facilities, which included any equipment used for the preparation and cooking of food, but did not include facilities usually found in motel room such as tea making equipment, electric jugs and a bar fridge.
- The current approval for Noosa Lakes Resort was for 94 lots (each having as an additional permitted use, the use of the downstairs area for the accommodation of parties unrelated to the users of the upstairs), and not for 188 self-contained dwellings.
- Condition 8 of the current approval was relevant and reasonably required within the meaning of the repealed *Local Government (Planning and Environment) Act 1990* and applied to the whole of each lot.

# Public need for a proposed development

Ronald Yuen

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Dexus Wholesale Property Ltd v Townsville City Council & Ors* [2013] QPEC 14 heard before Judge Robin QC DCJ**

June 2013

## Executive Summary

In this case the Planning and Environment Court was required to consider whether the proposed expansion of the Stockland North Shore Shopping Centre was "too big, too soon" as components of the proposal would not achieve "benchmark" performance levels for several years.

## Case

The hearing involved a submitter appeal by Dexus Wholesale Property Ltd, the operator of a shopping centre in the locality known as The Willows against Townsville City Council's decision to approve a large expansion of the Stockland North Shore Shopping Centre at Burdell by Stockland Development Pty Ltd (**co-respondent**). This was another instalment of the Townsville shopping centre wars between rival operators of successful centres.

## Facts

Stockland North Shore was initially approved by a decision notice issued for a shopping centre and commercial premises on 14 August 2008 premised on a preliminary approval by way of an order made by the court on 29 March 2007 which incorporated a plan of development. The development application for the preliminary approval was lodged on 23 May 2003, which was before the *City of Thuringowa Planning Scheme 2003* commenced on 20 October 2003 (which was anticipated to be replaced with a new planning scheme by the end of 2013).

On 23 December 2010, the co-respondent applied for a development application for a material change of use for extension to an existing shopping centre and commercial premises (discount department store, mini-major and specialty retail shops) which affected about 6.15 hectares of the overall approximate 1,000 hectares of the plan of development area.

The council approved the application subject to conditions, against which the appellant commenced an appeal. A similar appeal (624/2011) was lodged by Bushland Grove Pty Ltd, a company interested in residential and commercial development at Mount Low, northwest of the subject site, but it elected to withdraw before the hearing commenced. Stockland North Shore at the time of the hearing was a supermarket based centre, which consisted of a supermarket of 3,609m$^2$, retail specialities of 1,123m$^2$ and non-retail services of 1,047m$^2$. Under the approval the gross lettable areas (**GLA**) increased to 4,611m$^2$, 4,223m$^2$ and 1,544m$^2$ respectively, with the addition of a discount department store of 7,189m$^2$ and mini-majors (tenancies exceeding 400m$^2$) of 2,479m$^2$. This resulted in a total increase of the centre's GLA (retail) from 4,732m$^2$ to 18,505m$^2$. The issues presented to the court for consideration were mainly related to whether the approval was in conflict with the 2003 planning scheme and the preliminary approval, whether there was any need for the proposal and whether the proposal's prematurity was so gross that the approval should not have been given.

## Decision

The court considered the establishment of planning areas by the 2003 planning scheme, including section 3.3 (Centres Planning Area), which established a centres hierarchy in ascending order of scale. As part of the court's consideration, it noted that, whilst the subject site was not mapped as a centre or as part of the centre's planning area in any way, events had led to it being identified as the sub-regional centre in Mount Low-Deeragun, for which it was conceded to be suitable (with which the parties agreed). Notably, the court identified that within section 3.31 (Character Statement) of section 3.3 (Centres Planning Area) reference was made to the "establishment" of centres (be it district or sub-regional centres), particularly in relation to a "sub-regional centre in the Mt Low-Deeragun area". With that in mind, the court was of the view that desired environmental outcome 5, which provided that "economic development in the City is strong, diversified, supports local employment and enhances quality of life" provided support to the co-respondent's proposal.

In light of the appellant's allegation that the proposal could offend the centres hierarchy, the court considered the importance ascribed by it to the preservation of the integrity of planning for centres, which was recognised and apparently endorsed by the Court of Appeal in *Australian Capital Holdings Pty Ltd v Mackay Regional Council* [2008] QCA 157 (*Australian Capital Holdings* case) at [58]:

> *The importance of the hierarchy of retail shopping centres or precincts established by planning schemes and the necessity of not acting so as to prejudice the viability of the established hierarchy has been recognised in a number of planning decisions.*

The court noted that the distinction between that case and this appeal was that the council in this appeal, as the planning authority, supported the proposal rather than opposed it, as was the case in *Australian Capital Holdings* case. It was also noted in terms of the timing of the proposal, given that the 2003 planning scheme was coming to the end of its life, it raised the question of whether any good end would be served by waiting for it to finally go (whilst it was unknown what would replace it). Nonetheless, the court considered, by requiring the co-respondent to go through the stages of neighbourhood centre, district centre etc. as submitted by the appellant, it would be totally pointless and would do no more than condemning all interests affected to avoidable episodes of disruption and inconvenience.

The court believed the relevant question was whether an appropriate "time" had come or loomed, for a small sub-regional centre, to be established. In this regard, it was accepted that the time at which Judgments were made of "establishment", was when a centre was up and running, rather than at the time of approval. The court was of the view that, inevitably, there would be a certain amount of delay in the finalisation of designs and constructions and so on, and it was accepted that conditions of approval could impose a longer (or a defined) delay if appropriate. In this regard, the court relevantly noted that the development to which the plan of development and the preliminary approval applied was to be completed within 25 years after the preliminary approval took effect. Accordingly, the court concluded that there was no (or only a purely technical) conflict with the centres hierarchy provisions in the 2003 planning scheme.

The appellant asserted that the proposal conflicted with section 7.6(3) (Purpose of the commercial planning area code) and specific outcomes 15 and 16 of the plan of development, which generally revolved around the question of need for the proposed development. The court dismissed the asserted conflict, while acknowledging that development proposals that were premature should not be approved (see *Adam v Gold Coast City Council* [2007] QPEC 025; (2007) QPELR 379). In the context of the appeal, the court considered it appropriate that the question of prematurity be approached as it was in *Westfield Ltd v Gold Coast City Council* (2002) QPELR 542 (*Westfield* case) and relevantly noted, by reference to the *Westfield* case, that *"(p)rematurity is usually only a reason for refusing an application if it involves some substantial public disbenefit"* (at para 64) and *"(i)n reality a growing population enjoys early benefits if developers are prepared to provide them with facilities sooner rather than waiting for the catchment population to be filled. It is not good planning to allow a population to be created without any facilities…"* at [66].

Concerns were raised by the economists for both the appellant and Bushland Grove Pty Ltd that the proposal was premature. The court however, was not persuaded by such concerns (to warrant a refusal), particularly given the lack of adverse impacts, in line with the *Westfield* case, and that the co-respondent was an outfit which knew how to operate shopping centres. The court took some comfort from the co-respondent's proposal that 2015-2016 would be the first full year of operations and that the opening would not occur before December 2015 and believed that any possible prematurity could be overcome by imposing a condition to preclude commencement of operations before December 2015.

The court further considered the economists' forecasts on the anticipated performance of the proposal, taking into account the "benchmark" performance levels and also, the creation of employment by the proposal. On balance, the court was satisfied that the co-respondent had established economic need, and as it related to planning or public need, the proposal would add into the mix or place additional focus on considerations of competition, convenience and choice.

Contrary to the proposition put forward by the appellant, the court found that the proposal was not in conflict with the preliminary approval and to the extent of any conflict with the 2003 planning scheme, the proposal's conformity with the preliminary approval would outweigh such conflict.

The court was more persuaded by the co-respondent's approach that this was simply a conditions appeal. It was ultimately a matter of timing bearing in mind the scale of the proposal, which would be capable of being conditioned in such a way so as to ensure that it satisfied the relevant planning instruments.

Accordingly, the court dismissed the appeal, subject to a condition being included in the approval which delayed the commencement of operations in the proposed development until December 2015 or later.

## Held

The appeal be dismissed, subject to imposition of a condition delaying commencement of new uses.

# Commercial competitors and liability for costs

Ronald Yuen | Edith Graveson

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Morgan & Griffin Pty Ltd v Fraser Coast Regional Council & Parmac Investment Pty Ltd* [2013] QPEC 2 heard before Jones DCJ**

July 2013

## Executive Summary

This case involved the increasingly common situation where a developer, Parmac Investments Pty Ltd (**costs applicant**) and the assessing council, the Fraser Coast Regional Council (**council**) seek costs against a commercial competitor, Morgan and Griffin Pty Ltd (**costs respondent**) who has been unsuccessful in an application (**declaratory application**) to challenge an approval granted by the council.

While this case predates the costs reform brought about by the *Sustainable Planning and Other Legislation Act (No. 2) 2012*, the case provides some important indications of how the court might exercise its discretion in an application brought by a commercial competitor.

## Case

In this case, the original proceedings involved an application for declaratory relief and challenged the lawfulness of a preliminary approval granted by the council on three separate grounds:

- the referral of the development application;
- the scope of the preliminary approval; and
- the adequacy of public notification.

The costs applicant brought an application for costs (**costs application**) for all three grounds and the council sought costs limited to an issue raised regarding public notification. The Queensland Planning and Environment Court (**court**) ordered the costs respondent to pay the costs applicant and the council's costs for the part of proceedings relating to public notification and dismissed the remainder of the declaratory application.

## Facts

### Declaratory application

On 13 July 2011, the costs applicant lodged a development application with the council for a preliminary approval for material change of use of land "commercial uses" and to vary the council's planning scheme as it was then (**original development application**). On 13 February 2012, the council issued a decision notice approving the original development application (**preliminary approval**). Following the preliminary approval, the costs applicant lodged a new related development application with the council for a development permit for a material change of use for a shopping centre (**related development application**).

On 11 September 2012, prior to the council approving the related development application, the costs respondent filed the declaratory application in the court seeking declaratory relief. On 14 December 2012, the council issued a decision notice approving the related development application.

The declaratory application raised three separate issues regarding the preliminary approval approving the original development application, which were summarised by his Honour Judge Jones as follows:

> 1. *Whether the Council had the power to approve the application given the failure on the part of Parmac to refer the application to the then relevant administering authority under the Environmental Protection Act 1994;*
> 2. *Whether the preliminary approval exceeded the scope of the application by approving a shopping centre in circumstances where, on the face of the application, approval was sought for "commercial uses"; and*
> 3. *Whether there was a failure on the part of the second respondent to provide sufficient public notification of the application.*[1]

[1] *Morgan & Griffin Pty Ltd v Fraser Coast Regional Council and Anor (No. 2)* [2013] QPEC 12, [3].

Two further issues were raised by the applicant in relation to the related development application:

1. whether the related development application had lapsed due to a failure to refer it to the Department of Environment and Heritage Protection; and
2. what the appropriate level of assessment for the related development application was.

On 23 February 2013, his Honour handed down a judgment in the declaratory application refusing to grant the declaratory relief sought.

## Costs arguments

At the time the declaratory application was made, section 457 (Costs) of the *Sustainable Planning Act 2009* (**SPA**) required the parties to a proceeding to bear their own costs except in specified circumstances. As such, both the costs applicant and the council contended that the declaratory application was frivolous or vexatious within the meaning of section 457(2)(b) of the SPA.

### Public notification

The council's argument was limited to the public notification grounds and focused on the fact that there was:

> *…evidence before the Court which suggested that the public had not been misled. That evidence comprised the submissions actually made in response to the development application. Those submissions did not reveal any confusion on the part of the public as to what was proposed. In the circumstances, the public notification point lacked substance and there was no reasonable basis for arguing that the public had been misled.*[2]

As a result the council argued that the public notification point lacked substance, merit and caused unjustifiable trouble to the council. The costs applicant also argued that the public notification point was entirely devoid of merit.

### Referral

In relation to the question of referral to the administering authority under the *Environmental Protection Act 1994*, the costs applicant argued that the declaratory application was devoid of substance, lacked sufficient grounds and doomed to fail because:

- the construction of the SPA argued by the costs respondent in defence of this ground was contrary to the decision in *Stevenson Group Investments Pty Ltd v Nunn & Ors* [2012] QCA 351 (**Stevenson case**); and
- in any case, the court would exercise its excusatory power pursuant to section 440 (How court may deal with matters involving non-compliance) of the SPA to remedy the defect in the development application (**referral argument**).

The costs applicant also noted that it had put the costs respondent on notice that cost orders would be sought in the event the declaratory application failed and that the point raised regarding gross floor area was devoid of merit.

# Decision

His Honour interpreted the meaning of frivolous and vexatious for the purposes of section 457(2)(b) of the SPA by reference to the decisions in *Mudie v Gainriver Pty Ltd (No. 2)* (2003) 2 Qd R 271 and *Ebis Enterprises Pty Ltd v Sunshine Coast Regional Council* [2011] QCA 15.

His Honour noted that the "*Macquarie Dictionary defines "frivolous" as of little or no weight, worth or importance; not worthy of serious notice … characterised by lack of seriousness or sense*" and "*vexatious*" as "*causing vexation; vexing, annoying…*" and that "*something much more than a lack of success needs to be shown before a parties proceedings are frivolous or vexatious.*"[3] His Honour also noted that "*a proceeding will be frivolous if it lacks substance, so there was no reasonable basis for starting it so that each prosecution produced unjustified trouble for the other party.*"[4]

With respect to the public notification argument his Honour noted that, after lengthy consideration in the proceedings for the original application, he had concluded that the point lacked merit and that there was no evidence supporting the costs respondent's argument. In those circumstances, his Honour concluded that the relevant part of the declaratory application was frivolous and vexatious.

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2 *Morgan & Griffin Pty Ltd v Fraser Coast Regional Council and Anor (No. 2)* [2013] QPEC 12, [7].
3 *Mudie v Gainriver Pty Ltd (No. 2)* (2003) 2 Qd R 271.
4 *Ebis Enterprises Pty Ltd v Sunshine Coast Regional Council* [2011] QCA 15.

With respect to the referral argument his Honour noted that while he found that the Stevenson case was always going to be a high hurdle for the costs respondent to overcome, its attempts to distinguish the case were not frivolous or vexatious.

His Honour also found that the costs applicant's arguments in relation to costs failed to recognise that the costs respondent had succeeded in convincing the court that the original development application had lapsed and that the gross floor issue was an error in the application process. As such, his Honour concluded that these issues were neither frivolous nor vexatious.

## Held

On the basis of the above the court made the following orders:

- the costs respondent to pay the costs applicant and the council's costs of and incidental to that part of the declaratory application concerned with the "public notification" ground;
- costs, if not agreed to, be assessed on a standard basis; and
- otherwise the application for costs by the costs applicant be dismissed.

Colin Biggers & Paisley

# Inconsistent use represents a significant conflict with the planning scheme

Ronald Yuen | Phoebe Bishop

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2013] QPEC 15 heard before Robertson DCJ**

July 2013

## Executive Summary

This case was an appeal in relation to the refusal of a development application for a material change of use for commercial groundwater extraction at Mount Tamborine (**proposed development**). The issues in dispute related to conflict with the *Beaudesert Shire Planning Scheme* (**planning scheme**), unacceptable traffic, noise and amenity impacts and the impact of the proposed development on the water aquifers. The Queensland Planning and Environment Court (**court**) dismissed the appeal on the basis that the proposed development was in significant conflict with the planning scheme and there were not sufficient grounds to justify its approval despite the conflict.

## Case

This case involved an appeal brought by Gillion Pty Ltd (**appellant**) against a decision of the Scenic Rim Regional Council (**council**) refusing the appellant's development application for a development permit for a material change of use for commercial groundwater extraction (**development application**) with respect to land located at 22-26 Power Parade, Mount Tamborine (**site**).

## Facts

The appellant's development application was lodged with the council on 22 February 2011, after the council took successful enforcement proceedings against the appellant, which was the subject of the judgment of the court in *Scenic Rim Regional Council v Gillion Pty Ltd* [2010] QPEC 115 (**enforcement proceedings**).

The development application sought approval for the following:

- the extraction of the water from the sub artesian source using a single bore;
- the storage of the water onsite within two 20,000 litre tanks; and
- the transportation of the water off-site.

The council refused the development application and the appellant brought the current appeal.

The disputed issues in the appeal related to conflict with the planning scheme being an inconsistent land use across the Shire and conflict with many provisions from the Desired Environmental Outcomes (**DEOs**) to several codes. Many of the conflicts were said to arise from the proposed development producing unacceptable traffic impacts, unacceptable noise and vibration impacts, unacceptable impacts on the sustainability of the relevant aquifer or aquifers and unacceptable impact on the amenity of local residents and across the mountain traversed by the haul route.

## Decision

### "Hard" amenity impacts

The court considered the "hard" amenity impacts of the proposed development, which included impact on the groundwater, noise and traffic. In relation to all three the court ultimately found that any adverse impacts could be sufficiently dealt with by imposing appropriate conditions.

The issues surrounding traffic focused on the safety of the proposed haul route from the site. At the trial, the appellant and the Department of Transport and Main Roads (**DTMR**) reached agreement in relation to a number of conditions seeking to address these safety concerns. The court agreed with the parties' proposed conditions as well as several additional conditions.

The court noted that some of the concerns held by the council and the co-respondents, which related to traffic were more specifically concerned with the amenity impacts. In this regard, the court endorsed the view of the counsel for the DTMR that:

> *…traffic amenity concerns must be measured against the reasonable expectation of the public which are informed by a proper understanding of the role and function of these parts of the haul route that are over State-controlled roads.*

Such reasonable expectations were said to include an expectation that heavy vehicles would be present on State-controlled roads.

### Conflict with the planning scheme

There was no dispute between the parties that the proposed use of the site conflicted with the planning scheme. What was disputed was the extent of the conflict. The appellant submitted that the conflict was merely "mechanical" or "technical", whereas the other parties described it as "major" or "flagrant".

The site was located in the "Tamborine Mountain Zone" under the planning scheme. The consistent development table for the Tamborine Mountain Zone did not refer to the use of "Commercial Groundwater Extraction". Such use was defined under the planning scheme, which also included a "Commercial Groundwater Extraction Code", however was not included in the consistent development table for any of the zones in the planning scheme. The court therefore found that the designation of the use as inconsistent for the Tambourine Mountain Zone was significant.

In relation to the intangible impacts on amenity and impacts on character, the court held that there was an unacceptable impact to certain residents in the area, which the court considered represented a minor conflict with the planning scheme when considered in isolation.

Overall the court found that the proposed development constituted a significant conflict with the planning scheme.

### Sufficient grounds

In determining whether there were sufficient grounds to approve the development application despite the conflict with the planning scheme, the court considered:

- the need for the proposed development;
- the need for an upgrade to a nearby intersection; and
- the absence of unacceptable amenity impacts.

In relation to need, the court said that the question of whether a need is shown to exist is to be decided from the perspective of a community, not that of an appellant, commercial competitor or even objectors. The court further noted that the absence of any significant benefit to the community of Mount Tamborine or indeed the community covered by the planning scheme if the proposed development was to be approved was not fatal to the establishment of town planning need. However, the court found that although there was some evidence of town planning and community need for the proposed development, such need was not significant even accepting that there was a general need for bottled water in the community.

In relation to the absence of unacceptable amenity impacts the court considered the Court of Appeal's statement in *Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* [2012] QCA 370 where at paragraph 25, Holmes JA noted:

> *It must be a matter of public interest, for example, that the project under consideration will not destroy local amenity.*

On the basis of that statement the court was prepared to regard the absence of unacceptable amenity impacts as a relevant ground but not a ground that attracted much weight, particularly given the appellant had accepted conditions that would largely overcome hard impacts.

Overall the court found that the grounds were not sufficient to overcome what was a significant conflict with the planning scheme. Furthermore, the court stated that if it had determined the conflict with the planning scheme to have amounted to a technical or mechanical conflict, then it would have been persuaded that the grounds were sufficient to overcome the conflict and thereby allow the appeal.

## Held

The appeal was dismissed.

Colin Biggers & Paisley

# Use consistent with the planning scheme

Jamon Phelan-Badgery

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Edwards v Central Highlands Regional Council* [2013] QPEC 16 heard before Jones DCJ**

July 2013

## Executive Summary

A development application was approved by the Queensland Planning and Environment Court (**court**) for a material change of use for a bulk store despite the use being an industrial use situated in a rural residential zone, on the basis there was no conflict with the provisions of the *Emerald Shire Planning Scheme* (**planning scheme**), which did not completely prohibit industrial uses in the zone, but provided for land to be "predominantly used for houses", with commercial and industrial uses "generally not located" in the zone. When considered in the circumstances, where the particular parcel of land was suited to the use and impacts appropriately mitigated, it was considered appropriate to approve the application.

## Case

An appeal was lodged by the owner of the subject site (**Edwards**) against the refusal of the development application for a bulk store (building materials) (**application**) by the assessment manager (**council**). The council refused the application on various grounds including compromising a desired environmental outcome, negatively impacting on amenity, setting an undesirable precedent, inconsistency with overall outcomes of the Town Zone - Rural Residential Precinct, negatively impacting other industrial areas, and general complaints, which had been made to the council about industrial uses being situated in similar areas.

## Facts

The subject site was a corner site primarily fronting Campbell Ford Drive, a road connecting two other significant roads, and carrying a mixture of usual suburban and commercial traffic as well as heavier commercial and industrial vehicles. With an area of 4,061m$^2$ and containing a large house with a pool, gardens and a large class 10a shed of 378m$^2$, in and around which the bulk store was already occurring without an appropriate development permit.

The use applied for involved the receipt, storage and distribution of building materials related to the construction business operated by Edwards, including one employee visiting the site regularly throughout the day, the use of two forklifts and commercial vehicles for deliveries. This was accepted to be an industrial use, characterised as a bulk store under the planning scheme definition.

The overall outcomes sought for the Town Zone - Rural Residential Precinct relevantly included the following (our emphasis):

- Land is predominantly used for houses on small rural living lots, yet provided with appropriate urban services;
- Uses in the Commercial and Industrial Use Classes are generally not located on land within the Precinct.

Noise impacts associated with the use included reversing alarms on vehicles and the forklifts. Visual impacts were limited to fleeting views of operations by passers-by and the parking of vehicles.

No submissions were received objecting to the application. A door knock survey conducted by the council showed the court that notwithstanding that business operations had been conducted for number of years, at times to a greater degree than the present, that there were no complaints from residents in the residential estate on the opposite side of Campbell Ford Drive.

Observations of surrounding rural residential areas showed numerous instances of large sheds, which appeared to involve uses either commercial in nature or at least, higher in intensity than may be expected in a rural residential area. These did not appear to be the subject of an approval for commercial or industrial uses.

## Decision

The court considered the decision relating to whether there was a conflict must be reached through construing the planning scheme as a whole, in a broad and practical way that achieves the purpose of the planning scheme. His Honour concluded that:

> *There is a significant difference between planning schemes that reveal a clear intention to discourage inconsistent uses occurring in a precinct and those, while recognising they will not be the norm, also recognise that, in appropriate circumstances, apparently inconsistent uses might occur. The subject scheme falls into the latter category.*

A merits assessment resulted in the following findings, which led the court to decide that the appeal should not be refused:

- The court stated that while noise may be dealt with through appropriate conditions, it may be impossible to completely avoid all amenity impacts caused by the use, and remained a relevant consideration.
- The court was not willing to accept that the fact that the shed was ancillary to the house on the land, meant that the residents of the house would necessarily have a material degree of control or supervision of the use of the shed, and that the use of the shed would necessarily be limited in that regard. However:
  - the planning scheme did not prohibit a commercial or industrial activity taking place independently of a residential component of a property;
  - the fact the use fit within the definition of a bulk store in the planning scheme, which included uses of far greater intensity of that proposed, should not interfere with an objective assessment of the actual impacts of the use.
- The lack of adverse submissions or determinative results of the door knock survey tended to show that little evidence of complaint could be established. The court acknowledged that lack of complaint was not determinative but was relevant in the court's assessment.
- The visual aspects of the use were not considered to have a significant impact on amenity, and the court accepted evidence that a number of vehicles observed outside the premises were not related to Edwards' business, noting that a condition could be imposed to require vehicles associated with the bulk store use to be parked within the premises.
- Given the particular features of the land, the use was not inappropriate in the circumstances and was not expected to establish an undesirable precedent.

## Held

The appeal be allowed subject to the imposition of appropriate conditions and the appeal be adjourned to allow the parties to consider an appropriate conditions package.

# Queensland infrastructure planning and charging framework review

Ian Wright

**This article outlines the Queensland Department of State Development, Infrastructure and Planning's proposed options for the reform of the Queensland infrastructure planning and charging framework identified in a discussion paper released on 1 July 2013**

July 2013

## Introduction

### Infrastructure planning and charges reform

On 1 July 2013, the Queensland Department of State Development, Infrastructure and Planning (**DSDIP**) released a discussion paper on the review of Queensland's infrastructure planning and charging framework (**Discussion Paper**) which contains reform proposals that will have significant practical implications for all local governments and their ratepayers, distributor-retailers and their shareholders and customers as well as developers and land owners

### Reform timeline

The Discussion Paper identifies three stages in the infrastructure planning and charging reform process:

- **Public consultation stage** – From 1 July 2013 to 9 August 2013, the Discussion Paper is available for public consultation.
- **Government review and policy decision-making stage** – From 9 August 2013 to late 2013, DSDIP will review the feedback received during the public consultation period and develop a set of reform options to be presented for government approval in late 2013.
- **Implementation stage** – From 1 July 2014, the new framework is proposed to commence.

### Reform outcomes

The Discussion Paper identifies the following four reform outcomes against which the reform options have been tested.[5]

**Table 1 Reform outcomes**

| Outcome | Result |
|---|---|
| **Development feasibility** | Makes Queensland a desirable place for the development industry to do business by:<br>• linking the quantum of infrastructure charges to a development's demand for infrastructure;<br>• minimising risks to development associated with infrastructure contributions (including time delays, increased holding costs and uncertainty). |
| **Local authority financial sustainability** | Supports the long-term financial sustainability of local authorities and the planning, delivery and maintenance of local infrastructure by local authorities.<br>The framework is cost-effective and administratively simple to implement and maintain. |
| **Certainty** | The framework is simple to understand, implement and use.<br>Infrastructure charges are supported by transparent published methodologies and charging schedules. |
| **Equity** | Only infrastructure essential for development is eligible for infrastructure contributions. |

[5] See Discussion Paper, p14.

## Reform options

The reform options identified in the Discussion Paper are split into three specific parts, which include the following:

- Part 1: Framework fundamentals:
  - Infrastructure scope
  - Trunk and non-trunk infrastructure identification
  - Infrastructure planning.
- Part 2: Charges mechanisms:
  - Capped charges
  - Planned charges.
- Part 3: Framework elements:
  - Conditions
  - Offsets and refunds
  - Credits
  - Infrastructure agreements
  - Dispute resolution
  - Deferred payment.

The Discussion Paper identifies for each element a status quo option involving the retention of the current system with its attendant issues as well as options which seek to address the identified issues with the current framework.

## Themes of paper

This paper aims to address the following:

- The policy basis for infrastructure contributions.
- The reform options for the identified elements of infrastructure planning and charging framework.
- The potential implications arising from the reform options.
- Alternative reform options to address the implications identified with the current infrastructure planning and charging framework.

# Infrastructure contributions

Infrastructure contributions are financial, work or land contributions for infrastructure for development.

Financial contributions for infrastructure come in various forms but there are essentially 4 types:[6]

- **User pays levy** – payment to an infrastructure authority for planned infrastructure benefitting the development.
- **Impact mitigation levy** – payment to an infrastructure authority to make good the unanticipated adverse effects of development on planned infrastructure.
- **Development standard levy** – payment to the community to make good the adverse effects of development not complying with a development standard such as on site car parking spaces.
- **Betterment levy** – payment to the community for the development of higher and better uses on a site.

The characteristics of each financial contribution is summarised in Table 2.[7]

**Table 2 Financial contributions**

| Financial contribution | Apportionment principle | Implementation mechanism |
|---|---|---|
| **User pays levy** | *User pays principle* – Payment in accordance with a development's projected share of usage of planned infrastructure | Charges are levied by a notice or development approval condition in accordance with a charging instrument that relates to an infrastructure planning instrument |

6 Wellham K and Spiller M (2012) *Urban Infrastructure: Finance and Management*, Wiley Hoboken, p138.
7 Ibid, p139.

| Financial contribution | Apportionment principle | Implementation mechanism |
|---|---|---|
| **Impact mitigation levy** | *Exacerbator pays principle* – Developer pays 100% of additional costs of additional or changed infrastructure | Payments are imposed in a development approval condition |
| **Development standard levy** | *Inclusionary zoning principle* – Developer pays 100% of the costs to comply with a development standard | Negotiated infrastructure agreement |
| **Betterment levy** | *Value uplift principle* – Percentage of uplift attributable to granting additional use rights | Negotiated infrastructure agreement |

The Discussion Paper is primarily focussed on changes to Queensland's infrastructure charges framework which is a user pays levy. The Discussion Paper indicates that the following provisions of the *Sustainable Planning Act 2009* (**SPA**) are to be retained:

- the conditions powers under section 650 of the SPA for the additional cost impact for out of sequence or inconsistent development;[8]
- infrastructure agreements can be used to implement a development standard levy and a betterment levy.[9]

# Infrastructure scope

## Current framework

Local governments and distributor-retailers may require infrastructure contributions for development infrastructure which is defined as follows:[10]

> "*development infrastructure means—*
>
> *(a) land or works, or both land and works, for—*
>
> *(i) urban and rural residential water cycle management infrastructure, including infrastructure for water supply, sewerage, collecting water, treating water, stream managing, disposing of waters and flood mitigation, but not urban and rural residential water cycle management infrastructure that is State infrastructure; or*
>
> *(ii) transport infrastructure, including roads, vehicle lay-bys, traffic control devices, dedicated public transport corridors, public parking facilities predominantly serving a local area, cycle ways, pathways, ferry terminals and the local function, but not any other function, of State-controlled roads; or*
>
> *Note—*
>
> *The chief executive administering the Transport Infrastructure Act may make guidelines, including guidelines defining the local function of State-controlled roads.*
>
> *(iii) public parks infrastructure supplied by a local government, including playground equipment, playing fields, courts and picnic facilities; or*
>
> *(b) land, and works that ensure the land is suitable for development, for local community facilities, including, for example—*
>
> *(i) community halls or centres; or*
>
> *(ii) public recreation centres; or*
>
> *(iii) public libraries.*"

In particular a local government is empowered to:

- prepare a local government priority infrastructure plan which identifies development infrastructure as trunk infrastructure;[11]
- levy an infrastructure charge (a user pay levy) for the provision of trunk infrastructure;[12]

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8 See Table 12, Reform Options 1 and 2 of the Discussion Paper.
9 See sections 7.5.3 and 8.1.3 of the Discussion Paper.
10 See schedule 3 of the *Sustainable Planning Act 2009*.
11 See section 85 of the *Sustainable Planning Act 2009* and *Statutory guideline 01/11 – Priority Infrastructure Plans*, p7.
12 See section 629 of the *Sustainable Planning Act 2009*.

- require, by a development approval condition, a financial contribution (an impact mitigation levy) for the additional cost of trunk infrastructure;[13] and
- require, by a development approval condition, the provision of work and land contributions for trunk infrastructure and work contributions for non-trunk infrastructure.[14]

In South-East Queensland, distributor-retailers are given the same powers in respect of water supply and sewerage infrastructure.[15]

## Reform option

The Discussion Paper identifies that local governments are requiring infrastructure contributions for development infrastructure which is not essential to or does not directly benefit development but has a broader community benefit.

The Discussion Paper proposes that infrastructure contributions be limited to essential infrastructure for development only with non-essential infrastructure for development to be funded through other revenue sources unless provided for in an infrastructure agreement.

The significant differences between development infrastructure and essential infrastructure, which are summarised in Table 3, include the following:

- **Water supply and sewerage infrastructure** – Dams and other instream storages are excluded whilst pipes down to 200 mm are to be included.
- **Stormwater quantity and quality infrastructure** – On site treatment, bank and shore protection and flood mitigation infrastructure is excluded.
- **Road transport infrastructure** – Higher order roads such as arterial roads and the local function of State-controlled roads are excluded whilst some significant items of road transport infrastructure such as noise and light barriers, fauna management crossings, landscaping and fencing appear to be excluded.
- **Public transport infrastructure** – Bus, taxi, ferry and off-road pedestrian and bicycle infrastructure is excluded.
- **Park infrastructure** – Park areas are limited to 2 ha per 1,000 persons and embellishments are excluded.

**Table 3 Comparative analysis of development infrastructure and critical infrastructure**

| Development infrastructure (Schedule 3 SPA) | Essential infrastructure (Appendix 4 Discussion Paper) | Significant changes |
|---|---|---|
| **Urban and rural residential water cycle management infrastructure** | | |
| **Water supply infrastructure** | ✓ | Exclusions:<br>• dams and instream storages<br>• treatment funded by utility charges<br>Inclusion:<br>• pipes with diameter of 200 mm |
| **Sewerage infrastructure** | ✓ | |
| **Collecting water** | × | Exclusions:<br>• offsite stormwater quality and quantity<br>• bank and shore protection<br>• flood control |
| **Treating water** | ✓ | |
| **Stream managing** | × | |
| **Disposing of waters** | × | |
| **Flood mitigation** | × | |
| **Transport infrastructure** | | |
| **Roads** | ✓ | Exclusions:<br>• arterial roads |
| **Vehicle lay-bys** | ✓ | |

13 See section 650 of the *Sustainable Planning Act 2009*.
14 See sections 626 and 626A of the *Sustainable Planning Act 2009*.
15 See chapter 9, part 7A, division 5, subdivisions 1 and 2 of the *Sustainable Planning Act 2009*.

| Development infrastructure (Schedule 3 SPA) | Essential infrastructure (Appendix 4 Discussion Paper) | Significant changes |
|---|---|---|
| **Traffic control devices** | ✓ | • noise and light barriers<br>• traffic barriers<br>• fauna management crossings<br>• landscaping and street trees<br>• fencing<br>• taxi bays |
| **Dedicated public transport corridors** | × | Exclusion:<br>• public transport infrastructure |
| **Public parking facilities predominantly serving a local area** | × | |
| **Cycle ways** | × | |
| **Path ways** | × | |
| **Ferry terminals** | × | |
| **Local function of State-controlled roads** | × | Exclusion:<br>• State-controlled roads |
| **Public parks infrastructure supplied by local government** | | |
| **Land** | ✓ | Exclusions:<br>• park embellishments<br>• parks limited to 2 ha/1,000 persons |
| **Playground equipment** | × | |
| **Playing fields** | × | |
| **Courts** | × | |
| **Picnic facilities** | × | |
| **Community facilities land for local government** | | |
| **Land** | ✓ | No change |

## Implications of reform option

The reform option will have the following implications:

- **Capital funding gap** – The limitation of infrastructure contributions to development infrastructure which is essential infrastructure will reduce infrastructure charges and other infrastructure contributions for development. The costs of development infrastructure which is non-essential infrastructure will remain thereby creating a funding gap for non-essential infrastructure which will have to be funded by local governments and other revenue sources.
- **Access constrained development** – The exclusion of arterial roads from essential development will limit the development of access constrained land in growth areas where the interim construction of an arterial road (being at least the first carriageway) is necessary to allow for a local road function and development access. An example of this is provided in the Rochedale neighbourhood plan area in Brisbane.
- **Flood constrained development** – The limitation of essential infrastructure to on-site stormwater quantity and quality treatment will limit the development of capacity constrained land requiring off-site treatment to enable development. This will be particularly the case in infill areas and fringe areas within riverine and coastal floodplains.

- **Lower social infrastructure standards** – The limitation of park area and exclusion of embellishments will result in a significant lowering of social infrastructure standards. As the Productivity Commission has previously noted "There is now an expectation in the community that social infrastructure will be provided or made available for new development".[16]
- **Lower amenity and environmental standards** – The scope of the listed essential infrastructure represents a lowering of urban amenity and environmental standards particularly in terms of the exchange of off-site stormwater quality treatment, fauna management crossings and noise and light barriers for road transport infrastructure and public transport infrastructure in particular off road pathways and cycleways and public parking facilities.
- **Different development settings** – The list of essential infrastructure does not take account of different development settings such as existing urban areas, regional cities and towns and growth areas whether it be infill or greenfield. The exclusion of arterial roads in an urban area context may be reasonable but appears inappropriate in a greenfield or infill growth area.
- **Uncertain scope of infrastructure items** – The scope of the list of essential infrastructure is uncertain particularly in relation to road transport infrastructure where it is uncertain particularly in relation to road transport infrastructure where it is not clear that it includes elements of roads such as noise and light barriers, fauna management crossings, traffic barriers and fencing.
- **Land use and infrastructure integration** – The limited scope of essential infrastructure will discourage the integration of land use and infrastructure outcomes and encourage a fragmented approach to urban development which will be less efficient.

### Alternative reform option

In order to address the implications of the identified reform options the following alternative reform option is suggested:

- **Essential infrastructure list** – A list of essential infrastructure should be prepared which provides for the following:
  - a broader scope of essential infrastructure;
  - specification of items within each category of essential infrastructure to avoid variations in interpretation;
  - variations in the items of essential infrastructure to accommodate different development settings.
- **Road transport infrastructure** – Essential infrastructure should include land contributions for arterial roads in urban areas and land and work contributions for arterial roads in growth areas.
- **Public transport infrastructure** – Essential infrastructure should include land and work contributions for off road pedestrian paths and cycleways and public parking facilities and land contributions for bus corridors.
- **Public parks infrastructure** – Essential infrastructure should include work contributions for basic recreation embellishments in addition to serviced land contributions.

## Identification of trunk and non-trunk infrastructure

### Current framework

Local governments and distributor-retailers are empowered to identify development infrastructure as trunk infrastructure in an infrastructure planning instrument. Development infrastructure not identified as trunk infrastructure is non-trunk infrastructure.

Infrastructure planning instruments of local governments have included an infrastructure charging plan, planning scheme policies, adopted infrastructure charges resolution and priority infrastructure plan. Distributor-retailers are empowered to prepare a Netserv plan for trunk water supply and sewerage infrastructure.

The identification of development infrastructure as trunk infrastructure is important in the following respects:

- **Infrastructure charges** – Prior to the implementation of the maximum adopted charges regime, infrastructure charges were calculated based on an incremental cost methodology for the provision of trunk infrastructure.
- **Additional trunk infrastructure costs** – Development approval conditions can require additional trunk infrastructure costs for out of sequence or inconsistent development.
- **Trunk infrastructure land and work conditions** – In kind contributions for trunk infrastructure are required to be offset against infrastructure charges and essential trunk infrastructure costs and to be refunded if the value of the in kind contribution exceeds the infrastructure charge.
- **Non-trunk infrastructure land and work conditions** – Development approval condition powers for land and work contributions are more limited in the case of non-trunk infrastructure.

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16 Industry Commission (1993) *Taxation and Financial Policy Impacts on Urban Settlement*, Australian Government Publishing Service, Canberra, p100.

## Reform option

The Discussion Paper identifies that local governments are not recognising unidentified development infrastructure which is shared with existing or future development as trunk infrastructure with the effect that offsets and refunds are not applicable to shared development infrastructure.

The Discussion Paper proposes the following reform options:

- **Standard specifications for trunk infrastructure** – A Ministerial guideline for the preparation of an infrastructure plan is to provide a set of standard specifications for the identification of trunk infrastructure in an infrastructure plan.
- **Trunk infrastructure definition** – Essential infrastructure is to be trunk infrastructure if it satisfies any of the following:
  - essential infrastructure identified in an infrastructure plan; or
  - essential infrastructure which meets the minimum standard specification for trunk infrastructure in the Ministerial guideline; or
  - essential infrastructure which provides a trunk function in that it:
    - facilitates development of other existing serviced premises by enabling increased development or overcoming deficiencies;
    - links a group of premises to identified trunk infrastructure; or
    - would be identified as trunk infrastructure if the demand and development pattern was known at the date of the infrastructure plan.

## Implications of reform option

The reform option materially increases the scope of trunk infrastructure to which offsets and refunds apply by including unplanned essential infrastructure which meets minimum standard specifications or otherwise performs a 'trunk function'.

Whilst the reform option responds to stakeholder issues by providing increased flexibility for developers to have unplanned essential infrastructure recognised as trunk infrastructure, the reform option will have the following implications for local governments and distributor-retailers:

- **Planned infrastructure charges misaligned** – The identification of deemed trunk infrastructure will result in a misalignment of planned charges in that they are only related to the establishment cost of trunk infrastructure identified in the infrastructure plan. As such planned infrastructure charges will in effect be undercharging for the cost of trunk infrastructure (identified and deemed).
- **Offset reduction of infrastructure charges** – Infrastructure charges intended to fund the trunk infrastructure identified in the infrastructure plan will be reduced by offsets for deemed trunk infrastructure thereby reducing the infrastructure charges available to fund identified trunk infrastructure.
- **Reduced refunds from infrastructure charges** – The reduction of infrastructure charges from offsets for deemed trunk infrastructure will reduce the infrastructure charges available for refunds for developers which have provided identified trunk infrastructure thereby adversely impacting on the delivery of the identified trunk infrastructure for development consistent with the infrastructure plan.
- **Strategic planning and development assessment** – The financial implications of approving development requiring the provision of deemed trunk infrastructure which will accrue offsets and potential refunds will result in local governments adopting a conservative approach in its strategic planning and development assessment which will otherwise limit growth.

## Alternative reform option

The stakeholder issues and implications for local governments and distributor-retailers may be addressed by an alternative reform option in which an item of essential infrastructure is defined as trunk infrastructure if it:

- is identified in an infrastructure plan; or
- meets the minimum standard specification for trunk infrastructure and satisfies any of the following:
  - allows for the removal of an item of trunk infrastructure;
  - allows for the delayed provision of an item of trunk infrastructure beyond the planning horizon of the infrastructure plan;
  - is reasonably likely to have been included in the infrastructure plan had detailed network planning for the planned development been undertaken as part of the preparation of the infrastructure plan.

The alternative reform option increases the scope of trunk infrastructure for developers whilst providing reasonable certainty to local governments and distributor-retailers in relation to the financial liability of future offsets and refunds.

# Infrastructure planning

## Current framework

Under the current framework, local governments and distributor-retailers are required to provide detailed long-term plans for the delivery of infrastructure through the introduction of a priority infrastructure plan and Netserv plan, respectively. With the introduction of the maximum infrastructure charges framework in 2011, the detail required in a priority infrastructure plan or Netserv plan was reduced.

## Reform option

The Discussion Paper identifies stakeholder issues as relating to the onerous and time consuming amendment process for a priority infrastructure plan and Netserv plan and the limited detail now required in a priority infrastructure plan and Netserv plan resulting in a lack of clarity and consistency in infrastructure conditioning, offsetting, refunding and infrastructure agreement processes.

The Discussion Paper proposes a reform option with the following elements:

- **Infrastructure plan** – Local governments are required within two years to include in their planning schemes an infrastructure plan which contains a similar level of detail to that required in a priority infrastructure plan prior to the introduction of the maximum adopted charges regime but with the option of either:
  - including a cost apportionment methodology and applying planned charges; or
  - not including a cost apportionment methodology and applying capped charges.
- **Netserv plans** – A review of the Netserv plan requirements under the *South East Queensland Water (Distribution and Retail Restructuring) Act 2009* is to be undertaken by DSDIP in collaboration with the Department of Energy and Water Supply.
- **Standardisation** – Infrastructure plans are proposed to be standardised in three ways:
  - *Cost apportionment methodology* – This proposal involves adopting a standardised methodology for apportioning the cost of trunk infrastructure to future demand which may include one of the following identified methodologies:
    - average cost methodology – the total existing and future cost of infrastructure is divided by the total existing and future demand for the infrastructure to calculate a cost per demand unit for an area;
    - incremental cost methodology – the future cost of infrastructure to service future demand is divided by the future demand.
  - *Standard schedule of works model* – This proposal involves adopting a standard approach and format for the calculation and presentation of data in schedule of works spreadsheets. Draft templates are available for download on the DSDIP's website at www.dsdip.qld.gov.au/forms-templates/infrastructure-charges.html.
  - *Standard demand generation rates* – This proposal involves adopting a standardised approach to calculating infrastructure demand to appropriately apportion the cost of infrastructure between developments. The proposed process involves:
    - determining the total planned demand in each network service area;
    - determining the total infrastructure cost for each area;
    - determining the average cost per demand unit by dividing the total cost by the total demand;
    - testing the corresponding demand generation table against this information to ensure that demand generation rates are accurate.
- **Third party review** – Infrastructure plans are proposed to be subject to third party review with the results of the review being further reviewed by the State government.
- **Transitional arrangements**:
  - Prior to the adoption of a new infrastructure plan, relevant development approval conditions are to be assessed on a case by case basis to ensure compliance with the new system.
  - Local governments will be given a set period (stated to be two years) within which an infrastructure plan or Netserv plan is to be prepared.

- Local governments will be required to attach a compliant infrastructure plan to a planning scheme within a year of the planning scheme's adoption. This recognises the practicality that infrastructure plans (including planned charges) can only be resolved after the land use policy issues in a planning scheme have been finalised.
- A local government or distributor-retailer which has not prepared an infrastructure plan or Netserv plan will be able to condition the provision of essential infrastructure (presumably under the more limited non-trunk infrastructure condition powers) but will be limited to applying capped charges.

### Implications of reform option

The reform option addresses the stakeholder issues without having significant implications for local governments and distributor-retailers given that they are provided with the option of implementing a cost apportionment methodology and applying planned charges or not implementing a cost apportionment methodology and applying capped charges.

In relation to the proposed cost apportionment methodology, economic theory tells us that resources will be allocated efficiently when prices are equal to the marginal costs being the costs associated with an increment in supply - the cost of producing one more widget or the cost of providing roads for one additional subdivision or water pipes to one more housing development. A marginal cost methodology therefore reflects true cost pricing as marginal costs will take account of urban form matters such as location, density, local context and type.[17]

However implementing marginal cost pricing can be complex and difficult to estimate and to allocate to users. A practical alternative is an "average incremental cost approach" which combines marginal and average cost pricing and involves allocating each element of cost to a particular incremental decision that results in the provision of a service and then to assign to each additional user the increased cost attributable on average to their usage.[18]

It is therefore recommended that cost apportionment be based on a marginal cost approach where possible or an average incremental cost approach where marginal cost pricing is not possible.

It is likely that this will vary between local government given their differing development settings and between trunk infrastructure networks.

## Capped charges

### Current framework

When levying infrastructure charges, local governments are currently limited to levying charges less than or equal to the relevant maximum adopted charge specified in the *State Planning Regulatory Provision (Adopted Charges) 2012*. This system of capping charges to a clear maximum amount provides a measure of certainty to the infrastructure charges framework.

### Reform option

The key issues identified in the Discussion Paper in relation to the current system of capped charges include:

- The demand metric (number of bedrooms or GFA) does not necessarily reflect the infrastructure demand created by the development and there is little link between the charge and the demand.
- Charge categories need to be better aligned with types of land use to better reflect demand for infrastructure.
- Non-residential development types may currently be too heavily charged on the basis of the attribution of a high degree of traffic generation to these types of development.

The Discussion Paper does not propose any reform options for capped charges as an analysis is to be completed by 31 January 2014. However the Discussion Paper identifies that the analysis is proposed to:

- quantify the impacts of the final reforms on current capped charges and implement appropriate amendments;
- consider differentiating charges on the basis of location and type of development;
- take place concurrently with the implementation phase of other aspects of the reform;
- consider the financial sustainability of local governments and impacts on the feasibility of development;
- involve consultation with local governments and other stakeholders;
- consider the appropriateness of the current degree of traffic generation attributed to non-residential development.

The Discussion Paper outlines three options for differentiation of capped charges:

- **State-wide charges** – It is identified that whilst this option is administratively simple, it does not accommodate regional variations in development and infrastructure delivery costs.

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17 Blais, P (2010) Perverse Cities, UBC Press, p163.
18 Blais, P (2010) Perverse Cities, UBC Press, p173.

- **Location based differentiation** – It is identified that greenfield development may require new infrastructure in comparison to infill development although DSDIP analysis indicates that the differences are small.
- **Development type differentiation** – The issues and corresponding possible solutions specified in the below table are to be further considered in relation to the refinement of the capped charges categories:

**Table 4 Issues with capped charges**

| Development type | | Identified issue for the development type | Proposed solution for the identified issue |
|---|---|---|---|
| **Residential** | Dormitory-style accommodation | Charges are currently being levied on a per-bedroom basis which is often inappropriate for this type of development | Levy charges on a per-bed basis, rather than per-bedroom |
| | Retirement facilities | Maximum charges currently equivalent to a dwelling house which may overstate the infrastructure demand | No solution proposed at this time |
| **Non-Residential** | Warehouses and residential care facilities | Current system of charges often overstates the infrastructure demand | No solution proposed at this time |
| | Education facilities | Charges are currently being levied on a GFA basis of assessment | Schools Regulatory and Financial Reform Sub-Committee has issued a recommendation that charges move to a per-student basis of assessment |

## Implications of reform option

The proposed review of capped charges should take account of the Productivity Commission's key findings and recommendations in respect of the impacts of charging reforms:[19]

- Charges should, wherever possible, reflect any significant locational differences in the costs of providing urban infrastructure. Where they cannot do so, they should at least seek to avoid systematic locational bias [*chapter B3, section 3.4*].
- While it is not necessary to charge explicitly for costs that are common to all developments to transmit efficient location incentives within cities, cost recovery is desirable for reasons of efficient resource management and decision making in relation to the provision of new infrastructure *[chapter B3, section 3.5].*
- Because efficiency in pricing has more than one dimension, it will usually be necessary to employ a number of charging instruments simultaneously. Developer charges are well-suited to reflecting variations in costs by location and in some respects may be preferred to periodic access charges for that purpose. Charges for use are probably best matched with marginal costs of supplying the service (including congestion costs, broadly defined) [*chapter B3, section 3.4*].
- Where there is genuine excess capacity, it is important that use of ii not be discouraged by prices that exceed the costs of supply. New (and existing) users should be charged at levels that ensure that capacity is appropriately used [*chapter B3, section 3.5*].
- Present methods of charging for infrastructure services are often not sufficiently reflective of locational cost differences. There is too much reliance on averaging or uniformity in all forms of charging. In addition:
  - property values have no necessary relationship to costs of providing urban services such as water and sewerage, and the practice of using them as a basis for charging should end [*chapter B4, section 4.7*];
  - road authorities should be allowed to levy clearly identified charges on developers to cover the costs of providing and improving higher level roads attributable to new developments [*chapter B4, section 4.3*].
- In attempting to assess whether public infrastructure charging encourages expansion of settlement at the urban fringe, the Commission found:
  - for most categories of infrastructure, the detailed information needed for a definitive analysis is not available;

[19] Industry Commission (1993) *Taxation and Financial Policy Impacts on Urban Settlement*, Australian Government Publishing Service, Canberra.

- in the one case – hydraulic services – where available data permitted a quantitative assessment for Melbourne and Sydney, the existence of a significant inducement to fringe location was not confirmed;
- in most other cases, when all relevant factors are considered, it is difficult to judge whether net subsidisation of the urban fringe is likely, let alone the magnitudes involved. What is clear is that assessments which do not properly account for subsidies to established urban areas will generally overstate any inducement to fringe location, especially for social infrastructure [*chapter B4, section 4.7*].

- Lack of information is a fundamental obstacle to reform of infrastructure charging and better asset management. Public sector providers of urban services should be required to compile and publish annually the costs, revenues and charging structures associated with development in different areas within their administration. Information is also urgently needed on the value and condition of existing infrastructure throughout the cities [*chapter B6, sections 6.1 and 6.7*].

# Planned charges

## Current framework

The current framework has prohibited local governments from adopting infrastructure charges above the maximum adopted infrastructure charges.

However, some local governments, principally in high growth areas, have requested the ability to adopt infrastructure charges above the capped charges.

## Reform option

The Discussion Paper proposes the following reform option:

- **Capped charges** – These are to be retained as the default option for the levying of infrastructure charges where a local government prepares an infrastructure plan not incorporating a cost apportionment methodology.
- **Planned charges** – These are to be adopted where a local government prepares an infrastructure plan incorporating a cost apportionment methodology and the resulting planned charges are subject to a third party review assessment process and are approved by the Minister.

The proposed process involves the following four stages which are illustrated in Figure 1 (below):

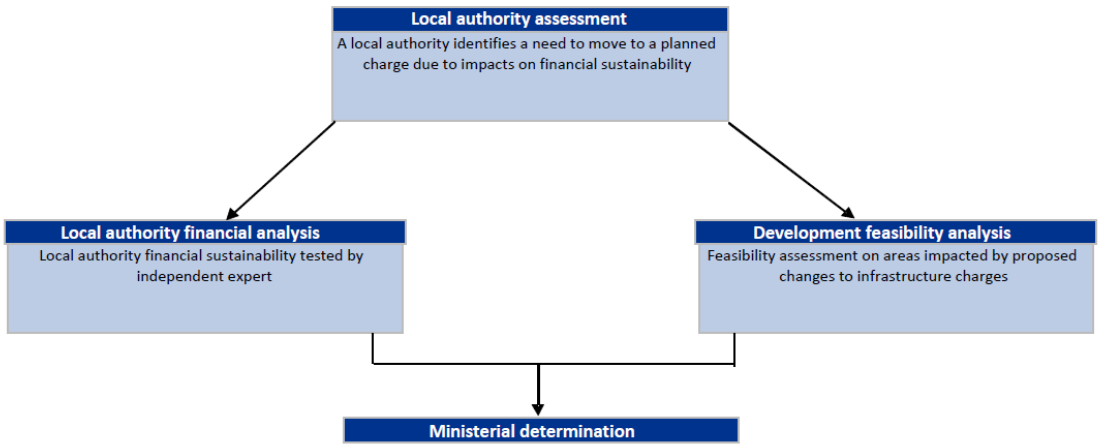
- **Local government assessment** – The local government decides whether or not to levy a planned charge.
- **Local government financial analysis** – This stage involves the following steps:
  - Step 1 – Network review:
    - The local government reviews the asset management plan and infrastructure plan to determine the cost profile for delivery of the infrastructure network.
  - Step 2(a) – Review infrastructure scope:
    - The local government estimates the future approach with respect to infrastructure development.
    - If this approach would not be financially sustainable, the assessment in step 2(b) is undertaken.
  - Step 2(b) – Financing options:
    - The local government identifies the funding shortage and the possibility of the local government financing the infrastructure itself.
  - Step 3 – Impact analysis:
    - Using the information identified above, an assessment of the impact on local government financial sustainability is undertaken.
    - It is proposed that the Queensland Treasury Corporation be authorised to undertake a review of this assessment.
- **Development feasibility analysis** – This stage involves the following steps:
  - Step 1 – Feasibility assessment:
    - The local government identifies areas impacted by the proposed infrastructure charges, assesses the impact within those areas on the goal of development feasibility and prepares a report.
  - Step 2 – Third party review:
    - The local government provides the report prepared in Step 1, in addition to relevant further information, to an independent third party who is to review the information, conduct further research and testing and issue a binding recommendation.

- Under this proposal there would be no right for an individual developer to appeal a planned charge on the basis that it makes their proposed development unfeasible, as the planned charge is to apply to the whole local government area.

- Step 3 – Ministerial determination:
  - The Minister receives the outcomes from the impact assessments and decides whether to accept or reject a planned charge.

- **Ministerial determination** – This stage involves the Minister accepting or rejecting the proposed planned charges. A sunset clause of 3-5 years has also been suggested to encourage continual review of planned charges.

**Figure 1 Proposed planned charges assessment process**




## Implications of reform option

The reform option provides for a planned charges assessment process through which a planned charge is assessed in terms of the impact on local government financial sustainability and development feasibility.

In considering the implications of the proposed assessment process, regard should be had to the Productivity Commission's key findings and recommendations in respect of the impacts of changing reforms.[20]

- While the incidence of developer charges and other contributions at any particular time will depend on the characteristics of the market, it is most likely in the longer term that they will fall on purchasers of developed land [*chapter B5, section 5.1*].
- In principle the timing of charges should make little difference to the burden of finance; in practice it may do so because of mechanical lending rules used by banks, the uncertainty created by the potential for public authorities to alter future charges, and government guarantees on the borrowings of public authorities [*chapter B5, section 5.1*].
- Statistical analysis conducted by the Commission suggests that the consumption of urban land in aggregate is not very responsive to changes in its price (and hence to changes in infrastructure charges). However this does not preclude changes occurring in the *pattern* of land use within cities, as illustrated by additional modelling undertaken by the Commission. Eventual impacts would depend upon the flexibility of land use restrictions and adjustment costs [*chapter B5, section 5.2*].
- The mix of people's income levels, household types and ages in the different parts of major cities suggests that the effects of reforms which led to higher charges would not fall disproportionately on any identifiable community group [*chapter B5, section 5.3*].
- The provision of subsidised urban infrastructure, or concessional charging far it, is not an efficient means of meeting equity objectives. Practical measures to shield deserving categories of people from hardship are better directed to them as people, rather than to the areas where they are thought to live, or to the city-wide networks of urban services they use [*chapter B5, section 5.3*].
- Charges for existing households should be examined as part of any reform of pricing structures. It would be equitable for established residents to at least face charges that matched the cost of replacing infrastructure required to service them [*chapter B5, section 5.3*].

[20] Industry Commission (1993) *Taxation and Financial Policy Impacts on Urban Settlement*, Australian Government Publishing Service, Canberra.

The proposed planned charges assessment process has the following implications:

- **Social and environmental costs and benefits** – The assessment process takes no account of the social and environmental costs and benefits of the planned charges; being limited to an analysis of the impact on local government finances and development feasibility.
- **Development feasibility** – The assessment of the impact of planned charges on potential development categories will be complicated and difficult, if not impossible, and will impose a significant burden on local governments and distributor-retailers.
- **Local government autonomy** – The proposed approval of planned charges is at odds with the State government's stated policy of empowering local government. The State government does not purport to approve other local government rates and charges.
- **Administrative burden** – A significant resource and financial burden will be imposed on local governments and distributor-retailers in relation to administering the assessment process.

### Alternative reform option

The implications of the reform option could be addressed by adopting an alternative reform option which requires a local government and distributor-retailer to prepare a traditional cost-benefit analysis for the planned charges which would ensure that the economic, social and environmental costs and benefits of the planned charges are rigorously considered prior to their adoption.

## Conditions

### Current framework

Local government may impose development approval conditions for land, work and financial infrastructure contributions as an alternative or supplement to levying infrastructure charges. Currently, shareholding local governments impose conditions on behalf of a distributor-retailer under a delegated assessment model; but under the proposed utility model a distributor-retailer would be empowered to impose development approval conditions.

### Reform option

The Discussion Paper envisages that the conditioning of non-trunk and trunk infrastructure would not be changed but that the reform option for deemed trunk infrastructure would address stakeholder issues in respect of the possibility of a local government both levying infrastructure charges for a development and also conditioning the provision of infrastructure which is to be shared with existing and future development for the development.

The reform option for trunk infrastructure and its implications have been considered earlier in respect of the identification of trunk and non-trunk infrastructure.

## Offsets and refunds

### Current framework

Under the current framework, where a development approval condition requires the provision of trunk infrastructure for a development in respect of which an infrastructure charge is levied, the applicant is entitled to the following:

- **Offset** – The value of the trunk infrastructure is to be offset against the infrastructure charge.
- **Refund** – Where the value of the trunk infrastructure contribution is higher than the infrastructure charge, a refund is to be provided, on terms to be agreed, from infrastructure charges for the development of premises serviced by the trunk infrastructure.

Offsets and refunds are generally negotiated and set out in an infrastructure agreement.

### Reform option

The Discussion Paper identifies the following trunk infrastructure issues in respect of offsets and refunds:

- **Uncertainty** – The uncertainty of the scheme of offsets and refunds in the absence of any supporting guidance framework.
- **Undervaluation** – The potential for the value of the land and works subject to an offset or refund to be underestimated in the absence of a uniform valuation method.

The Discussion Paper proposes reform options involving the following elements:

- **Valuation of trunk infrastructure** – The value of provided trunk infrastructure would be based on one of the following three options:
  - the planned value in the infrastructure plan;

- the actual value of the trunk infrastructure determined in accordance with a local government procurement process; or
- the applicant would be entitled to choose either of the above two options.

- **Standardised land valuation methodology** – It is proposed that a standard land valuation methodology be adopted although no particular methodology is stated.
- **Cross crediting of offsets** – It is proposed that offsets for a trunk infrastructure network be applied to the proportion of an infrastructure charge applicable to other trunk infrastructure networks.

### Implications of reform option

The reform option for the adoption of a standardised land valuation methodology will provide greater certainty in terms of the preparation of an infrastructure plan and the valuation of offsets and refunds for land contributions for trunk infrastructure.

However the proposed reform option for the valuation of trunk infrastructure and the cross crediting offsets will have significant implications:

- **Probity and public interest** – The proposal that the value of an offset will be the planned value or that the applicant will have the right to apply either the planned value or the actual value will create probity and public interest issues where the actual value of the trunk infrastructure is less than the planned value. In such circumstances, an applicant is receiving a financial benefit in the form of a reduced infrastructure charge or a refund which exceeds the actual cost incurred for the trunk infrastructure. The resulting probity and public interest issues may give rise to broader political issues for a local government and distributor-retailer.
- **Reduced infrastructure charges** – The revenue sourced from infrastructure charges will be materially reduced as a result of the value of offsets and refunds being increased by the following:
  - offsets and refunds being calculated either on actual values which exceed the planned values; or on planned values in circumstances where the actual value is less;
  - cross crediting the value of trunk infrastructure against infrastructure charges for other trunk infrastructure networks.
- **Infrastructure delivery** – The likelihood of reduced revenue from infrastructure charges will delay the delivery of trunk infrastructure to service planned development.
- **Development assessment** – Local governments and distributor-retailers acting prudently will have to consider the financial implications of a proposed development in terms of likely offsets and refund prior to determining a development application.

## Credits

### Current framework

Under the current system of credits, existing lawful use rights and previous contributions may be taken into account as deductions when infrastructure charges are levied.

### Reform option

The Discussion Paper identifies there is no legal requirement to apply credits and there is no standard methodology for calculating the value of a credit if a decision has been made to apply one.

The Discussion Paper identifies the need for a transparent methodology for applying credits that is administratively simple to implement and maintain and supports development feasibility estimates and development planning.

The reform option involves the following:

- **Mandatory credits** – Credits are to be provided for existing lawful use rights such that infrastructure charges may only be levied for infrastructure demand that is in addition to the demand provided for under the existing use rights.
- **Register** – Local governments and distributor-retailers will be required to provide for a more thorough recording of charges, credits and offsets for each lot. Details of the authority's credits policy must be made available through the authority's infrastructure plan, resolution or board decision.
- **Credit policy** – Public access is provided to a credits policy through an infrastructure plan, resolution or board decision.

### Implications of reform option

The main concern identified by DSDIP with this proposal is the potentially burdensome requirement of maintaining the record of charges etc for each and every lot within a local authority's area.

# Appeals and dispute resolution

## Reform option

The Discussion Paper states that the current system of appeals of dispute resolution is time and resource intensive. To achieve the specified reform objective of reducing the time and cost associated with infrastructure charges and conditions related appeals and dispute resolution the following reform options are identified:

- **Pre-lodgement mediation process** – This reform option would retain the rights of appeal under the current system for both planned and capped charges. However for appeals involving only infrastructure charges, a mediated dispute resolution process must be followed prior to an appeal being lodged with the Queensland Planning and Environment Court. Given the small number of appeals which would be affected by this proposal, the Discussion Paper appears to question the need for reform in this area.
- **Widening of appeal rights** – This reform option proposes to expand appeal rights to include one or more of the following:
  - the methodology used to calculate an infrastructure charge;
  - whether infrastructure the subject of a condition is trunk or non-trunk;
  - whether a condition related to infrastructure is reasonable and relevant;
  - the calculation of offsets, refunds and credits.

## Implications of reform option

The Discussion Paper outlines the following potential implications of the reform options:

- Both of the above options may lead to higher administrative costs for both the implementation and maintenance of the system.
- There is the potential for the introduction of reforms to the other areas outlined earlier (eg standardised infrastructure planning) to reduce the need for reforms at the dispute resolution stage.

# Infrastructure agreements

## Current framework

Under the current system, infrastructure agreements are a mechanism by which infrastructure may be provided for and funded outside the maximum charges framework. An infrastructure agreement may be required to be entered into as a condition of a development approval.

## Reform option

The Discussion Paper identifies that infrastructure agreements are potentially complex documents that may be expensive to prepare and some local governments avoid the proper utilisation of an infrastructure agreement on this basis. Conversely, some local governments use infrastructure agreements to address issues which may be more appropriately dealt with by another mechanism.

The Discussion Paper proposes a reform option which seeks to retain the flexibility of the existing system while implementing measures to clarify where an infrastructure agreement is appropriate involving the following:

- Undertaking a review of the SPA sections relevant to infrastructure agreements.
- The removal of the power of local governments to attach development approval conditions requiring the preparation of an infrastructure agreement.
- Introducing a time limit on the negotiation of an infrastructure agreement.
- Preparing a set of guidelines to demonstrate the principles and requirements of an infrastructure agreement.

# Deferred payments

## Current framework

Under the current system, the payment of infrastructure charges levied by a local government is to be made in accordance with the timeframe set out in the SPA. In respect of reconfiguration of a lot applications, charges are payable before the final sealing of a plan of subdivision. In practical terms this allows the local government to withhold the sealed plans until payment has been received.

### Reform option

The Discussion Paper outlines the following potential options for deferring the payment of infrastructure charges until a project is nearer completion as an attempt to provide for a higher likelihood of project success:

- **Mandate earliest payment at plan sealing** – Under this option, the earliest that infrastructure charges may be paid is at plan sealing unless otherwise agreed between the parties. Payment may be further deferred by entering into an infrastructure agreement, with early payment being encouraged through the offer of discounts where payment is made early.
- **Deferment until settlement of a lot** – This reform option would push the time at which charges are payable back to the settlement stage and an outstanding infrastructure charge for land is to be notified on the title. Each local government would be entitled to decide whether or not to implement deferred payment as an option in their local government area. The Discussion Paper states that this reform option would require 'major adjustments' to the conveyancing process. The Discussion Paper appears to conclude that the benefits of the implementation of this option are outweighed by the potential negative impacts on the finance industry, development industry and property purchasers.

### Implications of reform option

Mandating plan sealing as the earliest date for the payment of infrastructure charges for reconfiguring a lot unless otherwise agreed is unlikely to have significant implications.

## Alternative funding and financing

### Current framework

Under the current system of funding and financing infrastructure, local governments provide funding through means such as rates, government borrowing, user charges, public private partnerships and infrastructure contributions and distributor-retailers provide funding through user charges, infrastructure charges and government borrowing.

### Reform option

The Discussion Paper identifies a number of proposed alternative funding and financing arrangements for local governments and distributor-retailers, including the following:

- **Distributor-retailers** – Specific purpose securitised borrowing.
- **Local governments**:
  - *Specific purpose securitised borrowing* – Funds are borrowed for a specific project and are repaid out of the project's generated revenue.
  - *Value capture levies* – The rise in the value of land due to land development or construction of infrastructure is 'captured' to help fund necessary infrastructure.
  - *Special purpose levies* – These are issued in an area to raise the capital required to fund specific infrastructure in that area.
  - *Growth area bonds* – These are issued to finance infrastructure in a specific area and the debt is repaid through property tax revenues in that area.
  - *Business improvement districts* – Businesses within a defined area pay a tax or fee to finance infrastructure in that area.
  - *Centralised financing* – State and Commonwealth financing provides local governments with a structured debt to optimise borrowing.

The Discussion Paper identifies that these arrangements are only applicable at the small scale and do not have broad State-wide application. As such they will be confined to having a more ad hoc application outside the existing framework.

## Resolutions and distributor-retailer board decisions

### Current framework

Under the current framework, infrastructure charges are set by an adopted infrastructure charges resolution or a distributor-retailer board decision. The Discussion Paper identifies concerns that some resolutions do not comply with the SPA.

### Reform option

The Discussion Paper requests feedback on whether there is support for a third party review process for resolutions and board decisions or whether an alternative may be suggested.

## Transitional arrangements

The Discussion Paper states that DSDIP is to work with key stakeholders to develop transitional arrangements relating to the following:

- Providing local governments with time to implement these reforms.
- Providing a stakeholder information program.
- Providing ongoing support to key stakeholders.

## Next steps

DSDIP will review submissions on the Discussion Paper to inform the final content of the reforms. An analysis of the impacts on current capped charges is to take place with key stakeholders concurrently with the finalisation of content. The reform is to be finalised in time for commencement on 1 July 2014.

# Infrastructure planning and charging framework review

Ian Wright | Ben Caldwell

**This article reviews the reform options for the infrastructure planning and charging framework**

July 2013

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## Introduction

### Infrastructure planning and charging framework review

- DSDIP discussion paper outlines reform options for the infrastructure planning and charging framework.
- Significant implications for:
  - local governments and ratepayers;
  - distributor-retailers, shareholders and customers;
  - developers and land owners.

### Reform timeline

- *Public consultation stage* – 1 July 2013 - 9 August 2013.
- *Government review and decision* – 9 August 2013 - late 2013.
- *Implementation* – 1 July 2014.

### Reform outcomes

- *Development feasibility* – Linking charges to demand and reducing delays, holding costs and uncertainty.
- *Financial sustainability* – For local governments and distributor-retailers.
- *Certainty* – Simplicity and transparency.
- *Equity* – Only essential development infrastructure.

### Reform options

- Part 1: Framework Fundamentals.
- Part 2: Charges Mechanisms.
- Part 3: Framework Elements.

### Themes of paper

- Policy basis for infrastructure contributions.
- Reform options.
- Implications of reform options.
- Alternative reform options.

## Infrastructure contributions

- User pays levy.
- Impact mitigation levy.
- Development standard levy.
- Betterment levy.

# Infrastructure scope

## Current framework

- Infrastructure contributions for development infrastructure.
- Local governments are empowered to:
  - prepare a PIP identifying trunk infrastructure;
  - levy an infrastructure charge for provision of trunk infrastructure;
  - impose development approval conditions requiring a financial contribution for the additional cost of trunk infrastructure;
  - impose development approval conditions requiring work and land contributions for trunk infrastructure and work contributions for non-trunk infrastructure.

## Reform option

- Infrastructure contributions limited to 'essential infrastructure'.
- Non-essential infrastructure for development funded through alternative means or an IA.
- Significant differences between essential infrastructure and development infrastructure include:
  - water supply and sewerage infrastructure;
  - stormwater quantity and quality infrastructure;
  - road transport infrastructure;
  - public transport infrastructure;
  - park infrastructure.

## Implications of reform option

- Capital funding gap.
- Access constrained development.
- Flood constrained development.
- Lower social infrastructure standards.
- Lower amenity and environmental standards.
- Different development settings.
- Uncertain scope of infrastructure items.
- Land use and infrastructure integration.

## Alternative reform options

- Essential infrastructure list:
  - broader scope;
  - specification of items;
  - variations for development settings.
- Road transport – Arterial roads.
- Public transport – Pathways, cycleways and bus corridors.
- Parks – Area and basic embellishments.

# Identification of trunk and non-trunk infrastructure

## Current framework

- Local governments and distributor-retailers identify development infrastructure as trunk infrastructure in an infrastructure planning instrument.
- Unidentified infrastructure is non-trunk infrastructure.

- Identification as trunk infrastructure is important in the following respects:
  - infrastructure charges;
  - additional trunk infrastructure costs;
  - trunk infrastructure land and work conditions;
  - non-trunk infrastructure land and work conditions.

### Reform option

- Standard specifications for trunk infrastructure.
- Trunk infrastructure definition – Development infrastructure will be trunk infrastructure if:
  - identified in an infrastructure plan;
  - meets the minimum standard specifications; or
  - provides a trunk function in that it:
    - facilitates development of other serviced premises;
    - links a group of premises to identified trunk infrastructure;
    - would have been identified as trunk infrastructure if the demand and development pattern were known at the date of the infrastructure plan.

### Implications of reform option

- Planned infrastructure charges misaligned.
- Offset reduction of infrastructure charges.
- Reduced refunds from infrastructure charges.
- Strategic planning and development assessment.

### Alternative reform options

- Trunk infrastructure if:
  - identified in an infrastructure plan;
  - meets the minimum specification of trunk infrastructure and satisfies any of the following:
    - allows removal of trunk infrastructure;
    - allows delayed provision of trunk infrastructure;
    - is reasonably likely to have been included in the infrastructure plan with detailed network planning been undertaken.

## Infrastructure planning

### Current framework

- Local governments and distributor-retailers to provide detailed long-term plans for delivery of infrastructure in a PIP or Netserv Plan, respectively.
- Detail required in a PIP or Netserv Plan reduced in 2011 by introduction of maximum adopted infrastructure charges framework.

### Reform option

- Infrastructure Plan – Local governments to include detailed infrastructure plans in their planning scheme.
- Netserv plan – Requirements of Netserv Plans to be reviewed.
- Standardisation – Infrastructure plans standardised through:
  - cost apportionment methodology;
  - standard schedule of works model;
  - standard demand generation rates.
- Third party review – Review of infrastructure plans by a third party.

- Transitional arrangements:
  - prior to adoption of new, compliant infrastructure plan conditions to be assessed case by case;
  - local governments given a set period (stated to be 2 years) to adopt an infrastructure plan;
  - local governments to attach an infrastructure plan to a new planning scheme within a year of the scheme's adoption;
  - local governments and distributor-retailers without a compliant infrastructure plan will be limited to applying capped charges.

### Implications of reform option

- No significant implications for local governments and distributor-retailers as they are given an option of whether or not to implement planned charges through a cost apportionment methodology.
- Cost apportionment:
  - marginal cost pricing or average incremental cost approach rather than average cost methodology;
  - needs to vary between infrastructure networks and development settings.

## Capped charges

### Current framework

Levying of infrastructure charges limited to charges equal to or below the relevant maximum adopted charge.

### Reform option

- Issues identified in the Discussion Paper include:
  - demand metric (number of bedrooms or GFA) does not necessarily reflect infrastructure demand;
  - charge categories need to be better aligned with types of land use to better reflect infrastructure demand;
  - non-residential development types may currently be too heavily charged by attribution of high degree of traffic generation.
- No reform option identified as an analysis of the current system is to take place which is proposed to:
  - be completed by 31 January 2014;
  - quantify impacts of final reforms on capped charges;
  - consider differentiating charges based on location and type of development.
- Take place concurrently with the implementation phase of other aspects of the reform.
- Consider sustainability of local governments and impacts on feasibility of development.
- Involve consultation with local governments and stakeholders.
- Consider the appropriateness of the current degree of traffic generation attributed to non-residential development.
- Three options outlined for differentiation of capped charges:
  - Statewide charges;
  - location based differentiation;
  - development type differentiation.

### Implications of reform option

- Analysis of capped charges should take account of key findings of Industry Commission in relation to efficient charging for urban infrastructure:
  - charges should reflect locational differences;
  - desirability of cost recovery;
  - efficiency in pricing is multidimensional;
  - genuine excess capacity should not be discouraged by excessive costs;
  - present charging methods places uniformity above locational cost differences.

# Planned charges

## Current framework

Local governments prohibited from adopting infrastructure charges above the specified maximum adopted infrastructure charges.

## Reform option

- Capped charges – Retained as the default option for levying infrastructure charges
- Planned charges – May be adopted where:
  - a local government prepares an infrastructure plan incorporating a cost apportionment methodology;
  - planned charges are subject to an assessment process;
  - planned charges are given Ministerial approval.
- Proposed assessment process involves four stages:
  - local government assessment;
  - local government financial analysis – Involving four steps:
    - Step 1: Network review;
    - Step 2(a): Review infrastructure scope;
    - Step 2(b): Financing options;
    - Step 3: Impact analysis;
  - development feasibility analysis – Involving three steps:
    - Step 1: Feasibility assessment;
    - Step 2: Third party review;
    - Step 3: Ministerial determination;
  - ministerial determination.

## Implications of reform option

- Social and environmental costs and benefits.
- Development feasibility.
- Local government autonomy.
- Administrative burden.

# Conditions

## Current framework

Local governments may impose development approval conditions for land, work and financial infrastructure contributions as an alternative or supplement to levying infrastructure charges.

## Reform option

- Reform option for deemed trunk infrastructure would address the identified stakeholder concern that a local government may both:
  - levy infrastructure charges; and
  - condition development on the provision of infrastructure to be shared with existing and future development.

# Offsets and refunds

## Current framework

- Where a development approval condition requires the provision of trunk infrastructure for a development in respect of which an infrastructure charge is levied the applicant is entitled to:
  - offset against the charge for the value of the trunk infrastructure;
  - refund where the value of the trunk infrastructure is higher than the value of the charge.

### Reform option

- Issues identified in the Discussion Paper include:
  - *Uncertainty* – Lack of supporting guidance framework leads to uncertainty in the offsets and refunds scheme.
  - *Undervaluation* – Potential for value of works to be underestimated given lack of uniform valuation method.
- Valuation of trunk infrastructure – Applicant able to choose value to be calculated as either:
  - Establishment cost of the trunk infrastructure in the infrastructure plan.
  - 'Actual value' of the trunk infrastructure.
- Standardised land valuation methodology.
- Cross crediting of offsets.

### Implications of reform option

- Probity and public interest.
- Reduced infrastructure charges.
- Infrastructure delivery.
- Development assessment.

## Credits

### Current framework

- When levying infrastructure charges, the following may be taken into account as deductions:
  - existing lawful use rights;
  - previous contributions.

### Reform option

- *Mandatory credits* – Credits provided for existing lawful use rights with charges only being levied for infrastructure demand additional to demand provided for under existing use rights.
- *Register* – Thorough recording of charges, credits and offsets for each lot.
- *Credits policy* – Provision of public access to a credits policy through an infrastructure plan, resolution or board decision.

### Implications of reform option

Potentially burdensome requirement for local governments to keep and maintain a record of all charges, credits and offsets for each lot within the local government area.

## Appeals and dispute resolution

### Reform options

- Pre-lodgement mediation process:
  - rights of appeal under current system retained for both planned and capped charges;
  - where issues giving rise to appeal involve infrastructure charges only, mediation must take place prior to appeal being lodged.
- Widening of appeal rights – Rights of appeal provided in respect of one or more of:
  - the methodology used to calculate an infrastructure charge;
  - whether infrastructure is trunk or non-trunk;
  - whether a condition related to infrastructure is relevant or reasonable;
  - the calculation of offsets, refunds and credits.

### Implications of reform options

- Both options may lead to higher administrative costs.
- Reform in other areas may reduce the need for reform in this area.

# Infrastructure agreements

## Current framework

- Infrastructure agreements are a mechanism by which infrastructure may be provided for and funded outside the maximum charges framework.
- Development approval conditions may require an applicant to enter into an infrastructure agreement.

## Reform option

- Undertaking a review of the 5PA sections relating to infrastructure agreements.
- Removing power of local governments to require an infrastructure agreement through development approval conditions.
- Introducing a time limit on negotiation of an infrastructure agreement.
- Preparing a set of guidelines setting out principles and requirements of an infrastructure agreement.

# Deferred payments

## Current framework

In respect of reconfiguration of a lot applications, infrastructure charges are to be paid before the final sealing of plans.

## Reform options

- Mandate earliest payment at plan sealing:
  - No charges can be paid until plan sealing unless otherwise agreed between the parties.
  - Charges may be further deferred through an infrastructure agreement.
  - Early payment encouraged through discounts.
- Deferment until settlement of a lot:
  - Charges may be pushed back to the settlement stage.
  - Outstanding charges notified on title.

## Implications of reform options

- Issues arising in respect of conveyancing.
- Benefits to development may be outweighed by potential negative impacts on finance industry, development industry and property purchasers.

# Alternative funding and financing

## Current framework

- Local government funding and financing of infrastructure provided through:
  - rates;
  - government borrowing;
  - user charges;
  - PPPs;
  - infrastructure contributions.
- Distributor-retailers provide funding through:
  - user charges;
  - infrastructure charges;
  - government borrowing.

## Reform options

- Specific purpose securitised borrowing.
- Value capture levies.
- Special purpose levies.

- Growth area bonds.
- Business improvement districts.
- Centralised financing.

### Implications of reform options

- Small scale ad hoc use.
- No broader State-wide application.

## Resolutions and distributor-retailer board decisions

### Current framework

Infrastructure charges are set by an adopted infrastructure charges resolution or a distributor-retailer board decision.

### Reform option

- No reform option identified as feedback is requested on whether:
  - there is support for a third party review process;
  - any alternative proposal may be implemented.

## Transitional arrangements

- DSDIP to work with local governments and other stakeholders to develop transitional arrangements relating to providing:
  - time for local authorities to implement reforms;
  - information programs for stakeholders;
  - ongoing support to stakeholders.

## Next steps

- Review submissions.
- Finalisation of reform options.
- Identification of issues requiring further investigation.

# Is a letter to the community for litigation funding an abuse of process?

Ronald Yuen | Caitlin Stiles

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Friend & Ors v Brisbane City Council & Ors* [2013] QPEC 23 heard before Rackemann DCJ**

August 2013

## Executive Summary

In this case, the Queensland Planning and Environment Court (**court**) was required to consider whether a letter sent by the appellant submitter seeking donations to a litigation fund from other interested parties was in breach of the *Collections Act 1966* (**Collections Act**) and whether this amounted to an abuse of process in ongoing appeal proceedings. The court found that the prevention of the community funding sought by the appellant would effectively "cut off" the right to exercise an appeal by a submitter. This impediment of submitter's rights combined with the determination that information contained with the letter sent would not materially mislead a potential recipient, led the court to hold that the actions of the appellant were not an abuse of process.

## Case

The case involved an application in pending proceedings (**application**) by Trentham Holdings Pty Ltd, the developer and the co-respondent by election (**developer**) to the appeal, against Robert Friend (**appellant**), as one of the appellants in a submitter appeal against a development approval. The court had to determine whether the actions of the appellant in seeking a donation to a litigation fund from another potential appellant through a letter, was an abuse of process in the current proceedings. It also had to be determined if inaccuracies contained within the letter would materially mislead a potential recipient.

## Facts

The developer was the proponent of a mixed use development of three residential towers comprising in excess of 500 units and retail facilities, surrounding the Chalk Hotel at Woolloongabba (**development application**).

During the public notification stage of the development application process, a number of submissions were received, including a large number opposing the development. The Brisbane City Council (**respondent**) however, approved the development application on 20 November 2012. The appellant and a number of other submitters opposed to the development commenced a submitter appeal against the approval on the grounds that the approval conflicted with the *Brisbane City Plan 2000*, would cause adverse traffic impacts on the surrounding area and the need for different conditions be imposed if the development application were to be approved.

During the course of the appeal the appellant distributed a letter to another submitter who opposed the development but did not elect to institute an appeal, seeking a donation by way of a deposit into a bank account to assist with the payment of legal fees and other expenses associated with the appeal against the approval. It was contended by the developer that this act was in contravention of section 10 (Conducting of unlawful appeals for support) of the Collections Act as an unlawful appeal for support and subsequently amounted to an abuse of process in the appeal proceedings.

The impugned letter was also scrutinised by the developer on the basis that the inaccuracies contained within the letter had the ability to materially mislead a potential recipient. It was on both of these grounds that the developer sought a variety of injunctive style orders from the court, restraining any future calls for support to the litigation fund or the publishing of misleading statements by the appellant.

## Decision

### Abuse of process

The court did not see it relevant to determine whether a breach of the Collections Act had occurred as a statutory body exists to determine applications of that nature. The developer however, sought to rely upon the inherent jurisdiction of the court to remedy past and restrain any further breach of the Collections Act by the appellant.

The developer relied on the notion that the actions of the appellant could be deemed as unlawful funding of litigation, which is analogous with the grounds for a cause of action under the tort of maintenance. The court was not satisfied with the analogy drawn to maintenance by the developer, in that there is nothing untoward about third party support for legal proceedings derived from a bona fide common interest, being the protection of the "Gabba Hill" area from the development approved by the respondent. The appeal for support was addressed to

the recipient as a fellow opposed submitter and member of the local community, hence it was elucidated by the court that it was reasonable to expect that they would share a common interest in the outcome of the development application, to be decided by the court.

The court went further to outline that no reason for granting the orders sought could be grounded in a public policy argument, as section 5 (What advancing Act's purpose includes) of the *Sustainable Planning Act 2009* promotes "providing opportunities for community involvement in decision making", including any opportunity to appeal a decision. The court noted that the right to appeal would be merely illusory unless an individual had the ability to fund the exercise of this right. Subsequently, the court is becoming more tolerant of a wider range of commercial litigation funding arrangements to overcome this. It was on this basis that the court was unpersuaded that conduct which may potentially cause a breach of the Collections Act would amount to an abuse of process of this court or in turn lead to the granting of orders sought by the developer in this application.

### Materially misleading a potential recipient?

The court considered that while inaccuracies existed within the within the impugned letter, these alone or even in conjunction with a potential breach of the Collections Act could not be deemed sufficient to amount to an abuse of process. The court examined each of the claims presented by the developer with respect to the inaccuracies which exist within the letter to establish if they would have a significant impact on misinforming the recipient.

In relation to the letter being sent on behalf of the "Gabba Hill Community" that was entitled "The Communities Chalk Hotel Appeal", the court outlined that this was not likely to mislead an ordinary recipient of the origin or purpose of the letter, nor was it uncommon for a member of the community to presume to speak on behalf of the community when pursuing a matter believed to be of community interest. This reasoning was further applied with respect to the bank account being established by the appellant for the purpose of collecting donations. The court decided the purpose of the Collections Act was the protection of the broader public over that of a developer party to an appeal. As the community is not a legal entity, the actions of the appellant in establishing the bank account himself under guise that the community had done so were not done with the purpose to materially mislead, nor was there any evidence that anyone had been materially mislead.

The developer alleged that the impugned letter erred in suggesting that the respondent had failed to consider submissions received during public notification and that this decision by the respondent would "set precedent" for future adverse decisions. The court was amenable to accepting the rebuttal argument presented by the appellant that these views are commonly expressed and somewhat feared by individuals within a community when the approval of the development application is potentially controversial.

The court concluded that the inaccuracies highlighted within the application by the developer, combined with any potential breach of the Collections Act, would not lead to any of the orders sought to be granted, as the orders would effectively "cut off" any potential funding for the appeal. It was outlined that this position would not change regardless of evidence being produced to show that the letter was sent to more than the one known recipient.

## Held

The Application was dismissed.

# Are two "full line" supermarkets better than one?

Ronald Yuen | Elton Morais

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mackay Shopping Centre Pty Ltd as Trustee for the MSC Unit Trust v Mackay Regional Council and Parkside Development Pty Ltd* [2013] QPEC 29 heard before Robin QC DCJ**

August 2013

## Executive Summary

This case involved a submitter appeal to the Queensland Planning and Environment Court (**court**) by Mackay Shopping Centre Pty Ltd as Trustee for the MSC Unit Trust (**appellant**) against the Mackay Regional Council's (**council**) decision to approve a development application for a material change of use for the purpose of a shopping centre (**development application**) lodged by Parkside Development Pty Ltd (**co-respondent**) on land located at 245 Bridge Road, West Mackay (**land**).

## Case

This case involved a submitter appeal to the court by the appellant against the council's decision to approve the development application lodged by the co-respondent in respect of the land. The court had to determine whether the proposed development was in conflict with the *Mackay City Planning Scheme 2006* (**council's planning scheme**) and *Draft Mackay Regional Planning Scheme* (**council's draft planning scheme**) and if conflict did exist, whether there were sufficient grounds to justify an approval despite the conflict.

## Facts

The co-respondent lodged the development application with the council on 17 December 2009 in respect of the land. The proposed development was for a modern shopping centre and comprised a "full line" Coles supermarket (3644m$^2$) and a range of complimentary retail shops (2022m$^2$). The development application was subject to impact assessment and therefore, was publicly notified. The appellant, a commercial competitor, who is currently carrying out a development approval (still under construction) granted by the council for a shopping centre comprising a "full line" IGA supermarket (1650m$^2$), bottle shop, speciality shops, medical centre and a small hotel, located approximately 500 metres to the east of the land, made a properly made submission to the council objecting to the proposed development. On 14 March 2012, the council issued the co-respondent with a decision notice approving the development application subject to conditions.

### Issues

The issues the court was asked to determine generally related to the proposed "full line" supermarket of the co-respondent's development application were as follows:

- whether the proposed changes to the development application in order to comply with the evidence of the traffic engineers were a minor change;
- whether there was a need for the proposed development;
- whether the proposed development was in conflict with the Mackay, Isaac and Whitsunday Regional Plan (note this was rejected by his Honour, as such the matter was not properly raised or pursued by the appellant);
- whether the proposed development was in conflict with the desired environmental outcomes (**DEO**) of the council's planning scheme, and if so, whether there were sufficient grounds to justify the proposed development, in the event of any conflict with the DEO of the council's planning scheme.

### Minor change

The co-respondent, during the course of the hearing, sought to make changes to its proposed vehicular access arrangements to the proposed development, which at the time was through Wilson Street, Paradise Street and Bridge Road. Those changes comprised the removal of vehicular access via Wilson Street with pedestrian access only, the widening and signalisation of the entrance to Paradise Street and relocation of that street slightly to the south, now promoting access to general traffic in addition to trucks and staff vehicles (previously contemplated). The appellant contended that the proposed changes gave rise to a substantially different development pursuant to section 350 (Meaning of a Minor Change) of the *Sustainable Planning Act 2009* (**SPA**). In this regard, the appellant sought to rely on the examples provided for in the Statutory Guideline 06/09 (**Guideline**) in contending that the new traffic arrangements would significantly change the distribution of traffic movements and introduce new impacts.

His Honour gave consideration to the list of identified changes within the guideline and declared that the proposed changes were minor, given that the proposed development would remain unchanged, no new uses giving rise to a substantially different development were proposed, the impacts to Wilson Street will be reduced and those to Paradise Street will essentially be the same and section 4.1.52 (Appeal by way of hearing anew) of the *Integrated Planning Act 1997* (**IPA**) did not impede the appeal proceeding on the basis of the changes.

### Need

The appellant through its need expert contended that the financial impact of the proposed development on the other centres (in addition to its own) within West Mackay would be significant. To further support its contention, the appellant sought to rely on evidence from a representative of the IGA (proposed to move into its centre upon completion), who contended that the IGA would lose considerable market share should an additional supermarket (in particular a "full line" Coles) be established in the area.

The parties' need experts agreed that there would be a financial impact on the centres within West Mackay, should the proposed development be approved. However, it was also recognised that despite the appellant proposing a "full line" IGA, the proposed "full line" Coles would still provide for more choice and a wider variety of products for consumer to choose from, for example meats. Further, it was also recognised by the need experts that consumers do not ordinarily carry out all of their shopping at the one supermarket and overall there was sufficient need for an additional supermarket within West Mackay.

### Conflict with DEOs and sufficient grounds

As the land was located within the Mackay Frame Locality and zoned Higher Density Residential under the council's planning scheme, it was asserted by the appellant that the proposed development would compromise the achievement of the DEOs calling for centre hierarchies and encouragement of land for residential use, and there were not sufficient grounds to justify an approval of the proposed development despite the conflict. It should be noted that having regard to the council's draft planning scheme, there were no material changes to the designation of the land.

The co-respondent in reply (and council in support), contended that at the very most, there was a moderate conflict with the council's planning scheme (both current and draft) however, there were sufficient grounds to nonetheless grant an approval of the development. Those grounds were premised upon the council's planning scheme being overtaken by events, the council maintaining its support for the proposed development, the insignificant size of the supermarket (in comparison to other supermarkets and the planning scheme requirements), the community need for the proposed development, in particular the supermarket as it will result in further competition, range, choice and offer to the public and the convenient location of the land.

## Decision

His Honour having regard to the evidence before the court found that although the proposed development compromised some but not all the DEOs contended by the appellant, there were sufficient grounds to justify the non-compliance, referring in particular to community need.

His Honour also found that there was sufficient need for the proposed development and rejected the evidence from the representative of IGA, as being defeatist in nature. Rather, his Honour was of the view that the market share would depend on the way in which the supermarket was operated in the circumstances of its trading context.

Finally, his Honour also found that the proposed development had no negative impacts, a principal established in the matter of *Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* [2012] QCA 370. His Honour contended for an approval of the development application (as amended during the proceedings).

## Held

The appeal be allowed but only to permit the imposition of new conditions arising from the changes to the development application.

# Sufficient grounds for out of centre development

Samantha Hall | Phoebe Bishop

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Woodman McDonald Hardware Pty Ltd v Mackay Regional Council & Ors* [2013] QPEC 21 heard before Andrews SC DCJ**

August 2013

## Executive Summary

This case involved a submitter appeal to the Queensland Planning and Environment Court against a decision of the Mackay Regional Council to approve a development application for a development permit for a material change of use for a Bunnings hardware store. The appellant operates a Mitre 10 hardware store and will be a commercial competitor of the proposed development. The Queensland Planning and Environment Court found that the proposed development conflicted with the relevant planning scheme but there were sufficient grounds to justify the council's decision to approve the proposed development, and adjourned the appeal to enable the parties to finalise a conditions package.

## Case

This case involved a submitter appeal by Woodman McDonald Hardware Pty Ltd (**appellant**) to the Queensland Planning and Environment Court (**court**) against a decision of the Mackay Regional Council (**council**) to approve a development application by Bunnings Group Limited (**Bunnings**) for a development permit for a material change of use for a hardware store, plant nursery, catering shop and ancillary uses, and a development permit for a reconfiguration of one lot into four lots (**proposed development**) in respect of land located at 165-179 Archibald Street, Paget in South Mackay and more particularly described as Lot 28 on SP145140 (**land**).

## Facts

The proposed development consisted of a large format Bunnings hardware store with a GFA of 12,891m$^2$ comprising of a warehouse, plant nursery, timber trade area and a landscaped carpark. Under the *Mackay City Planning Scheme 2006* (**planning scheme**) the land was located within:

- the Mackay Frame Locality;
- the Pioneer River (Urban) Precinct; and
- the Industry (High Impact) Zone.

In the above zone the proposed development was identified as impact assessable development, but was described, in effect, as a "consistent" use.

The appellant submitted to the court that the appeal should be allowed and the development application should be refused for the following reasons:

- the proposed development significantly conflicted with the planning scheme, including the Desired Environmental Outcomes, the Mackay Frame Locality Code and the Retail and Commercial Code;
- the proposed development would result in an unacceptable loss of land zoned Industrial (High Impact);
- the proposed development was "out of centre development" that conflicted with the centres hierarchy in the planning scheme and was ad-hoc development that conflicted with planning principles supporting consolidation of centres and a planned urban structure;
- there were no sufficient grounds to approve the development despite the conflicts;
- there was no economic need for the development;
- the proposed development would have a significant adverse impact on existing and planned competing facilities;
- the proposal would jeopardise the economic development, sustainability and intended role of the Paget precinct;
- the proposal would cause unacceptable adverse impacts on the operation of the external road network.

# Decision

## Conflict

His Honour first considered whether the proposed development conflicted with the planning scheme and specifically, whether it conflicted with the centres hierarchy provisions of the planning scheme as an "out of centre development". In this respect the council and Bunnings similarly argued that while there was conflict with certain provisions of the planning scheme, when the planning scheme was looked at as a whole the conflict dissipated. His Honour noted that the council and Bunnings seemed to confuse the issue of the existence of a conflict with the separate issue of the significance of the conflict. He stated at [63]:

> *Conflict with a provision or with several provisions of a planning scheme may not amount to conflict with a planning scheme. The SPA s 329(1) is concerned with a conflict with a relevant instrument and not with conflict with a provision of a relevant instrument ... Once conflict with a provision also amounts to conflict with the planning scheme then the SPA s 329(1)(b) requires the court to determine whether there are sufficient grounds to justify the decision. The court cannot avoid that duty imposed by the SPA s 329(1)(b) by classifying a conflict with the scheme as insignificant, insubstantial or technical. The significance of a conflict is relevant, not to the existence of a conflict but to the next issue which arises when performing the duty imposed by the SPA s 329(1)(b) …*

His Honour found that the proposed development represented an "out of centre" retail development which was in direct conflict with the maintenance of the centres hierarchy. The fact that the proposed development would have minimal impact on existing centres did not remove the conflict with the scheme but was relevant to the nature and extent of the conflict. In that respect he found that the consequences of the conflict would not only have no effect on the viability of other centres in the hierarchy, but it would not have a significant impact on the existing hierarchy of centres or cause existing centres not to function properly. Therefore the nature and extent of the conflict with the planning scheme in this regard was not significant.

The second issue was whether the proposed development conflicted with the planning scheme by using land for large scale retailing instead of preserving it for an industrial use. His Honour found that when the relevant sections of Part 5, Division 16 of the planning scheme were read together it was clear that development of a non-industrial use such as retailing was not consistent with the overall outcomes for the area. This remained true despite the fact that "hardware store" was identified as a "consistent" use for the area under the planning scheme. This was because it had to be borne in mind that the proposed development was not simply a hardware use but also large scale retailing. In considering the nature and effect of the loss of the land for an industrial use, his Honour concluded that the loss was not unacceptable and was a minor matter to be weighed in the balance.

## Sufficient grounds

Bunnings relied on the following grounds to justify approval of the proposed development despite any conflict with the planning scheme:

(a) the planning scheme was due for review in 2014 and had been overtaken by events;

(b) the planning scheme's failure to cater for the needs of the unanticipated population was reflected by the council's recent approval of various large scale retail developments on land not within the Commercial zone;

(c) there was a need for the proposed development;

(d) the site was ideally located for the proposed development;

(e) the design, scale and use of the proposed development was compatible with industrial activity;

(f) the scale of the proposed development was such that it would take up valuable "centre" land that would otherwise be available for more conventional retail uses;

(g) there was a complete absence of any amenity or traffic impacts associated with the proposed development; and

(h) the proposed development would deliver significant employment during construction and operation.

His Honour accepted all of the above submissions. In regards to (g), he considered the case of *Lockyer Valley Regional Council v Westlink Pty Ltd* (2012) 191 LGERA 452 (**Westlink**) which determined that the absence of adverse effects is not a sufficient ground to outweigh a conflict with a planning scheme; but the absence of a negative impact or detrimental effect is a relevant consideration. In light of Westlink, his Honour found that the absence of amenity and traffic impacts was relevant when considering the issues raised by section 329(1)(b) of the *Sustainable Planning Act 2009* and that it was a matter of public interest if community need could be met by the proposed development on the site in a manner which did not create traffic or amenity impacts.

In relation to need, his Honour found that the main trade area would have an undersupply of retail hardware floorspace in 2014 and approval of the proposed development would meet that economic need with a large format hardware store which would also meet an existing planning need.

Overall, in considering the current planning scheme, his Honour found that the grounds put forward by Bunnings were sufficient to justify the conflicts with the planning scheme particularly because there was no centre capable of accommodating the proposal. His Honour also found it was appropriate to have regard to the council's *Draft Mackay Regional Planning Scheme* which had recently been published for public consultation. In relation to the draft planning scheme, his Honour concluded that approval of the proposed development would not sabotage future planning at Ooralea in which a "Specialised Centre (Homemaker Centre)" had been identified.

## Held

The court found that the grounds were sufficient to justify the council's decision to approve the proposed development, but adjourned the appeal to a date to be fixed to enable the parties to make submissions as to appropriate conditions of approval.

Colin Biggers & Paisley

# When will inadequate on-site parking be a killer point?

Samantha Hall | Edith Graveson

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Clelland & Ors v Brisbane City Council & Anor* [2013] QPEC 27 heard before Everson DCJ**

August 2013

## Executive Summary

This case involved a submitter appeal against a decision of the Brisbane City Council (**council**) to approve a development application made by the Zappala Family Co Pty Ltd (**co-respondent**) for a material change of use for an extension of the former Coronation Motel located at 26-20 McDougall Street Milton (**proposed development**).

The appeal was commenced by a group of residents including Trevor Clelland, Tracey Smith, Marlene Hancock, Paul Kerlin, Diana Wallis, Victor Siskind, Marlene Siskind, Paul Wruck, Kerry Lawford and John Esler (**appellants**) who own units in the Coronation Residences, a 10 storey residential building located between the site of the proposed development and Coronation Drive. The court allowed the appeal.

## Case

This case involved the court hearing an appeal brought by the appellants pursuant to section 462 (Appeals by submitters - general) of the *Sustainable Planning Act 2009* (**SPA**).

The primary issues on appeal were whether there were sufficient grounds to justify conflicts with the *Brisbane City Plan 2000* (**City Plan**) and whether the proposed development conflicted with the provisions of the draft *New City Plan* (**New City Plan**) to the extent that a decision to approve the proposed development would "cut across" the New City Plan.

## Facts

On 30 June 2010, the co-respondent lodged a development application with the council for a material change of use for a hotel including short term accommodation (within the meaning of the City Plan) on land situated at 26-30 McDougall Street, Milton (**land**). On 29 February 2012, the council issued a decision notice approving the proposed development.

### Proposed development

The proposed development was for a hotel with conference and meeting rooms and a hotel gymnasium located on level 1 and 132 rooms for short term accommodation on levels 2 - 13. The proposed development was intended to be constructed over the existing motel and the size of the existing basement would not be increased. Due to the size constraints of the existing basement, car stackers were proposed to be used to accommodate a proposed 56 car parks.

### The land and planning scheme provisions

The land was located within the High Density Residential Area of the City Plan. At the time the development application was made, the land more particularly fell within the City Plan's Milton Local Plan (**Local Plan**) and the Local Plan's Office Precinct (Precinct 6).

The proposed development was prima facie inconsistent with a number of provisions of the City Plan and Local Plan. The intent for the High Residential Area under the City Plan relevantly stated "Development will be to a maximum plot ratio of 1.5. Development will be no higher than 10 storeys and will address the street." In the High Density Residential Area the proposed development was described as "impact assessable generally inappropriate."

The Local Plan's Office Precinct was intended to accommodate "medium rise office development" and short term accommodation was generally inappropriate. The Acceptable Solutions of the Office Precinct further provided for a maximum building height of 4 storeys.

The appellants identified conflicts with Performance Criteria P15 and P16 of the Residential Design - High Density Code of the City Plan which required habitable spaces to avoid overlooking dwellings on adjacent land and maintain their ventilation and light penetration. Similar provisions constraining the bulk, scale, orientation of windows, noise and intrusion on privacy were contained in the Short Term Accommodation Code of the City Plan.

With respect to traffic impacts and parking, Performance Criterion P7 of the Transport, Access, Parking and Servicing Code of the City Plan relevantly provided that "the layout of development must achieve adequate provision for on-site vehicle parking that is clearly defined, safe and easily accessible and must be designed to contain potential adverse impacts within the site".

### Issues

The appellant raised four main issues on appeal:

1. that the proposed development was in conflict with the Milton Local Plan and the intent of the Office Precinct (**Conflict issue one**);
2. that the proposed development conflicted with the Short Term Accommodation Code because of its density, bulk, scale and the impacts it would have on the amenity of the occupants of Coronation Residences including loss of breezes, light, noise odour, loss of privacy, and loss of sunlight and sun penetration (**Conflict issue two**);
3. that the proposed development conflicts with the provisions of the draft New City Plan to the extent that a decision to approve the proposed development would "cut across" the New City Plan and offend the Coty Principle (**New City Plan issue**);[21]
4. that the proposed development would have unacceptable traffic impacts and conflict with the provisions of the City Plan due to the inadequate provision of parking (**Inadequate parking issue**).

## Decision

### Conflict issues

With respect to the conflict issues, his Honour Judge Everson noted that pursuant to section 326 (Other Decision Rules) of the SPA, the decision of the assessment manager must not conflict with the City Plan unless there were "*sufficient grounds to justify the decision.*"

In considering the issue of "sufficient grounds", his Honour noted that the land's inclusion in the Office Precinct of the Local Plan and the associated restrictions failed to take account of the pre-existing motel and other multi-storey residential developments in the surrounding area. As such his Honour held that the restrictions on the subject site had been overtaken by events.

His Honour also gave weight to development principle 2.3 of the Local Plan which relevantly provided that "residential environment in the Local Plan area is not characterised by the same level of peace and quiet or privacy as is experienced in suburban locations" and held that the evidence before the court indicated that any amenity concerns could be appropriated addressed by conditions.

### New City Plan issue

With respect to the New City Plan, his Honour considered comments by Thomas J in *Lewiac Pty Ltd v Gold Coast City Council* that "*it would be extraordinary if a planning strategy which was well on the way to adoption, or even adoption with amendment, could be frustrated by developments.*"[22]

His Honour held that there was no obvious planning strategy in the draft Milton Neighbourhood Plan and that the restrictions placed on the land were contrary to the intensification of development in the surrounding area. His Honour also noted that the New City Plan had only recently been made available for public notification and held that he was not convinced that the relevant parts of the plan would remain the same once the council had considered public submissions.

### Inadequate parking issue

The evidence before the court, including that of the traffic expert called by the co-respondent, indicated that the likely demand for parking spaces would exceed the 56 car parks contemplated by the proposed development.

As a result his Honour found that the proposed development was in serious conflict with Performance Criterion 7 of the Transport Access, Parking and Servicing Code. His Honour further held that there were no sufficient grounds to justify the approval of the proposed development and that allowing the proposed development in its current form would be bad planning considering the already considerable strain on parking in Milton.

## Held

His Honour held the appeal be allowed as a consequence of the inadequate provision of parking spaces in the proposed development.

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21 *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117.
22 *Lewiac Pty Ltd v Gold Coast City Council* (1996) 2 Qd R 266.

# Queensland infrastructure planning and charging framework review – Commentary on DSDIP discussion paper released July 2013

Ian Wright | Luke Grayson

**This article outlines the Queensland Department of State Development, Infrastructure and Planning's proposed options for the reform of the Queensland infrastructure planning and charging framework, identifies the implications of the reform options and suggests alternative reform options for consideration**

September 2013

## Introduction

### Infrastructure planning and charges reform

On 1 July 2013, the Queensland Department of State Development, Infrastructure and Planning (**DSDIP**) released a discussion paper on the review of Queensland's infrastructure planning and charging framework (**Discussion Paper**) which contains reform proposals which will have significant financial and other policy implications for all local governments and their ratepayers, distributor-retailers and their shareholders and customers as well as developers and land owners.

### Reform timeline

The Discussion Paper identifies three stages in the infrastructure planning and charging reform process:

- **Public consultation stage** – From 1 July 2013 to 9 August 2013, the Discussion Paper is available for public consultation.
- **Government review and policy decision-making stage** – From 9 August 2013 to late 2013, DSDIP will review the feedback received during the public consultation period and develop a set of reform options to be presented for government approval in late 2013.
- **Implementation stage** – From 1 July 2014, the new framework is proposed to commence.

### Reform outcomes

The Discussion Paper identifies the following reform outcomes against which the reform options have been formulated and tested.[23]

**Table 1 Reform outcomes**

| Outcome | Result |
|---|---|
| **Development feasibility** | Makes Queensland a desirable place for the development industry to do business by:<br>• linking the quantum of infrastructure charges to a development's demand for infrastructure;<br>• minimising risks to development associated with infrastructure contributions (including time delays, increased holding costs and uncertainty). |
| **Local authority financial sustainability** | Supports the long-term financial sustainability of local authorities and the planning, delivery and maintenance of local infrastructure by local authorities.<br>The framework is cost-effective and administratively simple to implement and maintain. |

[23] See Discussion Paper, p14.

| Outcome | Result |
|---|---|
| **Certainty** | The framework is simple to understand, implement and use.<br>Infrastructure charges are supported by transparent published methodologies and charging schedules. |
| **Equity** | Only infrastructure essential for development is eligible for infrastructure contributions. |

### Reform options

The reform options identified in the Discussion Paper are split into three specific parts, which include the following:

- Part 1: Framework fundamentals:
  - Infrastructure scope
  - Trunk and non-trunk infrastructure identification
  - Infrastructure planning.
- Part 2: Charges mechanisms:
  - Capped charges
  - Planned charges.
- Part 3: Framework elements:
  - Conditions
  - Offsets and refunds
  - Credits
  - Infrastructure agreements
  - Dispute resolution
  - Deferred payment.

The Discussion Paper identifies, for each element, a status quo option involving the retention of the current system with its attendant issues as well as options which seek to address the identified issues with the current framework.

### Themes of paper

This paper aims to address the following:

- The policy basis for infrastructure contributions.
- The elements of the current infrastructure planning and charging framework to be subjected to reform.
- The issues identified and proposed reform options for each element of the current framework.
- The potential implications arising from each reform option.
- Alternative reform options to address the issues of the current framework.

## Infrastructure contributions

### Types of infrastructure contributions

Infrastructure contributions are financial, work or land contributions for infrastructure related to development.

Financial contributions for infrastructure come in various forms but there are essentially 4 types:[24]

- **User pays levy** – a payment to an infrastructure authority for planned infrastructure benefitting the development.
- **Impact mitigation levy** – a payment to an infrastructure authority to make good the unanticipated adverse effects of development on planned infrastructure.

[24] Wellham K and Spiller M (2012) *Urban Infrastructure: Finance and Management*, Wiley Hoboken, p138.

- **Development standard levy** – a payment to the community to make good the adverse effects of development not complying with a development standard; for example a payment to a local government in lieu of the provision of on-site car parking spaces for a development to be used for the provision of a public parking facility by the local government.
- **Betterment levy** – a payment to the community for the development of higher and better uses on a site.

The characteristics of each financial contribution is summarised in Table 2.[25]

**Table 2 Financial contributions**

| Financial contribution | Apportionment principle | Implementation mechanism |
|---|---|---|
| **User pays levy** | *User pays principle* – Payment in accordance with a development's projected share of usage of planned infrastructure | Charges are levied by a notice or development approval condition in accordance with a charging instrument that relates to an infrastructure planning instrument |
| **Impact mitigation levy** | *Exacerbator pays principle* – Developer pays 100% of additional costs of additional or changed infrastructure | Payments are imposed in a development approval condition |
| **Development standard levy** | *Inclusionary zoning principle* – Developer pays 100% of the costs to comply with a development standard | Negotiated infrastructure agreement |
| **Betterment levy** | *Value uplift principle* – Percentage of uplift attributable to granting additional use rights | Negotiated infrastructure agreement |

The Discussion Paper is primarily focussed on changes to Queensland's infrastructure charges framework which is a user pays levy. The Discussion Paper indicates that the following provisions of the *Sustainable Planning Act 2009* (**SPA**) are to be retained:

- The conditions powers under section 650 of the SPA for the additional cost impact for out of sequence or inconsistent development.[26]
- Infrastructure agreements can be used to implement a development standard levy and a betterment levy.[27]

## Efficient charging for urban infrastructure

In considering the Discussion Paper and the proposed reform options, regard should be had to the key findings and recommendations in respect of the efficient charging for urban infrastructure.[28]

- Charges should, wherever possible, reflect any significant locational differences in the costs of providing urban infrastructure. Where they cannot do so, they should at least seek to avoid systematic locational bias [*chapter B3, section 3.4*].
- While it is not necessary to charge explicitly for costs that are common to all developments to transmit efficient location incentives within cities, cost recovery is desirable for reasons of efficient resource management and decision making in relation to the provision of new infrastructure [*chapter B3, section 3.5*].
- Because efficiency in pricing has more than one dimension, it will usually be necessary to employ a number of charging instruments simultaneously. Developer charges are well-suited to reflecting variations in costs by location and in some respects may be preferred to periodic access charges for that purpose. Charges for use are probably best matched with marginal costs of supplying the service (including congestion costs, broadly defined) [*chapter B3, section 3.4*].
- Where there is genuine excess capacity, it is important that use of it not be discouraged by prices that exceed the costs of supply. New (and existing) users should be charged at levels that ensure that capacity is appropriately used [*chapter B3, section 3.5*].
- Present methods of charging for infrastructure services are often not sufficiently reflective of locational cost differences. There is too much reliance on averaging or uniformity in all forms of charging. In addition:

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25 Ibid, p139.
26 See Table 12, Reform Options 1 and 2 of the Discussion Paper.
27 See sections 7.5.3 and 8.1.3 of the Discussion Paper.
28 Industry Commission (1993) *Taxation and Financial Policy Impacts on Urban Settlements*, Australian Government Publicity Service, Canberra.

- property values have no necessary relationship to costs of providing urban services such as water and sewerage, and the practice of using them as a basis for charging should end *[chapter B4, section 4.7]*;
- road authorities should be allowed to levy clearly identified charges on developers to cover the costs of providing and improving higher level roads attributable to new developments *[chapter B4, section 4.3].*

- In attempting to assess whether public infrastructure charging encourages expansion of settlement at the urban fringe, the Commission found:
  - for most categories of infrastructure, the detailed information needed for a definitive analysis is not available;
  - in the one case – hydraulic services – where available data permitted a quantitative assessment for Melbourne and Sydney, the existence of a significant inducement to fringe location was not confirmed;
  - in most other cases, when all relevant factors are considered, it is difficult to judge whether net subsidisation of the urban fringe is likely, let alone the magnitudes involved. What is clear is that assessments which do not properly account for subsidies to established urban areas will generally overstate any inducement to fringe location, especially for social infrastructure *[chapter B4, section 4.7].*
- Lack of information is a fundamental obstacle to reform of infrastructure charging and better asset management. Public sector providers of urban services should be required to compile and publish annually the costs, revenues and charging structures associated with development in different areas within their administration. Information is also urgently needed on the value and condition of existing infrastructure throughout the cities *[chapter B6, sections 6.1 and 6.7].*

# Infrastructure scope

## Current framework

Local governments and distributor-retailers may require infrastructure contributions for development infrastructure which is defined as follows:[29]

> ***development infrastructure*** *means—*
>
> *(a) land or works, or both land and works, for—*
>
> *(i) urban and rural residential water cycle management infrastructure, including infrastructure for water supply, sewerage, collecting water, treating water, stream managing, disposing of waters and flood mitigation, but not urban and rural residential water cycle management infrastructure that is State infrastructure; or*
>
> *(ii) transport infrastructure, including roads, vehicle lay-bys, traffic control devices, dedicated public transport corridors, public parking facilities predominantly serving a local area, cycle ways, pathways, ferry terminals and the local function, but not any other function, of State-controlled roads; or*
>
> *Note—*
>
> *The chief executive administering the Transport Infrastructure Act may make guidelines, including guidelines defining the local function of State-controlled roads.*
>
> *(iii) public parks infrastructure supplied by a local government, including playground equipment, playing fields, courts and picnic facilities; or*
>
> *(b) land, and works that ensure the land is suitable for development, for local community facilities, including, for example—*
>
> *(i) community halls or centres; or*
>
> *(ii) public recreation centres; or*
>
> *(iii) public libraries*.

In particular a local government is empowered to:

- prepare a local government priority infrastructure plan which identifies development infrastructure as trunk infrastructure;[30]
- levy an infrastructure charge (a user pay levy) for the provision of trunk infrastructure;[31]
- require, by a development approval condition, a financial contribution (an impact mitigation levy) for the additional cost of trunk infrastructure;[32] and

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29 See schedule 3 of the *Sustainable Planning Act 2009*.
30 See section 85 of the *Sustainable Planning Act 2009* and *Statutory guideline 01/11 – Priority Infrastructure Plans*, p7.
31 See section 629 of the *Sustainable Planning Act 2009*.
32 See section 650 of the *Sustainable Planning Act 2009*.

- require, by a development approval condition, the provision of work and land contributions for trunk infrastructure and work contributions for non-trunk infrastructure.[33]

In South-East Queensland, distributor-retailers are given the same powers in respect of water supply and sewerage infrastructure.[34]

## Reform option

The Discussion Paper identifies that local governments are requiring infrastructure contributions for development infrastructure which is not essential to or does not directly benefit development but has a broader community benefit.

This contention is in conflict with the Productivity Commission's key findings and recommendations for the efficient charging for urban infrastructure identified above. This contention also does not take account of the fact that in preparing a priority infrastructure plan a local government will have established a nexus between a development in a particular area and the small cumulative impacts of such development on higher order infrastructure. As the Queensland Planning and Environment Court has observed in the context of infrastructure charges for road transport infrastructure:[35]

> *If every miniscule or insignificant or sub-5 percent (or some other percentage) impact is disregarded, costs that in principle should be chargeable against developments will be foregone, but the aggregation of the impacts of developments, all of which escape a charge, will undoubtedly require expenditures from public resources to provide the necessary new infrastructure (quite apart from giving "free" access to existing infrastructure).*

The Discussion Paper proposes that infrastructure contributions be limited to essential infrastructure for development only; with non-essential infrastructure for development to be funded through other revenue sources unless provided for in an infrastructure agreement.

The significant differences between development infrastructure and essential infrastructure, which are summarised in Table 3, include the following:

- **Water supply and sewerage infrastructure** – Dams and other instream storages and pipes below 200 mm are excluded.
- **Stormwater quantity and quality infrastructure** – On site treatment, bank and shore protection and flood mitigation infrastructure is excluded.
- **Road transport infrastructure** – Higher order roads such as arterial and sub-arterial roads and the local function of State-controlled roads are excluded whilst some significant items of road transport infrastructure such as noise and light barriers, fauna management crossings, traffic barriers and fencing appear to be excluded.
- **Public transport infrastructure** – Bus, taxi, ferry, off-road pedestrian path and off-road bicycle infrastructure are excluded.
- **Park infrastructure** – Park areas are limited to 2 ha per 1,000 persons and embellishments are excluded.
- **Community facilities** – Land areas are limited to 2 ha per 1,000 persons.

**Table 3 Comparative analysis of development infrastructure and critical infrastructure**

| Development infrastructure (Schedule 3 SPA) | Essential infrastructure (Appendix 4 Discussion Paper) | Significant exclusions |
|---|---|---|
| **Urban and rural residential water cycle management infrastructure** | | |
| **Water supply infrastructure** | ✓ | • treatment facilities not funded from other sources such as rates or utility charges<br>• dams and instream storages<br>• pipes with diameter below 200 mm<br>• it is uncertain whether land for water supply and sewerage infrastructure is included |
| **Sewerage infrastructure** | ✓ | |
| **Collecting water** | × | • offsite stormwater quality and quantity |

33 See sections 626 and 626A of the *Sustainable Planning Act 2009*.
34 See chapter 9, part 7A, division 5, subdivisions 1 and 2 of the *Sustainable Planning Act 2009*.
35 *Hickey Lawyers v Gold Coast City Council* [2005] QPEC 22, 29.

| Development infrastructure (Schedule 3 SPA) | Essential infrastructure (Appendix 4 Discussion Paper) | Significant exclusions |
|---|---|---|
| **Treating water** | ✓ | • bank and shore protection<br>• flood control |
| **Stream managing** | × | |
| **Disposing of waters** | × | |
| **Flood mitigation** | × | |
| **Transport infrastructure** | | |
| **Roads** | ✓ | • arterial and sub-arterial roads<br>• noise and light barriers<br>• traffic barriers<br>• fauna management crossings<br>• landscaping and street trees<br>• fencing |
| **Vehicle lay-bys** | ✓ | |
| **Traffic control devices** | ✓ | |
| **Dedicated public transport corridors** | × | • public transport infrastructure |
| **Public parking facilities predominantly serving a local area** | × | |
| **Cycle ways** | × | |
| **Path ways** | × | |
| **Ferry terminals** | × | |
| **Local function of State-controlled roads** | × | • State-controlled roads |
| **Public parks infrastructure supplied by local government** | | |
| **Land** | ✓ | • park embellishments<br>• land limited to 2 ha/1,000 persons (thereby limiting metropolitan and district sports and recreation parks) |
| **Playground equipment** | × | |
| **Playing fields** | × | |
| **Courts** | × | |
| **Picnic facilities** | × | |
| **Community facilities land for local government** | | |
| **Land** | ✓ | • land limited to 2 ha/1,000 persons |

## Implications of reform option

The reform option will have the following implications:

- **Capital funding gap** – The limitation of infrastructure contributions to development infrastructure which is essential infrastructure will reduce infrastructure charges and other infrastructure contributions for development. The costs of development infrastructure which is non-essential infrastructure will remain thereby creating a funding gap for non-essential infrastructure which will have to be funded by local governments and distributor-retailers from other revenue sources.
- **Rural and regional development** – The exclusion of rural arterial and sub-arterial roads which connect regional growth areas and cities and towns will significantly impact on the ability of rural and regional governments to provide road transport infrastructure necessary for agriculture, mining and urban areas.

- **On site stormwater infrastructure** – The limitation of essential infrastructure to only on site stormwater treatment to a standard of non-worsening will have the following implications:
  - the conditioning of development to prevent basic common law nuisances on adjoining properties will be potentially subject to an offset or refund;
  - the provision of on-site stormwater treatment will be encouraged at the expense of regional treatment resulting in high maintenance and replacement costs and increased risks to public health and safety.
- **Hydraulically constrained development** – The exclusion from essential infrastructure of water supply and sewerage pipes below 200 mm which currently comprise parts of the trunk water supply and sewerage infrastructure networks will not only result in less revenue from planned charges but also the exclusion of these items from infrastructure plans and Netserv plans will constrain the development of hydraulically constrained land.
- **Access constrained development** – The exclusion of arterial roads from essential development will limit the development of access constrained land in growth areas where the interim construction of an arterial or sub-arterial road (being at least the first carriageway) is necessary to allow for a local road function for development access purposes.
- **Flood constrained development** – The limitation of essential infrastructure to on-site stormwater quantity and quality treatment will limit the development of capacity constrained land requiring off-site treatment to enable development. This will be particularly the case in infill areas and fringe areas within riverine and coastal floodplains.
- **Lower social infrastructure standards** – The limitation of park and community facility areas to half of that provided for in the Queensland State Guideline for Social Infrastructure Planning (Implementation Guideline No 5) and the exclusion of embellishments will result in a significant lowering of social infrastructure standards especially in the context of the current trends for smaller lot sizes and reduced private open space. As the Productivity Commission has previously noted "There is now an expectation in the community that social infrastructure will be provided or made available for new development".[36]
- **Lower amenity and environmental standards** – The scope of the listed essential infrastructure represents a lowering of urban amenity and environmental standards particularly in terms of the exclusion of off-site stormwater quality treatment, fauna management crossings and noise and light barriers for road transport infrastructure and public transport infrastructure in particular off road pathways and cycleways and public parking facilities.
- **Different development settings** – The list of essential infrastructure does not take account of different development settings such as rural areas, regional cities and towns, existing urban areas and growth areas whether it be infill or greenfield. The exclusion of work for arterial and sub-arterial roads in an urban area context may be reasonable but appears inappropriate in a greenfield or infill growth area.
- **Uncertain scope of infrastructure items** – The scope of the list of essential infrastructure is uncertain particularly in relation to the following:
  - *Road transport infrastructure* – where it is uncertain whether road transport infrastructure where it is not clear that it includes elements of roads such as noise and light barriers, fauna management crossings, traffic barriers and fencing.
  - *Water supply and sewerage infrastructure* – where the qualification in respect of "treatment facilities not funded from other sources such as rates or utility charges" is unclear in its intent.
- **Strategic infrastructure planning, budgeting and delivery** – If a local government is not required to include development infrastructure such as arterial and sub-arterial roads, off road pedestrian paths and cycleways, bus corridors and metropolitan and district parks in its infrastructure plan, then local governments may decide not to plan for infrastructure in its infrastructure plan or provide for it in its capital works program, long term financial plan and budgets due to funding limitations with the resulting social, environmental and financial costs evident in the past.
- **Land use and infrastructure integration** – The limited scope of essential infrastructure will discourage the integration of land use and infrastructure outcomes and encourage a fragmented approach to urban development which will be less efficient.
- **Increased use of infrastructure agreements** – The limited scope of essential infrastructure in the context of the limitation of development approval conditions to trunk and non-trunk essential infrastructure, will inevitably lead local governments and distributor-retailers to require infrastructure agreements for the provision of infrastructure contributions for non-essential infrastructure.
- **Public policy considerations** – The reform option is in clear conflict with the Productivity Commission's key findings and recommendations for the efficient charging of urban infrastructure, particularly in terms of higher level roads.

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[36] Industry Commission (1993) *Taxation and Financial Policy Impacts on Urban Settlement*, Australian Government Publishing Service, Canberra, p100.

### Alternative reform option

In order to address the implications of the identified reform options the following alternative reform option is suggested:

- **Essential infrastructure list** – A list of essential infrastructure should be prepared which provides for the following:
  - a broader scope of essential infrastructure;
  - the specification of items within each category of essential infrastructure to avoid variations in interpretation;
  - variations in the items of essential infrastructure to accommodate different development settings.
- **Road transport infrastructure** – Essential infrastructure should at least include land contributions for arterial and sub-arterial roads in existing urban areas and land and work contributions for arterial and sub-arterial roads in urban growth areas (infill and greenfield) and rural and regional areas.
- **Public transport infrastructure** – Essential infrastructure should include land and work contributions for off road pedestrian paths and cycleways and public parking facilities and land contributions for bus corridors.
- **Public parks and community facilities infrastructure** – Essential infrastructure should include work contributions for basic recreation park embellishments as well as land requirements for park and local community facilities which accord with the State Government Implementation Guideline No. 5.

## Identification of trunk and non-trunk infrastructure

### Current framework

Local governments and distributor-retailers are empowered to identify development infrastructure as trunk infrastructure in an infrastructure planning instrument. Development infrastructure not identified as trunk infrastructure is non-trunk infrastructure.

Infrastructure planning instruments of local governments have included an infrastructure charging plan, planning scheme policies, adopted infrastructure charges resolution and priority infrastructure plan. Distributor-retailers are empowered to prepare a Netserv plan for trunk water supply and sewerage infrastructure.

The identification of development infrastructure as trunk infrastructure is important in the following respects:

- **Infrastructure charges** – Prior to the implementation of the maximum adopted charges regime, infrastructure charges were calculated based on an incremental cost methodology for the provision of trunk infrastructure.
- **Additional trunk infrastructure costs (impact mitigation levy)** – Development approval conditions can require additional trunk infrastructure costs for out of sequence or inconsistent development.
- **Trunk infrastructure land and work conditions** – In kind contributions for trunk infrastructure are required to be offset against infrastructure charges and to be refunded if the value of the in kind contribution exceeds the infrastructure charge.
- **Non-trunk infrastructure land and work conditions** – Development approval condition powers for land and work contributions are more limited in the case of non-trunk infrastructure.

### Reform option

The Discussion Paper identifies that local governments are not recognising unidentified development infrastructure which is shared with existing or future development as trunk infrastructure with the effect that offsets and refunds are not applicable to shared development infrastructure.

The Discussion Paper proposes the following reform options:

- **Standard specifications for trunk infrastructure** – A Ministerial guideline for the preparation of an infrastructure plan is to provide minimum standard specifications for the identification of trunk infrastructure in an infrastructure plan.
- **Trunk infrastructure definition** – Essential infrastructure is to be trunk infrastructure if it satisfies any of the following:
  - essential infrastructure identified in an infrastructure plan; or
  - essential infrastructure which meets the minimum standard specification for trunk infrastructure in the Ministerial guideline; or
  - essential infrastructure which provides a trunk function in that it:
    - facilitates development of other existing serviced premises by enabling increased development or overcoming deficiencies;
    - links a group of premises to identified trunk infrastructure; or

> would be identified as trunk infrastructure if the demand and development pattern was known at the date of the infrastructure plan.

### Implications of reform option

The reform option materially increases the scope of trunk infrastructure to which offsets and refunds apply by including unplanned essential infrastructure which meets minimum standard specifications or otherwise performs a 'trunk function'.

Whilst the reform option responds to stakeholder issues by providing increased flexibility for developers to have unplanned essential infrastructure recognised as trunk infrastructure, the reform option will have the following implications for local governments and distributor-retailers:

- **Planned infrastructure charges misaligned** – The identification of deemed trunk infrastructure will result in a misalignment of planned charges in that they are only related to the establishment cost of trunk infrastructure identified in the infrastructure plan. As such planned infrastructure charges will in effect be undercharging for the cost of trunk infrastructure (identified and deemed).
- **Offset reduction of infrastructure charges** – Infrastructure charges intended to fund the trunk infrastructure identified in the infrastructure plan will be reduced by offsets for deemed trunk infrastructure thereby reducing the infrastructure charges available to fund identified trunk infrastructure.
- **Reduced refunds for identified trunk infrastructure from infrastructure charges** – The reduction of infrastructure charges from offsets for deemed trunk infrastructure will reduce the infrastructure charges available for refunds for developers which have provided identified trunk infrastructure thereby adversely impacting on the delivery of the identified trunk infrastructure for development consistent with the infrastructure plan.
- **Out of sequence and inconsistent development subsidised** – The requirement to provide offsets and refunds for unplanned infrastructure to service development which is outside of a priority infrastructure area or is otherwise inconsistent with the planning assumptions of a priority infrastructure plan will undermine strategic land use and infrastructure planning and result in inefficient land use patterns which are being subsidised by local government ratepayers and distributor-retailer customers. Furthermore the current conditioning powers in sections 650-652 of the SPA provide for refunds for additional trunk costs to be conditioned on development which is inconsistent with the planning assumptions in a priority infrastructure plan.
- **Increased maintenance and replacement burden** – The provision of subsidised out of sequence and inconsistent development will impose additional maintenance and replacement costs on local governments and distributor-retailers for infrastructure that is not required or is provided prematurely.
- **Strategic planning and development assessment** – The financial implications of approving development requiring the provision of deemed trunk infrastructure which will accrue offsets and potential refunds will introduce significant uncertainty in the development approvals process which will result in local governments adopting a conservative approach in its strategic planning and development assessment which will otherwise limit economic development.

### Alternative reform option

The stakeholder issues and implications for local governments and distributor-retailers may be addressed by an alternative reform option in which an item of essential infrastructure is defined as trunk infrastructure if it:

- is identified in an infrastructure plan; or
- meets the minimum standard specifications for trunk infrastructure and satisfies any of the following:
  - is an alternative to an item of infrastructure in the infrastructure plan or Netserv plan;
  - allows for the removal of an item of trunk infrastructure from the infrastructure plan or Netserv plan;
  - allows for the delayed provision of an item of trunk infrastructure beyond the planning horizon of the infrastructure plan or Netserv Plan;
  - is reasonably likely to have been included in the infrastructure plan had detailed network planning for the planned development been undertaken as part of the preparation of the infrastructure plan or Netserv plan.

The alternative reform option increases the scope of trunk infrastructure for developers whilst providing reasonable certainty to local governments and distributor-retailers in relation to the financial liability of future offsets and refunds.

## Infrastructure planning

### Current framework

Under the current framework, local governments and distributor-retailers are required to provide detailed long-term plans for the delivery of infrastructure through the introduction of a priority infrastructure plan and Netserv plan, respectively. With the introduction of the maximum infrastructure charges framework in 2011, the detail required in a priority infrastructure plan or Netserv plan was reduced.

## Reform option

The Discussion Paper identifies stakeholder issues as relating to the onerous and time consuming amendment process for a priority infrastructure plan and Netserv plan and the limited detail now required in a priority infrastructure plan and Netserv plan resulting in a lack of clarity and consistency in infrastructure conditioning, offsetting, refunding and infrastructure agreement processes.

The Discussion Paper proposes a reform option with the following elements:

- **Infrastructure plan** – Local governments are required within two years to include in their planning schemes an infrastructure plan which contains a similar level of detail to that required in a priority infrastructure plan prior to the introduction of the maximum adopted charges regime but with the option of either:
  - including a cost apportionment methodology and applying planned charges; or
  - not including a cost apportionment methodology and applying capped charges.
- **Netserv plans** – A review of the Netserv plan requirements under the *South East Queensland Water (Distribution and Retail Restructuring) Act 2009* is to be undertaken by DSDIP in collaboration with the Department of Energy and Water Supply.
- **Standardisation** – Infrastructure plans are proposed to be standardised in three ways:
  - *Cost apportionment methodology* – This proposal involves adopting a standardised methodology for apportioning the cost of trunk infrastructure to future demand which may include one of the following identified methodologies:
    - average cost methodology – the total existing and future cost of infrastructure is divided by the total existing and future demand for the infrastructure to calculate a cost per demand unit for an area;
    - incremental cost methodology – the future cost of infrastructure to service future demand is divided by the future demand.
  - *Standard schedule of works model* – This proposal involves adopting a standard approach and format for the calculation and presentation of data in schedule of works spreadsheets. Draft templates are available for download on the DSDIP's website at www.dsdip.qld.gov.au/forms-templates/infrastructure-charges.html.
  - *Standard demand generation rates* – This proposal involves adopting a standardised approach to calculating infrastructure demand to appropriately apportion the cost of infrastructure between developments. The proposed process involves:
    - determining the total planned demand in each network service area;
    - determining the total infrastructure cost for each area;
    - determining the average cost per demand unit by dividing the total cost by the total demand;
    - testing the corresponding demand generation table against this information to ensure that demand generation rates are accurate.
- **Third party review** – Infrastructure plans are proposed to be subject to third party review with the results of the review being further reviewed by the State government.
- Transitional arrangements:
  - Prior to the adoption of a new infrastructure plan, relevant development approval conditions are to be assessed on a case by case basis to ensure compliance with the new system.
  - Local governments will be given a set period (stated to be two years) within which an infrastructure plan or Netserv plan is to be prepared.
  - Local governments will be required to attach a compliant infrastructure plan to a planning scheme within a year of the planning scheme's adoption. This recognises the practicality that infrastructure plans (including planned charges) can only be resolved after the land use policy issues in a planning scheme have been finalised.
  - A local government or distributor-retailer which has not prepared an infrastructure plan or Netserv plan will be able to condition the provision of essential infrastructure (presumably under the more limited non-trunk infrastructure condition powers) but will be limited to applying capped charges.

## Implications of reform option

The reform option addresses the stakeholder issues without having significant implications for local governments and distributor-retailers given that they are provided with the option of implementing a cost apportionment methodology and applying planned charges or not implementing a cost apportionment methodology and applying capped charges.

In relation to the proposed cost apportionment methodology, economic theory tells us that resources will be allocated efficiently when prices are equal to the marginal costs being the costs associated with an increment in supply - the cost of producing one more widget or the cost of providing roads for one additional subdivision or water pipes to one more housing development. A marginal cost methodology therefore reflects true cost pricing as marginal costs will take account of urban form matters such as location, density, local context and type.[37]

However implementing marginal cost pricing can be complex and difficult to estimate and to allocate to users. A practical alternative is an "average incremental cost approach" which combines marginal and average cost pricing and involves allocating each element of cost to a particular incremental decision that results in the provision of a service and then to assign to each additional user the increased cost attributable on average to their usage.[38]

### Alternative reform option

The following alternative reform options are suggested:

- **Cost apportionment methodology** – The cost apportionment methodology should satisfy the following:
  - *Marginal cost* – be based on a marginal cost approach where possible or an average incremental cost approach where marginal cost pricing is not possible.
  - *Flexibility* – be capable of variation between local governments (given their differing development settings) and between trunk infrastructure networks.
- **Standard construction indexes and contingencies** – The State should also identify standard construction indexes, contingencies and administration costs for use in infrastructure plans and Netserv plans in addition to the proposed standardised land valuation methodology.
- **Standard schedule of works** – The standardised schedules of works may be too simplistic to reflect more sophisticated and flexible infrastructure charges models and as such, should not be mandated.
- **Standard demand generation rates** – The mandatory use of standard demand generation rates does not take account of different development settings and as such, should not be mandated.

## Capped charges

### Current framework

When levying infrastructure charges, local governments are currently limited to levying charges less than or equal to the relevant maximum adopted charge specified in the *State Planning Regulatory Provision (Adopted Charges) 2012*. This system of capping charges to a clear maximum amount provides a measure of certainty to the infrastructure charges framework.

### Reform option

The key issues identified in the Discussion Paper in relation to the current system of capped charges include:

- **No link between infrastructure charge and demand** – The demand metric (number of bedrooms or GFA) doesn't necessarily reflect the infrastructure demand created by the development and there is little link between the charge and the demand.
- **Better alignment of categories with land use** – Charge categories need to be better aligned with types of land use to better reflect demand for infrastructure.
- **Higher charges on non-residential development** – Non-residential development types may currently be too heavily charged on the basis of the attribution of a high degree of traffic generation to these types of development.

The Discussion Paper does not propose any reform options for capped charges as an analysis is to be completed by 31 January 2014. However the Discussion Paper identifies that the analysis is proposed to:

- quantify the impacts of the final reforms on current capped charges and implement appropriate amendments;
- consider differentiating charges on the basis of location and type of development;
- take place concurrently with the implementation phase of other aspects of the reform;
- consider the financial sustainability of local governments and impacts on the feasibility of development;
- involve consultation with local governments and other stakeholders; and
- consider the appropriateness of the current degree of traffic generation attributed to non-residential development.

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37 Blais, P (2010) Perverse Cities, UBC Press, p163.
38 Blais, P (2010) Perverse Cities, UBC Press, p173.

The Discussion Paper outlines three options for differentiation of capped charges:

- **Statewide charges** – It is identified that whilst this option is administratively simple, it does not accommodate regional variations in development and infrastructure delivery costs.
- **Location based differentiation** – It is identified that greenfield development may require more new infrastructure in comparison to infill development although DSDIP analysis indicates that the differences are small.
- **Development type differentiation** – The issues and corresponding possible solutions specified in the below table are to be further considered in relation to the refinement of the capped charges categories:

**Table 4 Issues with capped charges**

| Development type | | Identified issue for the development type | Proposed solution for the identified issue |
|---|---|---|---|
| **Residential** | Dormitory-style accommodation | Charges are currently being levied on a per-bedroom basis which is often inappropriate for this type of development | Levy charges on a per-bed basis, rather than per-bedroom |
| | Retirement facilities | Maximum charges currently equivalent to a dwelling house which may overstate the infrastructure demand | No solution proposed at this time |
| **Non-Residential** | Warehouses and residential care facilities | Current system of charges often overstates the infrastructure demand | No solution proposed at this time |
| | Education facilities | Charges are currently being levied on a GFA basis of assessment | Schools Regulatory and Financial Reform Sub-Committee has issued a recommendation that charges move to a per-student basis of assessment |

## Implications of reform option

The proposed review of capped charges should take account of the Productivity Commission's key findings and recommendations in respect of the impacts of charging reforms:[39]

- While the incidence of developer charges and other contributions at any particular time will depend on the characteristics of the market, it is most likely in the longer term that they will fall on purchasers of developed land *[chapter B5, section 5.1].*
- In principle the timing of charges should make little difference to the burden of finance; in practice it may do so because of mechanical lending rules used by banks, the uncertainty created by the potential for public authorities to alter future charges, and government guarantees on the borrowings of public authorities *[chapter B5, section 5.1].*
- Statistical analysis conducted by the Commission suggests that the consumption of urban land in aggregate is not very responsive to changes in its price (and hence to changes in infrastructure charges). However this does not preclude changes occurring in the *pattern* of land use within cities, as illustrated by additional modelling undertaken by the Commission. Eventual impacts would depend upon the flexibility of land use restrictions and adjustment costs *[chapter B5, section 5.2].*
- The mix of people's income levels, household types and ages in the different parts of major cities suggests that the effects of reforms which led to higher charges would not fall disproportionately on any identifiable community group *[chapter B5, section 5.3].*
- The provision of subsidised urban infrastructure, or concessional charging for it, is not an efficient means of meeting equity objectives. Practical measures to shield deserving categories of people from hardship are better directed to them as people, rather than to the areas where they are thought to live, or to the city-wide networks of urban services they use *[chapter B5, section 5.3].*

[39] Industry Commission (1993) *Taxation and Financial Policy Impacts on Urban Settlement*, Australian Government Publishing Service, Canberra.

- Charges for existing households should be examined as part of any reform of pricing structures. It would be equitable for established residents to at least face charges that matched the cost of replacing infrastructure required to service them *[chapter B5, section 5.3].*

### Alternative reform option

Whilst planned charges are a better public policy instrument than capped charges for the reasons outlined by the Productivity Commission, if capped charges are to be retained then the following alternative reform options are suggested:

- **Location based differentiation** – Capped charges which reflect different location settings such as existing urban areas, growth areas (infill and greenfield) and rural and regional areas.
- **Development type differentiation** – Non-residential development is charged against floor area on the theory that floor area reflects occupancy and that this is what drives capacity-related costs. However floor space reflects occupancy quite poorly given that floor space per employee varies so much between types of non-residential development. It is suggested that types of densities for each type of development be used to construct an estimate of square metres of land area per employee for each category of use. This methodology has the significant advantages of better pricing for marginal costs and of encouraging the densification of development.[40]
- **Proportional amount for distributor-retailers** – A methodology needs to be established to calculate the proportionate amount of a capped charge for water supply and sewerage infrastructure networks for distributor-retailers and local government infrastructure networks.
- **Distributor-retailer institutional financial arrangements** – The reduced revenue from capped charges as a result of the limitation of essential infrastructure, the deeming of unplanned trunk infrastructure and more expensive offset and refund policies, will have significant financial implications on distributor-retailers who are required to provide a return to shareholder local governments and whose utility charges are regulated. In the absence of considered reform, it is inevitable that distributor-retailers will have to reduce their capital and operating budgets to adjust to the reduced revenue environment or increase debt levels or reduce returns to shareholding local governments.

## Planned charges

### Current framework

The current framework has prohibited local governments from adopting infrastructure charges above the maximum adopted infrastructure charges.

However, some local governments, principally in high growth areas, have requested the ability to adopt infrastructure charges above the capped charges.

### Reform option

The Discussion Paper proposes the following reform option:

- **Capped charges** – These are to be retained as the default option for the levying of infrastructure charges where a local government prepares an infrastructure plan not incorporating a cost apportionment methodology.
- **Planned charges** – These are to be adopted where a local government prepares an infrastructure plan incorporating a cost apportionment methodology and the resulting planned charges are subject to a third party review assessment process and are approved by the Minister.

The proposed process involves the following four stages:

- **Local government assessment** – The local government decides whether or not to levy a planned charge.
- **Local government financial analysis** – This stage involves the following steps:
  - Step 1 – Network review:
    - The local government reviews the asset management plan and infrastructure plan to determine the cost profile for delivery of the infrastructure network.
  - Step 2(a) – Review infrastructure scope:
    - The local government estimates the future approach with respect to infrastructure development.
    - If this approach would not be financially sustainable, the assessment in step 2(b) is undertaken.
  - Step 2(b) – Financing options:
    - The local government identifies the funding shortage and the possibility of the local government financing the infrastructure itself.

[40] Blais P (2010) *Perverse Cities*, UBC Press Vancouver, p180-181.

- Step 3 – Impact analysis:
  - Using the information identified above, an assessment of the impact on local government financial sustainability is undertaken.
  - It is proposed that the Queensland Treasury Corporation be authorised to undertake a review of this assessment.

- **Development feasibility analysis** – This stage involves the following steps:
  - Step 1 – Feasibility assessment:
    - The local government identifies areas impacted by the proposed infrastructure charges, assesses the impact within those areas on the goal of development feasibility and prepares a report.
  - Step 2 – Third party review:
    - The local government provides the report prepared in Step 1, in addition to relevant further information, to an independent third party who is to review the information, conduct further research and testing and issue a binding recommendation.
    - Under this proposal there would be no right for an individual developer to appeal a planned charge on the basis that it makes their proposed development unfeasible, as the planned charge is to apply to the whole local government area.
  - Step 3 – Ministerial determination:
    - The Minister receives the outcomes from the impact assessments and decides whether to accept or reject a planned charge.
- **Ministerial determination** – This stage involves the Minister accepting or rejecting the proposed planned charges. A sunset clause of 3-5 years has also been suggested to encourage continual review of planned charges.

## Implications of reform option

The reform option provides for a planned charges assessment process through which a planned charge is assessed in terms of the impact on local government financial sustainability and development feasibility.

In the absence of planned charges, high growth local governments face intense pressure from anti-growth contingencies largely because those groups understand that they are being forced to pay for much of the cost of rapid infrastructure expansion through their property taxes. In practice when local governments find themselves feeling development pressures, the most realistic alternative to user pay levies tend to be growth controls or other exclusionary tools intended to limit growth.[41]

The proposed planned charges assessment process has the following implications:

- **Reduced planning costs** – The alignment of price signals through planned charges with planning objectives will reduce the direct costs of implementing and administering planning through reducing growth controls and other exclusionary controls.[42]
- **Social and environmental costs and benefits** – The assessment process takes no account of the social and environmental costs and benefits of the planned charges; being limited to an analysis of the impact on local government finances and development feasibility.
- **Development feasibility** – The assessment of the impact of planned charges on potential development categories will:
  - be complicated and difficult, if not impossible, given that development feasibility is changeable depending on macro scale factors such as market conditions, current land supply cycles, demand cycles and finance policies as well as the financial position and required rates of return of individual developments; and
  - impose a significant burden on local governments and distributor-retailers.
- **Local government empowerment** – The proposed approval of planned charges is at odds with the State government's stated policy of empowering local government. The State government does not purport to approve other local government rates and charges.
- **Administrative burden** – A significant resource and financial burden will be imposed on local governments and distributor-retailers in relation to administering the assessment process.
- **Uncertainty** – The requirement for Ministerial approval for planned charges will give rise to uncertainty given local governments' previous experience with long delays in the Ministerial approval of infrastructure charges schedules under priority infrastructure plans under the previous State government.

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41 Burge, GS (2009) *The Effects of Development Impact Fees on Local Fiscal Conditions*, Proceedings of the 2009 Land Policy Conference, p198.

42 Blais, P (2010) *Perverse Cities*, UBC Press, Vancouver, p162.

- **Distributor-retailer institutional arrangements** – The proposed planned charges assessment process is in addition to the existing institutional arrangements for regulating utility charges for water supply and sewerage. It would be more efficient for the review of planned charges to be carried out within the existing institutional arrangements.

### Alternative reform option

The implications of the reform option could be addressed by adopting an alternative reform option which requires a local government and distributor-retailer to prepare a traditional cost-benefit analysis for the planned charges which would ensure that the economic, social and environmental costs and benefits of the planned charges are rigorously considered prior to their adoption.

## Conditions

### Current framework

Local government may impose development approval conditions for land, work and financial infrastructure contributions as an alternative or supplement to levying infrastructure charges. Currently, shareholding local governments impose conditions on behalf of a distributor-retailer under a delegated assessment model; but under the proposed utility model a distributor-retailer would be empowered to impose development approval conditions.

### Reform option

The Discussion Paper envisages that the conditioning of non-trunk and trunk infrastructure would not be changed but that the reform option for deemed trunk infrastructure would address stakeholder issues in respect of the possibility of a local government both levying infrastructure charges for a development and also conditioning the provision of infrastructure which is to be shared with existing and future development for the development.

The reform option for trunk infrastructure and its implications have been considered earlier in respect of the identification of trunk and non-trunk infrastructure.

### Alternative reform option

Whilst the Discussion Paper states that the conditioning powers of non-trunk and trunk infrastructure would not be changed, the various reform options raise significant uncertainty in respect of the conditioning of development approvals including the following:

- **Non-essential infrastructure** – It appears that conditions will not be able to require financial, land and work contributions for non-essential development infrastructure. This raises questions about the legality of conditions relating to non-essential infrastructure such as conditions intended to:
  - preserve arterial and sub-arterial road corridors;
  - preserve amenity standards such as noise and light barriers on roads;
  - preserve environmental values such as fauna management crossings.
- **Refunds** – The following issues are unclear:
  - *Timing for payment of refunds* – It is uncertain if refunds are payable at:
    - the completion of the trunk work or provision of trunk land;
    - the completion of a stage of the development; or
    - completion of the development.
  - *Funding source of refunds* – It is uncertain whether refunds are to be paid from:
    - infrastructure charges received from premises serviced by the trunk infrastructure which has been provided (as is currently the case);
    - infrastructure charges received for other infrastructure networks (cross crediting of refunding);
    - infrastructure charges received from premises not serviced by the trunk infrastructure; or
    - other revenue sources.
- Out of sequence or inconsistent development – The following issues are unclear:
  - *Additional trunk infrastructure costs* – It is difficult to understand the operation of the conditioning powers under sections 650 to 652 of the SPA for additional trunk infrastructure costs for out of sequence or inconsistent development in the context of the reform option for the identification of deemed trunk infrastructure associated with out of sequence or inconsistent development.
  - *Refund of additional trunk infrastructure costs* – The Discussion Paper does not discuss the operation of the provisions in section 651 of the SPA for the refunding of additional trunk infrastructure costs for inconsistent development in the context of the reform option for offsets and refunds.

# Offsets and refunds

## Current framework

Under the current framework, where a development approval condition requires the provision of trunk infrastructure for a development in respect of which an infrastructure charge is levied, the applicant is entitled to the following:

- **Offset** – The value of the trunk infrastructure is to be offset against the infrastructure charge.
- **Refund** – Where the value of the trunk infrastructure contribution is higher than the infrastructure charge, a refund is to be provided, on terms to be agreed, from infrastructure charges for the development of premises serviced by the trunk infrastructure.

Offsets and refunds are generally negotiated and set out in an infrastructure agreement.

## Reform option

The Discussion Paper identifies the following trunk infrastructure issues in respect of offsets and refunds:

- **Uncertainty** – The uncertainty of the scheme of offsets and refunds in the absence of any supporting guidance framework.
- **Undervaluation** – The potential for the value of the land and works subject to an offset or refund to be underestimated in the absence of a uniform valuation method.

The Discussion Paper proposes reform options involving the following elements:

- **Valuation of trunk infrastructure** – The value of provided trunk infrastructure would be based on either:
  - the planned value in the infrastructure plan;
  - the actual value of the trunk infrastructure determined in accordance with a local government procurement process; or
  - the applicant would be entitled to choose either of the above two options.
- **Standardised land valuation methodology** – It is proposed that a standard land valuation methodology be adopted although no particular methodology is stated.
- **Cross crediting of offsets** – It is proposed that offsets for a trunk infrastructure network be applied to the proportion of an infrastructure charge applicable to other trunk infrastructure networks.
- **Offset banking** – The value of offsets from an earlier stage of the development approval may be retained and valued in demand units not cash for offsetting against infrastructure charges for subsequent stages.
- **Transferable offsets** – Offsets may be transferred to other sites owned by the same developer in the respective local government area or a distributor-retailer's geographical area.

## Implications of reform option

The reform option for the adoption of a standardised land valuation methodology will provide greater certainty in terms of the preparation of an infrastructure plan and the valuation of offsets and refunds for land contributions for trunk infrastructure.

However the balance of the reform option will have significant implications:

- **Probity and public interest** – The proposal that the value of an offset will be the planned value or that the applicant will have the right to apply either the planned value or the actual value will create probity and public interest issues where the actual value of the trunk infrastructure is less than the planned value. In such circumstances, an applicant is receiving a financial benefit in the form of a reduced infrastructure charge or a refund which exceeds the actual cost incurred for the trunk infrastructure. The resulting probity and public interest issues may give rise to broader political issues for a local government and distributor-retailer.
- **Reduced infrastructure charges** – The revenue sourced from infrastructure charges will be materially reduced as a result of the value of offsets and refunds being increased by the following:
  - offsets and refunds being calculated either on an actual value which exceeds the planned value; or on a planned value in circumstances where the actual value is less;
  - offsets when held in demand units will escalate in value in accordance with the producer price index applied to infrastructure charges which is generally greater than the consumer price index which would preserve the value of the offset over time;
  - cross crediting the value of trunk infrastructure against infrastructure charges for other trunk infrastructure networks.

- **Risk transference** – The proposal that the value of an offset will be the actual value of the trunk infrastructure effectively transfers the risk profile of delivering an item of trunk infrastructure from the developer to the public and also provides the potential for the shifting of some development costs to trunk infrastructure costs.
- **Infrastructure delivery** – The likelihood of reduced revenue from infrastructure charges will delay the delivery of trunk infrastructure to service planned development by local governments and distributor-retailers.
- **Development assessment** – Local governments and distributor-retailers acting prudently will have to consider the financial implications of a proposed development in terms of the likely offset and refund prior to determining a development application thereby potentially resulting in a delayed assessment process and the potential for increased refusals of development applications.
- **Administrative burden** – The transference of offsets will result in an additional administrative burden for local governments and distributor-retailers.

### Alternative reform option

The implications of the reform option could be addressed by adopting an alternative reform option involving the following:

- **Valuation of trunk infrastructure** – The value of the provided trunk infrastructure should be based on the lower of the following:
  - *planned value* – calculated by reference to the infrastructure plan and the extrinsic material and studies upon which the infrastructure plan was prepared;
  - *actual value* – calculated initially in accordance with a local government procurement process prior to the commencement of work with an ability to vary the actual value at the completion of the infrastructure delivery process to take account of variations prior to the claiming of the offset.
- **Valuation of offsets** – The value of an offset should be given not in demand units but in cash which should be escalated to preserve its value in accordance with the following:
  - *producer price index* – if the trunk infrastructure is provided after the planned date of provision in the infrastructure plan; or
  - *consumer price index* – if the trunk infrastructure is provided before the planned date of provision in the infrastructure plan, so as not to encourage premature development.

## Credits

### Current framework

Under the current system of credits, existing lawful use rights and previous contributions may be taken into account as deductions when infrastructure charges are levied.

### Reform option

The Discussion Paper identifies there is no legal requirement to apply credits and there is no standard methodology for calculating the value of a credit if a decision has been made to apply one.

The Discussion Paper identifies the need for a transparent methodology for applying credits that is administratively simple to implement and maintain and supports development feasibility estimates and development planning.

The reform option involves the following:

- **Mandatory credits** – Credits are to be provided for existing lawful use rights such that infrastructure charges may only be levied for infrastructure demand that is in addition to the demand provided for under the existing use rights.
- **Register** – Local governments and distributor-retailers will be required to provide for a more thorough recording of charges, credits and offsets for each lot. Details of the authority's credits policy must be made available through the authority's infrastructure plan, resolution or board decision.
- **Credit policy** – Public access is provided to a credits policy through an infrastructure plan, resolution or board decision.

### Implications of reform option

Whilst the Discussion Paper identifies that the reform option imposes additional administrative burdens in terms of maintaining the record of charges for each and every lot within a local government area or a distributor-retailer's geographical area, the benefits of the reform option in terms of improving the accountability of the credits system significantly outweigh the additional administrative costs.

# Appeals and dispute resolution

## Reform option

The Discussion Paper states that the current system of appeals of dispute resolution is time and resource intensive. To achieve the specified reform objective of reducing the time and cost associated with infrastructure charges and conditions related appeals and dispute resolution the following reform options are identified:

- **Pre-lodgement mediation process** – This reform option would retain the rights of appeal under the current system for both planned and capped charges. However for appeals involving only infrastructure charges, a mediated dispute resolution process must be followed prior to an appeal being lodged with the Queensland Planning and Environment Court. Given the small number of appeals which would be affected by this proposal, the Discussion Paper appears to question the need for reform in this area.
- **Widening of appeal rights** – This reform option proposes to expand appeal rights to include one or more of the following:
  - the methodology used to calculate an infrastructure charge;
  - whether infrastructure the subject of a condition is trunk or non-trunk;
  - whether a condition related to infrastructure is reasonable and relevant;
  - the calculation of offsets, refunds and credits.

## Implications of reform option

The Discussion Paper outlines the following potential implications of the reform options:

- **Higher administrative costs** – Both of the above options may lead to higher administrative costs for both the implementation and maintenance of the system.
- **Impact of other reforms** – There is the potential for the introduction of reforms to the other areas outlined earlier (e.g. standardised infrastructure planning) to reduce the need for reforms at the dispute resolution stage.

# Infrastructure agreements

## Current framework

Under the current system, infrastructure agreements are a mechanism by which infrastructure may be provided for and funded outside the maximum charges framework. A condition of a development approval may require compliance with an infrastructure agreement.

## Reform option

The Discussion Paper identifies that infrastructure agreements are potentially complex documents that may be expensive to prepare and some local governments avoid the proper utilisation of an infrastructure agreement on this basis. Conversely, some local governments use infrastructure agreements to address issues which may be more appropriately dealt with by another mechanism.

The Discussion Paper proposes a reform option which seeks to retain the flexibility of the existing system while implementing measures to clarify where an infrastructure agreement is appropriate involving the following:

- Undertaking a review of the SPA sections relevant to infrastructure agreements.
- The removal of the power of local governments to attach development approval conditions requiring the preparation of an infrastructure agreement.
- Introducing a time limit on the negotiation of an infrastructure agreement.
- Preparing a set of guidelines to demonstrate the principles and requirements of an infrastructure agreement.

## Alternative reform options

The following are suggested as alternative reform options:

- **Conditioning of infrastructure agreements** – The SPA empowers a local government to impose a condition of a development approval requiring compliance with an infrastructure agreement.[43] The SPA does not authorise the imposition of a condition requiring the preparation of an infrastructure agreement and such a condition would in any event face significant legal difficulties in terms of satisfying the reasonable and relevant test.[44] Conditions of this nature can be subject to an appeal and accordingly it is suggested that a specific statutory prohibition is not necessary.

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43 See section 346(1)(c) of the *Sustainable Planning Act 2009*.
44 See section 345 of the *Sustainable Planning Act 2009*.

- **Time limit for negotiation of an infrastructure agreement** – In lieu of the specification of a time limit for negotiation of an infrastructure agreement, which is considered to be impractical, consideration could be given to the inclusion of a statutory duty on local governments, distributor-retailers and applicants to:
  - commence the preparation of an infrastructure agreement as soon as is reasonably practicable;
  - act co-operatively in the preparation of the infrastructure agreement; and
  - negotiate in good faith in respect of the infrastructure agreement.

# Deferred payments

## Current framework

Under the current system, the payment of infrastructure charges levied by a local government is to be made in accordance with the timeframe set out in the SPA. In respect of reconfiguration of a lot applications, charges are payable before the final sealing of a plan of subdivision. In practical terms this allows the local government to withhold the sealed plans until payment has been received.

## Reform option

The Discussion Paper outlines the following potential options for deferring the payment of infrastructure charges until a project is nearer completion as an attempt to provide for a higher likelihood of project success:

- **Mandate earliest payment at plan sealing** – Under this option, the earliest that infrastructure charges may be paid is at plan sealing unless otherwise agreed between the parties. Payment may be further deferred by entering into an infrastructure agreement, with early payment being encouraged through the offer of discounts where payment is made early.
- **Deferment until settlement of a lot** – This reform option would push the time at which charges are payable back to the settlement stage and an outstanding infrastructure charge for land is to be notified on the title. Each local government would be entitled to decide whether or not to implement deferred payment as an option in their local government area. The Discussion Paper states that this reform option would require 'major adjustments' to the conveyancing process. The Discussion Paper appears to conclude that the benefits of the implementation of this option are outweighed by the potential negative impacts on the finance industry, development industry and property purchasers.

## Implications of reform option

Mandating plan sealing as the earliest date for the payment of infrastructure charges for reconfiguring a lot unless otherwise agreed is unlikely to have significant implications.

However the Discussion Paper does not consider the implications by a local government and distributor-retailer where infrastructure charges are not collected at the specified date due to an administrative oversight.

## Alternative reform option

In addition to the specification of an earliest date for payment, consideration could be given to specifying a sunset period after the specified date for payment within which the infrastructure charge may not be collected by a local government or distributor-retailer.

# Alternative funding and financing

## Current framework

Under the current system of funding and financing infrastructure, local governments provide funding through means such as rates, government borrowing, user charges, public private partnerships and infrastructure contributions and distributor-retailers provide funding through user charges, infrastructure charges and government borrowing.

## Reform option

The Discussion Paper identifies a number of proposed alternative funding and financing arrangements for local governments and distributor-retailers, including the following:

- Local governments:
  - *Specific purpose securitised borrowing* – Funds are borrowed for a specific project and are repaid out of the project's generated revenue.
  - *Value capture levies* – The rise in the value of land due to land development or construction of infrastructure is 'captured' to help fund necessary infrastructure.
  - *Special purpose levies* – These are issued in an area to raise the capital required to fund specific infrastructure in that area.

- *Growth area bonds* – These are issued to finance infrastructure in a specific area and the debt is repaid through property tax revenues in that area.
- *Business improvement districts* – Businesses within a defined area pay a tax or fee to finance infrastructure in that area.
- *Centralised financing* – State and Commonwealth financing provides local governments with a structured debt to optimise borrowing.

- **Distributor-retailers** – Specific purpose securitised borrowing.

### Implications of reform option

The Discussion Paper identifies that these arrangements are only applicable at the small scale and do not have broad State-wide application. As such they will be confined to having a more ad hoc application outside the existing framework.

## Resolutions and distributor-retailer board decisions

### Current framework

Under the current framework, infrastructure charges are set by an adopted infrastructure charges resolution or a distributor-retailer board decision. The Discussion Paper identifies concerns that some resolutions do not comply with the SPA.

### Reform option

The Discussion Paper requests feedback on whether there is support for a third party review process for resolutions and board decisions or whether an alternative may be suggested.

## Transitional arrangements

The Discussion Paper states that DSDIP is to work with key stakeholders to develop transitional arrangements relating to the following:

- Providing local governments with time to implement these reforms.
- Providing a stakeholder information program.
- Providing ongoing support to key stakeholders.

## Next steps

DSDIP will review submissions on the Discussion Paper to inform the final content of the reforms. An analysis of the impacts on current capped charges is to take place with key stakeholders concurrently with the finalisation of content. The reform is to be finalised in time for commencement on 1 July 2014.

# Infrastructure contribution powers under the Sustainable Planning Act 2009

Ian Wright | James Langham | Edith Graveson

**This article discusses the infrastructure contribution powers of local governments under the *Sustainable Planning Act 2009***

September 2013

## Introduction

On 6 June 2011, a new infrastructure contributions regime was implemented through two legislative instruments:

- the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011* (**Amended SPA**); and
- the draft *State Planning Regulatory Provision (Adopted Charges)* (**Draft SPRP**).

The Amended SPA introduced a capped infrastructure charging regime and narrowed the conditioning powers of local governments in respect of requiring infrastructure contributions through conditions of a development approval.

From 1 July 2011, under the SPA, a local government:

- cannot impose a condition requiring a financial contribution or levy an infrastructure charge under a priority infrastructure plan;[45] and
- has narrower powers to impose a condition requiring trunk and non-trunk infrastructure.

Therefore, local governments and other public entities now have a more limited ability to achieve infrastructure funding and supply arrangements through the imposition of conditions of a development approval, which places a greater importance on infrastructure agreements.[46]

## Financial contribution for trunk infrastructure

### Adopted infrastructure charge for trunk infrastructure

A local government may levy a charge for supplying trunk infrastructure by way of an adopted infrastructure charge under Division 5A of the *Sustainable Planning Act 2009* (**SPA**).[47] An adopted infrastructure charge for trunk infrastructure for which a State planning regulatory provision (adopted charges) applies is:

- if the local government has adopted a charge for the infrastructure under an adopted infrastructure charges resolution-the adopted charge; or
- otherwise – the lesser of the following:
  - a charge equivalent to the pre-SPRP amount for development for which the charge is levied;
  - the maximum adopted charge for the infrastructure.[48]

The adopted infrastructure charge is to be issued by way of an adopted infrastructure charges notice which may only be given in relation to a development approval or compliance permit.[49]

### Financial contribution for necessary trunk infrastructure

A local government may impose a condition requiring the payment of additional trunk infrastructure where the development is:

- inconsistent with the assumptions about the type, scale, location or timing of future development stated in the priority infrastructure plan; or
- for premises completely or partly outside the priority infrastructure area.[50]

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45 Section 880(2) of the *Sustainable Planning Act 2009*.
46 See I Wright, *Infrastructure Contributions Reform in Queensland*, Paper presented to a seminar of the Planning Institute of Australia, Brisbane, on 26 July 2011.
47 See section 629 of the *Sustainable Planning Act 2009* (see also 7551~CB(1) of the *Sustainable Planning Act 2009* for distributor-retailer power).
48 See section 648A of the *Sustainable Planning Act 2009*.
49 Sep section 648F(2) of the *Sustainable Planning Act 2009* (see also 755KB(3) of the *Sustainable Planning Act 2009* for distributor-retailer power).
50 See section 650(1)(b) of the *Sustainable Planning Act 2009*.

Where a development is completely in the priority infrastructure area, a local government may under section 650 of the SPA impose a condition requiring the payment of additional trunk infrastructure costs for the following:

- for the supply of trunk infrastructure earlier than anticipated in the priority infrastructure plan;[51] or
- for trunk infrastructure associated with a different type, scale or intensity of development from that anticipated in the priority infrastructure plan.[52]

Where a development is completely or partly outside of the priority infrastructure area, a local government may under section 650 of the SPA impose a condition requiring the payment of additional trunk infrastructure costs for the following:

- the establishment cost of any trunk infrastructure made necessary by the development; and
- establishment costs of any temporary infrastructure, of either or both of the following:
  - costs required to ensure the safe or efficient operation of the infrastructure;
  - costs made necessary by the development;
- the decommissioning, removal and rehabilitation costs of any temporary infrastructure; and
- the maintenance and operating costs of the infrastructure for up to 5 years.[53]

# Work contribution

## Work contribution for trunk infrastructure

A local government may impose a condition requiring the provision of a work contribution for trunk infrastructure, if:

- existing trunk infrastructure necessary to service the premises is not adequate and trunk infrastructure adequate to service the premises is identified in the priority infrastructure plan or an adopted infrastructure charges resolution of the local government; or
- trunk infrastructure to service the premises is necessary, but is not yet available and is identified in the priority infrastructure plan or an adopted infrastructure charges resolution of the local government; or
- trunk infrastructure identified in the priority infrastructure plan or an adopted infrastructure charges resolution of the local government is located on the premises.[54]

A condition requiring trunk infrastructure must also be "relevant or reasonable".[55] Such a condition is "relevant and reasonable"[56]:

- for a condition requiring the supply of necessary trunk infrastructure where existing trunk infrastructure servicing the premises is inadequate or future trunk infrastructure necessary to service the premises is not available:
  - to the extent that the infrastructure is necessary to service the premises; and
  - if the infrastructure is the most efficient and cost-effective solution for servicing the premises;
- for a condition requiring the supply of necessary trunk infrastructure where existing or future trunk infrastructure is located on the premises, to the extent the infrastructure is not an unreasonable imposition on:
  - the development; or
  - the use of the premises as a consequence of the development.

## Work contribution for non-trunk infrastructure

A local government may impose a condition requiring the provision of a work contribution for non-trunk infrastructure for 1 or more of the following:

- infrastructure internal to the premises;
- infrastructure connecting the premises to the external network;
- infrastructure protecting or maintaining the safety or efficiency of the network of which the non-trunk infrastructure is a component.[57]

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51 See section 651(1)(a) of the *Sustainable Planning Act 2009*.
52 See section 651(1)(b) of the *Sustainable Planning Act 2009*.
53 See section 652(1) of the *Sustainable Planning Act 2009*.
54 See section 649 of the *Sustainable Planning Act 2009* (see also 755Q of the *Sustainable Planning Act 2009* for distributor-retailer power).
55 See section 345 of the *Sustainable Planning Act 2009*.
56 See section 649(8) of the *Sustainable Planning Act 2009*.
57 See section 626 of the *Sustainable Planning Act 2009* (see also 755J of the *Sustainable Planning Act 2009* for distributor-retailer power).

A condition for non-trunk infrastructure must also:

- be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or
- be reasonably required in relation to the development or use of premises as a consequence of the development.[58]

### Work contribution for development infrastructure

If a local government does not have a priority infrastructure plan or an adopted infrastructure charges resolution which identifies trunk infrastructure, the local government may impose a condition requiring a provision of a work contribution for development infrastructure for 1 or more of the following:[59]

- a network internal to the premises;
- connecting the premises to an external infrastructure network;
- protecting or maintaining the safety or efficiency of the infrastructure network of which the development infrastructure is a component.

The condition must state the infrastructure to be supplied and when the infrastructure must be supplied.

## Land contribution

For development infrastructure that is land a local government may give, in addition to or instead of an adopted infrastructure charges notice, a notice requiring the transfer of part of the development land to the local government in fee simple.

However, the total value of the contribution must not be more than the amount of the adopted infrastructure charge payable for the premises for a development approval.[60] Accordingly, a local government must not issue a land dedication notice for land the value of which is greater than an adopted infrastructure charges notice for the premises for the development approval.

58 See section 345 of the *Sustainable Planning Act 2009*.
59 See section 626A of the *Sustainable Planning Act 2009* (see also 755J of the *Sustainable Planning Act 2009* for distributor-retailer power).
60 See section 648K of the *Sustainable Planning Act 2009*.

Colin Biggers & Paisley

# Are requirements of service mandatory for the commencement of a valid appeal in the Land Appeal Court?

Ronald Yuen | Phoebe Bishop

**This article discusses the decision of the Queensland Court of Appeal in the matter of *Hope & Anor v Brisbane City Council* [2013] QCA 198 heard before Muir and Gotterson JJA and Jackson J**

September 2013

## Executive Summary

This case highlighted the strict approach taken by the courts in relation to appeals instituted out of time under section 64 (Right of appeal to Land Appeal Court) of the *Land Court Act 2000*. It involved an application for leave to appeal a decision of the Land Appeal Court to the Court of Appeal on the ground of error or mistake of law. The question for determination was whether an appeal to the Land Appeal Court was incompetent if a party intending to appeal to that court failed to serve the notice of appeal against the order of the Land Court on the other party to the proceeding within 42 days after the order was made. The Court of Appeal agreed with the decision (and associated reasons) of the Land Appeal Court that the appeal was incompetent in those circumstances. The application for leave to appeal was therefore refused and the applicants were ordered to pay the respondent's costs of the application.

## Case

This case involved an application by Roy and Delia Hope (**applicants**) for leave to appeal a decision of the Land Appeal Court to the Court of Appeal on the ground of error or mistake of law. The issue was whether the Land Appeal Court was correct in finding that an appeal to the Land Appeal Court was incompetent because the applicants had failed to serve the notice of appeal against the order of the Land Court on the Brisbane City Council (**respondent**) within 42 days after the order was made pursuant to section 65(1)(a) (Notice of appeal) of the *Land Court Act 2000* (**LCA**).

## Facts

The applicants' land was taken by the respondent under the *Acquisition of Land Act 1967*. The Land Court made an order on 28 August 2012 assessing the compensation to which the applicants were entitled under that Act at $230,000 and providing that interest was payable at a particular rate (**order**).

On 9 October 2012, being 42 days after the order, the applicants filed a notice of appeal to the Land Appeal Court pursuant to section 64 of the LCA. The notice of appeal, however, was not served on the respondent until 10 October 2012. Therefore, service of the notice of appeal was one day late having regard to the requirements for service under section 65(1)(a) of the LCA.

The applicants contended that, on the proper construction of sections 64 and 65 of the LCA, non-compliance with section 65(1)(a) did not render the proceeding on appeal invalid. Alternatively, the applicants contended that the invalidity could be cured by an order made under section 57(c) (Powers of Land Appeal Court) of the LCA which provided that the Land Appeal Court might "*make an order the Land Appeal Court considers appropriate*".

The Land Appeal Court rejected both contentions and held that the requirements of service under section 65(1)(a) of the LCA by the parties were mandatory (and not procedural only) and there was no provision for the court to extend the time limit or for the condition to be waived under the LCA. Further, given the mandatory language used in section 65 and its proximity to section 64, a compliance with section 65 of the LCA was a condition of the institution of an appeal. Therefore, a failure to comply with section 65 of the LCA would mean that there was no valid appeal and as such the Land Appeal Court would not have jurisdiction and could not exercise the powers in section 57 of the LCA.

## Decision

In the Court of Appeal, his Honour Justice Jackson (with whom Muir JA and Gotterson JA agreed) agreed with the decision (and associated reasons) of the Land Appeal Court and added further observations which further supported his Honour's decision.

Firstly, his Honour stated that the case of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 was not only a "*leading case upon the principles of statutory interpretation*" but was also authority for the proposition that:

> *An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is, depends on whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition …*

Secondly, his Honour agreed with the Land Appeal Court's approach in characterising the question as "*whether the requirement of service on the other party within time was a condition of the essence of the right of appeal or procedural, going only to the mode of enforcement of that right*". His Honour noted that the approach was endorsed by many cases in analogous circumstances in the High Court. His Honour extracted the relevant principle of statutory interpretation by reference to *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 as stated in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1:

> *… When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.*

Thirdly, his Honour noted in construing the right given by particular provisions in this case, it had to be borne in mind that:

> *… a right of appeal and a power on appeal to set aside the decision appealed from and to make other orders in lieu thereof are creatures of statute alone and it is in and from the statute that the scope of the relevant right and power must be ascertained.*

Fourthly, his Honour noted that in their submissions, the applicants argued that as under rules 3 (Application of rules) and 7 (Filing documents) of the *Land Court Rules 2000* (**LCR**) a proceeding was started in the Land Appeal Court by filing a notice of appeal and the appeal was "*started*" before the notice of appeal was served in compliance with section 65 of the LCA. Whilst his Honour acknowledged there was some "*untidiness*" in the application of rule 7 of the LCR and the operation of section 65 of the LCA, it was important to note that:

> *service of the notice of appeal in accordance with s 65 is part of the institution of an appeal under the right conferred by s 64 ... the requirement of service on the other party to the proceeding within 42 days is one that operates in the Land Court Act itself and not in the rules of court which were made as subordinate legislation under section 214 of that Act.*

Finally, his Honour noted that the Land Appeal Court found it "*noteworthy*" that the legislative predecessor of section 65 of the LCA, section 44(11) of the *Land Act 1962*, contained an express power to proceed where a notice of appeal had been served out of time provided that the appellant satisfied the Land Appeal Court of certain matters. In the Land Appeal Court's findings, it concluded that:

> *the absence of a similar power to extend time in the Land Court Act 2000 reflects an intention on the part of the legislature that the time limit prescribed by s 65(1) was to be mandatory for the commencement of a valid appeal.*

In this regard, his Honour observed that, by reference to the case of *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 it was permissible to have regard to the legislative history in the form of prior legislation as a matter of statutory interpretation. Further, in his Honour's view, the Land Appeal Court rightly treated that matter as a "*salient point*" being that it was "*noteworthy*" and that the absence of a similar power in section 65 of the LCA "*reflects an intention that the time limit was to be mandatory*". Nonetheless, it did not deflect the Land Appeal Court from the primary task of construing the text of sections 64 and 65 of the LCA in the context of the other provisions of the LCA.

## Held

- The application for leave to appeal be refused.
- The respondent's costs of the application be paid by the applicants.

# Approving a natural gas-fired power station where a significant conflict with a planning scheme exists

Ronald Yuen | Caitlin Stiles

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Westlink Pty Ltd atf Westlink Industrial Trust v Lockyer Valley Regional Council & Ors* [2013] QPEC 35 heard before Robin QC DCJ**

September 2013

## Executive Summary

This case involved an appeal against a refusal of a development application seeking a material change of use for a natural gas-fired power station. The Queensland Planning and Environment Court had to determine a number of issues including a visual amenity impact, bushfire risks, alleged uncertainty on the implementation of a development approval (if given), conflicts with the relevant planning instruments and whether there was a need for the proposal. The appeal was allowed but was adjourned to allow the parties to work out appropriate conditions for inclusion in a development approval.

## Case

This case involved an appeal by Westlink Pty Ltd as trustee for Westlink Industrial Trust (**appellant**) against the Lockyer Valley Regional Council's (**respondent**) refusal of a development application seeking a material change of use for a gas-fired power station, which would provide electricity at times of peak demand at short notice, located north of Gatton (**proposal**).

## Facts

The proposal was the subject of previous hearings in the Queensland Planning and Environment Court, which were subsequently heard by the Court of Appeal.[61] His Honour Judge Robin QC however determined the appeal by reference only to the evidence and arguments presented in June 2013.

His Honour had to determine a number of issues associated with the proposal which included visual amenity impact, bushfire risks, alleged uncertainty on the implementation of a development approval (if given), conflicts with the relevant planning instruments and whether there was a need for the proposal.

## Decision

### Visual amenity impact

The proposal was alleged to be in conflict with section 4.11(2) (Overall outcomes for Rural General zone) of the *Gatton Planning Scheme* (**planning scheme**) which aimed to preserve the landscape quality of the Gatton area. The respondent contended that the Proposal would create adverse visual amenity impact on occupants of vehicles heading east on the Warrego Highway as the western half of the southern frontage of the subject site had unimpeded views as no buffer was present, unlike on the eastern half where views were obstructed by some off-site screening.

His Honour noted that the existing surrounds of the subject site were far from salubrious as they were predominately industrial utilities consisting of a gas compressor station and a proposed site for a substation to form part of a transmission line for Energex. His Honour observed, that the overall visual impact created by the proposal would not be unacceptable taking into account the "*assaults on rural character of the area that are coming on various fronts, leaving precious little to be "protected" or maintained*" and that only the tops of the six exhaust stacks would be visible from the Warrego Highway.

### Bushfire risk

Keep Lockyer Rural Inc, the fourth co-respondent by election contended that a bushfire risk was present at the large forested part of the subject site to the north of the generators which would not be able to be attended to by Queensland Rural Fire Services if a bushfire were to occur. In response, the appellant submitted that it had no cause to seek expert advice to demonstrate there was no unacceptable bushfire risk, particularly given that it was not included in the planning scheme's overlay mapping showing various categories of risk and its seriousness.

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[61] *Lockyer Valley Regional Council v Westlink Pty Ltd* [2011] QCA 358*; Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* [2012] QCA 370.

His Honour accepted that the bushfire risk associated with the large forested part north of the generators could be adequately addressed through conditions formulated in consultation with the Queensland Rural Fire Service and subsequently, determined that the issue did not warrant a refusal of the development application.

### Alleged uncertainty on the implementation of a development approval

Expert witnesses for the respondent expressed concern over the viability of the proposal due to the increasing cost of natural gas in Australia, to the point where the project, in their opinion, would never go ahead even if approved. His Honour accepted the respondent's proposition that "*an extant approval effectively constrains Council planning for a locality and may affect assessment of development applications*" and that it would "*create(s) expectation(s) in the community as to what could happen on a site*".

His Honour however, dismissed the contention made by the respondent that the proposal would involve a "*"real risk" of creating an "economic White Elephant"*" as the requisite commercial arrangements would be negotiated prior to the commencement of building work on the power station. His Honour observed that little to no disbenefit was apparent even if the appellant were to decide not to proceed with the proposal.

### Need for the proposal

The issue of "need" was critical to the success of the appellant's case by reference to section 3.5.14(2) (Decision if application requires impact assessment) of the *Integrated Planning Act 1997* (**IPA**). Whilst the appellant acknowledged that the demand for electricity had reduced and its reducing consequentially marginalised any "sufficient grounds" to justify an approval of a new power station. His Honour was not entirely convinced that the need for additional supply during peak periods had diminished, particularly given the occurrence of extraordinary summer temperatures in South-East Queensland.

His Honour believed that a longer term approach, rather than a short term one, should be taken in respect of the assessment of whether there was a need for an additional power station. His Honour therefore, was satisfied that there was a need for a power station which generated electricity to supplement existing supply during peak demand.

### Conflicts with the relevant planning instruments

It was determined by his Honour that a significant conflict existed between the proposal and the planning scheme under sections 4.11(2)(a) (Overall outcomes for Rural General zone) and 4.12(k) (Specific outcomes for Rural General zone) to the extent that the planning scheme did not permit a gas-fired power station.

However, his Honour noted, that the "vision" of the Rural General zone concerning the locality at which the subject site was situated had already been frustrated by existing utilities including a gas compressor station, electricity substation, a refuse dump and various other services. The appellant successfully relied upon provisions of the *South East Queensland Regional Plan 2009-2031* (**SEQRP**) to demonstrate support for the proposal, as the SEQRP promoted new large-scale electricity generation developments to be co-located with existing infrastructure (such as that adjacent to the proposal site) to reduce the need for new infrastructure to be provided at a cost to the community.

His Honour rejected the argument contended by the respondent that "*large infrastructure projects, such as powerlines, pipelines, roads and railways, have potential to undermine the attractiveness and function of the regional landscapes*", as it failed to take into account the pre-existing industrial surrounds located adjacent to the subject site.

His Honour went on to determine that the proposal offered positive benefits in satisfying a public and community need in the production of power to supplement existing infrastructure during peak usage times. His Honour noted that the ground of "need" was strengthened by the locational advantages of the subject site and its proposed use of "clean" fuel.

His Honour further determined that the positive impacts of the proposal outweighed the "minor" visual impact caused by the proposal.

## Held

The appeal was allowed, with appropriate conditions to govern the development approval and manage its impacts to be worked out.

Colin Biggers & Paisley

# Development in accordance with a 17 year old rezoning approval

Ronald Yuen | Edith Graveson

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MC Property Investments Pty Ltd v Sunshine Coast Regional Council* [2013] QPEC 32 heard before Robertson DCJ**

September 2013

## Executive Summary

MC Property Investments Pty Ltd (**applicant**) made an application to the Queensland Planning and Environment Court (**court**) seeking a declaration that a plan annexed to the affidavit of its sole director (**proposed plan**) was "generally in accordance with … Plan No. 427". Plan No. 427 was an approved plan which amended Plan No. 399 in association with a rezoning approval in respect of the subject site. The court held that the proposed plan was not generally in accordance with Plan No. 427 and therefore, dismissed the application.

## Case

This case involved an application to the court seeking a declaration that the proposed plan was "generally in accordance with … Plan No. 427". Plan No. 427 was an approved plan which amended Plan No. 399 in association with a rezoning approval in respect of the subject site.

## Facts

The subject site was located on the eastern side of the Bruce Highway at Forest Glen. The subject site had a long history of approvals and amendments to some of the approvals.

Plan No. 399, which was associated with a rezoning approval (which was granted in 1996), provided that a proposed hall with a gross floor area of 2,629m$^2$ was located at the northern end of the subject site. Plan No. 399 was amended and replaced by Plan No. 427. Under Plan No. 427, the proposed building the subject of Plan No. 399 was described as a building products display centre with an area of 1,410m$^2$.

However, the building products display centre was never built. Rather, by a subsequent order of the court in Appeal No. 159/04, it became a mini storage shed.

The applicant sought, by way of the proposed plan, an expansion of an existing building "I" (which was not either in Plan No. 399 or No. 427) to 1,417m$^2$ and submitted that the proposed plan was "generally in accordance with" Plan No. 427. The Sunshine Coast Regional Council (**council**) disagreed and submitted that the applicant's application must fail.

As part of its submissions, the applicant also sought to rely on the proposition that the use carried out in the building to be expanded under the proposal involved a pre-existing lawful use as at 30 March 1998 to support its arguments.

## Decision

### Pre-existing lawful use rights

His Honour considered that the applicant's pre-existing lawful use rights arguments were flawed and they could not be properly supported.

Firstly, the applicant misconceived the law relating to pre-existing lawful uses in that the *Integrated Planning Act 1997* preserved an "actual lawful use of premises as at 30 March 1998" rather than a right to use the premises in the future[62] and the use of the building "I" was not part of Plan No. 399 or No. 427 and did not commence until after it was built in 2005.

Secondly, the applicant erroneously sought to rely on a court order in a prosecution against the applicant (which in effect declared uses of various parts of the subject site unlawful) to support its submission that the use of building "I" was lawful despite the order saying nothing about the use of building "I".

Thirdly, the applicant appeared to incorrectly extend "use rights" across the subject site irrespective of where the use was carried out and in doing so; it effectively ignored the condition of the rezoning approval or the approved Plan No. 399 or No. 417.

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62 *Noosa Shire Council v Johns* (2008) QPELR 1.

Fourthly, the only lawful use preserved by the rezoning approval was "Architecture and Building Gallery". However, as conceded during the cross-examination of the applicant's sole director, the use of building "I" would more likely come within the definition of "light industry" under both the 1985 and 2000 planning schemes.

In the circumstances, his Honour found that the applicant had not established any pre-existing lawful use of any building on the subject site similar to what building "I" was being used for.

### "Generally in accordance with"

His Honour noted a comparison of the proposed plan with either Plan No. 399 or No. 427 showed:

- the proposal was being carried out in different positions from those indicated in either Plan No. 399 or No. 427;
- an increased intensity of development on the subject site;
- the building form was very different from that indicated in either Plan No. 399 or 427.

His Honour further noted there had been a significant change in the way the subject site had been developed since 1998 – in essence, what was to be an "Architecture and Building Gallery" had been converted to "a commercial/industrial estate comprising separate buildings and tenancies".

In his Honour's view, the comparison of the proposed plan with Plan No. 399 or No. 427 "*vividly illustrates the changes (are) much too dramatic to qualify with the ordinary meaning of ('generally in accordance with') whichever plan was used for comparison*".[63]

## Held

The application was dismissed.

[63] Quoting his Honour Judge Wilson in *Tamborine Mountain Progress Association Inc v Scenic Rim Regional Council & Anor* (2010) QPELR 195 at [16].

# Businesses that implement an Environmental Management System (EMS) gain many benefits

Maysaa Parrino

**This article discusses the benefits of implementing an Environmental Management System and the relevant certification and accreditation necessary in NSW**

September 2013

## Executive Summary

The benefits of implementing an EMS include lower business costs through reduced resource consumption and waste production, lower risk of polluting the environment, better relations with environmental regulators and a positive environmental image in the eyes of customers and the general public.

## Businesses may need an EMS under a regulatory regime or as a certification requirement

An EMS can be used by all organisations of any type or size to develop and implement a policy committed to the prevention of pollution and compliance with legal and non-legal requirements. In Australia, the EMS tool is based on the Australian and New Zealand standard for environmental management AS/NZS ISO14001. Case studies indicate that businesses that implement an EMS gain many benefits.

Participation in an EMS is voluntary, unless it forms part of a regulatory regime or is in response to an AS/NZS ISO 14001 certification requirement. Clause 4 of AS/NZS ISO14001 contains the requirement to be audited in order for an organisation to achieve certification of its environmental management system.

## EMS accreditation required for major projects in NSW

In accordance with the *NSW Government Code of Practice for Procurement* (**Code**), tenderers and service providers of major projects (that is, greater than $10 million) are required to have an EMS accredited by a government agency.

Within the building and construction industry, the *NSW Government Environmental Management System Guidelines Edition 3* (**Guidelines**) and AS/NZS ISO 14001:2004 provide a framework for an EMS in accordance with the Code. Similar regulations and guidelines apply to major projects in the other Australian states.

## Certification of EMS by authorised assessor

In addition to Code requirements, a common reason for seeking certification is that it allows independent verification and provides assurance to internal and external stakeholders of the integrity of an organisation's management system.

Companies seeking certification of their EMS need to complete a legal register as part of an EMS. The legal register refers to legislative requirements that are directly relevant to the organisation and its operations. Accordingly, not all environmental State and Federal legislation must be included in the legal register.

NSW Government Construction Agencies may only accept an EMS if they are provided with:

- evidence that the EMS was accredited in accordance with the Guidelines; and
- an audit report provided by an authorised assessor, attesting that the EMS complies with AS/NZS 14001 and all relevant environmental and other legislation.

The Guidelines also provide that the contractor must provide a statement confirming that they are not in default of any fine issued for a breach of environmental laws, along with details of all environmental prosecutions imposed upon the contractor. An EMS accredited in accordance with the Guidelines and Code will be deemed to be acceptable for three years after the date of accreditation.

## An EMS can lower business costs and improve profitability

Despite the stringent Guidelines, an EMS brings with it many benefits. For example, it may improve business profitability by lowering business costs through reduced resource consumption and waste production. The production of waste can be expensive, requiring the use of costly end-of-pipe systems or disposal fees.

The generation of waste may be a sign of an inefficient production process, requiring greater use of raw materials than actually needed. By recognising these costs, an organisation can develop ways to reduce waste, such as re-using waste internally or even selling parts of that waste for other processes and uses.

## PR benefits of sound environmental management

In addition to financial benefits, an EMS has the potential to improve an organisation's relations with environmental regulators and the broader community. Promoting a positive environmental image to customers has the potential to increase the demand for products and services.

## Civil and criminal penalties for environmental pollution

Whilst legislation for the protection of the environment varies across the states, all Australian organisations have a common general environmental duty to protect the environment. For example, Chapter 5 of the *Protection of the Environment Operations Act 1997* (NSW) imposes a general duty to avoid pollution of the environment. In light of their legal obligations, organisations can use an EMS to ensure that their environmental performance is compliant.

There is a multitude of legislation that not only provides for heavy civil penalties, but also imposes criminal penalties for pollution of the environment. It is important for all organisations to exercise their due diligence in identifying and assessing the specific environmental risks of their activities, whilst benefiting from the implementation of an EMS.

Compliance with relevant environmental legislation is the minimum standard that every organisation should achieve.

# Are we all neoliberals now? Urban planning in a neoliberal era

Ian Wright

**This article discusses the ideology of neoliberalism in the context of the competing ideologies of postmodernism and modernism in relation to urban planning**

October 2013

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

However the modernist perspective of rational planning action has been challenged by a postmodernist perspective of pragmatic planning, and more recently, by a neoliberal perspective rooted in the economic and political conditions of Milton Friedman's monetarism and Friedrick Hayek's classical liberalism.

This paper considers the ideology of neoliberalism in the context of the competing ideologies of postmodernism and modernism to identify the following:

- an urban change model which identifies the relationships between urban change, ideology, planning theory and planning models;
- the cultural, social, economic and political conditions of neoliberalism;
- the broad policy setting of a neoliberal government;
- the key features of the neoliberal strategic management planning model which is used by neoliberal governments;
- the key features of planning practice arising from the use of the neoliberal strategic managerial planning model;
- the role of urban planners in a neoliberal state.

The paper concludes that the neoliberal project is contestable and suggests that the adoption of collaborative planning processes and evidence based strategic management planning offers the opportunity for planners to reassert their professional status, rebuild the trust of the public and politicians and lift the planning profession out of its current malaise.

## Introduction

### Neoliberalism = classical liberalism + (theory of growth + Keynesianism)

"*In one sense, we are all Keynesians now. In another nobody is any longer a Keynesian*". (Milton Friedman, Time Magazine, February 4, 1966)

With these words in 1966, Milton Friedman the leading conservative economist of his generation, announced the passing of post war Keynesianism and the birth of neoliberal economics.

Whereas Keynes was concerned with achieving prosperity and stability from the depression and war scarred world of the 1930s and 1940s; Friedman was focussed on growing the already prosperous world of the 1950s and 1960s.

Friedman's neoliberal economics was an extension of the classical theory of growth which built upon but supplanted Keynesianism. As Keynes might have put it; Theory of growth + Keynesianism = Neoliberal economics (Time Magazine, December 31, 1965).

Friedman's neoliberal economics also built upon Friedrick Hayek's political philosophy of classical liberalism which espoused limited government, individual freedom and the rule of law.

The socio-economic and political conditions resulting from the fusion of monetarism and classical liberalism is known as neoliberalism.

Neoliberalism is an ideology that involves a commitment to the rolling back of the Keynesian-welfare state's collectivist institutions and the ethos of universal provision and the rolling out of market mechanisms and competitiveness to achieve economic growth (Peck and Ticknell 2002:384; McGuirk 2005:61).

### Waves of neoliberalism

Neoliberalism should not be seen as an end state or condition but rather as a process of changing the relationship between the public sector, private sector and civil society to facilitate economic growth.

Neoliberalism has advanced across the world in a series of four waves with Australia at the vanguard of each wave as summarised in Table 1.

- The rollback of Keynesianism in Australia under the rubric of economic rationalisation was commenced by the Fraser government in the 1970s and 1980s which preceded both Thatcherism in the United Kingdom and Reganism in the United States.
- The moderation of the rollback of Keynesianism under the Hawke and Keating governments in the 1980s and 1990s also preceded the Third Wave governments of Blair and Brown in the United Kingdom and Clinton in the United States.
- The roll out of neoliberalism under the Howard government in the 1990s and 2000s also preceded both the Bush presidency in the United States and the Cameron prime ministership in the United Kingdom.
- Finally, the moderation of the roll out of neoliberalism in Australia under the Rudd and Gillard Governments since 2007 has preceded similar efforts under the Obama administration in the United States.

**Table 1 Neoliberal waves**

| Australia | United States | United Kingdom |
|---|---|---|
| **First wave (1970s to 1990s) – Neoliberalism roll back** | | |
| Economic rationalism – Fraser Liberal National Party governments (1975 - 1983) | Reganism – Regan and Bush Snr Republican governments (1980 - 1992) | Thatcherism – Thatcher and Major Conservative governments (1979 - 1997) |
| **Second wave (1980s to 2010) – Neoliberalism roll back moderated (Third Way)** | | |
| Hawke and Keating Labour governments (1983 - 1996) | Clinton Democrat government (1992 - 2000) | Blair and Brown Labour governments (1997 - 2010) |
| **Third wave (late 1990s to current) – Neoliberalism roll out** | | |
| Howard Liberal National Party government (1996 - 2007) | Ownership society – Bush Jnr Republican government (2000 - 2008) | Big society – Cameron and Clegg Conservative / Liberal Democrat government (2010 - onwards) |
| **Fourth wave (late 2000s to current) – Neoliberalism roll out moderated** | | |
| Rudd and Gillard Labour governments (2007 - onwards) | Obama Democrat government (2008 - onwards) | ? |

However the moderation of neoliberalism arising from the Global Financial Crisis and the resulting Great Recession / Stagnation has not lead, as former Prime Minister Kevin Rudd had predicted in 2009, to the death of neoliberalism, and its replacement by social-democratic capitalism; which Rudd described as "*a system of open markets regulated by an activist state and one in which the state intervenes to reduce the great inequalities that competitive markets will inevitably generate*" (Rudd 2009).

Since 2009 Australians have elected neoliberal governments in most states and territories and if opinion polls are to be believed will elect a neoliberal Commonwealth government.

The reports of the death of neoliberalism therefore appear to be exaggerated; as are the claims that "*we are all Keynesians now*" (Rudd 2009). Indeed, the history of the last 50 years would indicate a jump to the right with only small steps to the left.

## Urban planning in a neoliberal era

The neoliberal dominance has significant implications for urban planning. From a neoliberal perspective, much of urban planning is seen as distorting land markets and increasing transaction costs through bureaucratisation of the urban economy; which should be rolled back by contracting the domain of planning (deregulation) and then privatising segments of the residual sphere of regulation (outsourcing) (Gleeson and Low 2000b:10).

As a result the raison d'etre of planning as a tool of correcting and avoiding market failure is dismissed; and planning is subsumed as a minimalist form of spatial regulation to provide certainty to the market and facilitate economic growth.

## Ideology, theory, policy and practice

Whilst it is unclear how ideology influences planning theory and in turn how planning theory effects planning practice, a consideration of ideology and planning theory does provide a basis for understanding how planning policy and practice may evolve as a result of a neoliberal planning reform agenda.

As Forester (1989:12) observes:

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

## Themes of paper

This paper has six themes:

- First, it establishes a model of urban change; a model that seeks to show the relationship of ideologies, planning theories and planning models to the components of urban change and the institutions responsible for that change.
- Second, it seeks to flesh out the cultural, socio-economic and political conditions of neoliberalism in the context of the competing ideologies of postmodernism, modernism and pre-modernism; to provide an ideological context to both the broad policy settings of a neoliberal government and the use of planning theory in a neoliberal state.
- Third, it seeks to flesh out the debate on planning theory to provide a theoretical context for the consideration of the neoliberal strategic management planning model in the context of the competing postmodernist collaborative planning model.
- Fourth, it discusses the key characteristics of the neoliberal strategic management planning model to provide context for the consideration of the potential implications in planning practice from the use of this model.
- Fifth, it seeks to identify the planning policy outcomes which are likely to be associated with a neoliberal government, to provide context to the potential scope of future urban planning reform in a neoliberal state.
- Finally, it discusses the role of the urban planner in a neoliberal regime and provides a suggested path out of the malaise that currently afflicts the planning profession in Australia.

# Urban change model

## Components and institutions of urban change

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

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

The characteristics of the institutional components and associated institutions of urban change are summarised in Table 2.

**Table 2 Components and institutions of urban change**

| Market – private sector | Government – public sector | Civil society – third sector |
|---|---|---|
| **Institutional stakeholders** | | |
| Consumers, producers, employers, employees, trade associations and unions | National, state and local government including public sector entities | Communities including media, churches, educational bodies, associations and community groups |
| **Institutional role** | | |
| Provision of wealth for development | Protection of rights and public realm | Guardian of culture and ethics |
| **Institutional outputs** | | |
| Goods and services | Laws and regulations; infrastructure and services | Values and vision |

| Market – private sector | Government – public sector | Civil society – third sector |
|---|---|---|
| **Institutional focus** | | |
| Focussed on an aggregated criteria of choice based on the notions of utility or satisfaction | Focussed on an overall idea such as 'the spirit of history' or the 'essence of society' | Focussed on the society (modernist) or societal groups (postmodernist) as the first ethical subject and consequently on a common conception of the common good of the society (modernist) or a societal group's conception of good (postmodernist) |
| **Institutional horizons** | | |
| Short term | Medium term (based on the term of office) | Long term |

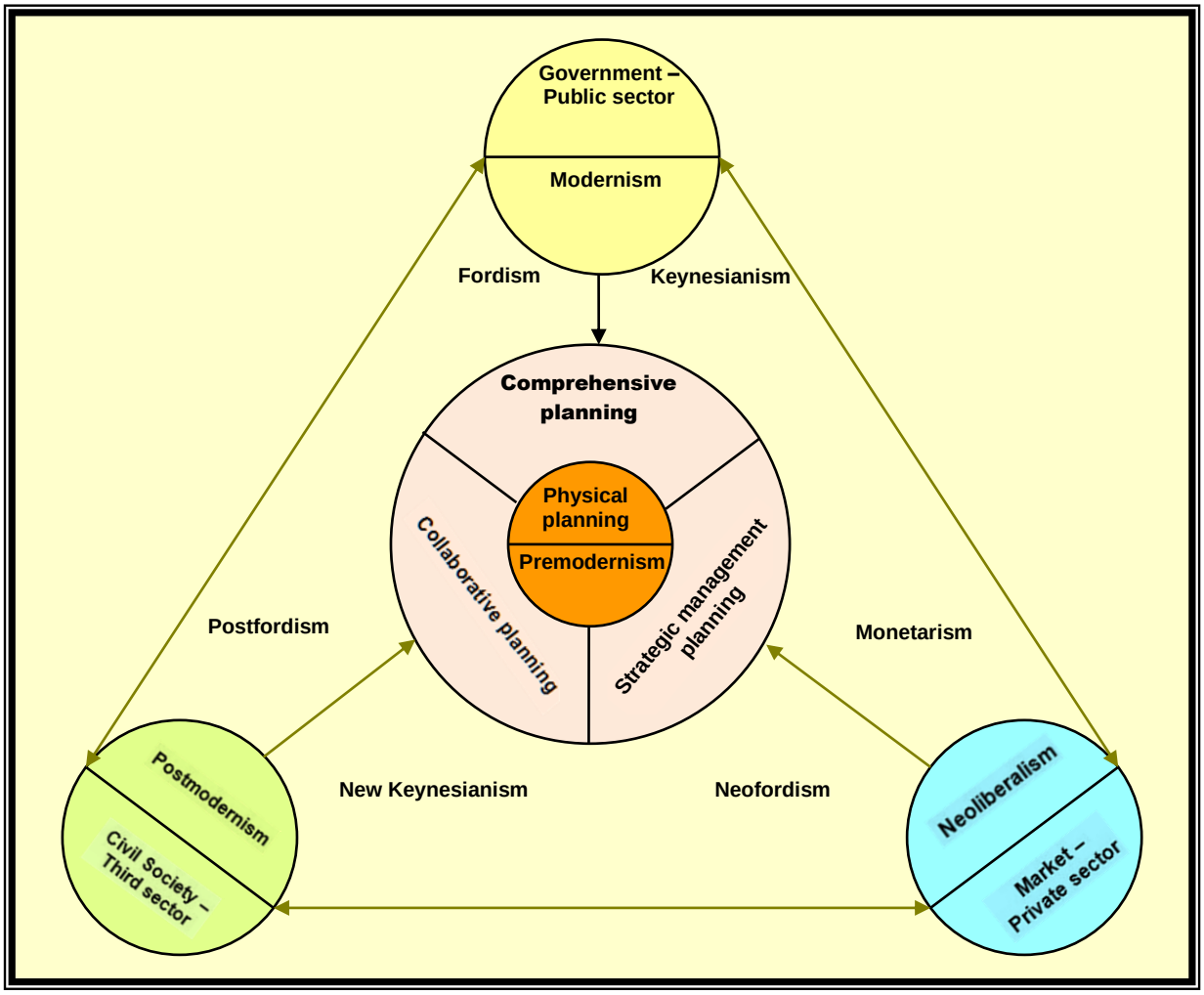
*Source*: Newman 2000:2; Moroni 2004:155; Alexander, Mazza & Moroni 2012:75

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

## Relationship of planning theory and practice to urban change

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

**Figure 1 Urban change model**




It is clear that planning and the capacity to effect urban change is critically influenced by planning theory and practice; although the extent of this influence is not well understood.

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

## Neoliberalism in a historic context

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

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

The cultural, socio-economic and political conditions of modern, postmodern and neoliberal ideologies are summarised in Table 3.

**Table 3 Cultural, socio-economic and political conditions**

| Modern | Postmodern | Neoliberal |
|---|---|---|
| **Period or era** | | |
| *Modernity* – The period of modern thought from the Enlightenment to the present | *Postmodernity* – The period of postmodern thought from the 1960s to the present | *Late capitalism* – The period of neoliberal thought from the mid 1970s to the present |
| **Political conditions** | | |
| *Social democracy* – The political conditions involving:<br>• a universal society existing as a structure;<br>• the collective good of the society;<br>• welfare services that are delivered to ensure equality of opportunity and removal of differences within society. | *Social liberal (deliberative) democracy (Third way)* – The political conditions involving:<br>• multiple societal groups existing as networks and flows;<br>• the good of each societal group;<br>• welfare services that are delivered to ensure personalised integrated services to reflect the differences within society. | Liberal democracy (New Right, Thatcherism, Reganism) – The political conditions involving:<br>• individuals; there being no society or societal groups;<br>• the good of the individual;<br>• welfare services that are delivered by the market with limited targeted welfare services. |
| **Cultural conditions** | | |
| *Modernism* – The cultural conditions which accompany a method of thought in which human reason is able to identify objectively existent and knowable laws of reality that can be used to effect change to achieve a unitary common public good or truth (Hirt 2002:3) | *Postmodernism* – The cultural conditions which accompany a method of thought in which human reason is able to identify the subjectively constructed views of groups that can be used to effect change to achieve a good as defined by those groups | *Neoliberalism* – This economic theory has little to say about the cultural conditions of society |
| **Social conditions** | | |
| *Fordism* – The social conditions which accompany industrial mass production using repetition and simplicity of standardised products for mass consumption by a mass market (Goodchild 1990:126) | *Postfordism* – The social conditions which accompany flexible small batch production of specialised products for consumption by different groups in niche markets (Goodchild 1990:126) | *Neofordism* – The social conditions which accompany the provision of services using information technologies to niche markets that predominates over declining industrial and manufacturing activities |

| Modern | Postmodern | Neoliberal |
|---|---|---|
| **Economic conditions** | | |
| *Fiscalism (Keynesianism , Welfarism)* – The economic conditions of a mixed economy involving predominately the private sector but also a significant role for the public sector in terms of monetary policy by central banks and fiscal policy by governments to stabilise output over the economic cycle | *New Keynesianism* – The economic conditions of a market economy involving the private sector where the role of the public sector is limited to macro-economic stability, investment in infrastructure and education, containing inequality and guaranteeing opportunities for self-realisation (Giddens 2000:164) | *Monetarism* – The economic conditions of a market economy involving the private sector where the role of the public sector is limited to monetary policy by central banks |

### Neoliberal cultural, socio-economic and political conditions

In the context of a consideration of the planning reform agenda it is important to understand the potential cultural, socio-economic and political conditions of a neoliberal state:

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

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

## Neoliberal policy settings

The broad policy settings which are generally associated with modern, postmodern and neoliberal ideology are summarised in Table 4.

**Table 4 Policy settings**

| Modern | Postmodern | Neoliberal |
|---|---|---|
| **Government function** | | |
| Big centralised government involving political-administrative control | Smaller but better integrated centralised government where political-administrative control is maintained | Decentralisation<br>Depoliticalisation<br>Agencification |
| **Government policy focus** | | |
| Social policy focus to ensure social cohesion | Social policy focussed on social exclusion and economic policy focused on full employment and planning | Liberalisation |

| Modern | Postmodern | Neoliberal |
|---|---|---|
| **Government economic management** | | |
| High taxes and spending | Lower but better targeted taxes<br>Spending on social exclusion areas | Financialisation<br>Fiscal conservatism |
| **Government regulation** | | |
| Regulation | Regulation to address areas of social exclusion | Deregulation |
| **Central and local government relationship** | | |
| Central and local governments address the public interest | Central and local governments address group interests, in particular areas of social exclusion<br>Local governments are well funded but are also more accountable to central government | Growthism<br>Entrepreneurialism |
| **Government and private sector relationship** | | |
| Government provision, commercialisation and corporatisation | Public-private partnerships<br>Reliance on volunteer and faith based institutions | Marketisation<br>Privatism |
| **Government and civil society relationship** | | |
| Government help for citizens | Community self-help<br>Government help for areas of social exclusion | Individualism<br>Individual self-reliance and entrepreneurship<br>Clientelism / consumerism |

*Source*: Jackson 2009:405; Robinson 2011:1100

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

- *Decentralisation* – Neoliberal governments tend to favour small central governments with decision making and implementation being delegated vertically to international governance (internationalism) and down to regional governance (regionalism) and local governments (localism) and horizontally to private sector and civil society partnerships and networks. Central governments seek to either steer (but not row) or direct (but not implement).
- *Depoliticisation* – Neoliberal governments favour tools, mechanisms and institutions to separate political and administrative functions so that an issue, policy field or decision is no longer the responsibility of politicians in order to remove the political character of decision making (Flinders and Butler 2006: 296).
- *Agencification* – Neoliberal governments favour structural disaggregation of integrated administrative structures into single purpose task specific semi-independent agencies (Sager 2009:69).
- *Liberalisation* – Neoliberal governments tend to focus more on economic policy directed to competition and innovation rather than on social and environmental policy.
- *Financialisation* – Neoliberal governments tend to favour financial markets and institutions having a greater influence over economic policy.
- *Fiscal conservatism* – Neoliberal governments tend to favour lower taxes to increase consumer choice, lower spending (austerity) and a user pays approach.
- *Deregulation* – Neoliberal governments tend to focus on market led development with lesser regulation in terms of rules, processes and internal considerations like expert jurisdictions and job security to reduce the role of government (Sager 2009:70).

- *Growthism* – Neoliberal governments tend to focus on the soliciting of growth, in the case of central governments, and the facilitating of growth, in the case of State and local governments, to create a favourable business climate.
- *Entrepreneuralism* – Neoliberal governments tend to support entrepreneurial spirit, such as risk taking investment and profit motives, rather than political-administrative managerialism involving the provision of public services.
- *Individualism* – Neoliberal governments tend to emphasise individual self-help, entrepreneurship and freedom of choice over government and community help.
- *Clientelism/consumerism* – Neoliberal governments tend to focus on the satisfaction of users, clients, customers and consumers who will optimise their own individual benefits in exchange for political support rather than serving citizens who have rights and obligations within the context of a civil society.
- *Marketisation* – Neoliberal governments tend to focus on the provision of services through privatisation, outsourcing, sub-contracting, competitive policies and market proxies in the residual public sector.
- *Privatism* – Neoliberal governments tend to focus on the facilitation of private sector activity rather than government or community activity.

These broad policy settings together with the broader socio-economic and political conditions of neoliberal ideology, provide the context for the consideration of the use of planning theory by planners.

# Planning theory in a neoliberal state

## Neoliberal planning theory

Given the neoliberal socio-economic and political conditions and broad policy settings which have become entrenched within governments across the world in the last 50 years, it is likely that the use of neoliberal planning theory will become more dominant amongst planners.

The approaches to planning theory that are embodied in premodern, modern, postmodern and neoliberal ideologies are summarised in Table 5.

**Table 5 Ideological approaches to planning theory**

| Premodern | Modern | Postmodern | Neoliberal |
|---|---|---|---|
| **Humanistic premise of planning (the planning end)** | | | |
| Utopia – An end state in which individuals are emancipated towards an ideal society | Collective public interest – An end state in which society en masse is emancipated towards a common good for the society | Group interest – An end state in which groups within society are emancipated towards a good defined by those groups | Individual interest – There is no end state for society or societal groups; but rather the right of each individual to pursue a good life that does not harm others |
| **Epistemological premise of planning (the planning means)** | | | |
| Artistic design method – Universal laws of physical and aesthetic design principles which can be objectively defined by human reason | Rational scientific method – Universal laws of planning principles which can be defined through value-free scientific reason (positivist knowledge) | Participatory method – There are no universal laws; only the subjective value laden principles of individuals which can be defined through a participative process (culturally subjective knowledge) | Managerialist method – There are no universal laws; only an individual good which can be pursued through a managerial process of defining and implementing goals, objectives and strategies |

| Premodern | Modern | Postmodern | Neoliberal |
|---|---|---|---|
| **Planning theories** | | | |
| Physical planning (Unwin 1996; Triggs 1909) | • Rational planning (Sharp 1940; Abercrombie 1959; Keeble 1969)<br>• Systems planning (McLoughlin 1969)<br>• Procedural planning (Faludi 1973) | • Advocacy planning (Davidoff 1965)<br>• Incremental planning (Lindblom 1959)<br>• Radical (action) planning (Friedmann 1987)<br>• Participatory planning (Arnstein 1969)<br>• Communicative planning (Habermas 1984; Healey 1997) | Strategic spatial planning (Kaufman and Jacobs 2007; Healey 2007) |
| **Planning models** | | | |
| Physical planning | Comprehensive master planning | Collaborative planning | Strategic management planning |
| **Planning era** | | | |
| Before First World War | • 1930s – avant-garde movement<br>• 1940s to 1980s – adopted by Government | • 1960s to 1990s – part of counter culture<br>• 1980's onwards – adopted by Government | • 1970s to 1990s – Neoliberal roll back<br>• Late 1990s onwards – Neoliberal roll out |

*Source*: Goodchild 1990:126; Hirt 2002

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

### Humanistic premise of planning theory

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

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

### Epistemological premise of planning theory

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

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

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

## Strategic management planning model in a neoliberal state

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

It is anticipated that strategic management planning will become the predominant planning model amongst urban planners in a neoliberal state.

The key features of the strategic management planning model, as compared with other planning models, are summarised in Table 6.

**Table 6 Key features of planning models**

| Physical planning | Comprehensive master planning | Collaborative planning | Strategic management planning |
|---|---|---|---|
| **Concept of the region or city** | | | |
| City Beautiful – Cities are a symptom of social order and disorder | City Functional / Mechanistic City – Cities are an object that can be rationally ordered and mass produced | Just City – Cities are an expression of the social diversity of its citizens and the ecological diversity of its environment | Entrepreneurial / Competitive / Productive City – Regions and cities are an economic object that are competing against each other for economic growth |
| **Planning governance** | | | |
| Limited uncoordinated community and government initiatives | Government led with limited community involvement | Government led with significant community involvement | Private sector led through the market |
| **Planning approach** | | | |
| Government top down with no bottom up community involvement | Predominantly government top down with some bottom up community involvement | Predominantly bottom up community involvement with top down government involvement | Bottom up through the market with limited top down government involvement |
| **Planning scale** | | | |
| City with some district level planning | City and district level planning | City and district level planning with some local and site planning | Strategic planning at city and district scale with development planning at local and site levels |
| **Planning horizon** | | | |
| Long term | Medium term | Medium term at the city and district levels and short term at the local and site levels | Short term |
| **Planning focus** | | | |
| Physical urban form and aesthetic design based planning at the city level (city visions) | • Detailed spatial urban form and infrastructure based planning at the city level (master, blueprint and layout plans)<br>• Development control based land use planning at the district level (zoning plans) | • Infrastructure based planning at national and state levels<br>• Detailed spatial urban form and infrastructure based planning at the regional level (regional plans) or city level (master plans)<br>• Development control based land use planning at the district level (zoning plans)<br>• Urban design based planning at local and site levels | • Strategic spatial urban form and infrastructure based planning at city and district level in place of detailed master plans (strategic spatial plans)<br>• Development based planning at local and site levels in place of development control based zoning plans |

| Physical planning | Comprehensive master planning | Collaborative planning | Strategic management planning |
|---|---|---|---|
| **Regional, city and district planning themes** | | | |
| • Promotion of massed suburban expansion<br>• Promotion of garden cities<br>• City beautiful movement<br>• Parks and open spaces movement | • Redevelopment of slums with high rise buildings in open spaces<br>• Controlled low density suburban expansion<br>• New towns within green belts<br>• Urban neighbourhoods criss-crossed by freeways | • Renewal and regeneration of central cities and infill sites<br>• Increased urban density within compact urban space<br>• Containment to minimise land consumption, preserve open space and reduce infrastructure costs | • Place branding, marketing, promotion and competition (Euro cities; capital cities; world cities; cool cities; creative cities)<br>• Attraction of the creative class (IT; arts; biotechnology; science)<br>• Attraction of corporate investment (free land or buildings; lower infrastructure charges; grants; tax relief such as stamp duty and payroll tax)<br>• Central city and adjoining areas redevelopment for commercial office space and residential apartments<br>• Employment centres focussed on the services sector<br>• Mega infrastructure projects seen as strategic economic assets<br>• Social infrastructure including exhibitions and arts, cultural and sporting venues and events for the creative classes<br>• Suburbs as residual places<br>• Suburban master planned communities |

| Physical planning | Comprehensive master planning | Collaborative planning | Strategic management planning |
|---|---|---|---|
| **Local and site planning themes** | | | |
| • More daylight and sunlight for canyon streets<br>• Public health and sanitary reform<br>• Tenement house reform<br>• Municipal art and civic art | • Zoning of urban space into self-contained single land use or functional districts<br>• Reduction of urban density<br>• Mixed flats and houses<br>• Demolition of dilapidated buildings | • Integration of land uses and functions into mixed use districts of urban space<br>• Increased urban density<br>• Mixed land uses<br>• Emphasis on local context<br>• Preservation of historic buildings and local cultural heritage | • Performance based zoning (flexible zones, urban enterprise zones, business improvement districts)<br>• Flexible building standards<br>• Integrated development control<br>• Reduced standards of service for infrastructure – roads and open space<br>• Reduced garden space for houses<br>• Urban design |

*Source*: Goodchild 1990:126; Jackson 2009:405

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

- *Concept of the region or city* – Strategic management planning is focussed on ensuring that the region or city is an economic growth object which can compete efficiently against other regions or cities for economic growth. The focus is on an entrepreneurial, competitive and productive region or city.
- *Planning governance* – Strategic management planning is market led by private sector developers.
- *Planning approach* – Strategic management planning is a bottom up market led approach rather than the predominantly top down/bottom up approach characteristic of the comprehensive master planning model (associated with modern planning theory) or the predominantly bottom up/top down approach characteristic of the collaborative planning model (associated with postmodern planning theory).
- *Planning scale* – Strategic management planning is focused on local and site level planning with limited regional, city and district level planning rather than on the city and district level planning characteristic of the comprehensive master planning model and local and site level planning characteristic of the collaborative planning model.
- *Planning horizon* – Strategic management planning has a short term horizon reflecting the reality that planning is intended to be capable of continual revision in response to the market.
- *Planning focus* – Strategic management planning is focussed on strategic spatial urban form and infrastructure based planning at city and district levels and development based planning at the local and site levels in place of the detailed plans and zoning plans associated with comprehensive master planning and collaborative planning.
- *Regional, city and district level planning themes* – Strategic management planning is focussed on the following themes at the regional, city and district levels:
  - urban branding, marketing, promotion and competition;
  - central cities and adjoining areas as key economic growth areas;
  - employment centres traditionally focussed on industrial areas but increasingly focussed on the service sector;
  - mega infrastructure projects such as road and public transport which are seen as strategic economic assets;

- key social infrastructure such as exhibition centres, science and technology parks, sports stadiums and cultural districts which are focussed on the creative classes;
- suburbs that are seen as residual places not to be touched; the 'heartlands'.

- *Local and site planning themes* – Strategic management planning is focussed on the following themes at the local and site levels:
  - performance based controls;
  - flexible standards;
  - integrated development control;
  - reduced infrastructure service standards (to avoid so called gold plating);
  - reduced garden space for houses;
  - urban design.

The increased use by planners of a strategic management planning model will have a significant influence on planning practice.

# Planning practice in a neoliberal state

## Neoliberal planning practice

The broad neoliberal socio-economic and political conditions and associated policy settings which have emerged under neoliberal governments will encourage the use of neoliberal planning theory and models that will have an increasing influence on planning practice.

Generally speaking it is expected that policies and processes associated with the comprehensive master planning model (in the case of modern planning theory) and collaborative planning model (in the case of postmodern planning theory) will be rolled back; whilst policies and processes associated with the strategic management planning model will be rolled out through public policy and legislative reform.

The anticipated implications for planning practice of the increased use by planners of neoliberal planning theory and a strategic management planning model is summarised in Table 7.

**Table 7 Implications for planning practice of neoliberal planning theory and models**

| Policy settings | Policy implications | Political implications |
|---|---|---|
| **Government function** | | |
| • Decentralisation<br>• Depoliticalisation<br>• Agencification | • Reduced central government planning<br>• Limited central government control of local government planning<br>• Contracting out of planning functions<br>• Central government off-loads unfunded risks and responsibilities to local governments<br>• Policy solutions borrowed or adapted across jurisdictional boundaries | • Greater electoral accountability<br>• Stronger role for local clientele relationships<br>• Fiscally constrained local governments |
| **Government policy focus** | | |
| • Liberalisation | • Focus on innovation and competitiveness rather than on full employment and planning<br>• Social wage is seen as a cost of production rather than as a means of redistribution to maintain social cohesion<br>• Welfare to work to reduce welfare expenditure | • Reduced social cohesion<br>• Increased social exclusion |

| Policy settings | Policy implications | Political implications |
|---|---|---|
| **Government economic management** | | |
| • Financialisation<br>• Fiscal conservatism | • Limited provision of infrastructure and services<br>• Less maintenance of infrastructure and services<br>• Greater private sector provision<br>• Reduced developer contributions in new growth areas<br>• Reduced focus on urban renewal projects<br>• Focus on cost recovery and user pays | • Fiscally constrained governments<br>• Infrastructure and services failures<br>• Price hikes<br>• Cross-subsidies are increased<br>• Rent seeking by the private sector |
| **Government regulation** | | |
| • Deregulation | • Removal of comprehensive master planning and collaborative planning policies and practices<br>• Simplified planning regulation<br>• Plans that are more flexible<br>• Plans that give less direction to local government<br>• Plans that give more certainty and predictability to developers<br>• Plans with fewer directives and more negative regulation<br>• Plans that specifically integrate central and local government priorities<br>• Enabling regulations for major or mega projects<br>• Use of reserved planning powers (Ministerial call ins and directions) to facilitate projects<br>• Speeding up of development assessment, public inquiry and plan preparation processes | • Less importance of rules, processes and expert jurisdictions<br>• Less concern for development externalities<br>• Stronger role for the private sector in determining the form and location of development<br>• Potential impact on the spatial cohesion of cities<br>• Reduced oversight and increased risk of corruption<br>• Risk of regulatory capture |
| **Central government and local government relationship** | | |
| • Growthism<br>• Entrepreneurialism | • Local governments focus on place branding, marketing, promotion and competition rather than place making<br>• Local governments focus on economic growth projects generally in central city locations at the expense of investment elsewhere | • Local governments forced to compete with each other for economic growth<br>• Reduction in public services |

| Policy settings | Policy implications | Political implications |
|---|---|---|
| | • Politicians and planners gain financial acumen and act as urban entrepreneurs<br>• Governments mimic corporate style and logic<br>• Public services seen as ineffective and wasteful and a drain on entrepreneurial activity | |
| **Government and private sector relationship** | | |
| • Marketisation<br>• Privatisation | • Rise of the intermediate services sector (private professional advisers who do planning work)<br>• Developer led development rather than plan led development<br>• Developers take over plan making<br>• Developers are stakeholders in major public infrastructure projects<br>• Public assets privatised or divested<br>• Privately governed community interest developments such as residential subdivisions, apartment developments and master planned gated communities with private streets, services and governments such as Homeowner Associations<br>• Compulsory purchase of private land for public benefit by private landholders<br>• Business improvement districts (UK/US) where revenue from a district is spent in a district<br>• Privatised planning regulation (for example private certification)<br>• Limited public review of public infrastructure projects (focus is on selling the project not evaluating the project)<br>• Private sector involvement in financing and operating infrastructure<br>• Competitive bidding for urban renewal and infrastructure projects<br>• Private sector provision of rental housing rather than public housing | • Loss of citizen entitlements<br>• Excess profits<br>• Price hikes<br>• Asset stripping<br>• Poor driven to the worst located areas<br>• Profit seeking by private contractors increases public sector expenses |

| Policy settings | Policy implications | Political implications |
|---|---|---|
| | • Privatisation of public spaces (public plazas; pavements; urban parks; government land and buildings)<br>• Privately governed and secured neighbourhoods through management (for example gated communities, community interest developments (US) and Homeowners Associations (US)) and passive design (for example master planned residential estates) | |
| **Government and civil society relationship** | | |
| • Individualism<br>• Clientelism | • Corporate style advisory boards replace community based consultative groups<br>• Focus on owner occupied and rental housing rather than public housing, community houses and housing associations<br>• Focus on private schools rather than public schools, TAFE and other public educational facilities<br>• Focus on private hospitals and private health insurance rather than public hospitals<br>• Limited investment in social infrastructure to address areas of social exclusion | • Downsizing of services<br>• Limited access to shelter and services for the poorest<br>• Rise in informality in cities |

*Source*: Jessop 2002; Jackson 2009:405; Robinson 2011:1100

## Waves of neoliberal planning reform in Australia

In Australia, three distinct waves of neoliberal planning reform by State governments can be broadly identified as summarised in Table 8:

- *First wave* – Neoliberal roll back associated with Liberal National Party State governments where state, regional and city strategic planning was eschewed in favour of standardised district level land use based zoning plans to maximise development control efficiency and local and site level development control plans to facilitate development.
- *Second wave* – The neoliberal roll back was subsequently moderated by State Labour governments under which State planning policy guidance was provided on balancing social, environmental and economic matters, detailed spatial plans were prepared at regional and local government levels and standardised land use zoning plans and neighbourhood plans were prepared to guide future development.
- *Third wave* – The neoliberal roll out has been reintensified since 2010 by State Liberal National Party governments which have implemented or proposed:
  - State planning policies focused on economic growth;
  - strategic spatial plans for regional and local government areas;
  - land use zoning plans and neighbourhood plans that are development not control oriented.

**Table 8 Waves of neoliberal planning reform in Australia**

| Planning scale | First wave - Neoliberal roll back | Second wave - Neoliberal roll back moderated | Third wave - Neoliberal roll out |
|---|---|---|---|
| **State governments** | QLD – National and Liberal Party governments (1970s - 1989)<br>NSW – Greiner/Fahey Liberal governments (1988 - 1995)<br>VIC – Kennett Liberal government (1992 - 1999) | QLD – Goss, Beattie and Bligh Labour governments (1989 - 2012)<br>NSW – Labour governments (1995 - 2011)<br>VIC – Bracks and Brumby Labour governments (1999 - 2007) | QLD – Newman Liberal National Party government (2012 onwards)<br>NSW – O'Farrell Liberal government (2011 onwards)<br>VIC – Baillieu and Napthine Liberal National Party governments (2010 onwards) |
| **State level planning** | Apparatus dismantled as district level planning is seen as the appropriate planning scale | State planning policies provided guidance for a wide range of economic, social and environmental matters | State planning policies amended to prioritise economic growth over social and environmental matters |
| **Regional level planning** | Apparatus dismantled and State government devolution to regional government offices | Detailed spatial urban form and infrastructure plans for metropolitan areas and regional cities | Strategic spatial urban form and infrastructure plans for metropolitan areas and other regions |
| **City/town level planning** | Rejection of strategic spatial planning | Detailed spatial urban form and infrastructure plans for local government areas | Strategic spatial urban form and infrastructure plans for local government areas |
| **District level planning** | Standardised land use based zoning plans to maximise development control efficiency | Standardised land use based zoning plans with increased self-assessable and code assessable development to maximise development control efficiency | Standardised land use based zoning plans which are development not control oriented |
| **Local and site level planning** | Development control plans to facilitate local or site level development | Neighbourhood plans to protect local areas and facilitate known local or site level development | Neighbourhood plans which are development not control oriented |

However it is critical to note that the characterisation of neoliberalism planning reform into three waves obscures the hybrid nature of neoliberalism where there have been multiple configurations of neoliberalism at different planning scales within and between Australian States and where the processes of neoliberal roll back of Keynesianism and the roll out of neoliberalism have been in conflict (McGuirk 2006:61).

## Role of the planner in a neoliberal state

The emergence of neoliberal planning theory and its associated strategic management planning model and consequential implications for planning practice have inevitably resulted in a re-evaluation of the role of the planner in urban change.

The role of a planner under the physical planning, comprehensive master planning, collaborative planning and strategic management planning models is summarised in Table 9.

**Table 9 Planner's role under different planning models**

| Physical planning | Comprehensive master planning | Collaborative planning | Strategic management planning |
|---|---|---|---|
| **Knowledge and skills** | | | |
| Specialist knowledge of planning principles and specialist skills to manage the planning process to define the public interest and planning principles | Specialist knowledge of utopian ideals and planning principles | Specialist knowledge and skills to manage the planning process to facilitate consensus of group interests | Specialist knowledge and skills to manage the planning process to facilitate economic growth outcomes |
| **Decision making** | | | |
| Utopian rationality – Rational vision | Instrumental rationality – Rational plan | Communicative rationality – Rational process | Economic rationality – Rational outcome |
| **Ethical perspective** | | | |
| Technician – Value neutral adviser to a decision maker | Technician – Value neutral adviser to a decision maker | Politician – Value committed activist that advocates policies for group interests | Hybrid – Hybrid of a technician and a politician that advocates for economic growth outcomes |

In a neoliberal state it is expected that the planner will be required to develop specialist knowledge and skills to manage the planning process to facilitate economic growth outcomes; in preference to social and environmental outcomes and in preference to a common public interest for the society or societal group interests.

In a neoliberal state, a planner is expected to make decisions (or provide recommendations) based not on instrumental rationality (that is the rationality of the plan) or communicative rationality (that is the rationality of the planning process) but rather on the basis of economic rationality. A rational decision is one which is in the general interest of the public as defined by means of a potential Pareto improvement; namely that a policy should only be implemented if those who benefit from the policy could compensate those that lose from the policy and still be better off (Gleeson and Low 2000b:15).

This will require the planner to gain greater financial and economic acumen and act as an urban entrepreneur.

This will inevitably require the planner to adopt a hybrid role involving the following (Howe 1980; Steele 2009:4):

- first, as a technician that seeks to be a value neutral adviser to a decision maker; but
- secondly, and more significantly, as a politician who is a value committed activist that advocates economic growth outcomes.

It is this second political role that is likely to cause an ethical dilemma for some planners for the following reasons:

- first, there is currently a strong professional and in some cases personal commitment on the part of some planners, to sustainable development (or ecological sustainability) and its goal of balanced economic, social and environmental outcomes;
- second, to actively facilitate development could be seen by some planners as co-opting planning to the private sector which is only one of the sectoral interests involved in urban change and whose focus is quite appropriately limited only to profit.

## Conclusions – are we all neoliberals now?

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

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

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

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

Neoliberalism is simply the process of restructuring the relationships between the public, private and third sectors, to rationalise and promote a growth first approach to urban change. As stated earlier in this paper; Neoliberalism = Classical liberalism + (Theory of growth + Keynesianism).

Each planner must personally and professionally determine where they stand in relation to the restructuring of the institutions of urban change that is being heralded by the neoliberal reform of planning and the planning system in Australia.

As a profession it is critical that planners regain the trust of the public and their elected representatives. This can only occur where the decision making and knowledge and skills of planners is seen as independent from politics. This requires planners to play to their strengths:

- Collaborative planning should be used to identify societal interests whilst acknowledging to the public that not all of the public's interests can be translated to a physical outcome in a planning instrument.
- Strategic management based planning which is evidence based should be used to demonstrate to politicians both the money that will be wasted on policies that do not work as well as the benefits that will accrue from policies that will work.

In short planners must reclaim their professional credibility by asserting their right to contradict the public and politicians. The first step involves the planning profession taking an active and positive part in the forthcoming contest between planning and neoliberalism.

# References and further reading

Note – This paper draws in part from a paper titled "*Reinvigorating planning and the planning system in Queensland - A neoliberal perspective*" prepared by the authors for the 2012 Conference of the Planning Institute of Australia (Queensland Branch).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# Excusal of the giving of a decision notice to a principal submitter

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**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Rockhampton Regional Council v GKI Resort Pty Limited & Anor* [2013] QPEC 40 heard before Durward SC DCJ**

October 2013

## Executive Summary

This case involved the Queensland Planning and Environment Court (**court**) hearing an application commenced by the Rockhampton Regional Council (**applicant**), seeking declarations and orders pursuant to section 456 (Court may make declarations and orders) and 440 (How court may deal with matters involving non-compliance) of the *Sustainable Planning Act 2009* (**SPA**), with respect to the giving of a decision notice to the principal submitters pursuant to section 337 (Assessment manager to give copy of decision notice to principal submitter) of the SPA.

## Case

This case involved the court hearing an originating application commenced by the applicant seeking declarations and orders to excuse non-compliance with respect to the giving of a decision notice to the principal submitters.

## Facts

On 28 March 2013, GKI Resort Pty Limited (**first respondent**) lodged a development application with the applicant which was declared by the Coordinator-General (**second respondent**) pursuant to the *State Development and Public Works Organisation Act 1971*, to be a significant project and consequently an environmental impact statement was required to be prepared and publicly notified by the first respondent. Submissions were made to the second respondent during the public notification period and the second respondent maintained the list of submitters.

On 22 May 2013, the applicant issued a decision notice by post to the first respondent but it did not include the list of principal submitters.

On 5 July 2013, the second respondent provided to the applicant a list of the submitters. There were 6,493 submissions received by the second respondent, responding to the environmental impact statement.

On 10 July 2013, after receiving the list of submitters from the second respondent, the applicant re-issued the decision notice with a copy of the list of submitters attached (which comprised 357 A4 pages).

On 16 July 2013, the applicant filed an application in the court seeking the following declarations and orders:

- a declaration that it did not comply with section 335 (Content of decision notice) of the SPA, as it related to not including the list of principal submitter;
- a declaration that it did not comply with section 337 of the SPA;
- an order pursuant to section 456 and 440 of the SPA that:
  - notwithstanding the non-compliance with section 335 of the SPA, it was taken to be an effective decision notice;
  - non-compliance with section 337 of the SPA be excused subject to the applicant's alternative proposal for complying with section 337 of the SPA;
- an order that the submitter's appeal period pursuant to section 462(4) (Appeal by submitters - general) of the SPA be varied as a result of the applicant's alternative proposal for complying with section 337 of the SPA.

The application was heard and determined by the court on 19 July 2013, at which time, the court made orders pursuant to section 440 of the SPA excusing the applicant from compliance with section 337 of the SPA and that the decision notice was taken to be an effective decision notice subject to the applicant undertaking to engage a revised method of complying with section 337 of the SPA.

As part of the continuation of the hearing, the applicant submitted to the court that the following alternative means of compliance with section 337 of the SPA were reasonable and practicable and sufficiently discharged the applicant's statutory obligation:

- giving the decision notice by email to those submitters who gave only an email address in their submissions;
- giving the decision notice by mail to those submitters who gave a complete postal address in their submissions;
- notifying the decision notice in the newspaper and on the applicant's website.

## Decision

His Honour Judge Durward SC acknowledged the extent of administrative and financial burden the applicant would otherwise have to carry if the decision notice was to be mailed to each of the submitters, in particular having regard to the size of the decision notice and the number of submitters involved. His Honour, having regard to the following matters, believed the alternate means submitted by the applicant were regular and lawful in the circumstances of the case, accorded with common sense, were practicable and reasonable and would likely inform most (if not all) of the submitters:

- Rule 4 (Philosophy - overriding obligations of parties and court) of the *Planning and Environment Court Rules 2010*, which encouraged the avoidance of expense and technicality in court proceedings, which included the IDAS process.
- The method of "giving" a decision notice, which included sending a notice by email.[64]

## Held

As per the final order made by the court on 19 July 2013.

[64] See section 39 of the *Acts Interpretation Act 1954* and the *Electronic Transactions (Queensland) Act 2001*.

Colin Biggers & Paisley

# Room for one more? Application for new local centre despite conflict with the planning scheme

Samantha Hall | Luke Grayson

**This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fabcot Pty Ltd v Cairns Regional Council* [2013] QPEC 38 heard before Rackemann DCJ**

October 2013

## Executive Summary

The Queensland Planning and Environment Court (**P&E Court**) allowed an appeal (**appeal**) by Fabcot Pty Ltd (**appellant**) against the refusal by the Cairns Regional Council (**respondent**) of a development application for a preliminary approval overriding the planning scheme for a material change of use (**development application**) made under the repealed *Integrated Planning Act 1997* (**IPA**).

## Case

This case concerned an appeal to the P&E Court to approve the development application which had been refused by the respondent. The Department of Transport and Main Roads (**first co-respondent by election**) did not seek a refusal of the development application, but sought conditions to be imposed on an approval of the development application. Mulgrave and District Chamber of Commerce (**third co-respondent by election**) was a submitter opposed to any approval of the development application. The Department of Local Government and Planning, being the second co-respondent by election, withdrew from the appeal.

## Facts

The development application related to a supermarket based retail centre (**proposed development**) on land located in the Residential 2 Planning Area of the *CairnsPlan 2009* (**planning scheme**). The development application involved a development application for a material change of use for a local centre and an application seeking to vary the effect of the planning scheme for the land. The proposed variation to the planning scheme (**proposed variation**) sought to substitute the Residential 2 Planning Area level of assessment table with a level of assessment table which would accommodate the proposed development without requiring further impact assessment.

The appellant accepted that the development application involved conflict with the planning scheme but submitted that there were sufficient grounds to approve the development application despite the conflict. The main grounds relied upon by the appellant were:

- the existence of a strong economic and planning need for the proposed development;
- that any negative impacts on competitors would be limited; and
- that the proposed development would provide a net community benefit.

In relation to the second of these grounds, the respondent and third co-respondent by election argued that the proposed development would unduly affect an existing district shopping centre in Gordonvale (**Gordonvale District Centre**) to such an extent that refusal would be warranted in the circumstances. His Honour Judge Rackemann DCJ indicated that this second ground was the key issue in this case and stated that "*The central issue in this case concerns the impact of the proposal on the [Gordonvale District Centre] and its intended continuing function as a District Centre, as described.*"[65]

## Decision

In relation to the issue of need for the full-line supermarket aspect of the proposed development, his Honour noted that at the time of hearing the appeal, in the absence of a full-line supermarket, the existing IGA in the Gordonvale District Centre was being relied on to a greater extent than would be expected if residents of the area had the option of a conveniently located full-line supermarket. Weight was also placed on the results of a survey which showed that over 50% of the IGA's customers were undertaking a majority of their shopping outside of Gordonvale. On this basis, his Honour accepted that the full-line supermarket in the proposed development would capture significant escape expenditure along with custom from the existing IGA in the Gordonvale District Centre.

[65] *Fabcot Pty Ltd v Cairns Regional Council* [2013] QPEC 38, [71].

His Honour stated the test of need and the conclusion in relation to the full-line supermarket as follows:

> *When the need of the community under consideration involves the daily essentials of life such as food and groceries, questions of convenience and availability of choice to the public are significant considerations. The proposal would deliver a full-line supermarket to a growing area which needs one, can support one, but currently has none.*[66]

There was agreement between the experts that there was a need for further specialty shops, fast food outlets and a service station in the Gordonvale area. His Honour concluded that "*Overall, there is a need for the collection of facilities proposed to be provided, in an integrated development, by the [Proposed Development].*"[67]

Each town planning expert involved in this appeal accepted that it would be preferable for the proposal to be provided in or adjacent to the Gordonvale District Centre. No alternative sites located in the Gordonvale District Centre were identified in the appeal and an examination of the area showed no vacant land available for this type of development. His Honour concluded that the Gordonvale District Centre was full. No significant weight was placed on a speculative proposal to open up a government precinct located near the Gordonvale District Centre for development of a shopping centre.

His Honour did not place any weight on the possibility that the proposed development may expand in the future. His Honour noted that any such expansion would require impact assessment and that an approval of the development application does not imply a right of future expansion.

His Honour noted that while the proposed development would involve the use of land which would otherwise be used for residential development, the growth corridor still contained undeveloped land and the respondent's town planning expert did not consider this issue of itself to be a sufficient justification to refuse the development application.

There were no traffic reasons to refuse the development application subject to the imposition of the first co-respondent by election's conditions of approval.

His Honour concluded that the development application should be approved for the following reasons:

- that the proposed development would not compromise the achievement of any DEO's;
- that there exist sufficient grounds to warrant approval notwithstanding conflict with the planning scheme.

His Honour gave the opinion that whilst the proposed variation appeared to be generally appropriate, the parties should consider whether any modification would be required in this regard.

## Held

- The application for the material change of use was approved.
- Further hearing of the appeal was adjourned to allow the parties to formulate proposed conditions of approval and any modification of the proposed variations to the planning scheme.

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66 *Fabcot Pty Ltd v Cairns Regional Council* [2013] QPEC 38, [108].
67 *Fabcot Pty Ltd v Cairns Regional Council* [2013] QPEC 38, [115].

Colin Biggers & Paisley

# NSW Planning Bill 2013 introduces greater community participation in planning process

Maysaa Parrino

**This article discusses changes to the NSW *Planning Bill 2013* which include streamlining the development process and more opportunity given to the community to engage in the planning process**

November 2013

## Executive Summary

The *Planning Bill 2013* introduces a new "code development" assessment track to streamline the development process and imposes a general obligation on consent authorities like local councils to inform those who lodge development applications of any issues that may lead to the refusal of their application.

## Public consultation results in significant changes to Planning Bill

On 20 November 2013, the long-awaited *Planning Bill 2013* (**Bill**) was introduced into the NSW upper house of parliament for debate, having passed the lower house on 30 October 2013. The Bill was anticipated to have been introduced earlier based on *A New Planning System for NSW - White Paper* (**White Paper**).

However, the NSW government adjourned its introduction due to concerns raised through public submissions. The public consultation process indicated that NSW's planning system would still remain unnecessarily complex.

According to the NSW Minister for Planning and Infrastructure, significant changes have been made prior to the introduction of the Bill in consideration of the public submissions received. Significant changes include those relating to the decision making process (with greater involvement from the community) and code assessment changes.

## Community to be given greater opportunity to engage in planning process

The Bill contains a new approach to community participation which will be at the centre of the new system as outlined under Part 2 of the Bill. The introduction of the Community Participation Charter (**Charter**) sets out the principles by which the community is to be given the opportunity to engage in the planning process. In particular:

- The Charter will apply to the exercise of strategic planning, development consent, environmental impact assessment, State infrastructure approvals and infrastructure plan functions.
- A planning authority (such as the State government and local councils) is to prepare a Community Participation Plan, to be publicly exhibited for at least 28 days, outlining how it proposes to provide opportunities for the community to participate in all areas of planning.
- A high level of community participation will be specifically required for the development of Regional Growth Plans and Subregional Plans.
- A planning authority is required to publish reasons for its decisions and set out how community views have been considered in the decision making process.

## New "code development" assessment track introduced to streamline assessment process

Under NSW's current planning system, a development requiring planning approval is either assessed as complying development, or is subject to a development application where "merit assessment" is undertaken.

Part 4 of the Bill introduced a new "code development" assessment track to streamline the assessment process. Code development is one track of other development assessment tracks requiring consent, including complying development, merit assessment and state significant development. Previously the White Paper provided that a development could be the subject of both code and merit assessment, however, this is no longer the case.

Under the Bill, code assessment will be limited to growth areas, urban renewal and growth activation precincts, as they are identified in Subregional Delivery Plans. Since councils have significant representation in Subregional Delivery Boards, they will also have a significant say in determining where code assessment will apply.

## Developments which will not be subject to code assessment

The Bill now provides that the following developments will never be subject to code assessment: State heritage items; Environmental Impact Statement assessed development; development applications relying on Strategic Compatibility Certificates; development requiring concurrence regarding threatened species and development that requires an Aboriginal heritage impact permit.

## Councils to assess code assessment applications

In addressing other issues raised in public submission, code assessment applications have been subject to further changes including the following:

- Councils, not private certifiers, will assess code assessment applications.
- No blanket target for code and complying development applications will be enforced on local councils.
- If a development proposal exceeds codes standards, even by 1cm, it will not be approved as code and will be subject to a full merit assessment.

## What else is changing under the Bill?

- Under Part 3 of the Bill, a **strategic planning framework** will be maintained as proposed in the White Paper. However, the ten strategic planning principles contained in the White Paper have been removed and replaced with broader, more general considerations.
- **Amber light approach** – the White Paper proposed that a consent authority must notify an applicant before it refused their development application and must specifically identify the amendments to be made before it would reconsider the application. Part 4 of the Bill has now been amended to impose a "general obligation" on the consent authority to inform the applicant after it lodges a development application of any issues that may lead to the refusal of their application. A consent authority is no longer required to advise the applicant as to how the application is to be amended.
- Infrastructure contributions will no longer be capped and will be based around a three tier system, including local infrastructure contributions, regional infrastructure contributions and biodiversity offset contributions. Whilst contributions will be applied to a broader number of developments, the Bill provides for greater flexibility of the payment of regional and local infrastructure contributions. In particular, the Bill will contain a provision enabling the deferral of payment of local and regional infrastructure contributions. The NSW Department of Planning and Infrastructure Feedback Report provides that the payment of contributions may be postponed until the property is sold or 12 months after consent is granted (whichever occurs earlier). This is a change from our current system which requires payment upfront at the approval stage.

If the Bill is passed in the upper house, the current NSW *Environmental Planning and Assessment Act 1979* will be repealed and replaced with the Bill, aimed to be implemented as soon as possible.

Colin Biggers & Paisley

# Increased penalties for illegal waste dumping in NSW

Maysaa Parrino

**This article discusses the increased penalties for illegal waste dumping in NSW under the new *Illegal Waste Disposal Act 2013***

November 2013

## Executive Summary

With the rising costs of disposing of waste by legal means, many businesses could be tempted to cut corners and dispose of the waste generated by their enterprise illegally. Businesses in NSW need to be aware of the increased penalties for illegal waste dumping.

## Previous penalties seen as insufficient to discourage illegal dumping of waste

In NSW, the new *Illegal Waste Disposal Act 2013*, which commenced on 1 October 2013, outlines the amendments made by the *Protection of the Environment Operations Amendment (Illegal Waste Disposal) Act 2013 No. 60* (**Act**). The Act amended the *Protection of the Environment Operations Act 1997* (**POEO Act**), with the purpose of preventing illegal waste disposal by increasing penalties.

The introduction of tougher penalties stems from the perception that the previous penalties imposed on individuals and corporations who illegally dump waste did not outweigh the profits that could be made from such dumping.

The NSW Environmental Protection Authority (**EPA**) aims to achieve a 70% household and municipal recycling target by 2021 as part of its draft Waste Avoidance Strategy 2013-2021.

## Penalties for supplying false or misleading information

Whilst it is a strict liability offence under section 144AA of the POEO Act for providing false or misleading information, the new Act creates an offence for "knowingly" supplying false or misleading information about waste.

This new offence carries significant fines of up to $500,000 for a corporation and $240,000 for an individual. Additionally, these fines may be coupled with a maximum period of imprisonment of 18 months, or the offender may be sentenced to imprisonment instead of the payment of a fine.

Currently, section 169A of the POEO Act imposes executive liability upon directors for offences of a corporation. Whilst these new offences do not explicitly apply to directors and managers, it is likely that they will be exposed to penalties if they commit an offence under the new regime. Recent case law indicates that liability and penalties, will extend to directors, especially in circumstances where the director obstructs an environmental investigation. (See *Environment Protection Authority v MA Roche Group Pty Ltd* [2013] NSWLEC 191).

## Repeat offenders who illegally dump waste

The new section 144AB of the POEO Act now imposes further penalties for offences within the scope of sections 120, 142A, 143 and 144 of the POEO Act. These offences include polluting waters with waste, polluting land, illegally dumping waste or using land as an illegal waste facility.

If an individual is previously convicted of an offence under section 144AB, and that offence has been repeated within a period of five years, the offence is punishable by a maximum period of imprisonment of two years, as an alternative or in addition to a fine.

## New powers to seize and impound motor vehicles and vessels

Under the new Part 7.6A of the POEO Act, the EPA has increased powers to seize a motor vehicle or vessel if it has reason to believe that it has been used to commit a repeat waste offence.

Additionally, the Land and Environment Court can order the forfeiture of a motor vehicle or vessel to the State if it convicts the person of a repeat waste offence.

## Unlawful waste facilities

The Act broadens the offence under section 144 of the POEO Act of using land as a waste facility without lawful authority, to using any "place" as a waste facility without lawful authority.

This now covers the illegal use of a body of water as a waste facility and the change from "land" to "place" now covers most areas.

## Additional financial penalties equal to monetary benefit gained by polluter

Section 249 of the POEO Act has been amended by the Act whereby an offender may be ordered by the court to pay an additional financial penalty, equal to the monetary benefit they gained from committing the crime, as an additional penalty for the offence.

## Changes to the waste levy and EPA licensing designed to expose illegal operators

Amendments to section 88 of the POEO Act change the waste levy regime so that all waste received at any licensed waste facility, not just landfills, will be liable to pay the levy.

Importantly, the payment of the levy will not be triggered until the waste is sent off-site for disposal, stockpiled on-site for more than 12 months or stockpiled above any legal stockpile limits. The liability will be extinguished on waste that is transported off-site for further processing or reuse.

The payment of the levy will commence with the new provisions under the draft NSW *Protection of the Environment Operations (Waste) Regulation 2005*.

Additionally, weighbridges will be required to be installed at all licensed waste facilities to ensure that data collected is accurate for the purposes of calculating the waste levy.

Further, in determining site-specific environmental risks at a licensed waste facility, the EPA will make use of its "risk assessment tool". Each licence will be allocated to one of three risk levels, with three being the highest risk. The risk based system will be used to impose certain fees related to the risk level, with the possibility of a site's fees being reduced over time if there is a level of certainty that the site will not harm the environment.

It is intended that the new amendments to the POEO Act will provide an even regulatory and financial playing field for the lawful operators and expose the illegal operators, at all levels.

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