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Planning Government Infrastructure and Environment group

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Colin Biggers & Paisley

No parking here: Planning and Environment Court holds that use of a public park for recreation vehicle accommodation is unlawful

Austyn Campbell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor* [2018] QPEC 52 heard before Williamson QC DCJ

January 2019

In brief

The case of *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor* [2018] QPEC 52 concerned an application to the Planning and Environment Court seeking declaratory and consequential relief, and enforcement orders regarding the use of a public park for overnight parking of Recreation Vehicles (**RV**).

Caravan Parks Association of Queensland Limited (**CPAQ**) commenced proceedings in the Planning and Environment Court against the Rockhampton Regional Council (**Council**) alleging that the use of a public park (**Kershaw Gardens**) for RV accommodation was unlawful under the *Planning Act 2016* (**Planning Act**).

Kershaw Gardens is controlled by the Council and comprises two contiguous lots which are dedicated to park and recreation purposes. The RV accommodation use was located within one of the two designated carparks in Kershaw Gardens and began in 2014.

CPAQ alleged a development offence was being committed as a consequence of the use of Kershaw Gardens for RV accommodation.

The definition of "use" in the Planning Act was central to the Council's case. The Council contended that the existing use of Kershaw Gardens was as a single planning unit, characterised by its dominant purpose, being a park.

CPAQ alleged that RV accommodation was a separate and distinct use to the dominant purpose of Kershaw Gardens and that no development permit existed to authorise that use.

The Court found it was necessary to examine the following issues:

- what is an ancillary use?
- is RV accommodation an ancillary use of Kershaw Gardens?
- had section 163 of the Planning Act been contravened and a development offence committed?
- had section 165(a) of the Planning Act been contravened and a development offence committed?

The Court relevantly determined the following:

- The RV accommodation was not an ancillary use as it was not evident that a functional relationship existed between the accommodation use and the park use.
- Section 163 of the Planning Act had not been contravened as the RV accommodation use predated the operation of the section.
- The continuation of the RV accommodation use was not a lawful use and constituted a development offence under section 165(a) of the Planning Act.

The Court granted enforcement orders intended to bring the RV accommodation use to an end. The Court declined to award the declaratory and consequential relief sought by CPAQ under section 11(1)(c) of the *Planning and Environment Court Act 2016* (**PECA**).

Importantly, the Court determined that section 163 of the Planning Act is not open to development offences involving the "carrying out of assessable development" having occurred before the commencement of the Planning Act on 3 July 2017.

What is an ancillary use?

The Court clarified the definition of "ancillary use". The Court provided that an "ancillary use" is one that is subservient to a principal use.

The Court made reference to the following statement in *Foodbarn Pty Ltd v Solicitor General* (1975) 32 LGRA 157 (emphasis added):

> *It may be deduced that where a part of the premises is used for a purpose which is subordinate to the purpose which inspires the use of another part,* ***it is legitimate to disregard the former and to treat the dominant purpose as that for which the whole is being used****.*

The Court noted that the absence of a dominant and subservient relationship is indicative but not determinative of two separate and distinct uses. It held that it is "*the strength of the connection or relationship… involving matters of fact or degree*" that serves to establish whether two uses are separate and distinct (at [45]).

Is RV accommodation an ancillary use of Kershaw Gardens?

The Council submitted seven matters to evidence that the RV accommodation was an ancillary use. The Court refuted the Council's key submissions that the size of the use, or the suggested lack of evidence regarding intensity, established that the RV accommodation was an ancillary use. The Court determined that most of the Council's submissions were not established on the evidence and constituted no more than general assertions.

The Court held that the RV accommodation was not an ancillary use of Kershaw Gardens. The determination was made on the basis that a dominant and subservient relationship did not exist between the accommodation use and the park use. The Court noted two particular features of the case in making this determination.

Firstly, the Court found as follows (at [46]):

> *As a matter of fact and degree, the strength of the connection or relationship as between the park and the RV accommodation use is limited in a functional sense, and is more a relationship of convenience.*

Secondly, the Court stated that the scale and intensity of the RV accommodation use did not evidence a use subordinate or subservient to the park use. Rather, the Court found the size and intensity of the RV accommodation use was consistent with CPAQ's proposition that it was separate and distinct from the dominant park use.

The Court accepted CPAQ's argument that the provision of the RV accommodation altered the underlying and dominant purpose of Kershaw Gardens as a park. It held that the augmentation of the dominant purpose for which Kershaw Gardens was used further reinforced that the RV accommodation was not an ancillary use.

Had section 163 been contravened and a development offence committed?

The Court went on to consider whether the RV accommodation use constituted assessable development carried out by the Council without an effective development permit.

Schedule 2 of the Planning Act defines a material change of use to be the "*the start of a new use of the premises*". Section 20C of the *Acts Interpretation Act 1954* (Qld) provides a legal presumption that an act or omission will only constitute an offence if committed after the commencement of the law which makes such acts or omissions illegal.

The RV accommodation use began in 2014, prior to the commencement of the Planning Act. CPAQ submitted that the Planning Act had retrospective operation and effect should be given to section 163 of the Planning Act. The Court did not accept this submission.

Section 163 of the Planning Act was held not to be open to offences involving the "carrying out of assessable development" which occurred before 3 July 2017. The Court, therefore, held that there had been no contravention of that section.

Had section 165(a) of the Planning Act been contravened and a development offence committed?

The Court considered whether the RV accommodation use constituted an unlawful use of premises under section 165(a) of the Planning Act. The Court relevantly examined the history of the RV accommodation use at Kershaw Gardens against relevant legislation and planning instruments.

The Court found that when the RV accommodation use commenced in 2014 there was no effective development approval. This constituted a contravention of section 578(1) of the *Sustainable Planning Act 2009* (**SPA**) which was in force at the time.

The Court held that as no development approval had been obtained to authorise the start of the use under the SPA, or the continuation of the use from 3 July 2017 under the Planning Act, the use had, at no time, been lawful.

It was held that, as the continuation of the RV accommodation use was not a lawful use, section 165(a) of the Planning Act had been contravened and a development offence had been committed.

The Court, therefore, held that as section 165(a) of the Planning Act had been contravened, the Court's power to grant enforcement orders had been enlivened.

Conclusion

The Court granted enforcement orders against the Council to bring the RV accommodation use to an end. The Court declined to grant the declaratory and consequential relief sought by CPAQ.

The Court allowed CPAQ's application under section 61 of the PECA to make submissions as to costs. In the later case of *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor (No. 2)* [2018] QPEC 59, the Court ordered the Council to pay CPAQ's costs of these proceedings, awarded on the standard basis.

Planning and Environment Court holds that it had no jurisdiction to grant the relief sought and that there was no evidence that an ancillary use would not contravene the Planning Act 2016

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *We Kando Pty Ltd v Western Downs Regional Council* [2018] QPEC 65 heard before Williamson QC DCJ

January 2019

In brief

The case of *We Kando Pty Ltd v Western Downs Regional Council* [2018] QPEC 65 concerned an application in pending proceeding by We Kando Pty Ltd (**Applicant**) to the Planning and Environment Court (**Court**) for a declaration about the use of land situated at 27150 Warrego Highway, Baking Board (**Premises**).

The Court determined the three main issues in the application to be the following:

- whether the Court had the power to grant the declaratory relief sought;
- whether leave should be granted under section 446(1) of the now repealed *Sustainable Planning Act 2009* (**SPA**) to permit the application to be treated as if it were an originating application, and thereby a fresh proceeding;
- whether the commencement of a use of the land for the parking of trucks (**Truck Parking Use**), as an ancillary use, is lawful.

The Court held that it did not have the power to grant the declaratory relief, was not satisfied that it should give leave to permit the application to be treated as an originating application and found that the Applicant failed to establish that the Truck Parking Use was lawful. The Court dismissed the application.

Applicant commences an application in pending proceeding seeking declaratory relief

The Applicant had submitted a development application to the Western Downs Regional Council (**Council**) for an environmentally relevant activity and four new uses, namely Extractive industry, Storage facility, Accommodation building and Noxious industry. The Council issued a part approval and refused the part of the development application which sought approval for the Storage facility and Accommodation building.

The Applicant appealed to the Court. The Applicant did not wish to proceed with the part of the appeal against the refusal of the Accommodation building.

The Applicant commenced an application in pending proceeding seeking declaratory relief in relation to the Truck Parking Use, with the intention of discontinuing the appeal if the declaratory relief was granted.

Transitional provisions do not save the right to commence an originating application for declaratory relief under the SPA

The Applicant commenced the application under section 456(1)(e) of the SPA, which provides that any person may bring a proceeding in the Court for a declaration about the lawfulness of land use or development. As the SPA had been repealed for eight months at the time of the hearing, the Court was required to consider if it had the power to grant the requested declaratory relief.

The Court noted that its statutory jurisdiction is confined to the powers given to it by the SPA and the *Planning Act 2016* (**Planning Act**). The transitional provisions of the Planning Act, namely section 311(2)(a), provide that in certain circumstances "*the [SPA] continues to apply to the proceedings*" (at [16]).

Therefore, the Court turned its attention to section 446, section 456 and section 496 of the SPA and concluded that section 446 and section 496, despite being general powers, did not provide the Court with power to make the declaration and neither did section 456 (at [17] to [26]).

The Court considered the now repealed section 456 of the SPA and determined that the section required that a declaratory proceeding be commenced as an originating application. An application in pending proceeding, such as the application that was commenced by the Applicant, is not an originating application.

Although the transitional provisions of the Planning Act allowed for the Applicant's appeal to be brought under the SPA, there are no transitional provisions in the Planning Act which give legal force to section 456(1)(e) of the SPA. Therefore, section 456(1)(e) does not give a right to commence new proceedings after the repeal of the SPA.

The Court held that it has no power to grant declaratory relief under section 456(1)(e) of the SPA.

Court decided that it would not make an order to treat the application like an originating application

The Applicant submitted that in the alternative the Court could order that the application in pending proceeding be treated as an originating application and relied upon rule 13 of the *Uniform Civil Procedure Rules 1999* (**UCPR**). The Court was not satisfied that it should make the order as the order would "*impermissibly permit [the Applicant] to do indirectly that which cannot be done directly*" (at [39]), as, relevantly, the Planning Act does not preserve the right under the SPA to commence fresh declaratory proceedings.

Applicant addressed the wrong question to the Court regarding the Truck Parking Use and consequentially failed to establish the elements necessary to grant relief

The Court then turned its attention to whether the Truck Parking Use was an ancillary use. The Applicant asked the Court (at [43]): "*Is the Truck parking use lawful because it is ancillary to existing lawful uses permitted on the land?*". The Court considered the question and concluded that if it was answered it would lead the Court into error. Furthermore, the Court concluded that the Applicant "*incorrectly assume[d] the lawfulness of the use is determined by whether it is ancillary to an existing use*" and the correct question to be asked and answered by the Court was "*whether the Truck parking use, if started and continued on the land, would give rise to the commission of a development offence under [sections] 163, 164 and 165 of the [Planning Act]?*".

As a consequence of the Applicant addressing the wrong question to the Court, the Applicant failed to provide adequate evidence that the Truck Parking Use would not give rise to a development offence under the third limb of section 163 of the Planning Act.

Section 164 of the Planning Act requires new uses to be generally in accordance with the approved plans which form part of the existing approvals over the land. The Applicant did not provide any evidence of the relevant existing plans for the Premises and, therefore, the Court, being unable to consider the relevant facts and circumstances, found that the Applicant had failed to establish that the Truck Parking Use would not contravene section 164 of the Planning Act.

Likewise, the Applicant failed to address to the Court the necessary elements required to determine if the Truck Parking Use would have been a lawful use under section 165 of the Planning Act. Therefore, the Court found that the Applicant failed to establish that the Truck Parking Use would be a lawful use.

Conclusion

Given that the Court held that it did not have the jurisdiction to grant relief under section 456 of the SPA, and that the Applicant had failed to establish that the Truck Parking Use would not contravene sections 163, 164 and 165 of the Planning Act, the Court ordered that the application be dismissed.

Planning and Environment Court does not find sufficient grounds to approve an application for the development of a multi-use high-rise building at Coolangatta

Larissa Zeil-Rolfe | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Body Corporate for Lindor Community Title Scheme 29204 and Planit Consulting Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 054 heard before Rackemann DCJ

January 2019

In brief

The case of *Body Corporate for Lindor Community Title Scheme 29204 and Planit Consulting Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 054 concerned a submitter appeal by the Body Corporate for Lindor Community Title Scheme 29204 and Planit Consulting Pty Ltd (**Appellants**) to the Planning and Environment Court (**Court**) against the decision of the Gold Coast City Council (**Council**) to approve a high-rise multi-use development application (**Development Application**) submitted by Komune Pty Ltd (**Co-respondent**).

The Appellant alleged conflict with a number of provisions of the Council's *City Plan 2003* (**2003 Planning Scheme**) and the Council's *City Plan 2016* (**2016 Planning Scheme**).

The proposed development comprises a 24 level high-rise (27 storeys), consisting of a resort hotel made up of a five star 100 suite resort, 94 residential apartments, as well as a restaurant, shop and café.

At the time of the Development Application and the commencement of the appeal, the *Sustainable Planning Act 2009* (**SPA**) was in force. The SPA was, therefore, the legislation relevant to the appeal, despite the *Planning Act 2016* taking effect on 3 July 2017.

The issues before the Court relevantly included the following:

- the degree of conflict with the 2003 Planning Scheme;
- the extent to which the 2016 Planning Scheme should be considered and the degree of conflict with the 2016 Planning Scheme;
- whether there were grounds that justify the approval of the Development Application despite the conflict with a relevant planning instrument, pursuant to section 326 of the SPA.

The Court held that there were not sufficient grounds in the public interest to justify the approval of the Development Application despite the conflict with the relevant planning instrument. "*The appeal [was] allowed and the [D]evelopment [A]pplication [was] refused*" (at [167]).

2003 Planning Scheme

The 2003 Planning Scheme comprises seven parts. While a number of conflicts were alleged with the Desired Environmental Outcomes (DEOs), the Appellant "*was prepared to confine its case in relation to the 2003 Planning Scheme to conflict with the Coolangatta Local Area Plan (LAP)*" (at [15]).

Court found substantial conflict between the Development Application and the Coolangatta Local Area Plan

The site is located in Coolangatta, therefore falling within the Coolangatta Local Area Plan (**Coolangatta LAP**) under the 2003 Planning Scheme. The 2003 Planning Scheme relevantly states that the nature of LAPs is to regulate smaller sections of the city, pursuant to the division of the city "*into special planning units with unique characteristics for the purpose of land use and development control*" (at [22]). The Coolangatta LAP encompasses multiple provisions that regulate developments in the Coolangatta area. These include the intent, DEOs, local features statement, precinct intent, a table of development and a place code. The Court found conflict with a portion of these provisions.

DEOs

The Appellant and the Council alleged conflict with the DEOs, which states that, "*[t]he impacts of the unit and tower developments are managed so that the amenity of surrounding locations is not adversely impacted*" (at [28]). The Court agreed with this allegation.

Local features statement

The local features statement relevantly stated that: "*[a]ppropriate development will have regard to its setting and incorporate appropriate measures to mitigate offsite impacts (including visual amenity, identified view corridor protection and overshadowing impacts)*" (at [30]). The Appellant argued that the proposed development lacked appropriate regard to its setting because it is located outside of the Coolangatta Centre and is more intense and taller than the buildings in the centre. The Appellant also argued that the proposed development failed to incorporate appropriate measures to mitigate off-site impacts, "*in that the proposed development would be of an inappropriate height, bulk, scale, plot ratio etc.*" (at [31]). The Court accepted these arguments.

Precinct intent

The proposed development is located within Precinct 2 of the Coolangatta LAP. The intent of Precinct 2 includes that the "*[d]evelopment is intended to be at a lesser intensity and scale than in the centre*" (at [32]). The proposed development would be taller than existing developments in the Coolangatta centre, and the Court, therefore, found that it conflicts with the intent of Precinct 2.

Place code

The Court found conflict between the Development Application and the Coolangatta LAP place code in a number of areas, including building height (PC1), accommodation density (PC2), site coverage (PC3), setbacks (PC4), setbacks above three storeys (PC6), amenity (PC24), plot ratio (PC34), landscape work (PC11) and minimum site area (PC12).

Court found substantial conflict between the Development Application and the 2016 Planning Scheme

The Development Application was lodged six weeks prior to the commencement of the 2016 Planning Scheme. The Court gave substantial weight to the 2016 Planning Scheme and found there was conflict with a number of provisions, including the following:

- section 3.3.2(9)(a), in that the proposed development did not reinforce local identity and sense of place;
- section 3.3.2(9)(g) and section 3.3.2.1(10), in that the proposed development did not comply with the building height restriction;
- section 3.3.1(3), in that the height of the proposed development was inconsistent with the amenity and desired future character of the local area;
- section 2(b)(v), in that the proposed development would negatively impact on the desirable building height patterns;
- section 2(b)(vi), in that the proposed development would not retain important elements of neighbourhood character and amenity;
- section 2(b)(vii), in that the proposed development would detrimentally impact on adjoining residential amenity;
- section 2(d)(i), in that the height of the proposed development would exceed the building height indicated on the Building Height Overlay Map;
- section 2(d)(iii) in that the proposed development failed to promote an urban setting via its setback from road frontages; and
- the Development Application also failed to comply with a number of Performance Outcomes (**PO**) of the Code, including POs regarding setbacks (PO1), site cover (PO2), building height (PO3) and density (PO4).

Court found that the Co-respondent did not make out sufficient grounds in the public interest to justify the approval of the Development Application despite the conflicts

The Co-respondent sought to rely on several grounds in order to justify the approval of the Development Application, notwithstanding the conflicts, including that the proposed development would "*add to the choice of tourist and resident accommodation*" (at [126]) and that the proposed development would reap economic benefits.

The Court accepted that the proposal would add to the choice of tourism and residential accommodation and would be of economic benefit. However, the Court held that this was insufficient "*to overcome the nature and extent of the conflict in this case*" (at [160]).

The Court, therefore, allowed the appeal and the Development Application was refused.

Planning and Environment Court finds no support for conditions requiring environmental protection measures on land not mapped as environmentally significant

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53 heard before Williamson QC DCJ

January 2019

In brief

The case of *Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53 concerned an Applicant appeal to the Planning and Environment Court against conditions imposed by the Gold Coast City Council (**Council**) on a development approval for reconfiguring a lot to create 67 community title lots, common property and two balance lots. The issue before the Court concerned the balance lots, being lots 900 and 901.

The Council in its decision notice required both lots to be combined and dedicated to the Council at no cost to the Council for "*Public open space for environmental conservation purposes*". In the course of the appeal, the Council contended for an amended conditions package in which it withdrew the condition in respect of Lot 900 and sought a new condition, being condition 8, in respect of Lot 900. This would constrain future development on the lot, require fauna friendly fencing, prohibit the ownership of domestic dogs, and require part of the lot to be rehabilitated for koala habitat purposes.

The Appellant accepted that Lot 901 should be dedicated to the Council as the land has ecological significance for koala habitat, which is recognised by the overlay mapping for environmental significance under the Environmental Significance overlay code of the Gold Coast City Plan (**City Plan**). The Appellant, however, opposed the new condition 8 and associated amendments, in respect of Lot 900, on the following two grounds:

- under the City Plan, the lot has no environmental significance; and
- under section 65(1) of the *Planning Act 2016* (**Planning Act**) condition 8 is unlawful.

To decide the appeal, the Court had to examine the following issues:

- Does Lot 900 have environmental significance?
- Does the overlay code under the City Plan support condition 8?
- Is condition 8 lawful under section 65(1) of the Planning Act?

The Court held in favour of the Appellant as the Council had failed to provide sufficient evidence to establish that condition 8 was necessary. The Court also found that the imposition of condition 8 was unlawful.

Does Lot 900 have environmental significance?

The Council's expert ecologist relied on a computer model which identifies and maps the areas for predicted koala activity. The results of the computer modelling suggested that Lot 900 fell within a high-use area for koala population densities and, therefore, the Council's expert concluded that Lot 900 is important for koala connectivity and dispersal in the local landscape.

The Court noted that the evidence presented by the Council's expert ecologist was heavily influenced by the computer modelling. The Court had concerns about the accuracy of the evidence, as the results were based on computer modelling which only predicted where koala activity was expected to occur. The evidence was not based on actual observations or fauna studies specific to the land.

The Appellant's expert ecologist gave evidence that Lot 900 was not environmentally significant. The Court noted that the Appellant's expert evidence was consistent with the City Plan as the City Plan did not map Lot 900 as being environmentally significant. The Court referred to section 8.1(6) of the City Plan which relevantly states as follows:

> *(6) Where development is proposed on premises partly affected by an overlay, the required outcomes and assessment benchmarks for the overlay only relate to the part of the premises affect by the overlay.*

The Court observed that only Lot 901 is mapped as being of environmental significance and, therefore, Lot 900 is not environmentally significant. The Court, therefore, held that Lot 900 is not a valuable area for koala habitat.

The Court also noted that the Appellant's expert ecologist adopted a practical approach in conducting an assessment of the land's ecological significance. In particular, the Court agreed with the Appellant's expert ecologist's evidence that condition 8 would actually encourage koalas to move through the local landscape by crossing busy roads and intersections where there are no existing or planned fauna friendly crossings.

The Court, therefore, accepted the evidence presented by the Appellant's expert ecologist and held that Lot 900 is not an environmentally significant area.

Does the overlay code under the City Plan support condition 8?

The Council relied upon PO15 and PO21 of the Environmental Significance overlay code to support the imposition of condition 8.

PO15 relevantly provides that "*site design provides safe koala movement opportunities by incorporating measures to maintain connectivity between areas of koala habitat on and adjacent to the site*". The Court held that section 8.1(6) of the City Plan made it clear that the Environmental Significance overlay code only applies to land which is impacted by the overlay mapping and, as a result, PO15 did not apply to Lot 900.

The second provision of the Environmental Significance overlay code which the Council relied upon to impose condition 8 was PO21. PO21 encourages development design and location to provide for the safe movement of native fauna through the site. The Court also held that PO21 does not apply to Lot 900 due to section 8.1(6) of the City Plan. Further, the Court held that PO21 does not require condition 8 as the safe movement opportunity will cease on the land when it adjoins busy roads which have no fauna friendly crossings and, as such, condition 8 in fact contradicted PO15 of the Environmental Significance overlay code.

Is condition 8 lawful under section 65(1) of the Planning Act?

The Appellant argued that condition 8 is unlawful under section 65(1) of the Planning Act, which relevantly states as follows:

> *(1) A development condition imposed on a development approval must—*
>
> > *(a) be relevant to, but not be an unreasonable imposition on, the development or the use of premises as a consequence of the development; or*
> >
> > *(b) be reasonably required in relation to the development or the use of premises as a consequence of the development.*

The Court held that condition 8 did not satisfy section 65(1)(a) of the Planning Act as the measures set out in the condition were an unreasonable imposition on the proposed development, as it would constrain the use of Lot 900 for environmental purposes by limiting the location and extent of the built form of the land, and would prohibit the keeping of domestic dogs, which is lawful when associated with residential dwellings.

The Court also held that condition 8 did not satisfy section 65(1)(b) of the Planning Act as the proposed development already made appropriate provision for fauna movement and connectivity as required by the City Plan.

The Court, therefore, held that condition 8 was an unlawful condition under section 65(1) of the Planning Act.

Conclusion

The Court held that Lot 900 has no environmental significance under the City Plan given that it is excluded from the relevant environmental overlay mapping. The Court also held that condition 8 is not supported by PO15 or PO21 of the Environmental Significance overlay code. The Court further held that condition 8 was unlawful under section 65(1) of the Planning Act. Therefore, the Court adjourned the appeal in order for both parties to finalise a suite of amended conditions which were consistent with the Court's decision.

Planning and Environment Court does not find sufficient grounds to support approval of an "opportunistic" Bunnings Warehouse

Claire Pekol-Smith | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bunnings Group Ltd v Sunshine Coast Regional Council & Ors* [2018] QPEC 042 heard before Everson DCJ

January 2019

In brief

The case of *Bunnings Group Ltd v Sunshine Coast Regional Council & Ors* [2018] QPEC 042 concerned two appeals to the Planning and Environment Court against the decisions of the Sunshine Coast Regional Council (**Council**) to refuse two development applications in respect of a proposed Bunnings Warehouse on a site in Western Coolum. The proposed site is bounded by the Sunshine Motorway to the west and the Yandina-Coolum Road to the south. The first development application was for a material change of use of premises for a Bunnings Warehouse, having a gross floor area of 8,600m^2. The second development application was for a material change of use of premises for a Bunnings Warehouse, having a gross floor area of 5,850m^2.

The development applications were made under the *Maroochy Plan 2000* (**Superseded Planning Scheme**), and the *Sustainable Planning Act 2009* (Qld) (**SPA**) applied because the appeals were commenced before the commencement of the *Planning Act 2016* (Qld).

The Court considered the following issues in the appeals:

- whether the development applications were in conflict with the Superseded Planning Scheme;
- whether the development applications would negatively impact visual amenity;
- whether the development applications caused unacceptable traffic impacts; and
- whether there were any sufficient grounds, in particular a planning need, to justify approval of the development applications, notwithstanding any conflict with the Superseded Planning Scheme.

The Court held that the development applications were in serious conflict with the Superseded Planning Scheme and that, on balance, there were no sufficient grounds to justify approval despite the conflicts.

Court held that the development applications were in serious conflict with the Superseded Planning Scheme

The Court was required to consider if the proposed Bunnings Warehouse relevantly conflicted with the following provisions of the Superseded Planning Scheme:

- Section 3.11.1 to 3.11.3, which requires that development applications must be consistent with the scale, intensity and function of the Coolum Beach's Village Centre designation in the Strategic Plan.
- Section 3.4.1, which requires that development applications must be consistent with the retail hierarchy.
- Section 3.11.4, which requires that development applications should not compete with the goods and services currently sold in the Coolum Village Centre Precinct.
- Section 3.11.4, which requires that a master plan or another development plan is required if the Coolum West Gateway Precinct was to be redeveloped.
- Section 3.11.4, which requires that provision should be made for an entry statement introducing motorists to the Coolum Beach township.

The Court noted that the correct way to construct the Superseded Planning Scheme was by reference to the language of the planning instrument as a whole, relying on the legal principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [69]-[70].

Under the Superseded Planning Scheme, the proposed site was located in part of the Coolum Beach Planning Area in the Coolum West Gateway Precinct, which provides an important entry to the Coolum Beach Township.

The Court noted that the designation of the site as urban under the Superseded Planning Scheme demonstrates an intention that retail activities serve the day-to-day needs of the community. Moreover, the Retail and Commercial Centres Hierarchy describes the Coolum Beach Township as a Tourist Centre and a Village Centre designated to provide a limited range of goods and services to satisfy the needs of tourists and the town. The Court held that the development applications were in conflict with the Superseded Planning Scheme because they were for a standalone outlet that would serve a higher order function outside the contemplation of the Superseded Planning Scheme and the retail hierarchy. The Court's finding that Coolum should remain a small village centre was reinforced by its determination that the Superseded Planning Scheme's Vision Statement intended for the Coolum Beach Planning Area to be a Village Centre.

The Court noted some tension within the Superseded Planning Scheme. This was because the Superseded Planning Scheme defines the Coolum Beach Planning Area as a Village Centre that should not serve a higher retail function. However, the West Coolum Gateway Precinct provides an exception for "showrooms" to provide large-scale and bulk goods and services. Therefore, the exception resolved any tension. However, the Court did not accept that the goods to be sold at the proposed Bunnings Warehouse would primarily be bulky items. Thus, the proposed Bunnings Warehouse did not constitute a showroom and was an unacceptable use of the site.

The Court also accepted that the proposed Bunnings Warehouse in the Coolum West Gateway Precinct would compete with a Mitre 10 store currently in Coolum Village Centre Precinct. The Court accepted evidence that the proposed Bunnings Warehouse would cause the closure of the Mitre 10 store. The Court held that the fact that the proposed Bunnings Warehouse would compensate for the loss of the Mitre 10 store did not resolve the conflict with the Superseded Planning Scheme to not compete with existing retailers.

The Court noted that under the Superseded Planning Scheme, the Council considers the Coolum West Gateway Precinct as a Master Planned Community. Therefore, the Appellant's failure to conduct any master planning was a conflict with the Superseded Planning Scheme.

The Superseded Planning Scheme intends that a provision should be made in the Coolum West Gateway Precinct for an "entry statement" to the Coolum Beach Township. The Court considered the appropriateness of the proposed Bunnings Warehouse as an "entry statement" to the Coolum Township. The Court determined that the requirement for an "entry statement" was already addressed by a sign in a landscape setting adjacent to the Yandina-Coolum Road.

The Court, therefore, determined that the development applications were in serious conflict with the Superseded Planning Scheme.

Court concluded that the development applications would not negatively impact visual amenity

The Superseded Planning Scheme requires that the visual amenity for motorists along the Sunshine Coast Motorway should include diverse landscapes, that buildings should be set within well landscaped grounds, and that car parks be located behind the buildings so as not to be visible from the Sunshine Coast Motorway or the Coolum-Yandina Road. The Court accepted evidence that the visual amenity impacts of the proposed Bunnings Warehouse could be treated by planting suitable vegetation. Except for glimpses of the built form and signage, this would screen the building from the view of motorists within eight years. Therefore, neither of the development applications were held to negatively impact visual amenity.

Court determined that the development applications would not cause unacceptable traffic impacts

The Court accepted evidence of two traffic engineers that the proposed Bunnings Warehouse would not cause unacceptable traffic impacts. Moreover, the Court found that any traffic impacts could be resolved by the introduction of traffic signals to accommodate the additional traffic on the site from 2020 to 2030.

Court held that there were no sufficient grounds to justify approval of the development applications, notwithstanding the conflicts with the Superseded Planning Scheme

The Court was required to consider whether there were any "grounds" to justify the development applications, notwithstanding the conflicts with the Superseded Planning Scheme under section 326(1)(b) of SPA. Schedule 3 of SPA relevantly provides that "grounds" are matters of public interest that do not include the personal circumstances of an applicant, owners or interested parties.

The Court applied the three stage test from *Lockyer Valley Regional Council v Westlink Pty Ltd (as trustee for Westlink Industrial Trust)* [2012] QCA 370, which requires the Court to examine the nature and extent of the conflicts, determine whether there are any grounds relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those grounds, and to determine whether the grounds in favour of the application as a whole are sufficient to justify approving the development application, notwithstanding the conflict.

The Court also applied *Bell v Brisbane City Council & Ors* [2018] QCA 84 in which it was stated that planning schemes should be read as a comprehensive expression of the public interest and that the Court should only depart from a planning scheme where there is a tension between the public interest and the planning scheme and there are sufficient grounds in the public interest to justify approval of the development application, notwithstanding the conflict.

The Appellant argued that the development applications should be approved on the following grounds:

- the development applications were materially similar to other developments in Coolum;
- the relevant provisions of the Superseded Planning Scheme were taken over by events;
- there is a planning need for the development applications;
- the development applications will result in beneficial traffic outcomes;
- the development applications will provide a community benefit without an unacceptable impact.

The Court found that the Appellant's grounds were, on balance, insufficient to justify approving the development applications, notwithstanding the serious conflicts with the Superseded Planning Scheme.

In particular, the Appellant argued that there was a planning need for the proposed Bunnings Warehouse. The Court applied the two limb test from *Isgro v Gold Coast City Council & Anor* [2003] QPELR 414, which relevantly requires that there be a likely demand for the proposed Bunnings Warehouse and that the proposed Bunnings Warehouse will satisfy the latent unsatisfied demand.

The Court accepted evidence of the Appellant's retail economist that there was a demand amongst local residents for the proposed Bunnings Warehouse. However, the Court concluded that there was no planning need because there was no latent unsatisfied demand currently unmet by another Bunnings Warehouse. The Court held that a 15 to 20 minute drive to the Bunnings Warehouses in Maroochydore or Noosaville was reasonable for this type of retail facility. Therefore, the Court held that there was no planning need to justify approval of the development applications.

Conclusion

The Court described the proposed Bunnings Warehouse as opportunistic and attempting to place a large stand-alone Burnings Warehouse in a location where no such use was intended. The Court, therefore, dismissed the appeals.

In the mix: Court upholds Council's decision to approve a quarry and concrete batching plant on rural land

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mary Valley Community Group Inc & Anor v Gympie Regional Council & Ors* [2018] QPEC 58 heard before RS Jones DCJ

January 2019

In brief

The case of *Mary Valley Community Group Inc & Anor v Gympie Regional Council & Ors* [2018] QPEC 58 concerned two proceedings made to the Planning and Environment Court commenced by a submitter, being an appeal and an originating application with respect to a quarry on land at Traveston, which is approximately 19 kilometres South of Gympie.

The land is in the Rural Zone and the relevant planning scheme is the *Gympie Regional Council Planning Scheme 2013* (**Planning Scheme**).

The originating application sought declaratory relief on the basis that a development permit for operational work facilitating the operation of a hard rock borrow pit on the land was void.

The appeal was against the Gympie Regional Council's (**Council**) decision to approve a development application made by the Applicant for a quarry and a concrete batching plant on the land.

In respect of the originating application for declaratory relief, the Submitter argued that the establishment of a borrow pit amounted to a material change of use and was not capable of being approved by the Council as operational work.

The Court rejected the Submitter's argument. The Court found that the relief sought had no "*practical outcome*" (at [34]) and refused the originating application.

In the appeal, the Submitter argued that the proposed development conflicted with the provisions of the Planning Scheme and ought to be refused.

The Court held that on balance the proposed development did not conflict with the Planning Scheme and even if it did there were sufficient grounds to warrant the approval of the batching plant, despite any conflict.

Originating application

The Applicant argued that the Council was not capable of approving the development permit for operational work because the development was in fact a material change of use, as there was a material change to the intensity and scale of work on the premises.

Originating application – was there a breach of the conditions of the development permit?

The Submitter argued that the Applicant had breached several conditions of the development permit for operational work.

The Submitter alleged that the Applicant began the operational work the subject of the development permit before the development approval. The Applicant accepted this allegation, however, the Applicant turned to the provision in the Planning Scheme that permitted 5000 tonnes of material to be removed from rural zoned land without a development approval. The Applicant submitted that it had removed approximately 5000 tonnes of material and did not remove an amount in excess of that amount. The Court accepted the Applicant's argument as there was no evidence to oppose it.

The Submitter argued that the Applicant failed to satisfy a condition of the development Permit, which required the closure of a section of road in close proximity to the Bruce Highway. The Applicant claimed that the breach had occurred because the Department of Transport and Main Roads had failed to provide the Applicant with the required designs. The Court accepted the Applicant's evidence.

The Submitter argued that the Applicant failed to satisfy the condition of the development permit regarding landscaping. The Applicant submitted that part of the land had been resumed, which had impacted the ability to landscape the area in the required time. The Court held that the resumption of land had significantly hindered the ability of the Applicant to meet the condition and found that this was a minor omission.

The Submitter argued that the Applicant carried out building work without a development approval. The Applicant accepted that it did carry out minor building work without a necessary development approval. The Submitter additionally argued that the Applicant failed to satisfy the condition of the development permit regarding the implementation of a remediation plan. The Applicant accepted that it did not comply with this condition. The Court established that the failure to satisfy these two conditions was a significant breach.

The Submitter lastly argued that the Applicant had conducted a blast without the relevant approval. The Court held that the Applicant did not require an approval to carry out a blast, however, the Court found that the Applicant had failed to give the required notice. The Court held that this, although a serious omission, was an oversight and was not deliberate misconduct.

In conclusion, the Court held that where the Applicant had breached the conditions of the development permit for operational work, such breaches were "*relatively minor in the scheme of things*" (at [55]). The Court found that there was no evidence to suggest that the Applicant intended to breach the conditions or act in an unlawful manner. The Court concluded that the breach of conditions did not have sufficient weight in the declaratory proceedings.

Originating application – was the development a material change of use or operational works?

The Submitter argued that the blasting, quarrying and crushing of 100,000m^3 of rock and the use of that in concrete and constructing works on the land authorised by the development permit for operational work was not operational work under section 10 of the *Sustainable Planning Act 2009*. The Submitter argued that the development was "*the start of a new use on the premises*" amounting to a material change to the use of the land (at [29]). On this basis, the Submitter argued that the Court should determine that the borrow pit was unlawful as it was used as a "*dry run for the quarry…in anticipation for the quarry*" (at [31]).

The Court had serious reservations about whether to grant the relief sought by the Submitter. The Court did not ultimately consider whether or not the development permit for operational work was lawful. The Court held that the Applicant had sought the development permit for operational work in good faith and it was not a "dry run" for the quarry. The Court held that the Applicant sought the development permit so that it could meet a requirement imposed on it to construct a membrane to separate soil from the water table. The Court further held that the relief sought achieved no practical outcome as the borrow pit was no longer in use.

The Court therefore dismissed the originating application.

Appeal proceedings

The Submitter appealed against the Council's approval of the proposed development on the basis that the proposed development conflicted with the Planning Scheme. The Court considered potential conflicts with respect to noise, air quality, visual amenity, ecology, and the potential of good quality agricultural land.

Noise and air quality

The Applicant's expert considered the potential negative impacts on amenity that might be caused by noise and air quality by the quarry and batching plant. The Submitter did not lead any expert evidence on this matter. The Applicant's expert witness stated that there was no acoustic or air quality reason for the proposed development to be refused and that the proposed operations would fully comply with the criteria set out in the *Planning Scheme*, *Environmental Protection (Noise) Policy*, and *Environmental Protection (Air) Policy*. The Court accepted the evidence of the Applicant's expert witness and held that the proposed development did not cause impacts upon noise and air quality.

Visual amenity

The Court accepted the evidence of the Applicant's expert that the proposed development would not cause any adverse impacts on visual amenity.

Ecology and bushfires

The Applicant's expert opined that the proposed development would not result in any unacceptable adverse impact to ecology and would not adversely impact on the bushfire risk. In response, the Submitter did not lead any expert evidence on this matter and made a submission which criticised the use of overlays and the failure to provide for a buffer area. The Court found the Submitter's submission was of no substance, and accepted the evidence of the Applicant's expert.

Good quality agricultural land

The Applicant's expert gave evidence that the proposed development would not compromise good quality agricultural land or other viable rural activities. The Submitter did not lead any expert evidence on this matter.

The Court was satisfied that the Applicant's expert evidence was fundamentally sound and addressed the issue at hand. The Court, therefore, concluded that there was no conflict.

Proposed quarry not in conflict with the Planning Scheme

The Court accepted that quarries are contemplated within the Rural Zone under the Planning Scheme. The Court was satisfied that any adverse impact on amenity or the environment at large as a result of the proposed quarry use could be addressed by the imposition of conditions and held that the proposed quarry use was not in conflict with the Planning Scheme.

Batching plant not in conflict with the Planning Scheme

The Court held that there was a clear conflict with the Planning Scheme in respect of the batching plant because, under the Planning Scheme, it is a "*High Impact Industry Use*" and is ordinarily located in an Industrial Zone and not a Rural Zone.

The Court held that the batching plant would have marginal consequences in that although the batching plant would introduce a non-rural use, such intrusion would be insignificant. The Court held that the batching plant would not detract from visual amenity.

The Court was satisfied that there were sufficient grounds to approve the batching plant use, despite any conflicts with the Planning Scheme.

The Court also held that there would be a material benefit to the community because it would introduce competition and employment benefits. Finally, the Court held that the batching plant would not be inconsistent with reasonable community expectations as it is a relatively small component of a heavy industrialised use of the land.

The Court held that there were sufficient grounds to warrant the approval of the batching plant, notwithstanding any conflicts with the Planning Scheme.

Court was satisfied there was an economic need for the proposed development

The Court considered at length whether there was a need for the proposed development.

The Applicant's expert opined that there is a demand for the proposed development as it would introduce competition to the area, would ensure reduced transportation costs due to the co-location of the quarry and batching plant and convenience to road infrastructure, and would be conveniently located to future infrastructure projects on the Sunshine Coast and Gympie.

The Submitter's expert gave evidence that there was no demand or need for the proposed development because there is an adequate supply and production capacity of hard rock quarries located in the study area, the co-location of a quarry and batching plant is inconsistent with a short shelf life of ready-mixed concrete, there was no evidence of a lack of competition, and there were no meaningful community benefits as there is not a clear market demand.

The Court found inconsistencies with the conclusions made by the Submitter's expert and preferred the evidence of the Applicant's expert. The Court held that the co-location of a quarry and batching plant would materially contribute to meeting an existing need and introduce choice and competition to the market. The Court also held that due to the co-location of the batching plant and quarry, the Applicant would also be in a position to better control costs. The Court was, therefore, satisfied that there was an economic need for the proposed development.

Conclusion

The Court dismissed the appeal and upheld the Council's decision to approve the proposed development and dismissed the originating application.

Climate change, greenhouse gas contributions and the case on the Rocky Hill Coal mine

Zac Mills | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 heard before Preston CJ

February 2019

In brief

The case of *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 concerned a Class 1 merit appeal to the New South Wales Land and Environment Court following the Planning and Assessment Commission's (**Commission**) refusal to grant consent to an open cut mine at Rocky Hill within the Gloucester Valley. The Land and Environment Court's Chief Judge also determined that the project should be refused, albeit on more expansive grounds to the Commission, including climate change.

Background

The decision of the Commission

On 18 December 2012, Gloucester Resources Limited (**Applicant**) applied to the Minister for Planning for development consent for the Rocky Hill Coal Project, for the purposes of coal mining as a state significant development. On 23 October 2017, after receiving 2,308 submissions (90%) of objection from individual members of the public and special interest groups, the matter was referred to the Commission. The application was refused at the Commission due to inconsistency with the zone objectives, visual impacts, and the public interest.

On 19 December 2017, the Applicant then filed a Class 1 merit appeal to the New South Wales Land and Environment Court, something enabled by the Minister for Planning (**Minister**) not requiring the Commission to hold a public hearing. The Minister was the first respondent to the appeal and Groundswell Gloucester Inc (**Submitter**), a community group opposed to the Rocky Hill Coal Project, was joined as the second respondent to the appeal.

Issues

The judgment is bookended by comments that explain why the mine was refused.

At paragraph 8 the Court states:

> *The mine will have significant adverse impacts on the visual amenity and rural and scenic character of the valley, significant adverse social impacts on the community and particular demographic groups in the area, and significant impacts on the existing, approved and likely preferred uses of land in the vicinity of the mine. The construction and operation of the mine, and the transportation and combustion of the coal from the mine, will result in the emission of greenhouse gases, which will contribute to climate change. These are direct and indirect impacts of the mine. The costs of this open cut coal mine, exploiting the coal resource at this location in a scenic valley close to town, exceed the benefits of the mine, which are primarily economic and social.*

In the last paragraph of the judgment, the Court states:

> *In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.*

The 689 paragraphs nestled between these two statements provide the Court's reasoning process for the decision.

The first part of the judgment addresses the "wrong place" arguments, which involved the Court weighing some acknowledged public benefits (albeit economic benefits that were found to be overstated) against the adverse impacts in the following three areas:

- visual (contrast with the surrounding environment, and night lights);
- amenity (noise and dust); and
- social (composition, cohesion and character of the community, the sense of place, the use of road infrastructure, the impact on Aboriginal culture and connection to Country and impact on heritage-scenic quality, the social impacts on health and wellbeing, the reasonableness of the fears and aspirations of the community, and the distributive inequity that would be caused within the community).

The second part of the judgment addresses climate change. The competing arguments of the Applicant, the Minister and the objector were analysed, which was followed by the Court's reasoning that the greenhouse gas emissions (**GHG emissions**) of the project support the refusal of the application. This finding rested on the following other conclusions:

- Both direct and indirect GHG emissions should be considered, requiring analysis of scope 1, 2 and 3 GHG emissions. Various New South Wales, Queensland and American decisions were considered.
- All GHG emissions contribute to climate change. In this regard, the scope 1, 2, and 3 GHG emissions over the project's life were found to be 37.8Mt CO2-e – a sizeable individual source, but that "*it mattered not*" that this aggregate represented a small fraction of total GHG emissions since the "*problem of climate change needs to be addressed by multiple local actions to mitigate emissions and remove GHGs by sinks*" (at [515]).
- The project's GHG emissions will contribute to climate change. The Court held that there was a causal link between the project's cumulative GHG emissions and climate change and its consequences, and there was no evidence of any action that would "net out" the project's GHG emissions. The Court also considered it irrelevant that greater GHG emission reductions could be achieved from other sources at lower cost by other persons or bodies, and that the market substitution argument had an apparent "*logical flaw*" having also been rejected in American caselaw. The Court also held that it was not necessary to approve the project to maintain steel production, for which the coal being produced would be used.
- The project's poor environmental and social performance in relative terms.

At 533 of the judgment, the Court refers to the function of a consent authority (which is relevant given the Court is metaphorically standing in the shoes of the consent authority in this matter) in weighing up these factors. The Court stated:

> *As Mahoney JA observed in BP Australia Ltd v Campbelltown City Council (1994) 83 LGERA 274 at 279, the function of a consent authority:*
>
> *… is, in the exercise of discretionary powers, to take into consideration the relevant considerations, to weigh them one against the other, and to determine what in the light of those considerations, should be done. Ordinarily, it would not be right for such a body to conclude that the effect of the relevant considerations is that one thing should be done and yet, without more, to do another.* ***The grant of a discretion is the grant of the authority to do what the authority sees as the discretionary considerations to warrant being done****.*

Where to from here?

While much of the commentary to date has related to the climate change reasons for the refusal, it is important to acknowledge that the project was found to have warranted refusal for the unacceptable planning, visual and social impacts alone. These "*wrong place*" type arguments comprise the more orthodox grounds for the refusal of development applications and need to continue to be carefully evaluated, but the decision now places climate change on the list of issues that must be grappled with.

While each development is assessed on a case-by-case basis, and the merits of each application for fossil fuel development must properly be evaluated, the Court's "*wrong time*" finding has significant repercussions for other projects in New South Wales involving or enabling a "*material source of GHG emission*". If such a project (irrespective of whether it related to a new or existing development) requires a development application or modification application, proponents' consent authorities as well as financiers need to carefully grapple with the reasoning processes adopted by the Court.

The approval pathway for proponents should be mapped out, and supporting documents carefully prepared and structured to respond to all the issues, including downstream GHG emissions.

"Close enough not good enough" in the Queensland Court of Appeal: Notice must be issued by a duly authorised representative or signatory of the claimant

Christopher Vale | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Santos Limited v BNP Paribas* [2019] QCA 11 heard before Holmes CJ and Fraser and Morrison JJA

February 2019

In brief

The case of *Santos Limited v BNP Paribas* [2019] QCA 11 concerned an appeal to the Queensland Court of Appeal against an order of His Honour Jackson J in the Queensland Supreme Court. His Honour had previously dismissed the Appellant Santos Limited's (**Santos**) application for summary judgment on a claim for payment of $55 million due under a performance security issued by the Respondent, BNP Paribas (**BNP**). Upholding the decision in the Court of Appeal, Her Honour Holmes CJ (Fraser and Morrison JJA agreeing) determined that the notice issued was defective as it had failed to comply with the draft letter attached to the performance security, and therefore dismissed the appeal with costs.

Performance security and draft letter

A performance security is defined as an unconditional bond or undertaking by the issuer to pay money of an agreed amount at the request of the claimant where arising (see *Wood Hall Limited v Pipeline Authority* (1979) 141 CLR 443 (at page 445), cited in *Santos Limited v BNP Paribas* [2018] QSC 105 (at [2]) (Jackson J)). BNP had issued a performance security in the form of a bank guarantee to Santos for the purposes of securing the performance of a contractor (Fluor Australia Pty Ltd), which was to provide engineering and design services to Santos for the purposes of one of its Coal Seam Gas extraction projects. The performance security was initially issued by BNP in the amount of approximately $75 million on 30 January 2012. That amount was later revised down to $55 million by Santos. A **draft letter** was attached to the performance security as a "template" document that Santos was to use in the event that it wished to make a claim on the bank guarantee. Santos subsequently sought to make a claim on the guarantee in terms different to that of the attached draft letter.

Letter of demand

On 18 December 2015, Santos issued a "letter of demand" which stated the words "Santos GLNG Project" rather than using Santos' official letterhead. The document was drafted in terms largely different to that of the draft letter, demanding payment of $55 million as owed under the bank guarantee issued by BNP. Critically, the letter was signed off as follows:

> *Yours sincerely,*
>
> ***Santos Limited - GLNG Upstream Project***
>
> *[handwritten signature]*
>
> *Rob Simpson*
>
> ***General Manager Development***

BNP refused to meet Santos' demand on the basis that it was defective as its maker had not purported to appear as a duly authorised representative or signatory of the claimant. Moreover, the demand had not contained the official letterhead of the claimant and had not been drafted in terms contemplated by the draft letter.

Application for summary judgment

Both parties brought an application for summary judgment against each other pursuant to rule 293 of the *Uniform Civil Procedure Rules 1999* (Qld). Santos proceeded on the basis that the demand had met the requirements of the performance security issued. BNP proceeded on the basis that the notice was defective and the demand was therefore non-compliant. Jackson J gave judgment for BNP on Santos' claim.

Grounds of appeal

Santos contended that Jackson J had erred in law with respect to two matters. First, that His Honour had found Mr Simpson's signature, when coupled with his position description, had not amounted to the necessary representation of authority required of the claimant, and second, that His Honour had failed to consider the demand as a whole, or to give consideration to the demand in the context in which it was given. Conversely, BNP contended that Santos had failed to meet the requirements of the performance security in that it had not been issued on a "Santos Limited" letterhead; second, that it had failed to identify Santos as the necessary person desiring payment under the performance security issued; and third, that it had failed to properly identify the performance security itself.

Santos relied on the authority provided in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 (at [38]) (**Pacific Carriers**) that both express and implied authorisations were representations which were considered equally actionable at law. Santos argued on account of the authority provided in Pacific Carriers that it was possible for a principal to equip its agents "*with a certain title, status and facilities*" and permit that agent with the ability "*to act in a certain manner without taking proper safeguards against misrepresentation*". Santos further argued that "*the principle of strict compliance had a bearing on* [the] *construction*" of the performance security, such that "*any suggestion that performance securities were to be construed more strictly than other commercial instruments was wrong.*" Put alternatively, the consideration as to whether the notice was compliant or not was one that required an intelligent, rather than mechanical application of the principle of strict compliance.

Conversely, BNP relied on the principles of strict compliance in that Santos had been bound to provide notice as claimant in the precise form of the draft letter attached to the guarantee. The Court ultimately agreed, stating that the purported authority of the signatory "*had to be manifest … on the face of the document*", such that "[if] *the signature alone were sufficient to convey the purport*[ed] *authority, the requirement of* [a] *signature by an authorised representative … would be rendered otiose*".

Proper construction of the performance security

Strict compliance

The Court of Appeal opined that the principle of strict compliance relieves the issuer of the security from any necessity to look beyond whether the party making the demand has met the stipulations within the guarantee in question and instead allows the issuer of the security to **take the claim** that has been made **at face value** and **in accordance with the security provided** to the claimant. As Jackson J had held below, the Chief Justice referred to the High Court's decision in *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85 (at [88]-[99]) (**Simic**) where the plurality stated:

> [The] *issuer … is not required or intended to be concerned with the terms of the underlying contract. … The issuer's sole concern is to provide security in accordance with its contract with its customer and, when the security is issued, to see whether there has occurred the event stipulated in the instrument on which the issuer's obligation to pay arises.*
>
> *In effect, such securities "create a type of currency" and are treated as being "as good as cash". Instruments of this nature are essential to international commerce and, in the absence of fraud, should be allowed to be honoured free from interference by the courts.*

Principle of autonomy

As issuer of the security, BNP was not required to concern itself with the terms of the underlying contract of whether the contractor had in fact performed its obligations. Rather, its sole concern was to provide security as it was contracted to do, and determine whether or not the specified event triggering its obligation to pay had arisen. The High Court stated in Simic (at [85]) [emphasis added]:

> *Subject to fraud perpetrated by a beneficiary,* [the] *unconditional promise to pay on demand is* ***independent of any underlying transaction and any other contract****.* [The] *principle of autonomy reflects that* **those instruments, by their nature, stand alone***. Not only are they equivalent to cash, but, by their terms, they also require that the obligations of the issue are not determined by reference to the underlying contract. The principle of autonomy dictates that the surrounding circumstances and commercial purpose of the* [underlying contract] *are different from those of the* [instrument as issued].

Commercial context

It is also relevant to note that Jackson J at first instance states that regard must be had to the commercial context in which instruments such as performance securities are issued and the purposes for which they are issued. His Honour quoted from the High Court in a recent restatement on the general rules of construction for commercial contracts in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 (at page 551, [16]) [emphasis added]:

> *It is well established that **the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract**. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.*

Conclusion

When it comes to issuing notice, it appears that "close enough" will not be "good enough".

As Viscount Sumner once stated in *Equitable Trust Co of New York v Dawson Partners Ltd* [1927] 2 Lloyd's Rep 49 (at 52), put simply:

> [there] *is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines.*

Her Honour Chief Justice Holmes states that effective notice on behalf of the claimant requires:

- **a positive representation** on the part of the maker of the notice that they are, in fact, a **duly authorised representative and signatory of the claimant**; and
- that the authority upon which the notice is provided by the claimant must be **manifest on the face of the document**.

Courts are now **unlikely** to look to the extrinsic considerations of a matter, nor tolerate arguments of implied authorisation stemming from the performance of an underlying contract existing between the parties. Courts are now **likely** to take a strict approach in circumstances where failure to include specific statements of authorisation have occurred, even where administrative error or mechanical omission have infected a notice issued by a claimant.

Developer's negligence claim against a local government and town planner is amended and avoids summary judgment

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Hyacinth Developments Pty Ltd v Scenic Rim Regional Council & Ors* [2018] QSC 230 heard before Douglas J

February 2019

In brief

The case of *Hyacinth Developments Pty Ltd v Scenic Rim Regional Council & Ors* [2018] QSC 230 concerned two interlocutory applications in respect of a claim by Hyacinth Developments Pty Ltd (**Applicant**) for negligence against the Scenic Rim Regional Council (**Council**) and for negligence and a breach of the *Trade Practices Act 1974* (Cth) (**TPA**) against the Applicant's town planning consultants (**Town Planners**). The first interlocutory application was brought by the Applicant, seeking leave to amend the statement of claim. The second interlocutory application was brought by the Council and the Town Planners, seeking summary judgment or to strike out the second further amended statement of claim.

The Court held that the application for summary judgment sought by the Council and the Town Planners was not appropriate in the circumstances as the Applicant had, in the Court's view, "*a real, not fanciful, prospect of success in the action*" (at [16]). The Court found that it was appropriate to grant the Applicant leave to amend the statement of claim as the proposed amendments arose out of the same or substantially the same facts that had already been alleged. The Court additionally dismissed the Council's and Town Planners' application for the Applicant's second further amended statement of claim to be struck out.

Background

The Applicant relevantly communicated with the Council about a desire to develop land located at North Tamborine, Queensland. The Applicant alleged that the Council made representations to the Applicant that the development proposal was acceptable and that it could be progressed as a minor change to an existing development approval without the necessity for advertising or public notification.

The Applicant alleged that, in reliance on the representations, it entered into a put and call option deed and settled its purchase of the land on 1 November 2005. Before settlement, the Council had approved two minor change applications and approved a further minor change application made by the Applicant and the Town Planners on 12 December 2006.

Unbeknownst to the Applicant, there had been active public opposition to earlier proposals to develop the land led by a community group, "Tamborine Mountain Progress Association Incorporated".

The Tamborine Mountain Progress Association Incorporated became aware of the proposed development and commenced proceedings in the Planning and Environment Court to object to the proposed development. In those proceedings, the Council conceded that approving the minor change applications were beyond its power as they constituted development requiring an impact assessable development application.

Tamborine Mountain Progress Association Incorporated was ultimately successful in its objection and the Planning and Environment Court made declarations that the approvals were beyond power and had no lawful effect. The Applicant in 2009 lost its financial support for the proposed development and in doing so went into liquidation, sold the land and could not apply for new development approvals.

In coming out of external administration and restoring its original director in 2015, the Applicant commenced proceedings seeking damages for negligence against the Council. The Applicant also pursued damages for negligence and breach of the TPA against the Town Planners as the Applicant alleged that they had, at relevant times, given advice to the Applicant in relation to the purchase of the subject land and the proposed development.

Application to amend statement of claim

The Court allowed the Applicant's application for leave to further amend its statement of claim and considered the following issues in making that finding:

- whether a summary judgment should be allowed in relation to:
  - whether the Applicant's action was brought "out of time" and;

- whether the Applicant had a real prospect of succeeding in the claim;

- whether the form of the proposed amended statement of claim was defective to justify a strike out; and
- whether the Applicant should be granted leave to amend the statement of claim to include two new causes of action.

Application for summary judgment

The *Uniform Civil Procedure Rules 1999* states that a defendant may apply to the Court for a judgment against a plaintiff if the Court is satisfied that the plaintiff has no real prospect of succeeding its claim and that there is no need for a trial of the claim.

Relevantly, the Council argued that the Court should allow the application for summary judgment as the Applicant's action was brought out of time. The Council argued that the Applicant suffered the loss as soon as it was bound to purchase the land, as the "package of rights" that was acquired by the Applicant when it purchased the land was less valuable than the purchase price. Subsequently, the Council argued that the cause of action arose on the date of the occurred loss, which was outside of the limitation period.

In response to the Council's submissions, the Applicant argued that the loss was not crystallised until the decision in *Tamborine Mountain Association Inc v Scenic Rim Regional Council & Anor* [2009] QPEC 98 at which time the Planning and Environment Court made the declaration that the relevant development approvals were void. The Applicant further argued that the authorities relied upon by the Council and the Town Planners should be distinguished as the undiscovered defects to the land existed before the land was purchased. This was in contrast to the present case as the Applicant did not receive significantly less than it should have for the land.

The Court agreed with the Applicant's arguments and held that the limitation of actions defence was not so compelling as to justify summary judgment for the Council and the Town Planners. The Court adopted a similar approach to the decision of *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 in which the High Court held that it is:

> *undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question.*

In considering the Applicant's argument the Court found that the Applicant had a "real, not fanciful, prospect of success in the action" and therefore could not justify awarding a summary judgment.

Form of amended statement of claim

The Council also made a number of complaints regarding the form of the proposed amended statement of claim. The Council firstly argued that part of the amended statement of claim relevant to a breach of the TPA for misleading or deceptive conduct against the Council should be struck out.

The Court found that it could not substantiate the Council's application to strike out part of the proposed amended statement of claim as the only action that was advanced by the Applicant, relevant to a breach of section 52 of the TPA, was against the Town Planners and not the Council.

The Council further argued that there were deficiencies in the pleading relating to the duty of care owed by the Council to the Applicant. The relevant paragraph contained allegations about why the Applicant believed the Council owed it a duty of care but did not allege that the Council did owe the Applicant a duty of care.

The Court held that although the pleading was poorly constructed, reading the relevant paragraphs together did amount to a sufficient pleading in relation to both owing a duty and a breach of the duty.

Leave to amend statement of claim

The Applicant applied to the Court to seek leave to further amend its statement of claim to include two new causes of action. The first new cause of action that the Applicant sought to plead in its amended statement of claim was to supplement the existing pleading relating to the Town Planners. Relevantly, the amendments stated (at [27]) that:

> *the town planner failed to correct or qualify the minor change representation; and … that, by failing to correct or qualify the minor change representation, the town planner engaged in conduct which was misleading or deceptive contrary to s 52 of the TPA.*

The second new cause of action alleged that the Council had failed to disclose active public opposition to the Applicant's proposed development and in doing so the Council had breached its duty of care that it owed to the Applicant. It further alleged that the Council and the Town Planners were aware of public opposition to earlier proposals to develop the land and that the Council had breached its duty of care by providing incomplete and incorrect information to the Applicant prior to the settlement of the purchase of the land.

The Applicant argued that the new causes of action arose out of the same, or substantially the same, facts that had already been pleaded and were closely connected to its existing case. The Applicant also argued that no prejudice would be occasioned to the Council or Town Planners due to the amendments.

The Court agreed with the Applicant and held that the proposed amendments would not cause unfair prejudice for the Council and the Town Planners as the issues pleaded have always been factually relevant. The Court also found that the new causes of action had arisen out of conduct that was closely connected to the Applicant's existing case and that the amendments sought should be made.

Amendments made relevant to causation and loss

In addition to the two new causes of action, the Applicant also sought to amend the existing pleading relating to causation and loss. The Applicant sought to include allegations that, but for the actions of the Council and the Town Planners, the Applicant would not have purchased the land and consequently would not have suffered loss in the form of wasted expenditure and loss of opportunity.

The Applicant argued that the amendments sought merely refined the way in which it pleaded causation and loss and it did not introduce a new cause of action. The Applicant relied upon the following from *Jobbins v Capel Court Corporation Ltd* (1989) 25 FCR 266 (at [45]):

> *where damage is an element of the cause of action, a new cause of action generally does not arise in respect of different and separate items of loss and damage, there being, instead, only a single cause of action.*

The Applicant also argued that, in the alternative, if it was wrong, it should be granted leave to amend the statement of claim as the allegations arose out of substantially the same facts as those that had already been pleaded.

The Court agreed with the Applicant and held that the amendments with respect to causation and loss did not introduce a new cause of action. The Court additionally held that, if it was wrong in its approach, it was also of the view that the allegations had arisen out of the same facts or substantially the same facts that were already pleaded by the Applicant.

In those circumstances, the Court granted leave to the Applicant to amend its statement of claim. The Court dismissed the application for summary judgment and the application to strike out the proposed amended statement of claim.

Planning and Environment Court finds that the Court is the "responsible entity" to decide a minor change application even when the contested conditions were imposed by a referral agency

Cara Hooper | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hobson Constructions (Qld) v Chief Executive Administering the Planning Act & Anor* [2018] QPEC 56 heard before Long SC, DCJ

February 2019

In brief

The case of *Hobson Constructions (Qld) v Chief Executive Administering the Planning Act & Anor* [2018] QPEC 56 concerned an originating application to the Planning and Environment Court by the Applicant who sought orders under section 81(4)(a) of the *Planning Act 2016* (Qld) (**PA**), to approve proposed changes to the conditions attached to a development permit for a material change of use. The development permit was granted by the Court on 5 December 2011 following an appeal by the Applicant against a refusal by the Townsville City Council (**Council**) of the development application.

The originating application sought the Court's approval of minor changes to conditions that were the subject of the response by a referral agency (**Referral Agency**).

The Applicant made a minor change application to the Referral Agency as the Applicant regarded it as the "responsible entity" under section 78(3)(a) of the PA. The Referral Agency refused to accept the minor change application on the basis that the Court, instead, was the "responsible entity" to decide the minor change application and further declined to provide a "pre-request response notice" on the basis that it was not an affected entity under section 89(2)(a) of the PA.

The Court was required to decide the proper "responsible entity" for the minor change application under section 78(3) of the PA. In order to decide the issue, the Court considered the following issues:

- What is the statutory intention of section 78(3) of the PA?
- Who is the proper "responsible entity" to decide the minor change application under section 78(3) of the PA?

The Court held that the "responsible entity", in this case, was the Court itself, as the development application was approved by an order of the Court and there were properly made submissions for the development application.

What is the statutory intention of section 78(3) of the PA?

The Applicant submitted that section 78(3) of the PA is ambiguous as although the section aims to identify a single "responsible entity" for any particular application, there is a drafting error which allows different responsible entities for the same factual circumstances. Section 78(3) of the PA relevantly provides as follows:

> *(3) The responsible entity is—*
>
> *(a) for a change application for a minor change to a development condition that a referral agency imposes—the referral agency; or*
>
> *(b) the P&E Court, if—*
>
> *(i) the change application is for a minor change; and*
>
> *(ii) the development approval was given because of an order of the court; and*
>
> *(iii) there were any properly made submissions for the development application; or*
>
> *(ba) for a change application to change a condition imposed by the Minister under section 95—the Minister; or*
>
> *(bb) for a change application to change a development approval given by the Minister for an application that was called in under a call in provision—the Minister; or*
>
> *(c) otherwise—the assessment manager.*

The Applicant contended that the Referral Agency is the "responsible entity" under section 78(3)(a) of the PA as the conditions concerning the minor change application were made by the Referral Agency and not the Court.

The Referral Agency submitted that section 78(3)(a) of the PA did not apply as it applies only where there is a minor change application to "a development condition that [the] referral agency imposes". The Referral Agency, instead, contended that the Court is the "responsible entity" to decide the minor change application because, since the development application was approved by the Court, any conditions, even if reflective of conditions imposed by the Referral Agency, are considered to be imposed by the Court.

The Court determined that the purpose of section 78(3) of the PA is not to only provide for a single "responsible entity" for any change application, but to also provide for such an entity having regard to the circumstances. This is because section 78(3) of the PA provides for alternative circumstances due to the inclusion of subsections (b), (ba) and (bb), which are all joined by the conjunction "or". Further, the inclusion of subsection (c) allows all other situations to fall under that subsection with the use of the word "otherwise". Therefore, the Court held that the evident legislative intent of section 78(3) of the PA is that different responsible entities will be determined depending on the circumstances of the application. The Court therefore did not accept the Applicant's submission.

Who is the proper "responsible entity" to decide the application under section 78(3) of the PA?

The Court declared that section 78(3)(b) of the PA applied in the circumstances of this application and thus, the Court is the "responsible entity" to determine the minor change application. This is due to the fact that the Court granted the development approval in 2011 and that there were properly made submissions for the development application, thus satisfying the requirements stated under section 78(3)(b) of the PA.

The Court therefore imposed the conditions on the development approval, not the Referral Agency.

Conclusion

The Court held that the "responsible entity" which is to decide the minor change application by the Applicant is not the Referral Agency, but rather, the Court itself. This is because under section 78(3)(b) of the PA, the Court is the "responsible entity" where there is a minor change application for conditions of a development approval which the Court approved and there were properly made submissions for that development application.

Planning and Environment Court finds that proposed changes would not cause a substantially different development

Cara Hooper | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hobson Constructions (Qld) v Chief Executive Administering the Planning Act & Anor (No. 2)* [2018] QPEC 57 heard before Long SC DCJ

February 2019

In brief

The case of *Hobson Constructions (Qld) v Chief Executive Administering the Planning Act & Anor (No. 2)* [2018] QPEC 57 concerned an application to the Planning and Environment Court by the Applicant to make changes to referral agency conditions attaching to the development approval, which allowed a development permit for a material change of use of premises. The related decision to the current proceeding, *Hobson Constructions (Qld) v Chief Executive Administering the Planning Act & Anor* [2018] QPEC 56, held that the responsible entity that was to decide the minor change application was the Court under section 78(3)(b) of the *Planning Act 2016* (**PA**), as the Court granted the original approval for the development application and there were properly made submissions.

In order to determine whether to allow the minor change to the development conditions which attached to the development approval, the Court had to consider the following:

- Did the Applicant have the owners' written consent under section 79(1A) of the PA?
- Did the proposed changes to the conditions of the development approval amount to a minor change?

The Court held that the proposed changes to the conditions originally imposed by the referral agency did amount to a minor change as the changes would not result in a substantially different development.

Did the Applicant have the owners' written consent under section 79(1A) of the PA?

The Court noted that the Applicant's material related to issues under section 79(1A) of the PA, which relevantly provides as follows:

> *(1A) Also, a change application must be accompanied by the written consent of the owner of the premises the subject of the application to the extent—*
>
> *(a) the applicant is not the owner; and*
>
> *(b) the application is in relation to—*
>
> *(i) a material change of use of premises or reconfiguring a lot; or*
>
> *(ii) works on premises that are below high-water mark and outside a canal; and*
>
> *(c) the premises are not excluded premises.*

The Court noted that the premises could be considered as an excluded premises. An excluded premises is defined under Schedule 2 of the PA as follows:

> ***excluded premises** means—*
>
> *...*
>
> *(b) for a change application or extension application—premises in relation to which 1 or more of the following apply for the application—*
>
> *...*
>
> *(iii) the responsible entity or assessment manager considers the application does not materially affect the premises and that because of the number of owners, it is impracticable to get their consent.*
>
> *Example of when owners' consent may be impracticable—*
>
> *Since the development approval was given, the premises have been subdivided and now has many owners.*

The Court noted that the consent of the owners of the residential lots that were created and sold prior to the date of the application has not been obtained, as the minor change application did not materially affect the 120 premises and would have been impracticable. Due to this, the Court held that the premises is an excluded premises under section 79(1A) of the PA as it fulfils subsection (b)(iii) of the definition of excluded premises under the PA, and therefore the consent of the owners was not required.

Did the proposed changes to the conditions of the development approval amount to a minor change?

The Court firstly referred to the definition of a minor change under Schedule 2 of the PA, which relevantly provides as follows:

> ***minor change*** *means a change that—*
>
> *...*
>
> *(b) for a development approval—*
>
> *(i) would not result in substantially different development; and*
>
> *(ii) if a development application for the development, including the change, were made when the change application is made would not cause—*
>
> *(A) the inclusion of prohibited development in the application; or*
>
> *(B) referral to a referral agency, other than to the chief executive, if there were no referral agencies for the development application; or*
>
> *(C) referral to extra referral agencies, other than to the chief executive; or*
>
> *(D) a referral agency to assess the application against, or have regard to, matters prescribed by regulation under section 55(2), other than matters the referral agency must have assessed the application against, or have had regard to, when the application was made; or*
>
> *(E) public notification if public notification was not required for the development application.*

The Court assessed whether the proposed changes to the conditions of the development approval were a minor change by reference to Schedule 1, section 4 of the Development Assessment Rules (**DA Rules**), which describes the meaning of a "substantially different development".

The Court noted that the proposed changes did not seek to change the development, but rather the conditions which were originally imposed by the Department of Transport and Main Roads (**DTMR**). The Applicant sought to remove the following conditions imposed by the DTMR; the construction of an additional lane upon a road located near the development; the construction of a road near the development; the upgrade of intersections near the development; and duplication of a road in both directions near the development.

The Applicant supported the minor change application with a traffic impact assessment report, which had updated information concerning the traffic impacts and road upgrades required and also other recommendations. Further, after a joint meeting of experts, the joint expert report recommended in the position statement that the additional overtaking lanes were not reasonably required.

The Court determined that the proposed changes did not result in a substantially different development with reference to Schedule 1, section 4 of the DA Rules for the following reasons:

- they did not change the ability of the development to operate as intended;
- they did not remove any integral components to the operation of the development;
- the removal would not significantly impact traffic flow or the traffic network;
- they would not introduce new impacts or worsen the severity of known impacts; and
- they would not impact on infrastructure provisions.

The Court therefore held that the proposed changes to the conditions attached to the development approval fall within the definition of a minor change under Schedule 2 of the PA.

Conclusion

The Court held that the Applicant did not require the owners' consent under section 79(1A) of the PA as it is an excluded premises as it was impracticable to obtain the consent of the owners of the 120 premises located on the subject land, and the minor change application did not materially impact the owners.

The Court further held that the proposed changes to the conditions of the development approval by the DTMR did amount to a minor change as stated in Schedule 2 of the PA as they would not cause a substantially different development.

Landowner's consent and development applications – What is necessary?

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bigini Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 1 heard before Williamson QC DCJ

February 2019

In brief

The case of *Bigini Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 1 concerned a hearing with respect to preliminary legal issues raised by six submitters (**Submitters**) in an applicant appeal to the Planning and Environment Court commenced by the applicant Bigini Pty Ltd (**Applicant**), against a decision by the Brisbane City Council (**Council**) to refuse a development application for a multi-unit dwelling on land situated at 284 Sir Fred Schonell Drive, St Lucia.

The land the subject of the development application, which was the subject of the appeal, comprised two lots being Lot 100, which is owned by Kalbita Pty Ltd (**Landowner**), and Lot 0, which is owned by the Larncasa Court Body Corporate (**Body Corporate**).

The Submitters, who elected to be co-respondents to the Applicant appeal, sought a preliminary hearing in the appeal with respect to the following issues:

- the Applicant did not have the Landowner's consent to the making of the development application as required by section 263 and section 260(1)(e) of the *Sustainable Planning Act 2009* (**SPA**);
- the relevant Body Corporate resolutions of 2010 and 2014 were invalid; and
- the development application was not properly made for the purpose of section 260 of the SPA.

The Court considered the Submitters' arguments and held as follows:

- the appeal right does not include a right to advance preliminary legal issues or a right to challenge a declaration for the purposes of section 260(1)(e)(ii) of the SPA, and that such issues should be raised by way of an originating application;
- the Applicant did obtain consent from the Landowner and the declaration provided by the Applicant was in accordance with section 260(1)(e)(ii) of the SPA;
- the Court did not have the power to question the validity of the resolutions but, in any event, was satisfied that both resolutions were valid; and
- the declaration provided to the Council pursuant to section 260(1)(e)(ii) of the SPA was a valid form of landowner's consent to the making of the development application, and therefore the development application was properly made.

The Court held that the preliminary legal issues raised did not preclude the appeal from proceeding to a hearing on the merits, that the issues did not warrant refusal of the development application, and ordered that the appeal be listed for review.

Court found that it did not have jurisdiction to consider the Submitters' allegations

The Court considered its jurisdiction to consider the issues raised by the Submitters.

The Court held that the right of appeal given to the Submitters does not encompass a right to advance preliminary legal issues such as a landowner's consent or whether the development application was properly made. The Court additionally held that the Submitters' right of appeal does not include a right to challenge a declaration made by the Applicant for the purposes of section 260(1)(e)(ii) of the SPA. The Court held that the appropriate legal proceeding to consider these issues is an originating application under section 11 of the *Planning and Environment Court Act 2016*.

Given that the preliminary legal issues could be considered and determined by the Court, albeit using a different legal proceeding, the Court determined that it would consider the Submitters' arguments in any event.

Court found that the Landowner's consent was valid

The Court considered whether the Applicant obtained the necessary Landowner's consent.

The Court emphasised that the Applicant's development application fell within the scope of section 263(1)(a) of the SPA, as it was a development application for a material change of use and therefore required consent from the Landowner under section 260(1)(e) of the SPA.

Under section 260(1)(e) of the SPA, when section 263(1)(a) has been engaged, the consent of the owner of the land the subject of the development application is required for the making of the development application. The consent can be provided in two ways: written consent under section 260(1)(e)(i) of the SPA or a declaration that the landowner has given written consent to the making of the development application under section 260(1)(e)(ii) of the SPA.

The Applicant argued that it had validly engaged section 260(1)(e)(ii) of the SPA, as a declaration was provided in its development application to the effect that the Landowner had given consent to the making of the development application. The Applicant additionally provided evidence by way of an affidavit, which stated that the landowner had taken deliberate actions to consent to the making of the development application. The Court held that the declaration and the affidavit unequivocally demonstrated that the Applicant did obtain the necessary consent required by section 260(1)(e)(ii) of the SPA and rejected the Submitters' argument.

Court found that the Body Corporate resolutions were valid

During the course of the preliminary hearing, the Court found that the Submitters were seeking to impugn the transfer of Lot 100 to the Landowner and challenge the Body Corporate's consent to the making of the development application.

The 2010 Body Corporate resolution to transfer Lot 100 to the Landowner was subject to an unsuccessful challenge to the Office of the Commissioner for Body Corporate and Community Management. The Court found that the freehold land register confirmed the Landowner was the registered owner of Lot 100, and therefore "*must be treated as correct*" (at [26]).

The Submitters' additionally argued that the 2014 Body Corporate resolution, which consented to the development application, was invalid as it did not bear the seal of the Body Corporate and was not signed by two members of the committee. Additionally, the Submitters' argued that the resolution was passed after the development application was made to the Council on 17 April 2014, and therefore alleged that the development application was invalid due to the lack of consent at the time the development application was made. The Court found that the allegations raised by the Submitters were a "technical" attack on the form of consent, rather than the substance of the consent. The Court held that the resolution reflected that the Body Corporate resolved to consent to the development application and rejected the Submitters' argument.

Court found that there was a properly made development application

Lastly, the Court considered whether or not the development application was properly made and correctly treated by the Council in its acknowledgement notice issued on 14 May 2014. The Submitters drew the Court's attention to two issues raised by one of the Submitters with the Council on 4 July 2014, being that the Landowner's consent in respect of the making of the development application had not been obtained and that there was a perceived impropriety surrounding the creation and transfer of Lot 100. The Council in response requested the Applicant to provide evidence of the Landowner's consent to the making of the development application. The Council was satisfied with the Applicant's evidence and issued a second acknowledgement notice on 25 February 2015.

The Court considered whether or not it was appropriate to issue a second acknowledgement notice. The Court found that the second acknowledgement notice represented a unilateral decision made by the Council to reconsider the development application against section 260 and 261 of the SPA. The Court held that the Council did not have power under the SPA to make such a decision or have the power to issue a fresh acknowledgement notice. The Court decided, however, that the first acknowledgment notice was not invalidated by the issuing of the second acknowledgement notice.

The Court additionally considered whether or not the Council was able to rely upon the Applicant's declaration under section 260(1)(e)(ii) of the SPA. The Court held that a declaration under section 260(1)(e)(ii) of the SPA was a valid means of granting the Landowner's consent. The Court emphasised that the rationale for requiring landowner's consent is to ensure a development application has utility. The Court held that section 260(1)(e)(ii) of the SPA contemplates that the giving of a declaration, rather than providing written evidence of consent, is consistent with the above rationale (at [49]). Subsequently, the Court held that the Council was entitled to rely upon the declaration in giving the acknowledgement notice and therefore the development application was properly made.

Conclusion

The Court found that the Applicant had obtained the Landowner's consent to the making of the development application and that the application was properly made. The Court rejected the Submitters' arguments and ordered that the appeal be listed for the purposes of making directions and orders about its future conduct.

Previous case requires the Planning and Environment Court to reconsider available power to excuse non-compliance with the Sustainable Planning Act

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brooks Earthmoving & Quarries Pty Ltd v The Lockyer Valley Regional Council* [2018] QPEC 51 heard before Long SC DCJ

February 2019

In brief

The case of *Brooks Earthmoving & Quarries Pty Ltd v The Lockyer Valley Regional Council* [2018] QPEC 51 concerned an originating application by Brooks Earthmoving & Quarries Pty Ltd (**Applicant**) to the Planning and Environment Court seeking declarations and orders in respect of a lapsed development permit for a material change of use and environmentally relevant activities for extractive industries (**Development Approval**). The land the subject of the Development Approval is located at 362 Seventeen Mile Road, Helidon (**Land**).

The issues for the Court to decide relevantly included the following:

- whether there was a provision of an Act which conferred on the Court the power to grant the relief sought; and
- whether the relief sought should be granted.

The Court held that it had the required power under the combined effect of section 11(4) and section 76(6) of the *Planning and Environment Court Act 2016* (**PECA**) and section 440 of the now repealed *Sustainable Planning Act 2009* (**SPA**). After considering the circumstances of the Applicant's failure to address the lapsed Development Approval, the Court held that it was appropriate to grant the relief sought, being the revival, change and extension of the Development Approval.

Development Approval lapsed due to the Applicant's misunderstanding

A related entity to the Applicant purchased the Land with the benefit of the Development Approval in December 2011 and the Applicant subsequently used the Land for extractive purposes only. Condition 4 of the Development Approval relevantly stated:

> *The life of this development permit is limited to 31 December 2015 to coincide with the expiry of ML 50094 and 50110. After such time the landowner may lodge a new application to undertake further extractive industries on the subject land;*

The relevant matrix of approvals included the Development Approval, mining leases and a local law permit. The Applicant decided not to renew the mining leases, but before their expiry enquired with the Lockyer Valley Regional Council about what steps were required to be taken to prevent the Development Approval from lapsing.

The Applicant misunderstood the advice that was provided and mistakenly believed that it could continue operating without relevantly renewing the Development Approval. Consequently, the Development Approval lapsed.

Orders requested from the Court

The Applicant sought relief from the Court under the *Planning Act 2016* (**Planning Act**) to the effect of the following:

- a declaration that the Development Approval had lapsed due to non-compliance with the requirements of the SPA;
- a declaration that the proposed changes to the Development Approval were minor changes;
- an order that the non-compliance be excused; and
- an order that the Development Approval be revived and relevantly amended to remove Condition 4.

The Court noted that the nature of the relief sought by the Applicant was discretionary, and as such the Court was required to consider and determine the relief sought by the Applicant and whether the Court had the power to grant the relief.

Court held that its power to grant relief under section 37 of the Planning Act for non-compliance in respect of the SPA was compromised by a recent Planning and Environment Court case

Section 37 of the PECA allows the Court to deal with non-compliance of a provision of the PECA or an "*enabling Act*". An "*enabling Act*" for the purposes of the PECA is an Act that confers jurisdiction on the Court.

With reference to the earlier case of *Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21, the Court accepted the argument that the "*SPA no longer (directly) conferred jurisdiction on this Court*" (at [51]), as the SPA is now repealed. Therefore, the SPA is not an "*enabling Act*" for the purposes of section 37 the PECA.

Thus, the Court held that section 37 was not available to the Applicant as a source of power that would have allowed the Court to grant the relief sought by the Applicant in respect of its non-compliance with the SPA.

Court held that a combination of sections provided the necessary power to grant the relief sought

The Applicant sought to rely solely upon section 11(4) of the PECA for the power to grant the relief sought, which relevantly states that the Court may make an order about any declaration it makes. However, the Court held that section 11 alone did not provide the relevant power to grant the relief and went on to consider other sections that could provide the relevant excusatory power.

Analogous to section 37 of the PECA, the now repealed section 440 of the SPA allowed the Court to deal with non-compliance with the SPA. The Court held that "[t]*he effect of section 76(6) of the PECA is to preserve the relevant operation of section 440 of the SPA*" (at [28]), for the purpose of dealing with non-compliance with the SPA under the Planning Act.

Therefore, the Court held that it was empowered to deal with the Applicant's non-compliance with the SPA, being the failure to apply for a permissible change to the Development Approval, "in the way the court considers appropriate" (at [29]), because of the combined effect of sections 11(4) and 76(6) of the PECA and section 440 of the SPA.

Court used its discretion to consider whether to grant the relief sought by the Applicant

Being so empowered, the Court turned its attention to whether it should grant the requested relief.

The Court determined the following:

- the proposed change to the Development Approval would not change any referral agency conditions;
- consent from the relevant landowner had been obtained; and
- by implication, the relevant department did not object to the requested relief.

Furthermore, the Court was satisfied that the proposed change, relevantly including the deletion of Condition 4, was a minor change and did not result in a substantially different development. In such circumstances, and given the nature of the oversight by the Applicant, the Court held that it was appropriate to grant the relief sought.

Conclusion

The Court made declarations under section 11(1) of the PECA and orders pursuant to section 11(4) and section 76(6) of the PECA and section 440 of the SPA to the effect that the Development Approval was revived and amended in the way sought.

Queensland Court of Appeal clarifies code assessment under the Planning Act

Christopher Vale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Brisbane City Council v Klinkert* [2019] QCA 40 heard before Gotterson and Philippides JJA and Boddice J

March 2019

In brief

The case of *Brisbane City Council v Klinkert* [2019] QCA 40 concerned an appeal to the Queensland Court of Appeal against a decision of the Planning and Environment Court to allow an appeal against a decision of the Brisbane City Council (**Council**) to refuse a development application for approval of building work, namely the demolition of a house on land at Archer Street, Toowong.

The issue was the interpretation of provisions under the *Planning Act 2016* (**Planning Act**) relating to a development application requiring code assessment. The Court of Appeal held that where a development application requiring code assessment is compliant with the relevant assessment benchmarks, an assessment manager must decide to approve a development application in accordance with the Planning Act.

Background

The Respondent was the owner of the land, which had been improved with a dwelling house constructed prior to 1947. The house was described in the proceedings as a "*high quality piece of architecture*" in the English Tudor revival style forming "*part of a cohesive group of five contiguous inter-War houses*" situated at the south-eastern end of the street.

In June 2017, the Respondent made to the Council a development application requiring code assessment for a development approval for building works to authorise the demolition of the house. The land was within the Traditional Building Character (Demolition) overlay (**Demolition code**) and required code assessment under the *Brisbane City Plan 2014* (**City Plan**).

The Council resolved in September 2015 to amend the City Plan, including the Demolition code and the relevant Planning scheme policy. Public notification of the amendments occurred between 17 October 2016 and 25 November 2016. The amendments came into effect on 1 December 2017 (see [12]), being after the respondent lodged the development application on 30 June 2017 and the Council refused the development application on 15 August 2017. The Respondent commenced an appeal to the Planning and Environment Court against the decision of the Council (see *Klinkert v Brisbane City Council* [2018] QPEC 030 [1]-[3]).

The Planning and Environment Court relevantly held as follows:

- the proposed development had complied with the assessment benchmarks that were in force at the date the development application was properly made; and
- section 60(2)(a) of the Planning Act was engaged and required that the assessment manager, after carrying out the assessment, decide to approve the application to the extent the development complies with all of the assessment benchmarks.

The Council sought leave to appeal against the decision of the Planning and Environment Court.

Competing interpretations of the code assessment provisions

The Council argued that section 60(2)(a) of the Planning Act supported the conclusion that the assessment benchmarks should include consideration of both the assessment benchmarks under the Demolition code (prior to amendment) and, where the assessment manager considers it appropriate to give weight to the amended Demolition code, the assessment benchmarks under the amended Demolition code.

The Council also argued that the Planning and Environment Court had made an error in law in finding that "*the weight to be given to the amended code was irrelevant to the decision maker's enquiry*" in determining whether section 60(2)(a) of the Planning Act had been engaged or not (see [23]).

Conversely, the Respondent contended that on the basis of its plain and ordinary meaning, section 60(2)(a) of the Planning Act was "*expressed in mandatory terms and determinative weight must be given to its language*" (see [25]).

The appeal turned on a perceived tension in the operation of the Planning Act, in particular sections 43, 45 and 60. Under the Planning Act, a categorising instrument is a regulation or a local categorising instrument which sets out the assessment benchmarks that an assessment manager must assess assessable development against (see section 43(1)(c)). The relevant local categorising instrument was the City Plan and under section 43(5)(c) of the Planning Act, a local planning instrument may not, in its effect, be inconsistent with the effect of a specified assessment benchmark in the *Planning Regulation 2017*.

The Court of Appeal determined that, when carrying out code assessment under section 45 of the Planning Act, the assessment manager "***must*** *be carried out only against the assessment benchmarks in a categorising instrument for the development and having regard to any matter prescribed by regulation [in that sub-section]*". Section 45(7) of the Planning Act makes qualifications to situations in which an assessment manager **may** "*give weight*" to a document which is to be amended or replaced. However, the Court determined that section 45(7) "*is not a vehicle for displacement or modification by the assessment manager of the statutory instrument or other document as in effect when the application was properly made*" (at [6]).

The Court of Appeal held that section 60 of the Planning Act provided that, where a development application is properly made, the assessment manager "***must*** *decide*" to approve the development application where the development application is compliant with the relevant assessment benchmarks; and "***may*** *decide*" to approve the development application even where there is non-compliance with those benchmarks. Relevantly, the obligation to do so only arises on the assessment manager "***after*** *carrying out the assessment*".

Order

The Court of Appeal granted leave to appeal, however, held that the Planning and Environment Court had correctly concluded as to the operation of section 60(2)(a) of the Planning Act, and therefore dismissed the appeal. The Court of Appeal ordered that the Council pay the Respondent's costs of the application for leave and the appeal on the standard basis.

Claim for damages for trespass and nuisance in relation to a sewer main rejected by the Supreme Court

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Woolnough & Anor v Isaac Regional Council* [2019] QSC 17 heard before Henry J

March 2019

In brief

The case of *Woolnough & Anor v Isaac Regional Council* [2019] QSC 17 concerned a claim in trespass and nuisance to the Supreme Court of Queensland by the registered owners of the land at Nebo (**Landowners**) against the Isaac Regional Council (**Council**). The Landowners sought damages in relation to the cost of decontaminating and removing soil from the land, loss of rental income from the dwelling on the land and the cost of rectifying the alleged subsidence to the Landowner's shed slab, house slab and rear fence.

The Court held that the Landowners' allegations against the Council were not supported by persuasive evidence and the Court dismissed the Landowners' claim on all grounds.

Issues in dispute

The Court identified three issues for determination and found that the issues were matters of fact rather than complex legal principles. The issues were as follows:

- whether the Council had trespassed onto the Landowners' land to install a sewer main;
- whether the installation of the sewer main caused subsidence in relation to the Landowners' shed slab, house slab or rear fence;
- whether the sewer main caused sewage leakage onto the land which constituted an unreasonable interference with the Landowners' use and enjoyment of the land.

Background

The Landowners became the registered owners of the land on 28 November 2006. Relevantly, at this time, the land was within the local government area of the Nebo Shire Council, which in 2008 formed part of the Isaac Regional Council.

As a consequence of the amalgamation, the Council inherited the responsibility for providing sewerage services in Nebo, which included the installation of underground sewer mains throughout the township. The Council was required to install a sewer main which traversed the rear of the Landowners' land.

In the Landowners' pleading, the Landowners alleged that the sewer main was installed on their land without their consent or knowledge on or about July 2007. The Landowners further alleged that as the sewer main was installed without their consent, its continuing presence constituted a continuing trespass. Additionally, the Landowners alleged that in 2010, untreated sewage began to surface and escape from the sewer main onto the land and that it had, from time to time, continued to leak untreated sewage. The Council refuted this allegation.

The Landowners consequently commenced proceedings against the Council in the Supreme Court for loss and damage for the cost of decontaminating and removing the soil from the land, the loss of rental income and the cost of rectifying the alleged subsidence to the Landowners' shed slab, house slab and fence.

Trespass

The Landowners alleged that the installation of the sewer main was completed without their consent and knowledge and that the installation constituted a trespass. The Landowners further alleged that as the installation of the sewer main was unlawful, its continuing presence on the land was therefore a continuing trespass. The Court noted that the Landowners did not advance an alternative case of continuing trespass on the basis that even if the previous registered owners had consented to the installation, the Landowners had not consented to its presence once they had become the registered owners.

The Council alleged that the sewer main had been installed through the property in 2005 and that they had obtained the Landowners' consent from the previous registered owners. The Council argued that as they had obtained consent from the previous registered owners in 2005, the sewer main was lawfully installed under section 1070(2)(b) of the *Local Government Act 1993*.

The Council called the previous registered owner as a witness who gave evidence that a sewer main was installed along the back fence of her land at a time before she had sold the land to the Landowners. The Council also sought to rely upon documentary evidence regarding the installation of the sewer main to support its argument that the installation occurred in 2005. In the cross-examination, the Landowners sought to discredit the previous registered owner.

Ultimately, the Court was satisfied on the evidence that the installation of the sewer main occurred in 2005 and therefore found against the Landowners' claim for trespass and continuing trespass.

Subsidence

The Landowners also alleged that the sewer main was poorly installed, the trench was too narrow, the backfill compaction was inadequate and the filled trench subsided. The Landowners alleged that the poor installation had caused subsidence to the shed slab, house slab and rear fence.

The Landowners also submitted that the sewer main had caused a "*sinkhole*" which eroded the bedding sand surrounding the pipe, which resulted in the pipe sagging and breaching. The Landowners exhibited photographs of the land showing cracks and one of the Landowners testified that he noticed that "*the ground was sinking along the rear fence*".

The Court accepted that there was some modest lowering of the height of the land's rear fence line but ultimately held that there was no credible evidence of trench settlement or side subsidence that had occurred to such an extreme extent that it caused the earth and structures to have subsided. The Council's forensic engineer estimated that the cost to rectify the minor deviation of the rear fence line would be roughly $800. The Court found that as the damage to the rear fence was estimated to have occurred within two to three years of the installation of the sewer main, it was beyond the relevant period of limitation.

The Court also accepted the evidence of the Council's forensic and geotechnical engineers that the installation of the sewer main had no effect on the house slab as it was "*too far away to be within the zone of influence*" and that it did not cause any material degree of subsidence to the shed slab.

The Court therefore held that the Landowners had failed to prove any compensable loss or damage resulting from subsidence and that the Landowners' claim for subsidence had failed.

Nuisance

The Landowners also alleged that, from time to time, sewage had leaked up from the installed pipe. The Landowners alleged that the leakage consequently contaminated the soil on the land, was harmful to human health and emitted an offensive odour, and that it constituted an unreasonable interference to their enjoyment of the land.

The Landowners relied on lay descriptions of what had been seen and smelt at the land. The Court was critical of the Landowners' decision to not obtain expert evidence to prove that the installation caused sewage to repeatedly leak from the pipe up onto land. The Court held that the probative value of the lay witnesses' evidence was limited by sensory subjectivity as they were not sewer experts and could not, without a doubt, correctly identify sewage. The Court also found that due to the fact that the witnesses were aware of the Landowners' complaints of the alleged leaking sewage, the evidence was therefore also limited by subjective influence.

The Council relied on the evidence submitted by their sewer and stormwater expert. The Council's sewer and stormwater expert had conducted a number of inspections of the sewer main in 2013 and 2015 and had found no fault with the integrity of the pipeline that would allow any sewage to escape. The sewer and stormwater expert also noted that the smell of sewage had not been detected at the ground surface during the inspection of the land.

The Court accepted the Council's sewer and stormwater expert's evidence and found that there was not an apparent breach in the integrity of the sewer main under the land, which would cause sewage to leak onto the ground. The Court additionally considered the evidence of the Council's geotechnical engineer being that there was no evidence of sewage leakage in the samples of soil taken from the land.

The Court concluded that the Landowners had not proved, on the balance of probabilities, that the sewer main caused repeated sewage leakage on the land. The Court therefore found against the Landowners' claim for nuisance.

Conclusion

The Court held that each of the Landowners' claims ought to be dismissed on the basis that there was insufficient evidence. The Court ordered that the Landowners pay the Council's costs on a standard basis. However, the Court allowed the parties the opportunity to file submissions if they desired to contend for a different costs order.

Measuring an acceptable dwelling height is not "purely numerical or quantitative"

Claire Pekol-Smith | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Planning Place Pty Ltd v Brisbane City Council* [2018] QPEC 62 heard before Kefford DCJ

March 2019

In brief

The case of *The Planning Place Pty Ltd v Brisbane City Council* [2018] QPEC 62 concerned an appeal by The Planning Place Pty Ltd (**Applicant**) to the Planning and Environment Court against the decision of the Brisbane City Council (**Council**) to refuse a development application to facilitate the redevelopment of a corner block into two dwelling houses. The subject site was 883m^2 on undulating terrain with a frontage of 19 metres to Rupert Street and 39 metres to Flower Street at Windsor. As part of the development application, the Applicant sought a development permit for the reconfiguration of a lot to create two lots, having an area of 357m^2 (**Proposed Lot 1**) and of 508m^2 (**Proposed Lot 2**). The development application also sought a development permit for a material change of use and building works to facilitate the building of a small lot dwelling house on Proposed Lot 1 and the building of a dwelling house on Proposed Lot 2, each being three storeys above a basement carpark partially excavated into the slope.

The *Planning Act 2016* (**PA**) applied to the appeal because it was filed after its commencement. The development application was made under version 7.0/2016 of the *Brisbane City Plan 2014* (**Planning Scheme**). However, the Council sought to rely on amendments introduced in version 8.0/2016 of the Planning Scheme.

The Applicant and the Council agreed that the development application for the development permit for reconfiguration of a lot was consistent with the Planning Scheme. Therefore, the issues in dispute in the appeal concerned the development application for a development permit for the material change of use and building works.

The Court considered the following issues in the appeal:

- whether the proposed dwelling houses complied with the relevant acceptable outcomes;
- whether there was a prevailing height among the dwelling houses in the area;
- whether the Proposed Lot 1 dwelling house complied with the Dwelling House (Small Lot) Code (**Small Lot Code**);
- whether the Proposed Lot 2 dwelling house complied with the Dwelling House Code (**Dwelling Code**);
- whether the proposed dwelling houses complied with the Low-medium Density Residential Zone Code (**Residential Zone Code**);
- whether the proposed dwelling houses complied with the Lutwyche Road Corridor Neighbourhood Plan Code (**Lutwyche Road NP Code**);
- whether the Court should exercise its discretion to consider the amendments to the Planning Scheme or to approve the development application if the proposed dwelling houses did not comply with the relevant assessment benchmarks.

The Court held that the development application complied with all relevant assessment benchmarks, and allowed the appeal.

Court held the proposed dwelling houses complied with the relevant acceptable outcomes

There was no dispute that the Proposed Lot 1 dwelling house was in conflict with AO2.1 and AO2.2 of the Small Lot Code because it exceeded the maximum height of 7.5 metres and the maximum height of two storeys.

In respect of the Proposed Lot 2 dwelling house there was conflict with AO2 of the Dwelling Code as it exceeded the maximum height of two storeys.

However, the Court held that the failure to comply with the acceptable outcomes was not determinative and that compliance could be achieved if the purpose, overall outcomes and performance outcomes of the relevant code were satisfied.

Court held that there was a prevailing height in storeys in the area but not a prevailing height in metres

The relevant benchmarks included the following:

> PO2(a) Small Lot Code
>
> Development is of a build and scale that:
>
> a) is consistent with and complements the built form and front boundary setbacks prevailing in the street and local area
>
> PO2(a) House Code
>
> Development has a building height that:
>
> a) is consistent with the building height of dwelling houses prevailing in the immediate vicinity

Both PO2(a) of the Small Lot Code and PO2(b) of the House Code required the Court to determine the prevailing height of the dwelling houses in the area. The Court held that there was a prevailing building height of two storeys but that there was no prevailing building height in metres.

Court held that the Proposed Lot 1 dwelling house was consistent with the Small Lot Code

The Council argued that the Proposed Lot 1 dwelling house conflicted with PO2(a) of the Small Lot Code because the proposed dwelling house's height was not consistent with the prevailing bulk and scale of the built form in the street and local area. The Court agreed and held that the Proposed Lot 1 dwelling house exceeded the prevailing height of two storeys.

The Court applied the principles from *Lake Maroons Pty Ltd v Gladstone Regional Council* [2017] QPEC 25 and concluded that PO2(a) of the Small Lot Code would be satisfied if the built form of the Proposed Lot 1 dwelling house was "*consistent with*" the prevailing bulk and scale of the built forms in the street and local area, meaning "*compatible with, in the sense of being capable of existing in harmony with*".

The Court concluded that although the dwelling houses in the local area were generally one to two storeys, those on the high side of the street were elevated above the street on retaining walls. The Court therefore held that the relative height of other dwelling houses was an important contextual factor to be considered. The Court accepted that although the Proposed Lot 1 dwelling house was approximately 9.5 metres, the recessed third storey meant the proposed dwelling house would appear to be of a similar bulk and scale to the built forms of the opposite properties. The Court also concluded that the Proposed Lot 1 dwelling house would sit at a lower profile to the adjoining heritage property and that the Proposed Lot 1 dwelling house would appear as two storeys to Rupert Street and the adjoining property.

The Court also held that the proposed design details would ameliorate the Proposed Lot 1 dwelling house with the prevailing bulk and scale of the built forms in the street and local area. The full height glazed walls extending across the full width of the proposed dwelling house, which were set back behind a terrace with glazed balustrades, mitigated the proposed dwelling house visual solidity on the Rupert Street façade, and the recessed garage door beneath the pool terrace and the terrace landscaping mitigated the basement's visual impacts.

The Council argued that the Proposed Lot 1 dwelling house was not "*consistent with*" the prevailing bulk and scale of the built form in the street and the local area because there was no other site that had two dwelling houses on top of a continuous platform or had a dwelling house with four tiers. The Court rejected this argument and held that PO2(a) of the Small Lot Code required dwelling houses to be "*consistent with*", not "*the same as*" the prevailing bulk and scale of the built forms in the street and local area.

The Court therefore held that the Proposed Lot 1 dwelling house complied with PO2(a) of the Small Lot Code.

Court held that the Proposed Lot 2 dwelling house was consistent with the Dwelling Code

The Council argued that the Proposed Lot 2 dwelling house was in conflict with PO2(a) of the Dwelling Code, as the proposed dwelling house's height was not consistent with the prevailing height in metres and the prevailing height in storeys in the immediate vicinity. The Council relied on AO2 of the Dwelling Code, which relevantly states that a building height is to be no more than 9.5 metres and no more than two storeys.

The Court did not accept that the Dwelling Code required the proposed dwelling house to meet both limbs of the definition under AO2 of the Dwelling Code. Moreover, the Court found that the Council's argument ignored that PO2(a) of the Dwelling Code only required "*consistency with*" the prevailing building height of the dwelling houses in the immediate vicinity. This determination involves a certain elasticity and is not purely numerical or quantitative.

The height of the Proposed Lot 2 dwelling house was three storeys and approximately 9.5 metres. The Court held that this exceeded the prevailing two-storey height in the immediate vicinity.

However, the Court ultimately held that the height of the Proposed Lot 2 dwelling house was still consistent with the prevailing height of dwelling houses in the immediate vicinity. This was because the relative height of the proposed and adjoining dwelling houses were comparable; that despite the prevailing height being two storeys the dwelling houses on the high side of the street were elevated on platforms which added apparent height; that the same design features discussed previously contributed to consistency with the prevailing height of dwelling houses in the immediate vicinity; and that integration of the building into the hilltop and topography reflected the slope of the terrain.

The Court therefore held that the Proposed Lot 2 dwelling house complied with PO2(a) of the Dwelling Code.

Court held that the proposed dwelling houses were consistent with the Residential Zone Code

Overall Outcomes 5(a) and 5(b)(ii) Residential Zone Code relevantly required that a dwelling house be of a height tailored to the specific location and be of a height that responds to the characteristics of the subject site. The Council argued four reasons why the proposed dwelling houses conflicted with the assessment benchmarks.

Firstly, that the proposed dwelling houses did not respond to the sloping topography apart from at the southern end of the proposed dwelling houses. Secondly, that the proposed dwelling houses made no attempt to reduce their bulk or height. Thirdly, that the proposed dwelling houses exceeded the prevailing height of dwelling houses because they appeared to be three to four storeys to Rupert Street and three storeys to Flower Street. Fourthly, that the proposed dwelling houses would appear as one building when standing directly in front of Rupert Street.

The Court rejected the arguments on all grounds.

The Court also considered the Council's arguments against Overall Outcomes 7(a) and 7(b) of the Residential Zone Code despite the Council not alleging non-compliance with these provisions. The Court held that the proposed dwelling houses were consistent with Overall Outcome 7(a) of the Residential Zone Code as the provision encouraged two to three storey low-medium rise dual occupancies or multiple dwellings, which may appear as a single building. The Court held that the proposed dwelling houses were also consistent with Overall Outcome 7(b) of the Residential Zone Code as the site was located a short distance from a public transport node.

The Court therefore held that the proposed dwelling houses complied with Overall Outcomes 5(a), 5(b)(ii), 7(a) and 7(b) of the Residential Zone Code.

Court held that the proposed dwelling houses were consistent with the Lutwyche Road NP Code

The Council argued that the proposed dwelling houses did not comply with Overall Outcome 3(j) of the Lutwyche Road NP Code because the proposed dwelling houses were not of a height consistent with the amenity, character and community expectations intended for the site and that the site should only be developed at a greater height when there was both a community and economic need. However, the subject site was not within a relevant precinct or sub-precinct of the Lutwyche Road NP Code. Despite this, the Court held that the generally relevant overall outcomes provided no guidance on the intended amenity, character or community expectations at the site.

Performance Outcome PO1 of the Lutwyche Road NP Code was the only generally relevant performance outcome. However, the Court held there was no conflict with this provision.

The Court therefore held that the amenity, character and community expectations for the site could be determined by other provisions in the Planning Scheme. Specifically, the Court concluded that if the proposed dwelling houses complied with relevant provisions of the Small Lot Code, the Dwelling House Code and the Residential Zone Code, then the height of the proposed dwelling houses could be regarded as consistent with the amenity, character and community expectations intended for the site.

The Court therefore held that the proposed dwelling houses complied with the relevant assessment benchmarks and that the development application ought be approved under section 60(2)(a) of the PA.

Court held it was unnecessary to make a determination upon any discretionary considerations

The Court did not consider whether the development application complied with the amended assessment benchmarks under the Planning Scheme because the Court held that the proposed dwelling houses complied with the Planning Scheme when the development application was made.

The Court did not consider whether the development application ought to be approved on discretionary grounds under section 60(2)(b) of the PA, because the Court held that the development application complied with the Planning Scheme and ought be approved under section 60(2)(a) of the PA.

Conclusion

The Court allowed the appeal and directed the Council to deliver a draft suite of conditions to the Applicant.

Colin Biggers & Paisley

Planning and Environment Court has refused a proposed development for an office for the reason that it was in severe conflict with the Planning Scheme and there was no "relevant matters" to justify the approval of the proposed development

Cara Hooper | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hotel Property Investments Ltd v Council of the City of Gold Coast* [2019] QPEC 5 heard before Everson DCJ

March 2019

In brief

The case of *Hotel Property Investments Ltd v Council of the City of Gold Coast* [2019] QPEC 5 concerned an appeal to the Planning and Environment Court against the decision of the Gold Coast City Council (**Council**) to refuse an impact assessable development application to change a development the subject of a development approval from showrooms and cafe to a single ground floor office.

The proposed development involved changes to the approved built form in regards to its internal layout, minor changes to the external facade and a reconfiguration of the car park to increase the car parking spaces from 32 to 37 spaces.

The site of the development application was within the Mixed use zone - Fringe business precinct code (**Mixed Use Zone Code**) of the *Gold Coast City Plan* (**Planning Scheme**) and was impact assessable as the proposed development exceeded the gross floor area of 200m^2.

The Applicant alleged that although the development application was inconsistent with the Mixed Use Zone Code, the inconsistencies were minor in nature and there were a number of "*other relevant matters*" which justified the proposed development, including planning need, the efficient use of land, the absence of adverse impacts, and the absence of adverse submissions. The Council alleged that the proposed development ought to be refused for the reasons that it was fundamentally inconsistent with the Council's centres strategy in the Planning Scheme.

In order to determine the appeal, the Court considered the following:

- Was the proposed development inconsistent with the Council's Planning Scheme?
- Did the "*other relevant matters*" submitted by the Applicant justify the proposed development?

The Court ultimately dismissed the appeal for the reasons that the proposed development significantly conflicted with the Planning Scheme and the "*other relevant matters*" submitted by the Applicant to justify the proposed development were not persuasive.

Court considered "other relevant matters" as the proposed development was impact assessable

The Court noted that as the proposed development was impact assessable, the Court, to the extent of the disputed issues, must assess the development application against the planning scheme in effect at the time the development application was properly made.

Further, as the development application was a change application, the assessment must be carried out only to the extent the matters are relevant to assessing and deciding the change application. Section 45(5)(b) of the *Planning Act 2016* (**PA**) relevantly provides:

> *(5) An impact assessment is an assessment that –*
>
> *…*
>
> *(b) may be carried out against, or having regard to, any other relevant matter, other than the person's personal circumstances, financial or otherwise.*

The Court can therefore take into consideration any "*other relevant matters*" in order to approve or refuse an impact assessable development application.

Was the proposed development inconsistent with the Council's Planning Scheme?

The Court considered the following relevant provisions under the Council's Planning Scheme:

- **Theme 3.4 "making modern centres" of the strategic framework:** The Court noted that the strategic outcomes of this theme addressed strengthening and diversifying the economy where centres are to be located in central locations for mixed use economic activity and community facilities which are integrated within residential populations; out-of-centre development is to be prevented; and compact, pedestrian orientated and vibrant mixed use centres, which have major concentrations of business, employment, community, cultural, retail and residential uses, are promoted.
- **Section 3.5.2(6) of the Planning Scheme:** The Court noted that under this section, showrooms are expressly contemplated under the specific outcomes for the fringe business precinct, whereas large offices are not encouraged.
- **Mixed Use Zone Code of the Planning Scheme:** The Court noted that under section 6.2.19.2(3) of the Mixed Use Zone Code, land uses are to consist of mainly high quality showrooms, bulking goods retailing, service and low-impact industry uses and outdoor sales yards. The Mixed Use Zone Code further stated that shops and offices are for very small tenancies which service only the immediate area and do not exceed a gross floor area of $200m^2$ under Acceptable Outcome 14 of the Mixed Use Zone Code.

The Court accepted the evidence by the Council's expert economist which stated that the proposed development may have the potential to impact on the orderly development of higher order centres. The Court also accepted the evidence by the Council's expert town planner which stated that the proposed development was not accessible to public transport, which is not desirable for a large office-based commuter work force.

The Court held that the overall planning strategy for the Mixed Use Zone Code is to limit the size of offices as large offices are intended to be located in centres where they can be appropriately co-located with other complementary uses and public transport. Therefore, the Court held that the proposed development was an out of centre development, which was inconsistent with the centres strategy and the Mixed Use Zone Code.

Did the "other relevant matters" submitted by the Applicant justify the proposed development?

The Applicant relied upon four "*other relevant matters*" in order to justify the proposed development; being planning need, the efficient use of land, the absence of adverse impacts, and the absence of adverse submissions.

The first relevant matter relied upon by the Appellant concerned planning need. The concept of planning need was discussed in *Isgro v Gold Coast City Council & Anor* [2003] QPELR 414; [2003] QPEC 2 at [21] where the Court relevantly stated:

> *Need, in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community…Of course, a need cannot be a contrived one. It has been said that the basic assumption is that there is a latent unsatisfied demand which is either not being met at all or not being adequately met… .*

The Applicant argued that there was a need for the proposed development as large, ground level office spaces with parking were not being adequately met in the centres designated in the Planning Scheme. The Applicant supported this argument with the evidence provided by a representative of a property and financial services group that made a commitment to lease the proposed development. The Court was not satisfied with the evidence provided by the representative for the following reasons:

- the representative conceded that the configuration of the proposed development was just a preference and other office buildings which were not entirely on the ground level would be adequate; and
- the representative stated that similar office buildings in one of the centres designated under the Planning Scheme would also meet the preferences of the group.

In addition to this evidence, the joint report of the economic experts concluded that it was "*inherently difficult to determine the level of demand*" for the proposed development. The economic expert for the Council also noted that there were a number of sites located within centres designated in the Planning Scheme which could accommodate the proposed development. Therefore, the Court held that the Applicant had failed to demonstrate that there was a latent unsatisfied demand for the proposed development.

The second relevant matter relied upon by the Applicant was the efficient use of land. The Applicant argued that there was no demand for showrooms, but a demand for an office. This submission was supported by evidence provided by the National Property Manager of the Applicant who stated that there was no demand for a showroom as they were unsuccessful in obtaining a retailer to lease the site. The Court found that the evidence provided by the National Property Manager was vague and did not establish that there was no demand for showrooms on the site.

The third relevant matter relied upon by the Applicant was that the proposed development would not cause adverse impacts to amenity or the economy. It was accepted by the Court that although this argument is a relevant matter which may be considered in the assessment of the proposed development, by allowing the development application it would cause a significant compromise to the centres strategy under the Planning Scheme, which is still in its infancy.

The final relevant matter relied upon by the Applicant was that no submissions were lodged in respect of the proposed development. The Court, however, gave little weight to this argument due to the severe conflict with the centres strategy of the Planning Scheme.

The Court therefore found that the relevant matters relied upon by the Applicant did not justify the development application.

Conclusion

The Court held that the proposed development was in significant conflict with the centres strategy of the Planning Scheme for the reason that large offices, such as the proposed development, ought to be located in the centres which are designated for that purpose and are close to public transport and other complementary uses.

The Court was also not persuaded by the "*other relevant matters*" submitted by the Applicant and noted that matters such as an absence of adverse impacts or adverse submissions are not sufficiently persuasive to justify a significant departure from the Planning Scheme.

The Court therefore dismissed the appeal.

Commercial groundwater extraction use refused as a result of conflicts with the planning scheme and an absence of sufficient grounds to justify approval despite the conflicts

Claire Pekol-Smith | Nadia Czachor | Ian Wright

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* [2018] QPEC 47 heard before Morzone QC DCJ

March 2019

In brief

The case of *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2018] QPEC 47 concerned an appeal by Gillion Pty Ltd (**Applicant**) to the Planning and Environment Court against the decision of the Scenic Rim Regional Council (**Council**) to refuse a development application for a material change of use for commercial groundwater extraction (**CGE**) in respect of premises on Tamborine Mountain. The relevant development application had been made to regularise an unlawful use. The appeal was opposed by the Council and 109 submitters (**Submitters**) who joined the appeal as Co-respondents by election.

The *Sustainable Planning Act 2009* (**SPA**) applied to the development application and the appeal because the SPA was in force when the development application was lodged and when the appeal was commenced. The relevant planning scheme was the *2007 Beaudesert Shire Planning Scheme* (**Planning Scheme**).

The ultimate questions to be considered by the Court were whether the proposed development conflicted with the Planning Scheme, and whether there were "*sufficient grounds*" to justify the approval of the proposed development despite a potential conflict with the Planning Scheme under section 326(1)(b) of the SPA.

The Court stated that the approach required by section 326(1)(b) of the SPA involved the following steps:

- Step 1 – what is the nature and extent that the proposed development conflicted with the Planning Scheme?
- Step 2 – is there a tension between the application of the Planning Scheme and the public interest?
- Step 3 – if there is a tension between the Planning Scheme and the public interest, are there any "grounds" that justify approval of the development application?
- Step 4 – are the "*grounds*" sufficient to justify the approval of the development application despite a conflict with the Planning Scheme?

The Court found that the development application was in conflict with the Planning Scheme and that there were not "*sufficient grounds*" to justify the approval of the development application despite the conflict with the Planning Scheme.

Step 1 – Court held that the development application was in conflict with the Planning Scheme

The Applicant accepted that the proposed development was not a consistent use in the Village Residential Precinct in the Tamborine Mountain Zone under the Planning Scheme.

Step 2 – Court held that there was no tension between the Planning Scheme and the public interest

The Court applied the Court of Appeal decision in *Bell v Brisbane City Council & Ors* [2018] QCA 84 (**Bell decision**). The Bell decision states that a development application which conflicts with a Planning Scheme may only be approved in exceptional circumstances where there is tension between the application of a Planning Scheme and the public interest. If there is a tension, section 326(1)(b) of the SPA is engaged, and the decision maker may approve the development application if there are "*sufficient grounds*" in the public interest to rebut the presumption that the Planning Scheme embodies the public interest.

Firstly, the Applicant argued that the Planning Scheme did not anticipate or properly deal with the need for the supply of commercial potable water on Tamborine Mountain, in circumstances where there were issues regarding water supply on Tamborine Mountain, including that there was inherent uncertainty and variability of the groundwater supply, that existing private tanks and bores failed from time to time, and that water importation was required. However, the Court found that there was sufficient evidence of reliable commercial potable water supply on Tamborine Mountain.

Secondly, the Applicant argued that in circumstances where the Planning Scheme made CGE an "*inconsistent use*", in circumstances where the Tamborine Mountain community had water supply needs that were not properly dealt with by the Planning Scheme.

The Court held that when reading the Planning Scheme as a whole, it was clear that the Council had made a deliberate policy choice that CGE be considered an "*inconsistent use*", given in the Tambourine Mountain Zone that the Planning Scheme had contemplated CGE by including a definition of CGE and a CGE Code and that CGE was not included in the Consistent Table of Uses of the Tamborine Mountain Zone or any other Zone.

The Court further held that the Planning Scheme had struck a balance between the application of the Planning Scheme and the public interest for reliable water supply, given that the Planning Scheme had acknowledged the lack of reticulated water or a sewerage system, by regularising developments in the precinct to provide on-site water and sewerage, by encouraging the use of underground water for agricultural purposes, and by not envisaging growth which would place a strain on future water supply.

Therefore, the Court held that there were not exceptional circumstances of tension between the application of the Planning Scheme and the public interest and, as a result, section 326(1)(b) of the SPA was not engaged.

Step 3 – Court held that there were no "grounds" to justify the approval of the development application despite the conflict with the Planning Scheme

In case the Court's approach at Step 2 was incorrect, the Court further considered whether there were any "*grounds*" to justify the approval of the development application despite the conflict with the Planning Scheme. Schedule 3 of the SPA defines "*grounds*" as matters of public interest that do not include the personal circumstances of an applicant, owner or interested party.

Ground 1 – Economic need to provide good quality water to the growing bottled water industry

The Court held that economic need requires the existence of an economic demand that the proposed development would address. The Court found that the groundwater extracted from Tamborine Mountain was of no different quality or taste and was therefore a homogenous product capable of substitution. The Court therefore found that given the size of the national market for bottled water, the proposed development would not improve the water supplied to businesses or residents locally, regionally or nationally. The Court therefore held that there was no economic need for the proposed development.

Ground 2 – Community and planning need to provide bulk water to Tamborine Mountain

The Court held that community need in the context of this case referred to the enhancement of community wellbeing. The Court found that community wellbeing would not be improved by increased water supply. This was because the proposed development would supply a fraction of the competitive market and thus would have a negligible impact on the price of potable water. The Court also held that increased water supply would not improve physical wellbeing in the community because the water supply issues during periods of high demand were a result of too few carriers and not as a result of the unavailability of water.

The Court held that planning need exists where there is a latent unsatisfied demand that is not being met or not adequately met. The Court held that there was sufficient water supply to meet the demand and that there was no planning need for the proposed development for the following reasons:

- other commercial groundwater extraction plants are located on Tamborine Mountain;
- a sustainable and reliable source of good potable water is currently available on Tamborine Mountain;
- other sites contained sustainable water resources for water extraction on Tamborine Mountain;
- there is insufficient evidence that the water extracted from the proposed premises is of better quality or taste to the water extracted from other premises; and
- two current Tamborine Mountain water extractors have excess capacity to supply the bottling market and the local market.

Ground 3 – The proposed development would supply a reliable and convenient water source for firefighting purposes where the community does not have a reticulated water supply

The Court held that the Applicant had made water available for firefighting and training, and that the Applicant intended to continue to provide water for these purposes. However, the Court held that the fire and emergency services did not require the proposed development to fight fires because there is an existing statutory and policy framework to allocate water resources for firefighting purposes, and because Tamborine Mountain has an existing water source for firefighting purposes. The Court therefore held that this was not a "*ground*" to justify the approval of the development application despite conflicts with the Planning Scheme.

Ground 4 – The proposed development would make available reliable and conveniently located water for charitable purposes during natural hazards and emergencies

The Court held that the Applicant donated water to charities during natural disasters and chronic water shortages, and that the Applicant intended to continue to provide water for this purpose. However, the Court held that although the donations were in the public interest, the benefit was not a "*sufficient ground*" to justify the approval of the development application despite the conflicts with the Planning Scheme.

Step 4 – The Court held that the "grounds" identified by the Applicant were not sufficient to justify the approval of the development application despite the conflicts with the Planning Scheme

The Court held that the "*grounds*" identified by the Applicant were not "*sufficient grounds*" to justify the approval despite the conflict with the Planning Scheme. The Court also concluded that, while relevant, the absence of the usual hallmarks of inconsistent development, including impacts on amenity, traffic, economic impact or otherwise, was not determinative in this case.

Conclusion

The Court upheld the Council's decision to refuse the development application.

Colin Biggers & Paisley

Planning and Environment Court revives a development approval granted under the repealed planning legislation, which lapsed without the knowledge of the Applicant

Cara Hooper | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Jenkinson v Tablelands Regional Council* [2018] QPEC 69 heard before Morzone QC DCJ

March 2019

In brief

The case of *Jenkinson v Tablelands Regional Council* [2018] QPEC 69 concerned an application by the Applicant to the Court to revive and extend a lapsed development approval in the form of a development permit to reconfigure a lot.

The development application was approved by the Tablelands Regional Council (**Council**) on 27 June 2008 under the *Integrated Planning Act 1997*. The approval period for the development approval was for four years. Between the years of 2012-2015, the Applicant made three extension requests for the approval period and each extension request was granted by the Council. However, the Applicant made an administrative oversight whilst furthering the development and allowed the final extension to lapse without submitting a further extension request. At the time the approval period lapsed, the *Sustainable Planning Act 2009* (**SPA**) was in force. It was only until May 2018 when the lapse of the development approval was realised by the Applicant and as a result the Applicant sought to have the development approval revived.

The Applicant did not dispute that the development approval had lapsed under the now repealed SPA and also did not dispute that it failed to comply with the provisions of SPA to extend the approval period within the time prescribed.

The main issue for the Court to determine was how and whether the non-compliance be excused and whether orders ought be made for the development approval to be revived and extended?

In order to determine this, the Court had to consider the following:

- Did the Court have jurisdiction to revive a lapsed development approval which lapsed under the repealed SPA?
- If the Court has jurisdiction, what other matters ought the Court consider?

The Court held that due to the combination of sections 11(4) and 76(6) of the *Planning and Environment Court Act 2016* (**PEC Act**) and section 440 of the SPA, the Court had jurisdiction and ultimately held that the development approval be revived.

Did the Court have jurisdiction to revive a lapsed development approval which lapsed under the repealed SPA?

The Court noted that legislative complication arises when there has been a change in planning legislation as the Court's own enabling legislation, the PEC Act, is enabled by "*an enabling Act*" to conduct the Court's work. The Planning and Environment Court has, in previous decisions, considered whether section 37 of the PEC Act is the appropriate provision for an application like the one in this case, and also whether the repealed SPA was an enabling Act.

The case of *Brooks Earthmoving & Quarries Pty Ltd v The Lockyer Valley Regional Council* [2018] QPEC 51 (**Brooks**) considered these issues and applied the decision in *Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21 (**Jakel**). In the case of *Jakel*, the Court held that the SPA, having been repealed by the time of the commencement of the PEC Act, could not be an enabling Act under section 37 of the PEC Act for an application of the type before the Court. The case of *Brooks* provided an alternative course to deal with matters of this nature, with the application of sections 11(4) and 76(6) of the PEC Act and section 440 of the SPA.

The Applicant sought relief based on the provisions applied by the Court in the *Brooks* case. Section 11(4) of the PEC Act provides for the jurisdiction of the Court to make an order about any declaration it so makes. Section 76(6) of the PEC Act applies more broadly to the current proceedings and relevantly provides as follows:

> *(6) Also, to remove any doubt, it is declared that repealed SPA, section 440—*
>
> *(a) applies also for a development approval that has lapsed; and*
>
> *(b) is not limited to—*
>
> *(i) circumstances in relation to a court proceeding under repealed SPA or a current P&E Court proceeding; or*
>
> *(ii) provisions under which there is a positive obligation to take particular action; and*
>
> *(c) applies as if a reference to a provision not being complied with, or not being fully complied with, is taken to include—*
>
> *(i) non-fulfilment of part or all of the provision; and*
>
> *(ii) a partial noncompliance with the provision.*

Section 440 of the SPA provides how a Court may deal with matters involving non-compliance. Section 440 relevantly provides as follows:

> *(1) Subsection (2) applies if the court finds a provision of this Act, or another Act in its application to this Act, has not been complied with, or has not been fully complied with.*
>
> *(2) The court may deal with the matter in the way the court considers appropriate.*
>
> *(3) To remove any doubt, it is declared that this section applies in relation to a development application that has lapsed or is not a properly made application.*

The Court determined that under these provisions, the Court has the jurisdiction to make an order about any declaration as to non-compliance, including excusing non-compliance and ordering that the matter be dealt with in a manner considered appropriate. The Court therefore determined that sections 11(4) and 76(6) of the PEC Act and section 440 of the SPA applied and thus held that the Court has jurisdiction to deal with the case.

If the Court has jurisdiction, what other matters ought the Court consider?

As the Court held that it had jurisdiction to decide the matter, the Court then used its discretion to grant the relief sought.

The Court firstly considered whether the development approval and conditions were consistent with the Planning Scheme. The Court noted that the Planning Scheme supported development such as the Applicant's on land within the priority infrastructure area in the emerging community zone and within the Herberton South expansion area. The Court determined that the development approval complied with the above and was consistent with the relevant provisions of the reconfiguring a lot code.

The Court also made the following findings:

- the Applicant had already completed a considerable amount of work with significant cost;
- the Applicant and the Council both recognise the merit of the development and seek for its extension;
- by requiring the Applicant to submit a new development application it would cause further cost and delay;
- a new development application would have no practical utility.

The Court therefore held that it was appropriate to grant the Applicant the relief sought and revive the development approval.

Conclusion

The Court determined that it was appropriate for the Court to make declarations that the development approval had lapsed and that there was non-compliance with the SPA as the Applicant had failed to apply for an extension for the approval period. The Court, however, held that sections 11(4) and 76(6) of the PEC Act and section 440 of the SPA applied and therefore revived the development approval until 30 July 2019.

Colin Biggers & Paisley

Planning and Environment Court has allowed an application to revise a development application for a preliminary approval on the basis that it was not a "substantially different development"

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2018] QPEC 63 heard before Kefford DCJ

March 2019

In brief

The case of *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2018] QPEC 63 concerned two appeals. The first appeal was an appeal against the Moreton Bay Regional Council's (**Council**) decision to approve a development application for a development permit for a material change of use to facilitate a local centre lodged by BGM Projects Pty Ltd (**First Applicant**). The second appeal was an appeal by Australian National Homes Pty Ltd (**Second Applicant**) against the Council's decision to refuse a development application for a local centre, which was proposed to be located on a site 600 metres away from the First Applicant's development.

The appeals were ordered to be heard together as both appeals concerned the *Moreton Bay Regional Council Planning Scheme 2015* (**Planning Scheme**) and involved common experts.

The substantive hearing of the appeals commenced on 11 June 2018, but did not conclude. In the course of the Court attempting to allocate final hearing dates, four applications in pending proceeding were filed by the parties.

The Second Applicant and a submitter filed an application in pending proceeding seeking permission to adduce evidence of an adjoining development approval that impacted the Second Applicant's access to an adjacent road (**Satterley Approval**), further amended plans, and additional expert evidence. The First Applicant filed an application in pending proceeding to the effect that if the Second Applicant was successful in its application, an order should be made to set aside the order that the appeals be joined. The Council supported the First Applicant's application.

During the hearing the Second Applicant sought to commit to a singular design depicted in further amended plans and confirmed that it no longer sought a preliminary approval which allowed a multitude of designs. The Court adjourned the hearing of the applications in pending proceeding in order for the Second Applicant to file a variation request.

The Second Applicant filed an application that its appeal be heard and determined based on a proposed change to the Second Applicant's development application, being that the variation request aspect of the development application refer to further amended plans. The Second Applicant later sought to amend the application in pending proceeding such that the preliminary approval aspect of the development application also refer to the further amended plans.

The Second Applicant argued the proposed change was a minor change, which was opposed by the First Applicant and the Council.

The Court held as follows:

- the proposed change was a minor change;
- it was appropriate to permit the Second Applicant to proceed with the changed development application;
- the appeals continue to be heard together; and
- the Second Applicant pay some of the First Applicant's and the Council's relevant costs.

Court held that the proposed change to the development application is a minor change

The Court noted that it could not consider a change to a development application unless the change is a minor change under section 46(3) of the *Planning and Environment Court Act 2016*. The First Applicant and the Council argued that the Second Applicant's proposed change resulted in a "*substantially different development*" and therefore was not a minor change.

The Court firstly considered the nature of the Second Applicant's development application. The Court considered the Second Applicant's town planning report which accompanied its development application. The Court found that the town planning report stated that the proposed development sought to achieve a local centre with the intent to provide a range of goods and services consistent with the Planning Scheme's Centre Zone - Local Centre Precinct (at [84 - 85]). The Court found that the development application could have been drafted with more clarity but there were sufficient references in the development application to indicate that the Second Applicant was seeking a preliminary approval to change the use of the site to a local centre.

The Court secondly considered the effect of the changes reflected in the Second Applicant's variation request. The Court noted that the development application originally indicated 41 proposed land uses for the site. The Second Applicant in its variation request sought to remove reference to 32 proposed land uses. The nine remaining proposed land uses included food and drink outlet, health care services, indoor sport and recreation, office, service industry, service station, shop, shopping centre, and veterinary services. The Court found that the removal of the uses caused the development application to require code assessment rather than impact assessment.

The First Applicant argued that the Second Applicant sought to change its development application from a "*bald variation request*" which sought to impose an alternative planning regime over the land to a development application, which ties code assessable development to a particular plan. The First Applicant additionally argued that the new plan resulted in a "*substantially different development*" (at [108]). The Court found that the Second Applicant's development application was not a "*bald variation request*" for the reason that upon a fair consideration of the development application, it was ascertainable that the Second Applicant was seeking a preliminary approval for a material change of use to change the site to a local centre.

The Court referred to the town planning report which demonstrated that the proposed development sought to achieve a local centre. The Court additionally found that given that the scope of the original development application was not defined by reference to a plan, the reliance on a new plan was not of itself determinative that the development application would result in a "*substantially different development*".

The Council argued that the Second Applicant's original development application sought a combination of any of the 41 proposed land uses. The Court rejected the Council's argument on the basis that the development application did not seek a material change of use for a local centre made up of a combination of any of the 41 proposed land uses and that the proposed changes to the development application contemplated a local centre. The Court held that the reduction of the proposed land uses did not result in "*substantially different development*" and rather it demonstrated that the proposed development was intended to be a local centre. The Court therefore held that the proposed changes were a minor change.

Court allowed a change to the development application

The First Applicant argued that the development application ought not be changed as the Second Applicant continually delayed the appeal and inhibited the First Applicant from capitalising from its development.

The Court held that the Second Applicant did exacerbate delays but noted that both parties had progressed the proceedings on an unrealistic timetable. The Court was satisfied that it was appropriate to permit the Second Applicant to proceed with the changed development application and held that the hearing was to resume on 8 April 2019.

Court was not prepared to sever the hearing of the two appeals together

The Court considered whether or not it was prepared to accede to the First Applicant's request that the appeals proceed separately.

The First Applicant submitted that the hearings ought be heard separately for the reasons that the delays encountered were not caused by the First Applicant, the proposed developments are not comparable, the Second Applicant's proposed development is not ready to be assessed, and the ongoing joinder will result in further delays caused by the Second Applicant.

The Second Applicant argued that the appeals ought to be heard together as there are common issues and overlapping evidence between both proceedings.

The Court accepted the First Applicant's first three submissions but gave weight to the Second Applicant's argument that the appeals do possess an extensive overlap. The Court noted that there is an overlap with the Planning Scheme provisions in each appeal, there are common experts, and that the severing of the expert evidence would unnecessarily consume Court resources.

The Court therefore on balance decided to uphold the joinder of the appeals.

Court ordered that the Second Applicant pay costs

The First Applicant and the Council submitted that the Second Applicant be ordered to pay costs in relation to:

- the tender and replacement of plans and the subsequent objection hearing regarding those plans in June 2018;
- the application to admit the new plan and evidence on 31 August 2018;
- the application to revise the development application filed on 13 September 2018; and
- the costs of the hearing.

In respect of the tender and its subsequent objection hearing, the Council submitted that the plans tendered had been made obsolete by the plans the subject of the application to revise the development application. The Council submitted that in relation to the tendered plans, the Second Applicant failed to act in an expeditious way given that it had behaved "*on the run*", it did not properly consider its development application, it tendered evidence in an unacceptable manner, and delayed the hearing of the appeals. The Court held that the timing and delivery of those plans was contrary to orderly case management and caused interruptions to the progress of the trial. The Court ordered that the Second Applicant pay half the costs incurred by the Council and the First Applicant for the objection hearing regarding the tendered plans.

In respect of the Second Applicant's application to admit a new plan and evidence which was heard on 31 August 2018, the Council submitted that the application was avoidable if the Second Applicant had taken steps to avoid the risk that another entity may seek a development approval which may impact its proposed road access. The Council additionally submitted that the Second Applicant did not need to admit new evidence as a result of the Satterley Approval. The Court agreed with the Council's submission and held that the Second Applicant pay the costs incurred by the Council and First Applicant for the 31 August 2018 application.

In respect of the variation request filed on 13 September 2018, the Council submitted that its costs had been thrown away due to the Second Applicant's application for leave to amend that application. The Council submitted that the Second Applicant had failed to particularise and properly consider the structure of its variation request and had taken advantage of the Court's process to identify faults in its development application. The Court held that the Second Applicant had not improperly used the Court process and therefore refused to award costs.

Lastly, the First Applicant sought costs of the trial to date. The Court found that it was not possible to ascertain the extent to which the trial costs had been thrown away and therefore reserved the question of an award of those costs.

Conclusion

The Court ordered that the hearing of the appeals proceed based on the changes made to the Second Applicant's development application.

Queensland Court of Appeal dismisses appeal against an order of the Planning and Environment Court in pipeline remediation matter

Christopher Vale | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Swan v Santos GLNG Pty Ltd & Ors* [2019] QCA 6 heard before Fraser and McMurdo JJA and Henry J

April 2019

In brief

The case of *Swan v Santos GLNG Pty Ltd & Ors* [2019] QCA 6 concerned an appeal to the Queensland Court of Appeal against an order of the Planning and Environment Court which had dismissed the Applicant's claim for an injunction under the *Environmental Protection Act 1994* (**EP Act**) and an award of costs against the Respondent, Santos GLNG Pty Ltd (**Santos**).

Background

The Applicant owned two agricultural lots near Moura, Central Queensland, being Lot 12 which was named "Inala", and Lot 3 which was named "Mulawa". Both lots were primarily used for grazing cattle and the operation of a cattle stud. The Applicant's father was the previous owner of the land. By way of deed dated 21 June 2011, the Applicant's father covenanted to grant an option for an easement to Santos to allow for the construction and maintenance of a 420km gas pipeline. The pipeline was for the transportation of liquified natural gas from the Surat and Bowen Coal Basins in Central Queensland to Curtis Island near Gladstone for export.

Part of the pipeline had been built over the Applicant's land. The easements granted to Santos provided for a right of way which was 30 metres in width and an adjacent working space which was 10 metres in width. Both the right of way and the working space were to allow for the construction and maintenance of the pipeline. Environmental authorities were granted to Santos in November 2011 and March 2015 which approved the construction of the pipeline under a petroleum licence. Santos' contractor, Saipem Australia Pty Ltd was commissioned to design, supply and construct the pipeline. Construction of the pipeline commenced in early 2013 and was completed in late 2014.

Alleged contravention of a condition of the Environmental Authority

The Applicant alleged that Santos had contravened the conditions of its environmental authority during the construction of the pipeline. Section 430 of the EP Act states that it is an offence for a person who is the holder of, or is acting under an environmental authority, to contravene, or wilfully contravene a condition of an environmental authority.

Santos was responsible for ensuring that its contractor ("another person" under section 431(2) of the EP Act) had complied with the conditions of the environmental authority granted. It is a defence for the holder of an environmental authority to prove that they had issued appropriate instructions and used all reasonable precautions to ensure compliance with the conditions; that the offence was committed without the holder's knowledge; and that the holder could not by the exercise of reasonable diligence have stopped the commission of the offence: section 431(4) of the EP Act.

Expert reports and affidavits

Section 505(1) of the EP Act relevantly states that a proceeding may be brought before the Planning and Environment Court to order a remedy or restrain an offence, or a threatened or anticipated offence against the EP Act to which the Planning and Environment Court may make orders which it considers appropriate. In May 2015, the Applicant sought a declaration from the Planning and Environment Court that Santos was in contravention of its environmental authority.

The Applicant had retained an expert to conduct a preliminary review of the pipeline who, in a report dated 18 August 2015, recommended that a revised rehabilitation management plan be produced. Santos also retained an expert, who, in a report dated 1 October 2015 (**Santos' Expert Report**), assessed the soils and vegetation cover at 12 locations in six transects along the pipeline and identified parts of the right of way which required rectification with regard to soil, land surface and weed management, but concluded that the rehabilitation management plan had ultimately met the conditions imposed under Santos' environmental authority.

The Applicant swore an affidavit stating their dissatisfaction with the rehabilitation works undertaken by Santos' contractors. An employee of Santos swore an affidavit to the effect that although Santos had been willing to undertake the rehabilitation, Santos' contractors were unable to do so due to the Applicant's refusal to allow Santos' contractors onto their land to undertake the rehabilitation works. In a subsequent report, the Applicant's expert concluded that despite the recent works, areas of the property had not yet been appropriately rehabilitated.

In May 2016, the Planning and Environment Court gave directions for a joint expert report to be issued by the experts who agreed on the following matters: that no soil rehabilitation exercise could result in a "replica" of the undisturbed soil project; that the success of rehabilitation is measured by ground cover, the areas of subsidence and pasture availability; and that the monitoring and ongoing repair provisions detailed in Santos' Expert Report should continue.

Notwithstanding this, the Applicant argued that the remediation undertaken by Santos had failed to meet the conditions required of the environmental authority. Santos contended that the remediation works it had already undertaken were substantially in accordance with the conditions of the environmental authority and that the area would be returned to a suitable condition within two seasons time. The Applicant sought orders under section 505 of the Act in the following terms:

- that Santos cause an independent investigation to be undertaken at its own cost in order to identify any contraventions of its environmental authority and the measures to be taken to remedy those contraventions;
- that Santos remedy the contraventions;
- that the Court make orders as may seem just to remedy the contraventions;
- that Santos pay the Applicant's costs in the proceedings where it may seem just having regard to all the circumstances.

Planning and Environment Court's Decision

The Planning and Environment Court refused to grant the Applicant's Orders on the following grounds:

- an order seeking to appoint an independent expert to identify the "spatial extent" of an alleged contravention in addition to identifying the remediation works required lacked sufficient certainty;
- that such an order would require the Court to concede its jurisdiction to a lay person (independent expert) to identify any offences and the measures to remedy those alleged offences;
- the orders would have required the Court's supervision in circumstances which were inappropriate;
- that the Applicant had failed to establish any of the alleged offences under section 430 or section 431 of the EP Act.

The Planning and Environment Court ordered that the Applicant pay Santos' costs in the proceedings to be assessed on the standard basis, or as agreed.

Application for leave to appeal

On appeal, the Applicant contended that the decision of the Planning and Environment Court contained errors of law. However, the Court of Appeal rejected the Applicant's contention that the Planning and Environment Court had failed to exercise the discretion bestowed on it under section 505(5) of the EP Act to make orders to remedy or restrain offences against the EP Act and that the Court had taken irrelevant considerations into account in arriving at its decision. The Court of Appeal held that the Applicant had failed to show that the Planning and Environment Court had fallen into error.

Proposed costs appeal

The Applicant also sought leave to appeal the costs decision of the Planning and Environment Court. Section 457(1) of the *Sustainable Planning Act 2009* (**SPA**) provides that the costs of a proceeding are to be assessed at the discretion of the Court such that the discretion conferred is "an open one" which must be exercised judicially having regard to the relevant circumstances (see *Cox v Brisbane City Council (No. 2)* [2014] QPELR 92; [2013] QPEC 78 at [2]-[3]).

In determining costs orders, the court may have regard to "*the relative success of the parties in the proceeding*" (see section 457(2)(a) of the SPA). The Court of Appeal held that:

- the Planning and Environment Court had rightfully observed the Applicant was wholly unsuccessful in proving the serious allegations made against Santos;
- the Planning and Environment Court was also entitled to have regard to "whether a party commenced or participated in the proceeding without reasonable prospects of success" (see section 457(2)(d) of the SPA);

- the Applicant had not only failed to establish that Santos had breached its environmental authority but also that the Applicant had failed to properly particularise their case; the orders sought would have invited the Planning and Environment Court to concede its jurisdiction; and Santos had made reasonable endeavours to remediate the site following the previous orders of the Planning and Environment Court made in November 2015.

No case submission and exercise of the costs discretion

The Court of Appeal held in favour of the Applicant that the Planning and Environment Court had failed to properly exercise its statutory discretion under the SPA with respect to ruling against the no case submission put forward by Santos on the fourth day of the trial. The effect of this was that the Applicant was prejudiced in persisting with a modified form of the orders which they had originally sought. The Court of Appeal set aside the costs order made in the Planning and Environment Court, instead making orders that the Applicant pay Santos' costs from 16 June 2016 onwards.

Planning and Environment Court clarifies rules of service relating to an originating application

Christopher Vale | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Chardan Pty Ltd v Sunshine Coast Regional Council & Ors* [2019] QPEC 7 heard before Williamson QC DCJ

April 2019

In brief

The case of *Chardan Pty Ltd v Sunshine Coast Regional Council & Ors* [2019] QPEC 7 concerned an originating application for declaratory relief under section 11 of the *Planning and Environment Court Act 2016* (**PECA**) made by the Applicant, Chardan Pty Ltd (**Chardan**) about the lawfulness of an existing land use, being the use of units in an apartment complex situated at Alexandra Headland on the Sunshine Coast (**Originating Application**).

In issue was whether the *Planning and Environment Court Rules 2018* (**PECR**) required personal service of the Originating Application on natural persons named as respondents to the proceeding. The Planning and Environment Court held that where the PECR fails to provide for a matter in relation to a Planning and Environment Court proceeding, in this case the mode of service for an originating process, the matter is to be ascertained by reference to the rules applying in the District Court, namely the *Uniform Civil Procedure Rules 1999* (**UCPR**).

Background

Chardan was the owner of the onsite management rights of the apartment complex located within the local government area of the Sunshine Coast Regional Council (**Council**), which was the first Respondent. The second Respondent owned the Resident Manager's unit within the premises. The third to thirty-fifth Respondents were owners of the remaining units, with the thirty-sixth Respondent being the body corporate for the premises. The underlying issue in the proceedings was whether the units in the apartment complex could lawfully be used for permanent residential occupation or not, save as to the Resident Manager's unit. Chardan argued that it had complied with the statutory requirements under the PECR with respect to service of its Originating Application as it had provided all but one of the named Respondents with effective service by way of post.

At issue was the mode of service for the purposes of serving an originating application on a natural person named as a Respondent in a proceeding before the Planning and Environment Court. The resolution of the issue primarily turned on the construction of rule 12 of the PECR, and an examination of the word 'serve' with reference to the UCPR.

An originating application must be served on other parties

Rule 12 of the PECR is stated as follows: "*Unless the P&E Court otherwise orders … an applicant must, within 10 business days after filing the originating application, serve a copy of the application on each other party to the P&E Court proceeding*". The Planning and Environment Court held that whereas rule 12 of the PECR provides for the requirement to serve the Originating Application, the rules as well as the definitions contained under Schedule 1 of the PECR were silent on the mode of service to be adopted in such circumstances.

Interpretation of the Planning and Environment Court Rules

The Planning and Environment Court observed that "*[the] orthodox approach to statutory interpretation in such circumstances requires the word to be given its ordinary meaning, informed by the context in which it appears*" (emphasis added). Therefore, having regard to the definitions of the word "serve" found in the Macquarie and Oxford English Dictionaries, the Planning and Environment Court held that service of a document, required the delivery of a "legal document in a legally formal manner".

Rule 4 of the PECR relevantly provides as follows: "*If these rules do not provide for a matter in relation to a P&E Court proceeding and the rules applying in the District Court would provide for the matter … the rules applying in the District Court apply for the matter in the P&E Court with necessary changes*" (emphasis added).

The rules which apply to the District Court are the UCPR. Rule 105 of the UCPR requires personal service of an originating process to be effected upon all parties to the proceeding. Rule 106 of the UCPR relevantly provides as to how personal service is to be performed; namely: "*[to] serve a document personally, the person serving it must give the document, or copy of the document, to the person intended to be served. … [If] the person does not accept the document, or copy, the party serving it may serve it by putting it down in the person's presence and telling [them] what it is*".

Rule 107 further provides that a different mode of service for an originating process will apply where a corporation is named as a party and should be dealt with in accordance with the *Corporations Act 2001*, or another applicable law. The Planning and Environment Court therefore held that originating applications commenced in the Court under the *Planning and Environment Court Act 2016* "*are to be served by an applicant on each other party in compliance*" (emphasis added) with rules 105, 106 and 107 of the UCPR.

Chardan's submissions

Chardan contended that rule 105 of the UCPR did not apply because rule 4 of the PECR had not been engaged, suggesting instead that rule 12 of the PECR should be read in conjunction with section 39(1)(a) of the *Acts Interpretation Act 1954* (**AIA**), which provides for service of an originating application by post. The difficulty with this argument was that Chardan would have to prove that rule 4 of the PECR had not been engaged insofar as rule 12 of the PECR had relevantly provided for the appropriate mode of service when read in conjunction with the AIA. To this, the Planning and Environment Court stated that section 39(1)(a) of the AIA "*is not to be treated as if it forms part of the PECR, either expressly or by implication*" (at [24]).

Conclusion

The Planning and Environment Court held that departure from the plain and ordinary meaning of rules 4 and 12 of the PECR should not be accepted (at [36]), citing the position of the High Court in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85; [1997] HCA 53 where it was said that:

> *When the express words of a legislative provision are* ***reasonably capable of only one construction*** *and neither the purpose of the provision nor any other provision in the legislation throws doubt on that construction,* ***a court cannot ignore it and substitute a different construction because it furthers the objects of the legislation*** (emphasis added).

The Planning and Environment Court therefore required Chardan to serve the Originating Application in accordance with the rules 105, 106 and 107 of the UCPR.

Planning and Environment Court dismisses a submitter appeal against a development approval for the redevelopment of an existing retirement facility

Christopher Vale | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Walters & Ors v Brisbane City Council & Anor* [2019] QPEC 3 heard before Kefford DCJ

April 2019

In brief

The case of *Walters & Ors v Brisbane City Council & Anor* [2019] QPEC 3 concerned an appeal against a decision of a local government to approve an application for a material change of use for the redevelopment of an existing retirement facility. The Planning and Environment Court held that although the proposed development would exceed the relevant height limits under the planning scheme, the Court was satisfied that the proposed development was appropriate on the basis of the other relevant assessment benchmarks.

Background

The Applicant owned and operated an existing retirement facility in the suburb of Newmarket in Brisbane's inner north. The existing retirement facility consisted of 74 independent living units which had been in place since 1990. The Applicant submitted a development application for a development permit for a material change of use to demolish the existing retirement facility and replace it with a new retirement facility containing 255 independent living units and associated facilities. The Council approved the development application with conditions. The Submitters appealed the Council's decision, alleging that the proposed development was of an unacceptable height, density, bulk and scale such that it failed to meet various assessment benchmarks under the *Brisbane City Plan 2014* (**City Plan**) and in particular the Ashgrove-Grange district neighbourhood plan code (**Neighbourhood Plan Code**).

The Submitters' allegations related almost exclusively to the bulk and scale of the proposed development, arguing that the development was "too big" in the way that the development would present its frontage to the main street and adjacent park. The Submitters argued that the existing retirement facility and the proposed development were within the Low density residential zone code under the City Plan and therefore the scale of the proposed development would be inappropriate in the circumstances.

The Applicant contended that although the proposed development departed from the assessment benchmarks contained under the City Plan, in particular the Neighbourhood Plan Code, regard should be had to the current lawful use of the premises, the prospective amendments to be made to the City Plan, the need for the proposed development, and the absence of hard amenity impacts and unacceptable visual impacts, respectively. Similarly, Council took the position that despite some non-compliance with the City Plan, the proposed development was appropriate having regard to the absence of tangible impacts, the need for the proposed development, the forthcoming planning scheme amendments, and the application of sound town planning principles.

Height

Part 6.2 of the City Plan states that a retirement facility may be accommodated within the Low density residential zone where the height of the facility is no greater than 1 or 2 storeys. Part 9.3 of the City Plan states that a development is of a height that is appropriate to the strategic and local context and meets community expectations where it consists of 2 storeys within the Low density residential zone. The Applicant conceded that by virtue of its height, the proposed development was non-compliant with the outcomes required under the City Plan. The Submitters contended that the proposed development suggested a "plain non-compliance" with the City Plan. The Planning and Environment Court rejected this allegation, stating that (at [71]):

> *Height is but one aspect that informs the bulk and scale of development. It is the bulk and scale of the proposed development that is to be consistent with the intended form and character of the local area, not its height alone.*

Density, bulk and scale

Part 9.3 of the City Plan provides that a development should be of a bulk and scale that is consistent with the intended form and character of the local area. The Submitters argued that the proposed development had a bulk and scale which was inconsistent with the receiving environment and the intentions of the overall outcomes under the City Plan. The Planning and Environment Court held that the overall outcomes under the City Plan do not prevent development which is not a low density residential use as the City Plan "*specifically contemplates community uses [and] small scale services which cater for local residents*" (at [83]).

The Court was also satisfied that the proposed development involved "*a well thought out design that [achieved] the outcomes sought with respect to integration and consistency with location and street context*" (at [100]). The Court also noted the retirement facility's ability to "support the neighbourhood structure" citing that the facility had been in place for nearly 30 years and was "part of the fabric" of the neighbourhood (at [159]-[160]).

Amendments to the City Plan

On 14 June 2016, Council resolved to amend the City Plan. The amendments were "intended to support the provision of aged care accommodation" by amending the Low density residential zone code under the City Plan. The Court held that despite the proposed development having failed to comply with the specific provisions of the City Plan, it was evident that the proposed development would comply with the Council's most contemporary statement of planning intent in relation to retirement facilities.

Lawful use

Section 31(1)(f) of the *Planning Regulation 2017* relevantly states that "*impact assessment must be carried out having regard to … any development approval for, and any lawful use of, the premises or adjacent premises*". The Applicant argued that the current lawful use of the land as a retirement facility was relevant in assessing the impact of the proposed development as the use would remain largely the same as it had been. Furthermore, it was argued that the existing use was relevant in assessing the existing character and amenity of the locality, and that the operation of the existing retirement facility provided evidence as to the need for the proposed development in the area.

Need for the proposed development

The Court found that there was a "*clear need*" for the proposed development on the basis of a "*present and continuing demand*" shown within the Applicant's detailed catchment area analysis, supply and demand analysis, and evidence of an undersupply of retirement facilities in the inner city area (at [323]).

Order

The Court dismissed the appeal but allowed for the parties to formulate an agreed suite of conditions for the approval and listed the matter for review for the purpose of making final orders in the appeal at a later date.

Colin Biggers & Paisley

Supreme Court of South Australia finds that compensation for the acquisition of land does not extend to non-economic loss

Christopher Vale | Ian Wright

This article discusses the decision of the Supreme Court of South Australia in the matter of *Anderson v Commissioner of Highways (No. 2)* [2018] SASC 121 heard before The Honourable Justice Parker

April 2019

In brief

The case of *Anderson v Commissioner of Highways (No. 2)* [2018] SASC 121 concerned an application for compensation for personal injury to the Supreme Court of South Australia against the acquisition of land made by the Commissioner of Highways for South Australia. The Applicant contended that they were entitled to a payment of compensation on the basis of personal injury suffered as a result of the acquisition. The issue was whether a personal injury of the nature suffered by the applicant was a "compensable loss" under the *Land Acquisition Act 1969* (**Land Act**). The Court held that compensation under the Land Act did not extend to compensation for personal injuries in such circumstances.

Background

The Applicant's parents owned a home on Main South Road at Bedford Park outside of Adelaide (**Property**). From 1980 until 2002, the Applicant resided at the Property while also conducting two home business operations. The Applicant lived elsewhere in Adelaide from 2002 until 2009 but continued to run the businesses from the Property during that time. The Applicant married in 2007, and in 2009, the Applicant resumed living at the Property with his wife and two children while still carrying out the business.

The Commissioner notified the Applicant and his parents of the proposed acquisition of the land in July 2014. The land was later compulsorily acquired by the Commissioner for the purposes of undertaking major road works. The relevant compensation for the acquisition had already been paid to the Applicant's parents and they had moved to another suburb nearby. From July 2014 until May 2016 the Applicant claimed that he had suffered from an "adjustment disorder" with related symptoms of "*anxiety, mental stress, forgetfulness, insomnia, depression, feelings of hopelessness and helplessness and suicidal ideations*" which he argued were caused by the acquisition (at [7]).

Applicant's claim

Section 6 of the Land Act provides that an "interest" in land means a legal or equitable estate or interest in the land. Section 22B of the Land Act states that a person may be entitled to compensation for the acquisition of land where that person's interest in the land has been divested or diminished by the acquisition; or the enjoyment of the person's interest in land is adversely affected by the acquisition. Compensation must be determined in accordance with the principles set out under section 25 of the Land Act.

The Applicant contended that his interest in the land had been divested or diminished by the acquisition and his enjoyment of that interest in the land had been adversely affected as a result. The Applicant's primary submission was that the words of the Land Act did not provide a principled basis to limit the meaning of the words "any loss" in section 25(1)(a) so as to exclude a compensable claim for personal injury on the basis of non-economic loss suffered as a result of the acquisition.

The Commissioner argued that the only type of "loss" compensable under the Land Act was one of "a detrimental disadvantage of an economic nature [directly arising] from the claimant's former legal relationship with the subject land having been divested or diminished or otherwise adversely affected by the acquisition" (at [23]). The Commissioner contended that the statutory right to compensation could not extend to loss in the nature of a personal injury.

Application of the Land Act

The Commissioner argued against the validity of the Applicant's claim on the basis of non-economic loss with reference to commentary and Canadian court decisions which had rejected claims for compensation made on the basis of personal injury or other non-pecuniary loss occasioned by the acquisition of land. Acknowledging the novel nature of the Applicant's claim for compensation on account of personal injury, the Commissioner submitted that the answer to whether the claim was compensable or not depended upon the proper construction of the legislation. Accordingly, the Court held that the matter was to be resolved by reference to the text, context and evident purpose of the Land Act. Accordingly, the Court stated that it was "of fundamental importance" that the Applicant's entitlement to compensation be determined on the basis of the Act alone (at [31]).

Principle of Disturbance and other authority

The Court held that although the principles of injurious affection and severance did not extend to the Applicant's claim, "*the boundaries of what may be compensable as disturbance are less clearly defined*" (at [42]). The Court continued, "*it might appear that the notion of disturbance could extend to personal injury suffered by reason of the acquisition of land*" or disturbance to the "*process of living*" citing the decision in *Brewarrana Pty Ltd v Commissioner of Highways* (1973) 4 SASR 476. However, the Court denied affording the principle such meaning, stating that it was unlikely that the Court in *Brewarrana* "*had intended to adopt a radically different interpretation [to the Land Act] so that personal injuries were recognised as being compensable*" (at [43]). The Applicant cited numerous decisions in support of their case, however the Court determined that the use of these authorities was misguided:

> *Care must be taken to avoid reading observations made in judgments as if they were the terms of a statute. The words used by a judge must be considered in the context of the proceedings before the Court.*

Further to this, the Court relied on the general principles of compensation for the acquisition of land previously provided for in the English decision of *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16 at [29] where it was said that (emphasis added):

> *The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e. that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form.*

Conclusion

In the result, the Court held that while the categories of circumstances that may be compensable were "not closed", it rejected the Applicant's contention that compensation may be sought for personal injury in the circumstances. In closing, the Court conclusively stated (at [90]):

> *The right to receive compensation arises from the act of acquisition and the financial consequences that flow from that event. The right to be compensated … is based upon the acquisition of the interest in property held by the claimant rather than the administrative processes which surround that event.*

Land Court has found that a request by expert witnesses for further information was justifiable after a mining company's refusal to provide the relevant information

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Cherwell Creek Coal Pty Ltd v BHP Queensland Coal Investments Pty Ltd & Ors (No. 17)* [2018] QLC 45 heard before FY Kingham

April 2019

In brief

The case of *Cherwell Creek Coal Pty Ltd v BHP Queensland Coal Investments Pty Ltd & Ors (No. 17)* [2018] QLC 45 concerned a request for information by expert witnesses (**Experts**) as part of a Court managed expert evidence process in the course of a proceeding in the Land Court of Queensland for compensation for the loss of opportunity to commercialise a coal mine.

The Experts requested further information pertaining to nine categories of information after a Court managed expert evidence meeting. The Court noted that the Respondents supplied information in relation to three categories of information but were unwilling to provide five other categories of information (**Additional Mining Information**).

The Respondents made the following submissions as to why it was unwilling to provide the Additional Mining Information:

- it was inappropriate for the Experts to request the Additional Mining Information as a result of a Court managed expert evidence process;
- the Additional Mining Information lacked utility;
- the Additional Mining Information would cause undue delay.

The Court found that the Experts' request was not an "inappropriate process" as argued by the Respondent and concluded that the Additional Mining Information had utility. The Court held that the Additional Mining Information directly related to the key facts of the Applicant's compensation claim and therefore any delay caused by the release of the Additional Mining Information was justified.

The Court ordered that the Respondents provide the Experts with the Additional Mining Information.

Court found that the Additional Mining Information request conformed with the Court's rules and procedures

The Respondents submitted that the Experts' joint report was not an opportunity for inquisitorial fact finding. The Court rejected the Respondents' submission on the basis that as part of an expert's duty to the Court, an expert may identify further information that would assist the Court on matters within the expert's area of expertise.

The Court relevantly identified some of the Court's rules and procedures specific to expert witnesses which are as follows:

- an expert witness has a duty to the Court which overrides any obligation owed to any party to the proceeding and must not act as an advocate (at [7] and [10]);
- an expert witness may identify and request further information which they do not have access to that would assist them to fulfil their duty to the Court (at [8] and [9]);
- an expert witness can alter or abandon an opinion (at [9]);
- an expert witness is not constrained by information provided by the party who engaged them (at [9]).

The Court held that the Experts' request for the Additional Mining Information was not an "inappropriate process" and rather, conformed with the Court's rules and procedures.

Court found that the Additional Mining Information had utility

The Respondents alleged that the Additional Mining Information lacked utility given that the Experts had differing views about the importance of the information. The Court noted that both the Applicant's and the Respondents' mine planning experts differed in view as to how much weight ought to be given to the Additional Mining Information.

The Court held that even though the mine planning experts differed on how much weight they sought to place upon the Additional Mining Information, as all Experts joined in the request for the Additional Mining Information, the Court concluded that the Additional Mining Information had real utility.

Court held that any further delay was justifiable

The Respondents submitted that the Additional Mining Information would cause delay in finalising the Experts' reports and therefore the request ought be declined.

The Court found that the Additional Mining Information would result in minimal delay and would be unlikely to interrupt the commencement of the forthcoming trial unless there was an unexpected result. The Court concluded that further delay as a consequence of an unexpected result would however be justifiable as the opinions formed would directly relate to the key facts of the compensation claim. The Court held that delay in and of itself was not a principled reason for declining the information request.

Conclusion

The Court found that the Respondents ought to provide the Experts with the Additional Mining Information and allowed the Experts' request.

Land Court finds that an outpatient operation is not a reasonable excuse for not filing a notice of appeal within the appeal period

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Lowe v Valuer-General* [2019] QLC 3 heard before GJ Smith

April 2019

In brief

The case of *Lowe v Valuer-General* [2019] QLC 3 concerned an appeal to the Land Court of Queensland by the registered owner of land at Ramsay (**Landowner**) against the Valuer-General's annual valuation. The notice of appeal was filed three days after the expiration of the appeal period and it was therefore for the Court to determine whether it had jurisdiction to hear the appeal.

The Court held that the Landowner did not establish a "*reasonable excuse*" for the late filing of the notice of appeal as required under section 158 of the *Land Valuation Act 2010* (**LVA**), and the Court found that it did not have jurisdiction to hear and determine the appeal.

Issues in dispute

The Court considered the submissions in respect of the appeal and identified that the key issues were as follows:

- whether the appeal was brought out of time;
- whether the Landowner had a "*reasonable excuse*" for not filing the notice of appeal within the appeal period as required under section 158 of the LVA.

Background

An objection decision notice in respect of the subject land was issued to the Landowner by the Valuer-General on 4 July 2018.

Due to the removal of a lesion on the Landowner's foot, the Landowner was unable to post the notice of appeal until 3 September 2018, which was subsequently received by the Court three days after the expiry of the appeal period.

Date the appeal was filed

The Landowner submitted that as the notice of appeal was dated 31 August 2018, it was not out of time. The Valuer-General disagreed and argued that the appeal was three days out of time as the appeal period had expired on 3 September 2018 and the Court did not receive the notice of appeal until 6 September 2018.

The Court held that although it was not unsympathetic to the Landowner's predicament, the Court could not accept the Landowner's submission that the notice of appeal was within time.

Reasonable excuse

Section 158(2)(b) of the LVA relevantly states that the Land Court can only hear an appeal that has been filed late if there was a reasonable excuse for not filing the notice of appeal within the relevant appeal period.

The Landowner submitted that due to an outpatient procedure, the Landowner was unable to send the notice of appeal earlier than the due date as she was "*trying to do everything that had to be done while keeping off her foot as much as possible*". The Landowner had also thought that it was necessary for the notice of appeal to be filed by post and that it could not be filed by facsimile.

The Valuer-General contended that although the removal of the lesion was a difficult situation for the Landowner, it would not have prevented the Landowner from completing and lodging the notice of appeal before the expiration of the appeal period. The Valuer-General further submitted that the circumstances had not actually prevented the Landowner from completing the notice of appeal as it was signed on 31 August 2018.

The Valuer-General argued that the Landowner had sent and received correspondence by facsimile to and from the Court Registry that related to the appeal and had also previously filed a notice of appeal by facsimile in 2016.

The Court relied on the reasoning of the Land Appeal Court in *AG Russell v The Crown* (1992-93) 14 QLCR 202 at [204] with respect to what constitutes a "*reasonable excuse*", in particular the following:

> *Whilst it has been laid down that each case depends on its own particular facts, it is clear from the above authorities that the reasonable cause or explanation must be substantial. The test is an objective one. It is of little use for an appellant for example, merely to say without more that he did not know of the time limitation, or that he had overlooked duly complying with the prescribed requirements of s.44(11)(a) or (b), or that he believed that what he did amounted to due compliance. The Land Appeal Court must be satisfied that there is a reasonable cause or explanation.*

As such, the Court held that a reasonable excuse had not been established by the Landowner when viewing the circumstances objectively. The Court found that as the Landowner had previously corresponded with the Court via facsimile, it would have been reasonable for the Landowner to have faxed the notice of appeal to the Court within time.

Conclusion

The Court concluded that despite the unfortunate circumstances, a reasonable excuse had not been established for the late filing of the notice of appeal, and it therefore did not have jurisdiction to hear and determine the appeal.

Colin Biggers & Paisley

Infrastructure planning and charging framework under the Planning Act 2016

Ian Wright | Nadia Czachor

This article discusses the current infrastructure planning and charging framework in respect of local governments in Queensland

May 2019

Introduction

Infrastructure planning and charging framework

On 3 July 2017, the *Planning Act 2016* (**Planning Act**) commenced, supported by the *Planning Regulation 2017* (**Planning Regulation**).

The Planning Act adopts a capped infrastructure planning and charging framework for local governments (**current capped framework**) which is an evolution of earlier frameworks established under the following:

- Amendments to the *Sustainable Planning Act 2009* (**SPA**) in June 2011 by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011* to implement the original capped infrastructure planning and charging framework for local governments and distributor-retailers in South-East Queensland (**original capped framework**).
- Further amendments to SPA on 4 July 2014 by the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act 2014* to provide for the previous infrastructure planning and charging framework (**previous capped framework**).

Under the current capped framework, provisions for infrastructure planning and charging by local governments are retained in the Planning Act and those applicable to distributor-retailers are retained in the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (**SEQ Water Act**).

This paper focuses only on the current capped framework in respect of local governments. While the infrastructure planning and charging framework for local governments and distributor-retailers under the previous capped framework was largely the same, the changes introduced by the current capped framework affect only local governments such that distributor-retailers remain under the previous capped framework. However, the extent of the differences between the previous capped framework and the current capped framework are not significant. References to the comparable provisions for distributor-retailers under the SEQ Water Act are provided for interest and ease of reference.

Key elements of the current capped framework

This paper considers the following key elements of the current capped framework:

- Infrastructure scope.
- Identification of trunk and non-trunk infrastructure.
- Infrastructure planning instrument.
- Local infrastructure charging instrument.
- Infrastructure charge.
- Development charge.
- Conditions for trunk and non-trunk infrastructure.
- Conversion applications for non-trunk infrastructure conditions.

However, this paper does not consider other elements of the current capped framework, including:

- Offsets and refunds for trunk infrastructure and development charge.
- State infrastructure provider powers.
- Infrastructure agreements.

Infrastructure scope

The scope of the current capped framework is based on the definition of "*development infrastructure*" which includes water cycle management infrastructure, transport infrastructure, public parks infrastructure and land for specified local community facilities.[1]

Unlike the original capped framework, development infrastructure under the current capped framework (as with the previous capped framework) does not include the local function of State-controlled roads in relation to transport infrastructure.[2]

Identification of trunk and non-trunk infrastructure

The current capped framework empowers a local government to identify development infrastructure as trunk infrastructure in a local government infrastructure plan (called an **LGIP**). Development infrastructure that is not identified as trunk infrastructure in the LGIP (**LGIP unidentified infrastructure**) will generally be non-trunk infrastructure.[3]

However LGIP unidentified infrastructure can become trunk infrastructure in the following circumstances:

- *Necessary infrastructure condition* – The LGIP unidentified infrastructure is required by way of a necessary infrastructure condition and services development consistent with the assumptions in the LGIP about the type, scale, location or timing of development.[4]
- *Conversion application* – The LGIP unidentified infrastructure is required by way of a non-trunk infrastructure condition and the relevant local government subsequently approves a conversion application.[5]

Infrastructure planning instrument

The current capped framework requires a local government to include an LGIP in its planning scheme before it may levy charges for or impose conditions requiring the provision of trunk infrastructure under Chapter 4 of the Planning Act.[6] An LGIP under the current capped framework (as with the previous capped framework) is similar to a priority infrastructure plan (**PIP**) under the original capped framework.

For local governments that included a PIP in their planning scheme under the original capped framework, that PIP was transitioned to become an LGIP under the previous capped framework and constitutes an LGIP under the current capped framework.[7]

All local governments have now proceeded to prepare an LGIP.

Local infrastructure charging instrument

Charges resolution

The current capped framework (as with the previous capped framework) empowers a local government to adopt a resolution (called a **charges resolution**).[8] A charges resolution under the current capped framework is similar to an adopted infrastructure charges resolution under the original capped framework.

A charges resolution adopts charges (each an **adopted charge**) for providing trunk infrastructure for development, but does not of itself levy a charge.[9]

An adopted charge in a charges resolution may be made for development in the following circumstances:[10]

- *Prescribed by regulation* – the adopted charge is prescribed for the development in section 52 and Schedule 16 of the Planning Regulation.
- *No more than the maximum* – the adopted charge is no more than the maximum adopted charge for providing trunk infrastructure for the development as prescribed in Schedule 16 of the Planning Regulation.

An adopted charge must not be for the following:

- works or use of premises authorised under the *Greenhouse Gas Storage Act 2009*, the *Mineral Resources Act 1989*, the *Petroleum Act 1923* or the *Petroleum and Gas (Production Previous and Safety) Act 2004*; or

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1 See definition of "*development infrastructure"* Schedule 2 of the Planning Act and Schedule of the SEQ Water Act.

2 See definition of "*development infrastructure"* Schedule 3 of SPA (28 May 2014 reprint).

3 See definition of "*non-trunk infrastructure"* in Schedule 2 of the Planning Act and Schedule of the SEQ Water Act.

4 See section 128 of the Planning Act and section 99BRCR of the SEQ Water Act.

5 See section 142 of the Planning Act and section 99BRDE of the SEQ Water Act.

6 See section 111 of the Planning Act.

7 See section 982 of SPA (19 May 2017 reprint).

8 See section 113 of the Planning Act.

9 See sections 113(1) and (2) of the Planning Act and sections 99BRCF(1) and (2)(a) of the SEQ Water Act.

10 See section 114(1) of the Planning Act and section 99BRCG(1) of the SEQ Water Act.

- development in a priority development area under the *Economic Development Act 2012*; or
- development by a department, or part of a department, under a designation; or
- development for a non-State school under a designation.[11]

A charges resolution is also required to provide for the following:

- *Effective date* – The day when an adopted charge under the resolution is to take effect.[12]
- *Charges breakup* – For local governments that are a participating local government for a distributor-retailer, the charges breakup for all adopted charges between the local government and the distributor-retailer.[13]
- *Offset and refund calculation methodology* – A methodology for working out the cost of infrastructure the subject of an offset and refund, which must be consistent with the parameters provided for under a guideline made by the Minister and prescribed by regulation.[14] That methodology is provided for in Part 1 of Chapter 6 of the Minister's Guidelines and Rules dated July 2017 (**MGR**).
- *Conversion criteria* – The criteria for deciding a conversion application, which must be consistent with the parameters provided for under a guideline made by the Minister and prescribed by regulation.[15] That criteria is provided for in Part 2 of Chapter 6 of the MGR.

Automatic increase

A charges resolution may also provide for automatic increases in a levied charge from the date it is levied to the date it is paid.[16] However, the amount to be paid cannot be more than would result from increasing the charge by the 3 yearly average of the producer price index and cannot exceed the maximum amount that could be levied for the amount at the time the charge is paid.[17]

It is relevant to note that, unlike the original capped framework, the maximum increase under the current capped framework (as with the previous capped framework) is calculated by reference to the producer price index rather than the consumer price index.[18]

Method for working out the cost of infrastructure

A local government's charges resolution must include a method for working out the cost of the infrastructure that is the subject of the offset or refund, which must be consistent with the parameters provided for under Part 1 of Chapter 6 of the MGR.[19]

The MGR prescribes the following parameters:

- *Clarity* – the methodology should be clear, certain and transparent.
- *Cost effective* – the methodology for pursuing an actual cost valuation should not be cost prohibitive for applicants.
- *Time efficient* – timeframes should be realistic and encourage the efficient resolution of actual cost valuations.

While the MGR also provides further specific parameters for undertaking land valuations to work out the cost of infrastructure that is land, it does not provide a specific process for working out the cost of infrastructure that comprises works. Accordingly, local governments have to determine their own method consistent with the parameters in the MGR to include in their charges resolution.

Most local governments have adopted a method that refers to the establishment cost of infrastructure specified in the schedule of works in their LGIP. However, it is relevant to note that under the current capped framework (as with the previous capped framework) the definition of "*establishment cost*" is different to under the previous capped framework,[20] when many local governments prepared their LGIP (at that time called a PIP). Under the current capped framework the "establishment cost" for trunk infrastructure means the following:[21]

- *Existing infrastructure (works)* – the current replacement cost of the infrastructure as reflected in the relevant local government's asset register.

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[11] See section 113 (Adopting charges resolution) of the Planning Act, see also section 99BRCF (Power to adopt charges by board decision) of the SEQ Water Act for similar but not identical requirements under that Act.

[12] See section 113(4) of the Planning Act and section 99BRCF(3) of the SEQ Water Act.

[13] See section 115(4) of the Planning Act.

[14] See section 116 of the Planning Act and section 99BRCH of the SEQ Water Act.

[15] See section 117 of the Planning Act and section 99BRCHA of the SEQ Water Act.

[16] See section 114(3)(b) of the Planning Act and section 99BRCG(3)(b) of the SEQ Water Act.

[17] See section 114(5) of the Planning Act and section 99BRCG(5) of the SEQ Water Act.

[18] See for comparison sections 648D(9) and (10) and 755KA(2), (3) and (4) of SPA (28 May 2014 reprint).

[19] See section 116 of the Planning Act and section 99BRCH of the SEQ Water Act.

[20] See definition of "*establishment cost*" in Schedule 3 of SPA (28 May 2014 reprint).

[21] See definition of "*establishment cost*" in Schedule 2 of the Planning Act and section 99BRCC of the SEQ Water Act.

- *Existing infrastructure (land)* – the current value of the land acquired for the infrastructure.
- *Future infrastructure* – all costs of the land acquisition, financing, and design and construction for the infrastructure.

Conversion criteria

The conversion criteria included in a local government's charges resolution must be consistent with the parameters provided under Part 2 of Chapter 6 of the MGR.[22]

The MGR provides the following parameters for criteria for deciding a conversion application:

- *Capacity to service other developments* – The infrastructure has capacity to service other development in the area.
- *Consistency with identified trunk infrastructure* – The function and purpose of the infrastructure is consistent with other trunk infrastructure identified in an LGIP or a charges resolution for the area.
- *Not consistent with non-trunk infrastructure* – The infrastructure is not consistent with non-trunk infrastructure for which conditions may be imposed in accordance with section 145 of the Planning Act.
- *Most cost effective option* – The type, size and location of the infrastructure is the most cost effective option for servicing multiple users in the area. The most cost effective option is the least cost option based on the life cycle cost of the infrastructure required to service future urban development in the area at the desired standard of service.

Infrastructure charge

Levied charge

The current capped framework requires a local government to give an applicant an infrastructure charges notice (called an **ICN**)[23] which levies a charge by applying the adopted charge (called a **levied charge**)[24] under a charges resolution in the following circumstances:[25]

- *Development approval* – A development approval has been given.
- *Adopted charge* – An adopted charge applies to providing trunk infrastructure for the development.

Infrastructure charges notice

Under the current capped framework, an ICN is required to state or include all of the following:[26]

- *Amount* – The current amount of the levied charge.
- *Calculation* – How the amount of the levied charge has been worked out.
- *Premises* – The premises to which the levied charge relates.
- *Timing* – When the levied charge will be payable.
- *Automatic increase* – Whether the levied charge is subject to automatic increases and how the increases are worked out.
- *Offset or refund* – Whether an offset or refund applies and, if so, information about the offset or refund, including when the refund will be given. However, this requirement may be waived by the recipient of the ICN.
- *Date* – The date of the ICN.
- *Appeal rights* – Any appeal rights the recipient of the ICN has in relation to the ICN.
- *Other information* – Any other information prescribed by the Planning Regulation.

Originally, the Planning Act required an ICN to be issued with a decision notice, which was defined to include the decision, the reasons for the decision, the date on which the decision was made and any relevant appeal rights. However, following the decision in *Sunland Group Limited & Sunland Developments No. 22 Pty Ltd v Gold Coast City Council* [2018] QPEC 22 (**Sunland Decision**) the Planning Act was amended to remove the requirement for a decision notice. The requirement for an information notice in respect of distributor-retailers under the SEQ Water Act remains the same.[27]

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[22] See section 117 (Criteria for deciding conversion application) of the Planning Act.

[23] See section 119(2) of the Planning Act and section 99BRCI(2) of the SEQ Water Act.

[24] See section 119(12) of the Planning Act and section 99BRCI(6) of the SEQ Water Act.

[25] See section 119(1) of the Planning Act and section 99BRCI(1) of the SEQ Water Act.

[26] See section 121 of the Planning Act and section 99BRCK of the SEQ Water Act.

[27] See definition of "*information notice*" in Schedule of the SEQ Water Act.

Recent amendments to the Planning Act, also following the Sunland Decision, save ICN's given under the SPA after 4 July 2014 but before the commencement of the Planning Act which fail to comply with the requirement to provide an information notice.[28]

The inclusion of offset and refund information in an ICN under the current capped framework (as with the previous capped framework) provides greater certainty to an applicant about its financial liability for the provision of infrastructure for development without the need for an infrastructure agreement. However, unlike the original capped framework, the effect is that a local government must now determine its liability for an offset or refund at the decision stage of the development assessment process, whereas previously that liability would have been determined by the later negotiation of an infrastructure agreement.

The recipient of an ICN may enter into an infrastructure agreement with the local government about the payment of the levied charge or the provision of infrastructure instead of paying the levied charge.[29] However, unlike the original capped framework,[30] the power of a local government to give a land contribution notice in lieu of, or in addition to, the payment of infrastructure charges has been removed since the previous capped framework and under the current capped framework.

Power to issue an infrastructure charges notice where there is an earlier preliminary approval

In *Sunland Group Limited and Anor v Gold Coast City Council* [2019] QPEC 19, the Planning and Environment Court considered a condition of a preliminary approval which sought to vary the effect of a local planning instrument imposed under the *Integrated Planning Act 1997* and which required the payment of infrastructure contributions. The Planning and Environment Court was required to consider whether the local government ought issue an ICN in respect of later development permits given in respect of the preliminary approval, or whether the local government could only rely upon the preliminary approval conditions for the payment of infrastructure contributions.

The Planning and Environment Court relevantly held that the earlier preliminary approval conditions were preserved such that the local government could only seek the payment of the relevant infrastructure contributions under the conditions of the preliminary approval and could not issue an ICN in respect of the later development permits. It is the writers' view with respect that this principle ought only apply where the subsequent development permit is in respect of development which accords with the earlier preliminary approval, which ordinarily would have been made code assessable under the preliminary approval and not development that does not accord with the earlier preliminary approval, which ordinarily would have been made impact assessable by the earlier preliminary approval. The reason for this is that the infrastructure requirements of the later development were not contemplated by the conditions of the preliminary approval.

Features of a levied charge

The current capped framework for a levied charge has the following features:

- *Limited to extra demand* – A levied charge may only be for extra demand placed upon the trunk infrastructure which will be generated by the development.[31] It is relevant to note that the previous capped framework used the alternative terminology of "*additional demand*", which continues to be used in the SEQ Water Act. The difference in terminology is unlikely to have material consequences.

  A levied charge must therefore not include infrastructure demand generated by the following:[32]

  - *Existing use* – An existing use on the premises if the use is lawful and already taking place on the premises.
  - *Previous use* – A previous use that is no longer taking place on the premises if the use was lawful at the time the use was carried out.
  - *Other development* – Other development on the premises if the development may be lawfully carried out without the need for a further development permit, such as development for which a development permit has been given but not yet implemented and development that is accepted development under the relevant planning scheme.

  It is of interest to note that while an adopted infrastructure charges resolution under the original capped framework could provide for a discount to an adopted infrastructure charge, taking into account the existing usage of trunk infrastructure by the premises, there was no requirement for a local government not to include demand generated by a previous or existing use or other development lawfully carried out on the premises.[33]

[28] See section 344 of the Planning Act.

[29] See section 123 of the Planning Act and section 99BRCM of the SEQ Water Act.

[30] See sections 648K(3) and (4) and 755MA(4) and (5) of SPA (28 May 2014 reprint).

[31] See section 120(1) of the Planning Act and section 99BRCJ(1) of the SEQ Water Act.

[32] See section 120(2) of the Planning Act and section 99BRCJ(2) of the SEQ Water Act.

[33] See section 648D(1)(d) of SPA (28 May 2014 reprint).

- *Payable by the applicant* – A levied charge is payable by the applicant.[34] An applicant for a development approval is stated to be the person who applied for the approval or a person in whom the benefit of the approval vests.[35]
- *Attaches to the premises* – A levied charge attaches to the premises.[36]
- *Taken to be a rate* – A levied charge is for the purpose of its recovery taken to be a rate of the local government.[37] However, this does not apply if the local government and the applicant have entered into an agreement in relation to the payment of the levied charge.[38] In the case of *Trevorrow v Council of the City of Gold Coast* [2018] QCA 19 the Court of Appeal held that the levied charge could be recovered from the applicant as well as the owner of the relevant land, even where the owner of the relevant land was not also the applicant.[39] However, this was decided in circumstances where the statutory regime did not provide an express statement as to who must pay the levied charge. This has been amended in the Planning Act which relevantly states that the levied charge must be paid by the applicant.[40]

  It is relevant to note that there is no equivalent provisions under the SEQ Water Act to recover a levied charge as a rate since a distributer-retailer is not a government entity with the power to recover rates.

Infrastructure charge versus development charge

A levied charge under the current capped framework has the following important characteristics:

- *Infrastructure charge not development charge* – A levied charge is an infrastructure charge which has the primary goal of recovering the cost of trunk infrastructure to be provided by a local government to service development.[41]

  A levied charge is different to a development charge, which is a charge designed to internalise the marginal external costs that are imposed by development, and which has the primary goal of influencing the location and nature of development.[42]
- *Average cost approach not marginal cost approach* – The maximum adopted charges prescribed by the State in Schedule 16 of the Planning Regulation are calculated by reference to an average State-wide cost approach. The adopted charges in a local government's charges resolution upon which a levied charge in an ICN is based are calculated by reference to an average municipality-wide cost approach, but limited to the maximum amount prescribed by the State.[43]

  Accordingly, levied charges under the current capped framework are based on an average cost approach and are capped, and therefore do not reflect the true marginal cost of providing the infrastructure. As such, levied charges do not achieve full cost recovery as was the case with infrastructure charges prior to the introduction of the original capped framework.

Development charge

Extra payment conditions

The current capped framework empowers a local government to impose a condition on a development approval requiring the payment of extra trunk infrastructure costs for development (called an **extra payment condition**) if it meets the following criteria:[44]

- *Infrastructure demand* – The development achieves one of the following:
  - Generates infrastructure demand of more than that required to service the type or scale of future development that the LGIP assumes.
  - Requires new trunk infrastructure earlier than when identified in the LGIP.
  - Is for premises completely or partly outside the priority infrastructure area (**PIA**) identified in the LGIP.

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[34] See sections 119(12)(b) of the Planning Act and section 99BRCI(6)(b) of the SEQ Water Act.

[35] See section 280 of the Planning Act.

[36] See section 119(12)(c) of the Planning Act and section 99BRCI(6)(c) of SEQ Water Act.

[37] See section 144(1) of the Planning Act.

[38] See section 144(2) of the Planning Act.

[39] See *Trevorrow v Council of the City of Gold Coast* [2017] QSC 12.

[40] See section 119(12)(b) of the Planning Act.

[41] Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment*, Research Report, Volume 1, April 2011, page 198.

[42] Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment*, Research Report, Volume 1, April 2011, page 198.

[43] Clinch JP and O'Neill E *Designing Development Planning Charges: Settlement Patterns, Cost Recovery and Public Facilities*, Urban Studies, 15 March 2010, page 2152.

[44] See section 130(1) of the Planning Act and section 99BRCU(1) of the SEQ Water Act.

- *Extra trunk infrastructure costs* – The development would impose extra trunk infrastructure costs on the local government after taking into account levied charges for the development and the provision of trunk infrastructure by the applicant.

It is relevant to note that under the previous capped framework the alternative terminology of "*additional trunk infrastructure cost*" was used, which continues to be used in the SEQ Water Act. The difference in terminology is unlikely to have material consequences.

An extra payment condition requiring the payment of extra trunk infrastructure costs for development is a development charge which is intended to internalise a local government's marginal external costs imposed by development that is inconsistent with the LGIP.

An extra payment condition is therefore intended to influence the location and nature of development. This is unlike a levied charge the primary purpose of which is cost recovery, although under the current capped framework full cost recovery is far from being achieved.

Contents of an extra payment condition

An extra payment condition imposed on a development approval is required to state all of the following:[45]

- *Reason* – The reason why the condition was imposed.
- *Amount* – The amount of the payment to be made under the condition.
- *Details* – Details of the trunk infrastructure for which the payment is required.
- *Timing* – The time that the amount becomes payable.
- *Option to provide* – That the applicant may, instead of making the payment, elect to provide part or all of the trunk infrastructure.
- *Details for provision* – If the applicant elects to provide part or all of the trunk infrastructure, the extra payment condition must state the requirements for providing the trunk infrastructure and when it must be provided.

Extra payment condition for development completely inside the PIA

For an extra payment condition for development completely inside the PIA the following applies:[46]

- *Extra payment condition* – The extra payment condition may only require a payment for the following:
  - *Earlier than planned* – For trunk infrastructure to be provided earlier than planned in the LGIP, the extra establishment cost that the local government incurs to provide the trunk infrastructure earlier than planned.
  - *Different type or scale* – For infrastructure associated with a different type or scale of development from that assumed in the LGIP, the establishment cost of any extra trunk infrastructure made necessary by the development.
- *Refund* – The payer is to be refunded the portion of the establishment cost of the extra trunk infrastructure that may be apportioned reasonably to other users of the extra trunk infrastructure and has been, is, or is to be, the subject of a levied charge.[47]

Extra payment condition for development completely or partly outside the PIA

If an extra payment condition is for development completely or partly outside the PIA it may only require a payment of the following:[48]

- *Trunk infrastructure cost* – The establishment cost of infrastructure that is made necessary by the development and, if the local government's planning scheme indicates the premises are part of an area intended for future development for purposes other than rural or rural residential purposes, necessary to service the rest of the area.
- *Temporary trunk infrastructure costs* – The establishment costs of any temporary trunk infrastructure required to ensure the safe or efficient operation of infrastructure needed to service the development or costs made necessary by the development.
- *Decommissioning, removal and rehabilitation costs* – Any decommissioning, removal and rehabilitation costs of any temporary trunk infrastructure.
- *Maintenance and operating costs* – The maintenance and operating costs for up to 5 years of the infrastructure and temporary infrastructure.

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[45] See section 131 of the Planning Act and section 99BRCV of the SEQ Water Act.

[46] See section 132 of the Planning Act and section 99BRCW of the SEQ Water Act.

[47] See section 134 of the Planning Act and section 99BRCY of the SEQ Water Act.

[48] See section 133 of the Planning Act and section 99BRCX of the SEQ Water Act.

Issues arising from extra payment conditions

Extra payment conditions give rise to the following legal issues:

- *Spending of the extra payment* – The statutory scheme does not expressly state that the local government is to spend the payment and deliver the extra trunk infrastructure. However, equitable principles in respect of constructive trusts are likely to apply such that the local government is required to expend the payment only on the extra trunk infrastructure.
- *Accounting for the payment* – The local government is likely, under the equitable principles in respect of constructive trusts, to be required to account to the applicant for the extra payment when it becomes apparent that the local government does not intend to provide the extra trunk infrastructure.
- *Timing* – In the case of extra payment for development in the PIA, the statutory scheme does not oblige the local government to provide the extra trunk infrastructure earlier than when identified in the LGIP. Whilst the extra payment condition is required to state when an applicant is to provide the extra trunk infrastructure, should it elect to do so, this timing obligation does not apply to the local government. However, equitable principles in respect of constructive trusts are likely to apply such that the local government is required to expend the extra payment or account to the applicant for the extra payment where it is not expended earlier than that identified in the LGIP.
- *Multiple development applications* – An extra payment condition may be imposed on multiple development applications for the same extra trunk infrastructure. Where this occurs, the first applicant who carries out the development which requires the extra trunk infrastructure will bear the cost of complying with the extra payment condition by either making the payment or providing the extra trunk infrastructure. After the first applicant makes the payment or provides the extra trunk infrastructure, the other applicants are no longer required to satisfy the relevant extra payment condition as the requirement to provide the extra trunk infrastructure has been satisfied. For development in the PIA, the first applicant may however be entitled to a refund being the proportion of the establishment cost of the extra trunk infrastructure that may be apportioned to other users. This amount is to be worked out reasonably.

Conditions for trunk and non-trunk infrastructure

Types of development conditions for infrastructure

The current capped framework empowers a local government to impose the following conditions on a development approval requiring the provision of trunk and non-trunk infrastructure:

- *Necessary infrastructure condition* – A condition requiring the provision of trunk infrastructure if trunk infrastructure has not been provided or has been provided but is not adequate, and either of the following apply:[49]
  - The trunk infrastructure is or will be located on premises that are the subject of a development application, whether or not the infrastructure is necessary to service the subject premises.
  - The trunk infrastructure is or will be located on other premises, but is necessary to service the subject premises.
- There are two types of necessary infrastructure conditions:
  - *LGIP identified infrastructure* – If the LGIP identifies adequate trunk infrastructure to service the subject premises, a condition may require either or both the infrastructure identified in the LGIP or different trunk infrastructure delivering the same desired standard of service to be provided at a stated time.[50]
  - *LGIP unidentified infrastructure* – If the LGIP does not identify adequate trunk infrastructure to service the subject premises, a condition may require development infrastructure necessary to service the premises to be provided at a stated time if the development it will service is consistent with the assumptions in the LGIP about the type, scale, location or timing of development.[51]
- *Non-trunk infrastructure condition* – A condition requiring the provision of non-trunk infrastructure for one or more of the following:[52]
  - *Internal network* – A network, or part of a network, internal to the premises.
  - *Connection to external network* – Connecting the premises to external infrastructure networks.
  - *Safety or efficiency of network* – Protecting or maintaining the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.

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[49] See sections 127 of the Planning Act.

[50] See section 128(1) of the Planning Act and section 99BRCQ of the SEQ Water Act.

[51] See section 128(2) and (3) of the Planning Act and section 99BRCR of the SEQ Water Act.

[52] See section 145 of the Planning Act and section 99BRDJ of the SEQ Water Act.

A non-trunk infrastructure condition must state the infrastructure to be provided, and when the infrastructure must be provided.[53]

Power to impose a development condition for infrastructure

The power to impose a condition on a development approval is subject to the following requirements:

- *Relevant or reasonable requirement* – The condition must be relevant to, but not an unreasonable imposition, or be reasonably required.[54]
- *Conditioning power identified* – The local government's decision notice in respect of the development approval must state the provision of the Planning Act under which the condition was imposed.[55]

The current capped framework (as with the previous capped framework) is significantly different from the original capped framework, where a necessary infrastructure condition could only be imposed if the trunk infrastructure is identified in the PIP or an adopted infrastructure charges resolution of the local government.[56]

Relevant and reasonable test for a necessary infrastructure condition

A necessary infrastructure condition is taken to comply with the relevant and reasonable requirement if the following are satisfied:[57]

- *Most efficient and cost effective solution* – Generally, infrastructure required is the most efficient and cost effective solution for servicing other premises in the general area of the subject premises.

  According to common law principles, the infrastructure is likely to be an efficient and cost effective solution in the following circumstances:

  - Construction of the infrastructure is not carried out on a piecemeal basis.
  - Infrastructure that is necessary to service other premises in the general area of the subject premises is carried out in full rather than in part as development of other premises progresses.
- *Not an unreasonable imposition* – For infrastructure required to be provided on the subject premises, the infrastructure is not an unreasonable imposition on the development or the use of the subject premises as a consequence of the development.

  According to common law principles, the infrastructure required to be provided on the subject premises is not an unreasonable imposition in the following circumstances:

  - The infrastructure involves the following:
    - No or minor redesign of the development.
    - No significant restriction on the development.
    - No significant additional cost burden.
  - The infrastructure is in the interests of rational development or efficient and orderly planning of the general area in which the subject premises is situated.
  - The infrastructure is actually needed to service existing, approved or foreseeable development.
  - The infrastructure is subject to an identifiable timeframe for the provision of the infrastructure.

It is relevant to note that, unlike the previous capped framework, the current capped framework does not require that the infrastructure required by the necessary infrastructure condition be "*necessary to service the subject premises*" for the condition to be taken to be relevant and reasonable.[58] The requirement that the infrastructure is "*necessary to service the subject premises*" is now only a prerequisite to the imposition of a necessary infrastructure condition where the trunk infrastructure will be located on premises that are not the subject of a development application.[59]

However, that requirement for the condition to be taken to be relevant and reasonable remains in respect of distributor-retailers under the SEQ Water Act.[60] The current capped framework also declares that a necessary infrastructure condition may be imposed for infrastructure even if the infrastructure will service premises other than the subject premises.[61]

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[53] See section 145(a) of the Planning Act and section 99BRDJ(3) of the SEQ Water Act.

[54] See section 65(1) of the Planning Act and section 99BRAJ(1) of the SEQ Water Act.

[55] See section 63(2)(e)(iv) of the Planning Act and section 99BRAI(2)(e) of the SEQ Water Act.

[56] See section 649 of the SPA (28 May 2014 reprint).

[57] See section 128(4) of the Planning Act.

[58] See for comparison section 648(1)(a)(i) of SPA (19 May 2017 reprint).

[59] See section 127 (Application and operation of subdivision) of the Planning Act.

[60] See section 99BRCS(1)(a)(i) of the SEQ Water Act.

[61] See section 128(5) of the Planning Act and section 99BRC(2) of the SEQ Water Act.

Relevant and reasonable test for a non-trunk infrastructure condition

A non-trunk infrastructure condition is required to satisfy either of the following:[62]

- *Relevant to, but not an unreasonable imposition* – The non-trunk infrastructure required by the condition must satisfy the following:
  - The non-trunk infrastructure must be relevant to the development or use of the premises as a consequence of the development.

    According to common law principles, the infrastructure is likely to be relevant to the development or use of the premises as a consequence of the development where the non-trunk infrastructure is required for the following purposes:
    - Maintain proper standards.
    - Another legitimate basis such as where it is imposed in the interests of rational development of the general area in which the premises is situated.
  - The non-trunk infrastructure must not be an unreasonable imposition on the development or use of the premises as a consequence of the development.

    According to common law principles, the infrastructure is not likely to be an unreasonable imposition in the following circumstances:
    - The infrastructure would result in the following:
      - No or minor redesign of the development.
      - No significant restriction on the development.
      - No significant additional cost burden.
    - The infrastructure is in the interests of rational development or efficient and orderly planning of the general area in which the subject premises is situated.
    - The infrastructure is actually needed to service existing, approved or foreseeable development.
    - The infrastructure is subject to an identifiable timeframe for the provision of the infrastructure.
- *Reasonably required* – The non-trunk infrastructure required by the condition must be reasonably required in relation to the development or use of the premises as a consequence of the development.

  According to common law principles, the infrastructure is likely to be reasonably required if a nexus exists between the infrastructure and the development or use of the premises and the following circumstances apply:
  - The development or use of the premises creates a change to the existing state of the infrastructure network.
  - The infrastructure requirement is a reasonable response to the change.

Permissible change

The Planning and Environment Court, in *East Coast Gravel Pty Ltd v Brisbane City Council* [2019] QPEC 15 considered whether, under the SPA, an applicant who had acted on a development approval and complied with conditions requiring the payment of infrastructure charges and the construction of infrastructure, being a bike path, was able to request a "permissible change" under section 367 of the SPA to amended the condition regarding payment of infrastructure charges such that it was reduced to take account of the money spent building the bike path.

The Planning and Environment Court did not accept that the proposed change was outside the scope of the SPA, but found that it was not a "permissible change" under the SPA, as it was likely that it would cause a person, including the local government, to make a properly made submission objecting to the proposed change, if the circumstances allowed.

The case may be decided differently under the Planning Act as the corresponding provision, being in respect of a "minor change", does not require consideration of whether the change would cause a person to make a properly made submission objecting to the proposed change. Whether the change would result in "substantially different development" is however still relevant under the Planning Act, and includes a consideration of whether the change will have impacts on infrastructure provisions; which is likely to be determinative against an applicant if a similar set of circumstances arose.

[62] See section 65(1) of the Planning Act and section 99BRAJ of the SEQ Water Act.

Conversion applications for non-trunk infrastructure conditions

Conversion application criteria

The current capped framework empowers an applicant for a development approval (or a person in whom the benefit of a development approval vests)[63] to apply to convert non-trunk infrastructure to trunk infrastructure (known as a **conversion application**)[64] if both of the following circumstances apply:[65]

- *Non-trunk infrastructure condition* – The infrastructure is required to be provided under a non-trunk infrastructure condition.
- *Construction not started* – Construction of the non-trunk infrastructure has not started.

A conversion application must be made to the relevant local government within 1 year after the development approval starts to have effect.[66] It is relevant to note that under the previous capped framework there was no equivalent time limitation for making a conversion application, which continues to apply in respect of distributer-retailers under the SEQ Water Act.

When deciding a conversion application, the local government must consider the criteria for deciding the application in its charges resolution.[67] In *The Avenues Highfields Pty Ltd v Toowoomba Regional Council* [2017] QPEC 48 (**Highfields Decision**), the Planning and Environment Court considered the predecessor to this requirement, being section 660 of the SPA, which was on slightly different terms, in that it said "*the local government must <u>have regard</u> to the criteria*" rather than "*the local government <u>must consider</u> the criteria*" [emphasis added]. In the Highfields Decision, the Planning and Environment Court held that the requirement to "*have regard to*" the criteria does not mean that the local government must adhere to the criteria. Rather, the local government is to give "*proper, genuine and realistic consideration*"[68] to the criteria, but is not bound to make a decision that complies with the criteria. That position is made more clear under the Planning Act by the use of the word "*consider*".

Effect of approval of conversion application

Approval of a conversion application has the following effect:[69]

- *Non-trunk infrastructure condition* – The non-trunk infrastructure condition no longer has effect.
- *Necessary infrastructure condition* – The local government may amend the development approval by imposing a necessary infrastructure condition for the trunk infrastructure.
- *ICN* – If a necessary infrastructure condition is imposed, the local government must either give an ICN or amend an existing ICN to state whether an offset or refund applies and, if so, information about the offset or refund, including when the refund will be given.

Power to impose a necessary trunk infrastructure condition

In the Highfields Decision, the Planning and Environment Court also considered whether section 662(3) of the SPA conferred a discretion on the local government to impose a necessary trunk infrastructure condition that changed the form of the infrastructure. The Planning and Environment Court held that there was no requirement under the SPA that a local government impose a necessary trunk infrastructure condition on the same, or substantially the same, terms as the original condition. The Planning and Environment Court so held on the basis that, among other reasons, protections existed under the SPA for the benefit of applicants in respect of the imposition of a necessary trunk infrastructure condition following a successful conversion application. Such protections referred to by the Court included section 649 of the SPA which had the effect of requiring the local government to bear the financial burden where the costs of the necessary trunk infrastructure is greater than the adopted charge for the development. The Planning and Environment Court also referred to section 662(3) of the SPA which required a conversion application to be made before construction commences, which the Court opined would ensure no wasted costs in the event the ultimate form of the infrastructure was changed. Although decided under the SPA, the principles are still applicable under the Planning Act as the relevant provisions under the Planning Act are substantially in the same form.[70]

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[63] See section 280 of the Planning Act.

[64] See section 139 of the Planning Act and section 99BRDE of the SEQ Water Act.

[65] See section 138 of the Planning Act and section 99BRDD of the SEQ Water Act.

[66] See section 139(2) of the Planning Act.

[67] See section 140 of the Planning Act and section 99BRDF of the SEQ Water Act.

[68] *Zhang v Canterbury City Council* (2001) 51 NSWLR 589, 601 [62]; [2001] NSWCA 167

[69] See section 142 of the Planning Act and section 99BRDH of the SEQ Water Act.

[70] See relevantly section 129 and section 142 of the Planning Act.

Issues arising from conversion application process

The conversion application process gives rise to the following potential issues:

- *Timing* – A conversion application can only be lodged after a development approval takes effect, by which time the appeal period in respect of the non-trunk infrastructure condition itself will have expired. Accordingly, applicants who decide to pursue a conversion application will not be able to appeal the non-trunk infrastructure condition in the event that the conversion application is refused, although the refusal of the conversion application may itself be the subject of an appeal.[71]
- *Financial consequences* – Applicants may seek to design development in such a way that proposed development infrastructure meets the relevant conversion criteria. This may result in additional and unintended financial pressure on local governments if they are forced to fund additional trunk infrastructure to that originally planned for in respect of their LGIP.

[71] See Schedule 1, Table 1, Item 5 of the Planning Act.

Colin Biggers & Paisley

A Council's failure to provide sufficient particulars in an enforcement notice has caused an enforcement notice to be set aside and an originating application to be dismissed by the Planning and Environment Court

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Benfer v Sunshine Coast Regional Council* [2019] QPEC 6 heard before Kefford DCJ

May 2019

In brief

The case of *Benfer v Sunshine Coast Regional Council* [2019] QPEC 6 concerned two proceedings heard in the Planning and Environment Court. The first proceeding concerned an appeal by a landowner (**Landowner**) against the decision of the Sunshine Coast Regional Council (**Council**) to give an enforcement notice regarding the alleged unlawful importation of approximately 10,000 cubic metres of fill. The second proceeding concerned an originating application commenced by the Council to seek enforcement orders requiring the removal of the fill and reinstatement of the land.

The Court held that the Council did not discharge the onus of proof in relation to both proceedings. The Court found that the enforcement notice failed to state the nature of the offence and that it was possible to make the works comply with a development approval. The Court also held that it did not have jurisdiction under the *Planning Act 2016* (**PA**) to make an order to require a person to remedy the effect of a development offence committed under the *Sustainable Planning Act 2009* (**SPA**) and held that it was inappropriate to grant the Council relief as it did not establish that the Landowner had committed a development offence. The Court ordered that the appeal be allowed and the enforcement notice be set aside and dismissed the originating application.

Background

In 2017, the Council gave the Landowner a show cause notice under section 167 of the PA in relation to complaints about a large quantity of fill material which had been imported onto the Landowner's land. An enforcement notice was issued by the Council to the Landowner in September 2017.

The enforcement notice stated that the Landowner had committed a development offence under section 163 of the PA. Section 163(1) of the PA relevantly states that "*A person must not carry out assessable development, unless all necessary development permits are in effect for the development*".

The Council claimed that 10,000 cubic metres of fill was imported onto the land without a development approval, and that the fill was located within the Flood and Inundation Area of the Council's planning scheme.

The Landowner appealed the Council's decision to issue the enforcement notice and, in response, the Council lodged an originating application seeking enforcement orders for the removal of the fill and reinstatement of the land.

Appeal proceeding

The Landowner lodged an appeal against the Council's enforcement notice. The Landowner advanced three grounds of appeal which were as follows:

- the enforcement notice did not comply with section 168(3)(a) of the PA;
- it was unreasonable to require the removal of approximately 10,000 cubic metres of fill;
- the prescribed time frames for the removal of the fill were too short.

The Court found that the enforcement notice failed to comply with section 168(3)(a) of the PA

The Landowner alleged that the enforcement notice failed to comply with section 168(3)(a) of the PA as it "*did not state the nature of the offence*". The Landowner submitted that the enforcement notice failed to identify the following:

- the type of development which was alleged to have been carried out without a development permit;
- the planning scheme provisions which make the development assessable development requiring a development permit;
- the dates, times or periods on which the alleged development offence occurred.

The Council submitted that the enforcement notice contained sufficient particulars regarding the nature of the offence and complied with section 168(3)(a) of the PA.

During the proceeding the Council argued that the Landowner had also committed a development offence under section 578 of the SPA. Relevantly, section 578(1) of the SPA provides that "*A person must not carry out assessable development unless there is an effective development permit for the development*". The Council conceded to the Court that the enforcement notice ought to have referred to section 578 of the SPA.

Despite this concession, the Council submitted that the enforcement notice ought not be set aside for the following reasons:

- section 168(3)(a) of the PA only required the nature of the alleged offence to be identified and not the legislative provision;
- the conduct relied upon to allege the offence was the same under the SPA as it was under the PA; and
- the Landowner had not suffered any prejudice as the relief for both offences is the same.

In regards to the Council's first submission, the Court found that section 168(3)(a) of the PA requires that a legislative provision be identified as well as the nature of the alleged offence. The Court additionally held that an enforcement notice should set out the nature of the alleged offence and the details of the actions required with sufficient certainty so that a person of ordinary intelligence and experience can ascertain what is reasonably required (see [95]). The Court found that the Council's enforcement notice failed to do this. Consequently, the Court held that the enforcement notice did not sufficiently particularise the nature of the offence for the purposes of section 168(3)(a) of the PA.

The Court rejected the Council's submission that the conduct of the alleged offence is the same under both the SPA and the PA. The Court held that the key difference relates to the timing of the importation of the fill. The Court found that the enforcement notice failed to refer to the importation of fill that occurred both prior to, and after 3 July 2017 (being the commencement date of the PA), and held that this was a material omission.

The Court rejected the Council's submission that the Landowner did not suffer any prejudice from the Council's failure to reference section 578 of the SPA in the enforcement notice. The Court held that the absence of the reference to section 578 of the SPA inhibited the Landowner's ability to have knowledge that the Council was alleging an offence under the SPA and therefore the Landowner's ability to lodge an appeal.

Lastly, the Court found that it was a material omission that the enforcement notice did not allege that the filling constituted operational work which was assessable development. The Court noted that the planning scheme only required a development approval if the fill does not involve the placement of topsoil. The Court therefore held that a reference to the planning scheme provision was essential.

The Court found that it is possible to make the works comply with a development approval

The Landowner alleged that it was unreasonable to require the removal of approximately 10,000 cubic metres of fill as the Landowner was willing to lodge a development application for a development permit to authorise the carrying out of operational work.

The Court rejected the Council's allegation that the Landowner was not genuine about lodging a development application as the Landowner did not have the opportunity to understand the nature of the offence that it was required to remedy. The Court found that the Landowner had the capacity to take practical steps to lodge the requisite development application.

The Landowner claimed that the fill additionally improved amenity and flood mitigation to the land. The Council submitted that the fill had caused negative impacts on amenity and increased flood risk to the land. The Court referred to the findings of the Council's engineering expert and found that the fill did not increase flood risk and had no adverse impacts on amenity.

Council conceded that the timeframe to remove the fill was too short

The Landowner alleged that the prescribed timeframes for the fill's removal were too short having regard to the volume of the fill. The Council conceded that the enforcement notice should be changed to enlarge the time to six months which the Court concluded to be a reasonable timeframe.

Originating Application

The Council lodged an originating application to seek enforcement orders requiring the Landowner to remove approximately 10,000 cubic metres of fill and reinstate the land. The Court considered the following three issues in relation to the originating application:

- whether the Court has power to make an enforcement order under section 180 of the PA;
- whether the Council has demonstrated the commission of a development offence under section 578 of the SPA and section 163 of the PA; and
- whether the Court should grant relief.

Court lacked jurisdiction

The Council submitted that section 180 of the PA confers power on the Court to make an order to require a person to remedy the effect of a development offence made under the SPA and the PA. The Court however held that the power conferred under section 180 of the PA does not confer a power to make an order requiring a person to remedy the effect of a development offence under the SPA, and is limited to a development offence under PA.

No commission of offence and therefore no relief granted

The Court found it unnecessary to consider whether the Council demonstrated the commission of development offences under section 578 of the SPA and section 163 of the PA, as the Council conceded that if the Court did not have power to make an enforcement order with respect to a development offence under the SPA, no enforcement order should be made as it was unable to identify the extent of the fill imported after 3 July 2017.

The Court found that it would be inappropriate to grant the relief sought as the Council failed to prove that the Landowner's actions constituted operational work that was assessable development. The Court found that as the Council did not provide evidence that the works undertaken by the Landowner did not involve the placement of topsoil, the Council did not discharge the onus of proof.

The Court additionally found that the relief sought was inappropriate having regard to the delay in commencing the proceedings, the Landowner's indication that it would make a development application, and the evidence produced by the Council's expert that the fill did not increase the risk of flooding on the land or adjacent properties.

Conclusion

The Court found that the Council did not discharge the onus of proof and relevantly ordered that the appeal be allowed and the enforcement notice be set aside. Additionally, the Court held that as the Council did not discharge the onus of proof, the originating application ought be dismissed.

Court of Appeal finds error in law in the interpretation of "essential management" under the Sustainable Planning Regulation 2009

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council* [2019] QCA 51 heard before Gotterson and McMurdo JJA and Davis J

May 2019

In brief

The case of *Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council* [2019] QCA 51 concerned an application for leave to appeal a decision of the Planning and Environment Court to the Queensland Court of Appeal. In the appeal, Moreton Bay Regional Council (**Council**) submitted that the Planning and Environment Court had erred in its finding that the proposed clearing work was within the definition of "*essential management*" on the basis that it involved the creation of firebreaks to protect "*infrastructure*". The Council further submitted that the Planning and Environment Court had made a second error of law in finding that the provisions of the *2005 Redcliffe City Planning Scheme* (**Planning Scheme**) which categorised the proposed work as assessable development was invalid as it was inconsistent with the *Sustainable Planning Regulation 2009* (**SPR**).

Traspunt No. 4 Pty Ltd (**Applicant**) submitted that the Planning and Environment Court had erred in its finding that the proposed clearing work on the southern and western boundaries of the relevant land was not essential management.

The Court of Appeal held that all of the proposed clearing work on the land was assessable development as prescribed under the SPR and the Planning Scheme. The Court of Appeal granted Council leave to appeal and allowed the Council's appeal. The Court of Appeal additionally granted the Applicant leave to appeal but dismissed the Applicant's appeal.

Previous decision of the Planning and Environment Court

The Applicant submitted a development application for a development permit to clear vegetation on two parcels of freehold land located at Rothwell. The Council refused the development application and the Applicant subsequently appealed this decision to the Planning and Environment Court.

The Planning and Environment Court held that the proposed clearing work on the northern and eastern side boundaries of the land was "*essential management*" under the SPR, and therefore did not require the Council's approval. The Planning and Environment Court found the purpose of the proposed clearing work was to establish or maintain a necessary firebreak to protect "*infrastructure*" which was identified, by the Planning and Environment Court, to be the residential development to the north and east of the subject land.

The Planning and Environment Court found in favour of the Council for the proposed clearing work along the southern and western boundaries of the land and held the proposed clearing work was for the purpose of protecting fences which was expressly excluded from the definition of "*essential management*" under the SPR and was therefore assessable development.

The Planning and Environment Court considered whether there had been a deemed approval of the development application, but found the Applicant did not have the benefit of a deemed approval as it was a vegetation clearing application under the *Vegetation Management Act 1999*, which was expressly excluded from the deeming provisions.

In considering the merits of the application, the Planning and Environment Court held there were insufficient grounds to justify the approval of the development application despite the conflict, as it conflicted with the Natural Features or Resource Overlay Code of the Planning Scheme.

The Applicant and the Council both sought leave to appeal to the Court of Appeal against the decision of the Planning and Environment Court, on the basis that each party alleged that it should have succeeded entirely and that the Planning and Environment Court had made errors of law in reaching its decision.

Interpretation of infrastructure in relation to essential management

The SPR relevantly provides that "*essential management*" is "*clearing native vegetation for establishing or maintaining a necessary firebreak to protect infrastructure other than a fence, road or vehicular tracks, watering facilities and constructed drains other than contour banks, other than to source construction material…*". The *Sustainable Planning Act 2009* (**SPA**) states that infrastructure "*includes land, facilities, services and works used for supporting economic activity and meeting environmental needs*".

The Council submitted the Planning and Environment Court had erred in its finding that the proposed clearing work was within the definition of "*essential management*" on the basis it involved the creation of firebreaks to protect "*infrastructure*". The Council submitted that residential housing did not fall within the definition of "*infrastructure*" in the context of the SPR as it is not relevant to the definition of "*infrastructure*" provided under the SPA. The Council further argued that residential housing is not included even when considering the ordinary meaning of "*infrastructure*".

The Applicant submitted the Planning and Environment Court was correct finding the work was essential management, and residential housing constituted infrastructure in the ordinary meaning of the word.

The Court of Appeal found that the definition of "*infrastructure*" as provided under the SPA applied to the SPR by application of section 37 of the *Statutory Instruments Act 1992*. Relevantly, the Court of Appeal held residential housing was not "*infrastructure*" in the context of "*essential management*". The Court of Appeal found that the Council had demonstrated that there was an error of law in the Planning and Environment Court's conclusion that the proposed clearing work on the northern and eastern boundaries of the land was "*essential management*" as defined under the SPR.

The Court of Appeal further considered the Council's argument that the work was assessable development by the operation of the Planning Scheme. The Court of Appeal held the Planning and Environment Court had erred in its conclusion that the provisions of the Planning Scheme which categorised the proposed work as assessable development were invalid on the basis that they were inconsistent with the SPR. The Court of Appeal held that the absence of the SPR prescribing the clearing work as assessable development did not mean that the Planning Scheme could not prescribe the clearing work as assessable development.

Maintaining fences not to be classified as essential management

The Applicant argued the Planning and Environment Court had erred in its finding that the proposed clearing work on the southern and western boundaries of the land was assessable development as it was necessary to maintain fences, and therefore "*infrastructure*" on the boundaries as provided under the definition of "*essential management*" in Schedule 26 of the SPR.

The Court of Appeal disagreed with the Applicant and held that when reading the definition of "*essential management*" as a whole, the maintenance of infrastructure would involve work that is done to the infrastructure itself. The Court of Appeal found that if the maintenance of the infrastructure included the construction of a firebreak to protect the infrastructure, it would cause a considerable overlap between the categories under the definition of "*essential management*", and would cause unavoidable tension between the two. Consequently the Court of Appeal held that the Planning and Environment Court's finding that the work on the southern and western boundaries of the land was not essential management was correct.

Conclusion

The Court of Appeal concluded all of the work was assessable development as prescribed under the SPR and the Planning Scheme. The Court granted the Council leave to appeal and allowed the Council's appeal. The Court granted the Applicant leave to appeal but ultimately dismissed the Applicant's appeal. The Court remitted the proceeding to the Planning and Environment Court for further consideration and orders.

Planning and Environment Court has approved the demolition of a dwelling house constructed pre-1946 as the dwelling house and streetscape lacked a traditional character

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Di Carlo v Brisbane City Council* [2019] QPEC 4 heard before Everson DCJ

May 2019

In brief

The case of *Di Carlo v Brisbane City Council* [2019] QPEC 4 concerned an appeal commenced by the applicant against the decision of the Brisbane City Council (**Council**) to refuse a development application for a development permit for building work for demolition of a dwelling house in the Traditional Building Character Overlay of the Council's City Plan 2014 (**Planning Scheme**).

The Council argued that the development did not comply with Performance Outcome 7 (**PO7**) of the Traditional Building Character (Demolition) Overlay Code (**Demolition Code**) and therefore the dwelling house ought not be demolished.

The Court found that the development application did not comply with PO7 of the Demolition Code but did not accept the Council's submission that PO7 provided a "*blanket prohibition*".

The Court found that it was appropriate to consider the Demolition Code as a whole, and held that it was appropriate to exercise its discretion under section 60(2)(b) of the *Planning Act 2016* to approve the development application despite its non-compliance with PO7.

The Court held that the development complied with Performance Outcome 5(c) (**PO5(c)**) and Acceptable Outcome 5(d) (**AO5(d)**) of the Demolition Code for the reasons that the dwelling house did not contribute to the traditional building character of the part of the street in which it was situated as the street itself lacked traditional character. The Court therefore allowed the appeal.

Court found that a planning instrument must be read as a whole to determine the true intent of its provisions

The Council submitted that the dwelling house ought not be demolished as the dwelling house exhibited traditional building character and was structurally sound. The Council argued that because of this, the development failed to comply with PO7 of the Demolition Code. PO7 relevantly provides that demolition or removal of a building constructed in 1946 or earlier involves a building which:

> *(a) does not represent traditional building character;*
>
> *(b) is not capable of structural repair;*
>
> *(c) is not a building constructed in 1946 or earlier.*

The Court accepted the Council's submission that the dwelling house was structurally sound and exhibited a traditional building character. However, the Court found that the development did not comply with PO7 of the Demolition Code.

The Court however applied the principles for construing a planning document set out in *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QCA 147 (**Zappala**). In that case, the Court held that planning documents must be construed by reference to the language of the instrument viewed as a whole and with the intention to achieve balance between the outcomes. Applying the principles in the Zappala case, the Court held that the Demolition Code must be read as a whole in order to determine whether or not the development application ought be approved. The Court found the primary objective of the Demolition Code is to protect residential buildings that either individually or collectively contribute to the Traditional Building Character Overlay where it forms part of a character streetscape and compliments the traditional building character buildings constructed in 1946 or earlier.

Applying the principles in the Zappala case, the Court held that there was no "*meritorious planning basis*" for PO7 to provide a "*blanket prohibition*" to prevent the demolition of a dwelling house constructed in 1946 or earlier.

In addition, the Court noted that the development complied with PO5(c) and AO5(d) of the Demolition Code. PO5(c) relevantly provides that demolition or removal of a building constructed in 1946 or earlier involves a building which "*does not contribute to the traditional building character of the part of the street within the Traditional Building Character Overlay*". Additionally AO5(d) relevantly provides that demolition or removal of a building constructed in 1946 or earlier involves a building which "*is in a section of the street within the Traditional Building Character Overlay that has no traditional character*". The Council conceded that the development complied with PO5(c) and AO5(d) of the Demolition Code.

On the basis that the development failed to comply with PO7 of the Demolition Code but complied with PO5(c) and AO5(d) of the Demolition Code, the Court found that it was appropriate to exercise its discretion under section 60(2)(b) of the *Planning Act 2016* to approve the development application even if the development did not comply with some of the assessment benchmarks.

Court exercised its discretion under section 60(2)(b) of the Planning Act

Section 60(2)(b) of the *Planning Act 2016* relevantly provides that the Court may decide to approve a development application even if the development does not comply with some of the assessment benchmarks.

The Court found that as the Applicant had complied with PO5(c) and AO5(d) of the Demolition Code, the appeal ought be allowed.

Conclusion

The Court allowed the appeal despite the non-compliance with PO7 of the Demolition Code and approved the development application.

Planning and Environment Court has approved the reconfiguration of a lot and repositioning of a pre-1947 dwelling despite conflict with the Brisbane City Plan 2014

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Smout v Brisbane City Council* [2019] QPEC 10 heard before Williamson QC DCJ

May 2019

In brief

The case of *Smout v Brisbane City Council* [2019] QPEC 10 concerned an appeal by the registered owner of land (**Landowner**) to the Planning and Environment Court against the Brisbane City Council's (**Council**) decision to refuse a development application for a reconfiguration of a lot to realign the boundaries of the land to create two square lots and a material change of use.

The Court found that the proposed development's non-compliance with the *Brisbane City Plan 2014* (**City Plan 2014**) did not support the refusal of the development application, and held that it should exercise its discretion under section 60(3) of the *Planning Act 2016* (**PA**) to approve the development application.

Issues in dispute

The issues in the appeal were as follows:

- whether the proposed development's non-compliance with the Character Residential Zone Code warranted the refusal of the development application having regard to Overall Outcome (5)(a) and Overall Outcome (6)(d); and
- whether the Court should exercise its discretion under section 60(3) of the PA to approve the development application despite the conflict.

Background

The land, subject of the development application is located at the corner of Abbott and Massey Street, Ascot. The land is improved by a pre-1947 traditional character dwelling. The Landowner relevantly submitted an impact assessable development application to the Council for a development approval for a reconfiguration of a lot and a material change of use. The proposed development involved realigning the boundaries of the land to create two square lots being $400m^2$. The existing dwelling was proposed to be partially demolished, repositioned and renovated. The Council refused the development application on five grounds. The Landowner subsequently appealed that decision.

Conflict with the City Plan 2014

The Council submitted that the development application ought be refused on the basis that there was significant non-compliance with the City Plan 2014. The Council alleged that the proposed development did not comply with the Strategic Framework, the Character Residential Zone Code (**Character Code**) and the Subdivision Code; however conceded at the hearing that the Character Code was the main point of contention to be determined in the appeal.

The Council argued that the proposed development did not comply with Overall Outcome (5)(a) of the Character Code. Overall Outcome (5)(a) relevantly provides that "*development occurs on an appropriately sized and configured lot and is of a form and scale that reinforces a distinctive subtropical character of low rise buildings set in green landscaped areas*". To determine what constitutes as an "*appropriate size*" the Council submitted that Overall Outcome (6)(d) of the Character Code prescribes a quantitative measure which should be adhered to. Overall Outcome (6)(d) relevantly provides that "*development provides for a minimum lot size of* $450m^2$ *to maintain a block pattern that accommodates traditional backyards and large trees*".

The Council submitted that if the proposed development were to be approved, it would create two square lots that were of a size less than 450m^2 into a predominately rectangular block pattern, which amounted to significant non-compliance with the Character Code. The Council further argued that the proposed development did not comply with the Character Code as it created two lots that had either no backyard or a small backyard with limited potential to accommodate large trees.

The Court considered the Council's submissions and found that the Council's case was founded upon a superficial approach to the Character Code and did not consider the planning rationale that underlies it. The Court held that Overall Outcome (6)(d) of the Character Code could not purport to operate as a prohibition on development involving lots less than 450m^2 in size. The Court held that rather than applying an inflexible approach, the facts and circumstances of each case should be determined based on whether the underlying planning rationale had been met.

Relevantly, the Court held that the underlying planning rationale for Overall Outcome (6)(d) was for the development to "*maintain a block pattern that accommodates traditional backyards and large trees*". The Court accepted the town planning experts' evidence that the block pattern did not accommodate for "*traditional backyards*" in a general sense and that the size and function of the backyards in the block varied significantly. The Court was therefore satisfied that the proposed development met the underlying planning rationale of Overall Outcome (6)(d) having regard to specific locational attributes.

The Court disagreed with the Council's submission that the proposed development ought be refused on the basis that it did not accommodate a backyard and held that the existing character of the area included traditional character housing that did not have a backyard. The Court held that the development, if approved, would not sound in any appreciable adverse planning conflicts.

Discretion

In determining whether the Court should exercise its discretion to approve the proposed development despite its non-compliance with the City Plan 2014, the Court considered the nature of the conflict against proper town planning practice and principle.

The Court firstly considered the purpose of the Character Code and the Strategic Framework of the City Plan 2014 and held that the proposed development would protect and enhance the character of the area. The Court found the character of the area was not influenced by the existence of "*traditional backyards*", and held that the proposed development created a positive contribution to the character of the area.

In relation to block size, the Court held that the proposed reconfiguration had met the underlying planning rationale of Overall Outcome (6)(d) of the Character Code, in that it maintained the block pattern. The Court therefore could not identify any adverse planning consequences arising from the proposed development.

The Court lastly considered the requirement to exercise its discretion under the PA in a way that advances the purpose of the PA as required under section 5(2)(i) of the PA. Section 5(2)(i) of the PA relevantly provides that "*advancing the purpose of this Act includes applying amenity…in the built environment in ways that are…of public benefit*". The Court found that the approval of the proposed development would be consistent with section 5(2)(i) of the PA in that it would reinforce and protect the character of the zone. The Court therefore held the proposed development would achieve the stated public benefit.

Conclusion

The Court held that it should exercise its discretion to approve the proposed development despite the conflicts with the City Plan 2014. The Court granted the appeal and held that the development application should be approved subject to conditions.

In confidence – the Office of the Information Commissioner rejects an application for the disclosure of a without prejudice letter

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Office of the Information Commissioner in the matter of *Zacka and Fraser Coast Regional Council; BGM Projects Pty Ltd (Third Party) & Ors* [2019] QICmr 2 heard before K Shepherd

May 2019

In brief

The case of *Zacka and Fraser Coast Regional Council; BGM Projects Pty Ltd (Third Party) & Ors* [2019] QICmr 2 concerned an application made by a landowner (**Landowner**) to the Office of the Information Commissioner Queensland (*OIC*) to review a decision made by the OIC in which it decided to refuse disclosure of a "without prejudice" letter (**Letter**) that contained information regarding a negotiation between the Fraser Coast Regional Council (**Council**) and a developer (**Developer**) who neighbours the Landowner's property.

The Landowner argued the disclosure of the Letter would be of "public interest".

The OIC found that disclosure of the Letter ought be refused under section 47(3)(b) of the *Right to Information Act 2009* (**RTI Act**) on the basis that its disclosure would, on balance, be contrary to the public interest.

Background

The Landowner and the Developer are in an ongoing dispute in the Supreme Court of Queensland regarding drainage and overland flow issues in connection with their adjoining properties. The Developer alleges that a concrete structure constructed by the Landowner has caused drainage problems on its land. The Landowner however argues that the concrete structure was erected as a result of the Developer's development causing overland flow and drainage problems on its property.

The Council additionally commenced proceedings in the Planning and Environment Court against the Landowner seeking enforcement orders in respect of alleged operational works being carried out on the Landowner's property without the necessary development permit. The alleged operational works includes the construction of the concrete structure.

The Landowner applied to the Council for access to documents relating to communications, reports, or meetings with the Developer, or information regarding the Council's communications with hydraulic engineering consultants in relation to the Landowner's and Developer's respective properties.

The Council refused access to all of the documents requested by the Landowner. The Landowner applied to the OIC who formed the view that some of the refused information could be disclosed. The Council additionally undertook searches in relation to additional information and located the Letter the subject of the proceeding. The Letter concerned without prejudice negotiations between the Council and the Developer. The Landowner requested the Letter be disclosed and the Council refused disclosure.

Landowner's submissions

The Landowner argued there were a number of public interest factors weighing in favour of the Letter being disclosed, which were as follows:

- access to the Letter would contribute to informed debate about overland flow, drainage and hydrology matters;
- hydrology matters are a matter of environmental risk and public health;
- disclosure would provide an insight to the expenditure of Council funds and enhance the Council's accountability as a "model litigant";
- disclosure would inform the community about the Council's operations in the context of development approvals and compliance;
- disclosure would enhance the Landowner's "fair treatment" and contribute to the administration of justice in relation to the ongoing dispute; and
- at the time of the without prejudice negotiation, the Council and the Developer were not opposing parties to litigation.

The OIC found that disclosure of the Letter would moderately enhance the Council's accountability and transparency

The OIC afforded moderate weight to the Landowner's submission that disclosure would demonstrate the Council's accountability in that it would reveal the extent of the matters discussed at the without prejudice meeting. The OIC also found disclosure would moderately enhance the Council's transparency in terms of how it fulfilled its obligations as a model litigant as the Letter demonstrated that the Council was seeking to resolve the disputes outside of a formal court process.

The OIC afforded minimal weight to the submissions that disclosure would contribute to public debate, inform the public about Council's processes and expenditure, and that the Council and the Developer were not opposing parties

The OIC found the Letter was contextually specific to the disputes between the Landowner, the Developer and the Council. The OIC therefore afforded low weight to the Landowner's submission that disclosure of the Letter would enhance informed public debate.

The OIC considered whether or not the Letter informed the community about the Council's public expenditure, or public health and safety risks. The OIC found that as the Letter did not refer to litigation expenses or costs incurred by the Council in relation to its dispute with the Landowner, disclosure would not allow an insight into the Council's expenditure of public funds. The OIC further noted that the Letter did not reveal any concerns regarding public health and environmental risks in respect to the land.

The OIC lastly considered whether disclosure of the Letter would advance the Landowner's "fair treatment" in the ongoing proceedings. The OIC found that the without prejudice negotiation the subject of the Letter had been referred to in published court transcripts in which proposed outcomes regarding the involvement of hydraulic experts, approval processes and relevant site works were revealed. The OIC therefore awarded low weight to this submission due to the nature and extent of the information already released.

The OIC accepted the Council and the Developer were not opposing parties in litigation during the without prejudice negotiation. The OIC however found that as both parties were involved in separate proceedings against the Landowner with respect to the concrete structure, it could be foreseeable that if there was a resolution concerning certain issues, more than one of the proceedings could be resolved. Additionally, the OIC referred to court transcripts where it was stated that the related proceedings could be settled at the same time by alternative dispute resolution. The OIC therefore held that the Council and the Developer have opposing interests concerning the hydrological issues impacting the respective properties and that the parties were in discussions as part of an alternative dispute resolution process.

The OIC afforded significant weight to the preservation of confidentiality afforded by without prejudice activities

The OIC noted the RTI Act recognises there is a public interest in the non-disclosure of information that could reasonably be expected to impede the administration of justice (see [27]).

The OIC found the Council engaged in a without prejudice meeting with the Developer in an attempt to resolve the disputes between the parties. The OIC held there was a mutual understanding between the Council and the Developer of confidence in respect of the without prejudice negotiation. The OIC afforded high weight to the understanding of confidence as it found it is of public interest to protect confidential discussions.

The OIC concluded the disclosure of the Letter would prejudice the Council's ability to conduct future negotiations of that nature particularly in the planning and environment context. The OIC held that eroding the confidence afforded to without prejudice meetings would diminish the viability of the alternative dispute resolution process.

The OIC concluded that disclosing confidential information communications made in the course of attempting to resolve the disputes, would prejudice the Council's ability to engage in future without prejudice meetings and impede the administration of justice.

Conclusion

The OIC afforded significant weight to the factors favouring non-disclosure and held that disclosure of the Letter would be contrary to public interest.

The OIC varied the decision under review and refused disclosure of the Letter under section 47(3)(b) of the RTI Act.

No third party rights for an adjoining landowner seeking to be joined as a party to an originating application seeking to extend the currency period for a lapsed development approval

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *JPJ Development v Brisbane City Council* [2019] QPEC 13 heard before Everson DCJ

May 2019

In brief

The case of *JPJ Development v Brisbane City Council* [2019] QPEC 13 concerned a joinder application to the Planning and Environment Court by a landowner (**Adjoining Landowner**) who is a neighbour of land which had the benefit of a development approval that had lapsed.

The Adjoining Landowner sought an order under rule 69(1)(b) of the *Uniform Civil Procedure Rules 1999* (**UCPR**) that it be joined as a party to an originating application which sought to extend the currency period of the lapsed development approval until July 2020.

The Court found that the Adjoining Landowner had no statutory right to be joined as a party to the originating application, and had no standing to make allegations in respect to the lapsed development approval. The Court rejected the relief sought and dismissed the application for joinder.

Background

A development application for a development permit for reconfiguring a lot and an access easement was lodged in 2009 over land located in Kenmore, Brisbane. The development application was approved on 22 October 2009.

The landowner at the time (**Previous Landowner**) made numerous requests to extend the currency period of the development approval. The Brisbane City Council (**Council**) approved the extension of the development approval's currency period on two occasions, namely in 2014 and 2016. The Court additionally approved permissible changes to the development approval and various operational works development approvals.

With respect to the Court's approval of the permissible change applications, the Court found the changes did not cause a person to make a properly made submission under section 367 of the *Sustainable Planning Act 2009* (**SPA**).

Most recently, the currency period was extended in 2016 but lapsed on 19 July 2018. The Previous Landowner sold the land subject to the development approval to a developer in 2017. The developer filed an originating application to the Planning and Environment Court on 3 December 2018 seeking orders under section 37 of the *Planning and Environment Court Act 2016* (**PEC Act**) to excuse the Previous Landowner's failure to comply with the conditions of the development approval and to extend the currency period of the development approval until July 2020. The Adjoining Landowner sought to be joined as a party to the originating application filed by the developer.

Adjoining Landowner's submissions

The Adjoining Landowner made the following submissions:

- under rule 69(1)(b) of the UCPR, it is "*desirable, just and convenient*" that it be heard in respect of the originating application to extend the currency period;
- the developer had breached the conditions of the development approval;
- the Court ought to grant the relief sought by the Adjoining Landowner.

Issues

The Court considered the following three issues:

- whether rule 69(1)(b) of the UCPR grants a statutory right to the Adjoining Landowner to be a party to the originating application;

- whether the Adjoining Landowner has standing to make allegations with respect to breaches of the conditions of the development approval;
- whether the Court has jurisdiction under section 37 of the PEC Act to grant relief to the Adjoining Landowner.

No statutory right to include the Adjoining Landowner as a party to the originating application

The Adjoining Landowner submitted that rule 69(1)(b) of the UCPR permitted it to be joined as a party to the originating application. Rule 69(1)(b) of the UCPR relevantly provides:

> *any of the following persons be included as a party -*
>
> *(i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;*
>
> *(ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.*

The Adjoining Landowner argued that it would be "*desirable, just and convenient*" for it to be heard in respect of the originating application as it would have made a properly made submission objecting to the changes to the development approval and would have sought emergency access over the land for its own benefit.

The Court found the Adjoining Landowner had no statutory right under rule 69(1)(b) of the UCPR to be a party to the originating application, as the Court had already decided that no third party was entitled to make a properly made submission under section 367 of the SPA (in consideration of the previous permissible change applications). The Court found the permissible change applications were a matter already judged and there was no basis on which the Adjoining Landowner had a right to invoke both rule 69 of the UCPR and section 367 of the SPA.

The Adjoining Landowner had no standing to take issue with the alleged breach of the development approval

The Court found the Adjoining Landowner had no right to be heard by the Court in order to make allegations concerning a breach of the conditions of the development approval. The Court concluded the allegations would be better addressed by way of a proceeding for an enforcement order or an interim enforcement order.

The Court refused to grant the relief sought by the Adjoining Landowner

The Adjoining Landowner submitted that the Court ought to use a broad discretion under section 37 of the PEC Act to grant it third party rights. Section 37 of the PEC Act relevantly provides:

> *(1) If the P&E Court finds there has been noncompliance with a provision of this Act or an enabling Act, the court may deal with the matter in the way it considers appropriate.*
>
> *(2) Without limiting subsection (1) and to remove any doubt, it is declared that subsection (1)—*
>
> > *(a) applies for a development approval that has lapsed, or a development application that has lapsed or has not been properly made under the Planning Act; and*
> >
> > *(b) is not limited to—*
> >
> > > *(i) circumstances in relation to a current P&E Court proceeding; or*
> > >
> > > *(ii) provisions under which there is a positive obligation to take particular action.*

The Court held the proper exercise of the jurisdiction to grant relief sought by the Adjoining Landowner "*requires a balancing of the rules of natural justice with the statutory intention in the relevant legislative regimes*"(at [7]). The Court found, subject to section 37 of the PEC Act, any consideration of the interest of third parties is a matter for the Court in exercising its discretion and not a matter for submission by third parties. The Court subsequently declined to grant the relief sought by the Adjoining Landowner.

Conclusion

The Court dismissed the Adjoining Landowner's application to be joined as a party to the originating application.

Planning and Environment Court confirms a decision to refuse a development approval for a child care centre and sets out the assessment and decision framework for impact assessable development under the Planning Act 2016

Cara Hooper | James Nicholson | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 heard before Williamson QC DCJ

June 2019

In brief

The case of *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 concerned an appeal to the Planning and Environment Court against the Brisbane City Council's (**Council**) decision to refuse an impact assessable development application for a material change of use to develop a childcare centre.

The Council refused the development application on the basis that it did not comply with a number of provisions of the *Brisbane City Plan 2014* (**Planning Scheme**), particularly the Low density residential zone code (**Zone Code**).

The Appellants appealed the Council's refusal to the Court and submitted that the development application strongly aligned with the Planning Scheme, and that any non-compliance should not be determinative in the exercise of the Court's discretion.

The Court considered the following in its determination:

- Was the proposed development well-located?
- What was the nature of the need to be served by the proposed development?
- Did the bulk and scale of the proposed development comply with the Planning Scheme?
- Were there any interface issues?
- Did the proposed development conflict with the amenity of the area?
- Was there a strong and pressing need for the proposed development?

The Court dismissed the appeal in the exercise of the planning discretion on the basis that the size and scale of the proposal exceeded the identified demand and resulted in unacceptable impacts on amenity and non-compliance with the Planning Scheme.

This case is significant for the Court's consideration of the statutory assessment and decision making framework for impact assessment under the *Planning Act 2016* (**PA**), and how it differs to the previous framework under the *Sustainable Planning Act 2009* (**SPA**).

The Court sets out the assessment and decision making framework for impact assessment under the Planning Act 2016

The Court observed that the agreed list of issues prepared by the parties failed to recognise that the PA prescribes a different assessment and decision framework to that which applied under SPA.

The Court noted that unlike the SPA, which constrained an assessment manager's decision making power by mandating refusal in circumstances where "*conflict*" is established and there is an absence of "*sufficient grounds*", section 60(3) of the PA instead confers a power on the decision maker to exercise a broad planning discretion in respect of an impact assessable application. Accordingly, while the existence of non-compliance with an assessment benchmark is a relevant fact and circumstance in the exercise of that planning discretion, it should not be assumed that the non-compliance automatically warrants refusal.

The Court described the planning discretion as follows (at [60]):

> *The planning discretion, and the inherent balancing exercise, is invariably complicated, and multi-faceted. It is a discretion that is to be exercised based on the assessment carried out under s.45 of the PA. It will turn on the facts and circumstances of each case, including the nature and extent of the non-compliances, if any, identified with an assessment benchmark.*

The Court explained that where a party contends that a non-compliance with an assessment benchmark warrants refusal of an impact assessable application, the party will need to identify at least the following two things in any document purporting to articulate the issues in dispute:

- The non-compliance alleged.
- The planning basis relied upon to contend the non-compliance warrants refusal in the exercise of the planning discretion under section 60(3) of the PA.

The Court further explained that in identifying the issues to be determined in an appeal, it needs to be borne in mind that the exercise of the planning discretion for impact assessment under section 60(3) of the PA is subject the following three requirements:

- The exercise of the planning discretion must be based on the assessment of the development application under section 45 of the PA, which includes that an assessment may be carried out against or having regard to "*any other relevant matter*".
- The exercise of the planning discretion must be performed in a way that advances the purpose of the PA, as required by section 5(1) of the PA.
- The exercise of the planning discretion is subject to an implied limitation that it must be exercised for a purpose that is within the contemplation of the PA.

Having set out the decision making and assessment framework for the exercise of the planning discretion, the Court stated simply (at [86]): "*The real question to be determined can be stated as: should the discretion conferred under s60(3) of the PA be exercised in favour of approval in the circumstances of this case?*"

However, the simplicity of this question belies the complexity and multi-disciplinary nature of planning and the exercise of the planning discretion.

Was the proposed development well-located?

The Court found that the proposed development was on a well-located site for the purposes of the Planning Scheme as the land was highly accessible to the surrounding road network, had a high level of accessibility and provided a physical connector to the surrounding schools and the retail and commercial centre of the suburb.

The Court was not satisfied with the Council's argument that the proposed development did not comply with PO1 of the Childcare centre code of the Planning Scheme as the Court held that the proposed development was in close proximity to other facilities such as schools and retail and commercial centres. The Court also determined that the proposed development did not conflict with the purpose of the Community facilities code due to these reasons.

What was the nature of the need to be served by the proposed development?

Under the Zone Code of the Planning Scheme, land may be developed for non-residential purposes. A childcare centre is specifically contemplated to be one such purpose under overall outcome 4(k) of the Zone Code when it serves a local community facility only and the bulk and scale is compatible with and integrates with the built form of the Zone Code.

The Court considered whether the proposed development would serve a local community facility need only. The Court relied upon the evidence of the expert economists for the parties. The expert economists noted that 2.5% to 5% of the children who would attend the childcare centre would reside outside the locality (otherwise known as 'rouge trade'). The Court found that the proposed development would not serve a local need only as the proposed development would be the largest competing facility in the catchment area.

The Court found that if the proposed development was to be approved, it would result in an oversupply of childcare facilities in the locality and would serve more than a local need as it would have to pursue enrolments beyond the locality.

Did the bulk and scale of the proposed development comply with the City Plan?

The Council argued that the bulk and scale of the proposed development would also unacceptably impact on the character and amenity of the area under overall outcome 4(k) of the Zone Code of the Planning Scheme. The Court noted that this provision required consideration to be given to matters of compatibility and integration with the built form intent of the Zone Code.

Under overall outcome (4)(c) of the Zone Code of the Planning Scheme, a development which is not a dwelling house should be located on a well-located site with a minimum area of 3,000 square metres in order to ensure there is sufficient private open space. The Court determined that the proposed development would not be compatible with overall outcome (4)(c) as the proposed development would have a gross floor area of only 1,000 square metres.

The Court further determined that the proposed development sits uncomfortably with overall outcome (5)(a) of the Zone Code of the Planning Scheme. This is because the proposed development would be perceived as a large non-residential development in a residential area which is not consistent with the subtropical, low rise, low density character envisaged for the Zone Code.

Were there any interface issues?

The Court noted that the interface between the proposed development, being a residential use, and the surrounding development was a planning consideration which needed to be examined further. Overall outcome (2)(f)(v) of the Zone Code of the Planning Scheme required development to sensitively transition to surrounding uses. Further overall outcome (2)(k) of the Zone Code of the Planning Scheme also noted that development should maintain adequate buffering between adjoining land uses.

The Court determined that the proposed development would not sensitively transition to, or buffer, the adjoining dwelling house. The Court found that the proposed screening along the common boundary did not demonstrate compliance with PO16 of the Community facilities code which requires development to not impose adverse visual amenity impacts on surrounding sensitive uses as it was unclear how well the screen would reduce the view of the carpark. The Court found that the adjoining property would still have a clear view of the tallest part of the built form of the proposed development and thus was not consistent with what was intended under the Zone Code.

Did the proposed development conflict with the amenity of the area?

The Council argued that the proposed development would impact the amenity of the local area due to its setting, building bulk and scale, the scale of the proposed use and the lack of transition which was provided to surrounding development. Additionally, the Council argued the proposed hours of operation and traffic arrangements would give rise to unacceptable amenity impacts.

In relation to the proposed hours of operation for the proposed development, the Appellants argued that the opening hours of the proposed development would be between 7:00 am to 6:30 pm with staff arriving and leaving outside of those hours. The Court noted this was not consistent with the high level of amenity expected in the Zone Code and also conflicted with PO1 of the Community facilities code as it would impact upon the amenity of nearby sensitive uses. Additionally, the Court determined that the operating hours of the proposed development conflicted with AO1.1 of the Community facilities code of the Planning Scheme which limits the operating hours of non-residential uses to be between 7:00 am and 6:30 pm.

In relation to the traffic impacts of the proposed development, the Council argued that the increased number of traffic movements upon Goldie Street would impact upon the existing amenity of the area. The expert traffic engineer for the Council noted that the proposed development would increase the traffic movements from 14 vehicle movements during the peak hour to 107 vehicles during the weekday morning peak in the surrounding streets. The Court determined the proposed development would increase non-local traffic into the surrounding residential streets and therefore conflicted with PO1 of the Childcare centre code of the Planning Scheme.

Was there a strong and pressing need for the proposed development?

The last issue which the Court considered was whether there was a need for the development. The Court was assisted by the evidence of the economic experts for the parties. The Court noted that the evidence provided by the expert economists' established that if the proposed development was approved and subsequently constructed, it would cause an oversupply of childcare centres in the area.

The Court held that the Appellant had failed to establish that there was a strong and pressing need for the development as the nine features of the evidence they relied upon only established that there was a general need for additional childcare centres in the area. Therefore the Court held that there was no pressing need for the proposed development.

Conclusion

The Court concluded that the proposed development did not align with the Planning Scheme as it was not anticipated in the Zone Code and did not support a high level of amenity. The Court further noted that there was no nexus between the identified demand and the size and scale of the proposed development. The Court therefore dismissed the appeal.

Colin
Biggers
& Paisley

Appeals against infrastructure notices under the Sustainable Planning Act 2009 have been upheld

Krystal Cunningham-Foran | Ben Caldwell | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wagner Investments Pty Ltd & Anor v Toowoomba Regional Council* [2019] QPEC 24 heard before RS Jones DCJ

June 2019

In brief

The case of *Wagner Investments Pty Ltd & Anor v Toowoomba Regional Council* [2019] QPEC 24 concerned a total of 10 appeals in the Planning and Environment Court against negotiated infrastructure charges notices (**ICNs**) issued under the now repealed *Sustainable Planning Act 2009* (**SPA**). Nine ICNs related to both stormwater trunk infrastructure and transport trunk infrastructure networks. One related to transport trunk infrastructure networks only.

In respect of the ICNs for stormwater trunk infrastructure, the Court found that they were not for trunk infrastructure identified in the Toowoomba Regional Council's Local Government Infrastructure Plan (**LGIP**). The Court held that section 636 of the SPA requires that a levied charge only be for additional demand placed upon trunk infrastructure. As there was no trunk infrastructure for which additional demand could be placed, the Court ordered that the ICNs be set aside.

In relation to most of the ICNs issued for transport trunk infrastructure, despite varied reasoning, the Court ultimately found that the ICN amounts were not lawfully reasonable in the *Wednesbury* sense. These conclusions were premised upon the improper assessment of use and demand and the incorrect application of specialised uses by the Toowoomba Regional Council (**Council**). Three ICNs issued for transport trunk infrastructure were held to be lawfully reasonable.

In relation to the ICN for reconfiguring a lot, based on the evidence presented to the Court, the Court found that reconfiguring a lot the subject of the appeal, did not generate demand on infrastructure. This and the other ICNs for transport trunk infrastructure were remitted back to the Council.

Factual circumstances

The ICNs issued by the Council pursuant to section 635 of the SPA arose out of development approvals granted to Wagner Investments Pty Ltd and Marcoola Investments Pty Ltd (**Wagner Group**) for the development of an airport and a business park located within the Council's local government area. The total amount of the charges appealed against was $2,930,239.03.

The appeals

The SPA outlines the specific grounds of appeal which may be raised in appeals against infrastructure charges notices in section 478(2). Wagner Group appealed on the following grounds:

- *Section 478(2)(a)* – the charge in the notice was so unreasonable that no reasonable relevant local government could have imposed it.
- *Section 478(2)(b)(i)* – the decision involved an error relating to the application of the relevant charge adopted.
- *Section 478(2)(c)(ii)* – the decision involved an error relating to the working out, for section 636, of additional demand.

The powers of the Planning and Environment Court in respect of appeals against infrastructure charges notices are found in section 47 of the *Planning and Environment Court Act 2016* and section 496 of the SPA. Those sections provide that the Planning and Environment Court can confirm, change, set aside and replace, or set aside and remit the matter back to the local government who made the determination.

The Court began with the proposition that the fundamental starting point in any exercise of statutory construction is to recognise that it is the duty of the Court to give the words of a statutory provision the meaning that the legislature is taken to have intended. Starting with section 636 of the SPA, the Court noted that the legislature intended there be two requirements before an infrastructure charges notice can issue. Firstly, there must be trunk infrastructure, and secondly, there must be additional demand on that trunk infrastructure (see [17]).

The broad topics the Court had to consider in these appeals can be separated into stormwater trunk infrastructure and transport trunk infrastructure.

Stormwater trunk infrastructure

In relation to the infrastructure charges notices relating to stormwater trunk infrastructure, it was common ground between the parties that the Council's LGIP did not specifically identify stormwater trunk infrastructure that was relevant to the development. The Council argued however, that Westbrook Creek which adjoined the site, was relevant stormwater trunk infrastructure as the Council's planning scheme identified that the trunk infrastructure network included natural formed and unformed waterways (see [29]).

After consideration of the statutory regime, the Court rejected the Council's argument and held that Westbrook Creek was not relevant trunk infrastructure. In making this determination, the Court noted that the LGIP identified both the existing and proposed trunk infrastructure networks in the Plans for Trunk Infrastructure (**PFTI**) and no part of Westbrook Creek in the vicinity of the land was identified in the PFTI.

The Court therefore determined that section 636 of the SPA was not enlivened and it did not have to consider whether there was additional demand on trunk infrastructure. However, if the issue of additional demand was required to be considered, the Court held that it was satisfied that no additional demand would be placed on trunk infrastructure as a result of the development (see [37]).

Transport trunk infrastructure

In relation to the infrastructure charges notices relating to transport infrastructure, the parties agreed that there would be additional demand placed on transport trunk infrastructure. Wagner Group however argued that the charges imposed by the Council had no rational or reasonable basis and should be set aside and the Council be required to reconsider and issue new charges.

In determining whether or not the infrastructure charges issued by the Council were invalid due to being so unreasonable that no reasonable local government could have imposed them, the Court relied upon the principles enunciated in *Associates Provincial Picture Houses Pty Ltd v Wednesbury Corporation* [1948] 1 KB 223, including:

- A decision being arbitrary may indicate unreasonableness.
- A decision without common sense may be unreasonable.
- Lack of intelligible or evident justification may result in unreasonableness.

The Court held that a number of the ICNs issued for transport trunk infrastructure were outside of the range of possible legal outcomes. This conclusion was premised on the Council's categorisation of development as either "*industry*" or "*essential services*" which adopted a calculation methodology of a dollar rate per square metre for the relevant gross floor area (GFA) rather than as a "*specialised use*" which required an assessment of use and demand (see [79]).

The Council's downfall in this regard was that the development to which the ICNs related clearly fell within the definition of "*air services*" and constituted a "*specialised use*" for the purposes of determining the infrastructure charges to be applied and not the category of "*industry*" or "*essential services*" adopted by the Council. The Court held that there was clearly an intended distinction in the methodologies of assessment to be applied for specialised uses and other uses, and accordingly, the Council should have conducted an assessment of use and demand rather than "*the broad brush GFA approach adopted*" (see [82]) as it was bound to do by virtue of its own policies (see [86]).

The Court criticised the Council's GFA approach on the basis that it failed to take account of the likely traffic that would be generated from the developments (see [60] to [68]; [83]). The Court concluded, whilst recognising this method may be used, that there was insufficient correlation between the GFA and volumes of traffic for the charges levied by the Council to be reliable.

Two other ICNs were categorised by the Council as "*warehouse*". Although the approvals relating to these ICNs were for material change in use to a "*warehouse*" and a "*warehouse (freight)*", the Court held that the application of the GFA methodology resulted in charges that could not sensibly fall within the range of possible lawful outcomes (see [94]). The Court considered the proximity of the warehouse developments to the runway and their association with the operation of the airport sufficient to warrant a categorisation of the developments as "*air services*" which is a "*specialised use*" requiring an assessment of use and demand (see [93]).

In respect of three other ICNs issued for transport trunk infrastructure and categorised as "*industry*" for the purpose of determining the adopted charge, the Court held that the approach of the Council was not unreasonable as they relevantly fell within the description of "*industry*" and the expert evidence demonstrated demand would be placed on trunk infrastructure (see [88] to [90]). These three appeals were dismissed.

The ICN issued by the Council for reconfiguring a lot was held unreasonable on the basis the evidence presented to the Court failed to demonstrate a rational link between the reconfiguration of the land and the estimated additional demand that would be placed on the transport trunk infrastructure network (see [99]).

Conclusion

All appeals against ICNs relating to stormwater infrastructure charges were allowed and set aside based on the proper construction of the SPA and the Council's charges resolution. The appeals relating to transport trunk infrastructure networks, except the three dismissed, were set aside and remitted back to the Council for reassessment.

Colin Biggers & Paisley

Does "assistant" and "delegate" have the same legal effect under Native Title legislation? The Full Court of the Federal Court reverses the affirmative decision of the Federal Court

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Full Court of the Federal Court of Australia in the matter of *Northern Land Council v Quall* [2019] FCAFC 77 heard before Griffiths, Mortimer and White JJ

June 2019

In brief

The case of *Northern Land Council v Quall* [2019] FCAFC 77 concerned an appeal and a cross-appeal from the Federal Court decision in *Quall v Northern Land Council* [2018] FCA 989 to the Full Court of the Federal Court against the Federal Court's judicial review decision that section 203BK(1) of the *Native Title Act 1993* (Cth) (**NT Act**), properly construed, included the power to delegate certification functions under the NT Act.

On appeal and cross-appeal, the issues for the Full Court were the following:

- Whether the certification functions of a representative body in section 203BE of the NT Act are delegable to the chief executive officer of a representative body.
- Whether the Court's discretion in section 27 of the *Federal Court of Australia Act 1976* (Cth) should be exercised to allow the admission of further evidence regarding a delegation by the Northern Land Council (**NLC**).
- In the event that further evidence is to be admitted, whether NCL's delegation to the chief executive officer of NLC (**CEO**), was effective so as to authorise the CEO to exercise the certification functions in section 203BE of the NT Act.

The first issue was raised in the cross-appeal and the Full Court decided that the certification functions must be exercised by a representative body in accordance with the provisions of the NT Act.

Upon the success of the cross-appeal, the Full Court did not need consider the remaining issues.

Factual circumstances

The Northern Territory of Australia and the NLC agreed upon an area Indigenous Land Use Agreement (**ILUA**) in 2016, which was varied in 2017. The CEO signed the certificate for registration of the ILUA after the variation. The respondents and cross-appellants, Mr Quall and Mr Fejo, sought judicial review on the basis that the certificate endorsed by the CEO was invalid either because the NLC could not delegate this function, or, in the alternative, that the instrument of delegation was not a valid delegation to the CEO.

In the appeal before the Full Court, the NLC, CEO, and Northern Territory of Australia (which was granted leave to intervene in the appeal) argued that the Full Court should answer the issues outlined above in the affirmative. The respondents/cross-appellants argued that the issues should be answered in the negative.

Section 203BE does not imply a power of delegation

Section 203BK(1) of the NT Act relevantly states that "*A representative body has power to do all things necessary or convenient to be done for or in connection with the performance of its functions*".

The Federal Court found that section 203BK(1) of the NT Act was broad enough to encompass a representative body delegating its certification functions. However the Full Court of the Federal Court disagreed.

The Full Court came to its decision based on the construction of the NT Act and the certification provisions, including their nature, character, text, function, and purpose. The Full Court stated that an important consideration was whether or not the power involves the formation of an opinion. As part of the provision of a certification, a representative body is required, by section 203BE(5) of the NT Act, to include an express statement that the body holds the **opinion** that all reasonable efforts have been made to ensure those who may, or do, hold native title in the ILUA area have been identified and that such identified persons agree to the making of the agreement (at [98] to [100]).

The Full Court said that the particular wording in the heading of section 203BK of the NT Act, namely, that they are "*powers of representative bodies*"; and that "*entering into an arrangement with another person*", as encompassed in section 203BK(2) of the NT Act, contemplates bilateral/mutual agreement and not the unilateral delegation of a power (at [103]).

The Full Court also held that the wording in sections 203BB, 203BD, and 203BK of the NT Act including "*briefing out*", "*obtain services to assist*", "*entering into arrangements*" etc. do not contemplate any powers of delegation, rather, they contemplate a representative body obtaining assistance from others in the performance of its functions (at [104]).

The Full Court also noted that although the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALR Act**) makes clear that only Aboriginal people may be members of a Land Council, it is completely silent as to whether members of staff, including executive officers, have to be Aboriginal. Accordingly a chief executive officer could possibly not be of Aboriginal descent (at [68]). Furthermore, representative bodies under the NT Act do not have to be a Land Council established under the ALR Act, and therefore the Full Court stated that it is possible a representative body may not be constituted by persons who are Aboriginal (at [95]).

Conclusion

Despite being able to obtain **assistance** in the performance of certification functions under section 203BE(1)(b) of the NT Act, representative bodies cannot **delegate** or **outsource** the actual performance of those functions nor other functions which the legislature clearly intended the representative body to perform.

Colin
Biggers
& Paisley

Appeal against refusal to change an infrastructure charges condition to reduce transport infrastructure charge dismissed by the Planning and Environment Court

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *East Coast Gravel Pty Ltd v Brisbane City Council* [2019] QPEC 15 heard before Kefford DCJ

June 2019

In brief

The case of *East Coast Gravel Pty Ltd v Brisbane City Council* [2019] QPEC 15 concerned an appeal by a developer (**Developer**) to the Planning Environment Court of Queensland (**Court**) against the Brisbane City Council's (**Council**) decision to refuse a request to change a development approval under the *Sustainable Planning Act 2009* (**SPA**). The Developer sought to amend an infrastructure charges condition to allow an offset against the transport infrastructure charge for the value of a bike path provided by the Developer.

The Court dismissed the appeal on the basis that it was a change that would likely cause the Council to make a properly made submission objecting to the proposed change.

Issues in dispute

The issues for determination were identified by the Court as follows:

- whether the change requested by the Developer was outside the intended scope of the legislative provisions;
- whether the change was a "*permissible change*" under section 367 of the SPA;
- whether the Court had the power to amend the condition and compel the Council to issue an offset;
- whether the appeal should be approved on the basis that there was no legal impediment to approve the change.

Proposed change to the development approval

The Developer lodged on 19 June 2008 a development application with the Council that sought a preliminary approval for a material change of use to facilitate 51 residential lots and a development permit for reconfiguration of land at 59 Wypama Road, Bald Hills. To quell the Council's concerns regarding the inconsistency of the development with the zoning of the area, the Developer promised that the site would be provided with "*the appropriate infrastructure for the intended purpose of the site*" and that "*the infrastructure costs would be borne by the Developer*" (at [28]).

The Council granted a development approval on 26 March 2010. The decision notice noted that the proposed development had demonstrated sufficient grounds for approval despite the conflicts with the *Brisbane City Plan 2000* (**City Plan**). One of the grounds listed in support of the proposed development included the "*provision of a bike path along the wetland for public use*" (at [39]).

The development approval permitted the Developer to develop 76 residential lots subject to conditions. Relevantly, condition 9 of the development approval required the payment of infrastructure charges. Condition 35 required the Developer to construct a bike path at the Developer's expense.

The Developer acted on the development approval, constructed the bike path and paid the infrastructure charges. After the completion of the development, the Developer submitted a change request to the Council on 12 December 2016 to amend condition 9 of the development approval. The Developer sought an offset to the transport infrastructure charge "*as fair compensation for the significant cost of the public bike path*" (at [5]).

The Council refused the request and the Developer subsequently appealed the decision.

Intended scope of legislative provisions

Section 369 of the SPA allows a person to request a "*permissible change*" to a development approval. Relevantly, section 367 of the SPA provides that a proposed change to a development approval is a permissible change if the change would not:

> *(a) result in a substantially different development; or*
>
> *(b) if the application for the approval were remade including the change—*
>
> > *(i) require referral to additional concurrence agencies; or*
> >
> > *(ii) for an approval for assessable development that previously did not require impact assessment—require impact assessment; or*
>
> *(c) for an approval for assessable development that previously required impact assessment—be likely, in the responsible entity's opinion, to cause a person to make a properly made submission objecting to the proposed change, if the circumstances allowed; or*
>
> *(d) cause development to which the approval relates to include any prohibited development.*

The Council argued that the requested change to condition 9 was outside the scope of section 369 of the SPA, as it was absurd to suggest that the legislature intended to allow a developer to obtain a refund on money spent complying with a condition of the development approval where the development approval had been fully acted upon. The Council further contended that it would be irrational to construe the provision to mean that it permitted a right to compensation against the Council.

The Council submitted that the conditions of a development approval are not a mechanism to impose obligations on a local government, but rather to impose obligations on the beneficiary of a development approval.

The Court considered the natural and ordinary meaning of section 369 of the SPA and found that as it imposes no statutory timeframe or deadline for making a permissible change request, it did not preclude the making of a permissible change request where the development had been completed. The Court therefore held that the proposed change was not outside the scope of the SPA.

Was the requested change a permissible change?

The Council submitted that the requested change was not a "*permissible change*" for the purposes of section 367 of the SPA as the requested change would likely cause the Council to make a properly made submission objecting to the requested change in its capacity as an infrastructure provider.

The Developer relied upon the decision of the Planning and Environment Court in *Ausbuild Pty Ltd v Redland Shire Council* [2001] QPELR 409 to consider the likelihood of a submission and argued that the hypothetical potential objector must "*… be taken to be an average representative of the community…taking a rational view of the matter*" (at [15]). The Developer submitted that the Council, as the infrastructure provider, was not a "*hypothetical potential objector*" and an "*average representative of the community*". The Developer further argued if the Council made a submission in their capacity as the infrastructure provider, it would be providing the submission to itself as the assessment manager, and it would therefore be impossible to establish whether the Council had objectively considered the submission.

The Court held that there was no practical impediment for the Council to make a submission as the infrastructure provider to itself as the assessment manager. The Court held that in any other circumstance, if an infrastructure provider wished to make its position known to an assessment manager it would be by way of a submission. The Court found that it should be no different in the circumstances and held that there was nothing pointless about such an exercise given the different capacities of the Council. The Court also noted that it is usual for local governments to operate in different capacities and to follow the usual procedures to ensure each action is appropriately referrable.

The Developer further argued that it was unlikely for the Council to make a submission against the requested change as the Council had requested the bike path as planned infrastructure on the basis that it constituted trunk infrastructure. The Developer contended that the requested change did not remove the requirement to provide a bike path, but rather amends the condition requiring it to meet the cost of the provision of the trunk infrastructure.

The Council refuted the Developer's claim that it had imposed the construction of the bike path as planned infrastructure on the basis that it was trunk infrastructure. The Council submitted that it relied on the provision to construct the bike path at no cost to the Council as a ground to approve the development application despite the conflicts with the City Plan.

The Court disagreed with the Developer and held that there was insufficient evidence to substantiate its assertion that the Council had requested the bike path as planned infrastructure on the basis that it was trunk infrastructure. The Court held that although the requested change would not remove the requirement to provide a bike path, it would remove the public benefit of it being of no cost to the community. The Court found that the requested change to the development approval would remove one of the grounds relied on by the Council to justify the approval of the development application despite its conflicts with the City Plan.

The Court held that it was likely that a properly informed person, including the Council as the infrastructure provider, would make a submission against the requested change to the development approval and therefore it was not a "*permissible change*" under section 367 of the SPA.

The Court's power to approve the change sought

The Council contended that the Court did not have the power to grant the relief sought even if the Court found that the Developer was entitled to an offset. The Council submitted that the Court did not have the power to require the Council to enter into an infrastructure agreement or to require it to undertake a valuation for the purposes of determining an offset.

The Developer submitted that the requested change did not seek a change that required anything other than to recognise its entitlement to an offset for the cost of the trunk infrastructure it provided.

The Court held that it was unnecessary to address the issue further in light of its finding that the request was not for a "*permissible change*".

Should the appeal be approved on its merits

In considering the merits of the appeal, the Court held that the requested change should be refused on four grounds.

Firstly, the Court held that the requested change should not be approved as there was a substantial delay in submitting the change request with no reasonable explanation for the delay. The Court noted that the Developer had waited almost six years from the original grant of the development approval and after the payment of the relevant infrastructure charges to then pursue an amendment to the conditions.

Secondly, the Court held that the requested change should be rejected as the Developer had not elected to challenge the conditions of the development approval by way of appeal when it was granted.

Thirdly, the Court held that the appeal should be refused on the basis that the Council had relied upon the construction of the bike path as one of the grounds to approve the development application despite its conflicts with the City Plan. The Court held that the cost to construct the bike path constituted a portion of the community price paid by the Developer to secure the right to develop the rurally zoned land. The Court held that the appeal ought to be refused in relation to this matter alone.

Finally, the Court found that the Developer's election to not appeal the relevant conditions at the time of the granting of the development approval would be prejudicial towards the Council. The Court held that as the request was submitted after the development was complete, it denied the Council the ability to argue that the development application should be refused.

The Court held that the Developer had not discharged its onus and dismissed the appeal.

Local government determined to not have a duty of care in its planning guise after a member of the public developed a psychiatric injury due to a fatal accident in a carpark

Cara Hooper | Ian Wright

This article discusses the decision of the Queensland District Court in the matter of *Bryant v Competitive Foods Australia & Ors* [2018] QDC 258 heard before Jarro DCJ

June 2019

In brief

The case of *Bryant v Competitive Foods Australia & Ors* [2018] QDC 258 concerned a trial in the District Court in relation to a personal injuries claim for damages for a psychiatric injury following an accident in the First Defendant's carpark which resulted in the death of a child.

The Plaintiff was the driver of the vehicle which struck a child on a pedestrian crossing in a Hungry Jack's carpark (**Premises**). Due to the accident, the Plaintiff developed a psychiatric injury and sought damages for personal injuries against the following parties:

- Competitive Foods Australia Pty Ltd (**Competitive Foods**);
- Brisbane City Council (**Council**); and
- Wayne Blow & Associates Pty Ltd (**Architects**).

The Plaintiff's complaint in respect of the Council's involvement in the trial, concerned the design and approval of the driveway and carpark. The Plaintiff submitted that the Council owed the Plaintiff a duty of care when approving the development application for the modification of the driveway and carpark of the Premises.

The Council denied that it owed the Plaintiff a duty of care and submitted that even if the Council did, it not breach its duty or caused the Plaintiff's psychiatric injury.

In order to determine the trial, the Court had to determine whether the Council owed the Plaintiff a duty of care in relation to the approval of a development application in respect of the Premises.

The Court held that the Council did not owe the Plaintiff a duty of care in its role as a planning authority when exercising its statutory approval powers in relation to the development application over the Premises.

Development application of the Premises

In September 1999, the Architects on behalf of Competitive Foods, submitted a development application to the Council for 'extensions and alterations to an existing fast food store' at the Premises (**Development Application**). The Council had to assess the Development Application under the provisions of the *Integrated Planning Act 1997* (**IPA**).

The Council made an information request to Competitive Foods under section 3.3.6 of IPA which requested Competitive Foods submit amended drawings which provided for safe and convenient movement of pedestrians from the existing car parking area into the restaurant. It also requested Competitive Foods to demonstrate compliance with section 19.10 of the *Transitional Planning Scheme* in relation to non-discriminatory access.

The Architects responded to the Council's Information Request with the requested documents. The Council then approved the Development Application with conditions under section 3.5.15 of IPA.

Did the Council owe a duty of care to the Plaintiff when approving the Development Application?

The Plaintiff submitted that the Council, as the assessment manager for the Development Application, owed a duty care to the public and therefore, owed a duty of care to do the following:

- exercise its statutory powers conferred by the IPA in respect to the Development Application with reasonable care;
- avoid giving a development approval which gives rise to reasonably foreseeable risks to the public;

- comply with the relevant planning schemes and codes; and
- comply with the 'Off Street Parking Facilities' Standard and the 'Manual of Uniform Traffic Control Devices' Standard.

The Court noted that the decision of *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* [2014] NSWSC 1280 (**Lee Decision**), is the authority for the proposition that a council in its planning guise does not owe a duty of care. The court in the Lee Decision determined that when there is no authority establishing the existence of a duty of care, the Court should apply the salient features test established in *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258, 103 (**Caltex Decision**).

The Council relied upon the application of the salient features test established in the Caltex Decision and submitted that as the pedestrian crossing was located on privately owned land, it was not under the control of the Council. It was further submitted that once the Development Application was approved under the IPA, the Council had no role in the construction of the pedestrian crossing, or control over the subject works.

The Court accepted the Council's submission and determined that the Council did not owe a duty of care in relation to the approval of the Development Application. The Court further noted that the Plaintiff, as a motorist using the Premises, did not exhibit any reliance upon the Council's approval of the Development Application and additionally, it ought to be reasonably expected that drivers who enter the Premises would keep an appropriate lookout for pedestrians on the Premises.

The Court lastly noted that the statutory provisions within the IPA did not identify an existence of an actionable duty of care as there was no reference to the payment of compensation for a personal injury, no reference to the bringing of proceedings for personal injuries, and no reference to the provision of resources for the payment of compensation to adversely affected parties.

Conclusion

The Court held that the Plaintiff failed to establish that the Council had a duty of care in its planning guise when exercising its statutory approval powers in relation to the Development Application concerning the Premises. The Court therefore held that the Council did not owe the Plaintiff a duty of care and thus was not liable for the Plaintiff's claim for compensation due to the development of a psychiatric condition after the accident.

Court determines a submitter's proposed condition to be unlawful and unreasonable

Austyn Campbell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Johnston v Banana Shire Council & Anor* [2019] QPEC 8 heard before Everson DCJ

June 2019

In brief

The case of *Johnston v Banana Shire Council & Anor* [2019] QPEC 8 concerned a submitter appeal to the Planning and Environment Court against the approval of a development application for an integrated caravan park and accommodation village.

A commercial competitor (**Submitter**) commenced an appeal in the Planning and Environment Court against a decision by the Banana Shire Council (**Council**) to approve an application for a development permit for a material change of use for an integrated caravan park and accommodation village.

A caravan park has operated on the land in Moura since the 1960s. Moura is located south-west of Rockhampton and primarily services surrounding mining and rural activities. In recent times, the use of the land, owned by Panchek Pty Ltd (**Applicant**), has expanded to provide accommodation for non-resident workers. The expanded use resulted in the Council issuing a Show Cause Notice and a subsequent Enforcement Notice.

The development application was made to both regularise the expanded use of the land, and provide for a staged expansion of a larger accommodation component, for non-resident workers in the future. The Council approved the development application.

The Submitter relevantly alleged that the development application failed to comply with the planning scheme, being the *Banana Planning Scheme 2006* (**Planning Scheme**), and that no planning need existed for the proposed development. The issues in dispute narrowed considerably prior to the hearing of the appeal, such that the only issue in dispute was the terms of a condition to be imposed upon the development approval. The Submitter and the Applicant proposed competing terms of a condition which concerned the type and proportion of residents that could occupy the proposed development.

At the hearing of the appeal, the Court considered the issues in dispute as follows:

- Whether the proposed condition was reasonably required?
- Whether the proposed condition was an unreasonable imposition on the development approval?
- Whether either proposed condition, if any, should be imposed on the development approval?

To these questions, the Court determined the following:

- The Submitter's proposed condition was not reasonably required as it posed an unreasonable imposition upon the development approval.
- The Applicant's proposed condition was reasonably required and ought be imposed.

Proposed condition

The Submitter and the Applicant proposed conditions that sought to regulate the use of the caravan park development generally.

In particular, the parties argued for an enforceable condition which concerned the maximum number of cabins within the accommodation village expansion that may be used by non-resident workers. The conditions proposed were materially the same, differing on two points: the permitted percentage of non-resident workers occupying the development, and the way in which occupancy was to be recorded.

The Applicant's proposed condition sought to allow a higher percentage of occupancy for non-resident workers. While both parties proposed a register to record the rates of occupancy, the Applicant's proposed condition provided greater specificity.

Legislative framework

The Court, in determining the appeal, was required to assess the development application with regard to sections 45 and 65 of the *Planning Act 2016*.

Section 45 provides that the development application must be assessed against the relevant planning scheme in place at the time the application was properly made, and that assessment may be made with regard to any other relevant matters.

Section 65 provides that a condition may be imposed if it is either relevant to, but not an unreasonable imposition on, the development, or is reasonably required in relation to the development. The Court noted that the Court has interpreted the power to impose lawful conditions on an approval as a broad residual discretion which must be exercised for a proper planning purpose.

Whether the proposed conditions were reasonably required?

The Court assessed the development application and the competing conditions against the relevant assessment benchmarks in the Planning Scheme, in particular the relevant zone code being the Town Zone Code.

The Court found that the overall outcomes in the Town Zone Code, for the relevant precinct, being the Tourism Precinct, were particularly relevant. The Court relevantly found that the proposed development involved the continued operation of a caravan park to some degree, and therefore the land would continue to be used predominantly for tourism, regardless of which condition was imposed, in compliance with the relevant overall outcomes. The Court held that the development application therefore complied with the relevant overall outcomes for the Tourism Precinct in the Town Zone Code.

Expert witnesses confirmed a significant demand existed for the accommodation of non-resident workers in the Moura area. The Court concluded that there was a need for the accommodation village expansion aspect of the proposed development which was not currently being met.

The Court determined that a proposed condition which sought to cap the number of non-resident worker occupants, was therefore reasonable.

Whether the proposed condition was an unreasonable imposition?

The Court held that the Submitter's proposed condition was unlawful and an unreasonable imposition on the proposed development. The Court stated the following in respect of the Submitter's proposed condition (at [16]):

> *an excessive quarantining of the proposed development in terms of non-resident worker accommodation does nothing to contribute to the economic advancement of Moura and achieves no legitimate outcome for the community.*

Conversely, the Court held the Applicant's proposed condition was a reasonable imposition which would ensure the proposed development's viability.

Should either proposed condition, if any, be imposed on the development approval?

The Court stated that no planning purpose existed to justify the imposition of the Submitter's proposed condition and reiterated that, in any event, it should not be imposed.

The Court held that the Applicant's proposed condition would, for reasons mentioned above, be an appropriate imposition on the development approval.

Conclusion

The Court upheld the Submitter's appeal to the extent that the Applicant's proposed condition be imposed.

Planning and Environment Court finds no unlawful increase in the number of residents in a backpacker hostel and sets aside enforcement notice

Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Moramou2 Pty Ltd v Brisbane City Council* [2019] QPEC 18 heard before Everson DCJ

June 2019

In brief

The case of *Moramou2 Pty Ltd v Brisbane City Council* [2019] QPEC 18 concerned an appeal to the Queensland Planning and Environment Court against the decision of the Respondent, the Brisbane City Council (**Council**), to give an enforcement notice to Moramou2 Pty Ltd (**Appellant**) in respect of the use of its premises as a backpacker hostel. In issue was whether there had been an unlawful increase in the number of residents occupying the premises.

Background

The Council gave an enforcement notice to the Appellant, in respect of the use of its premises, located at 47 Brighton Road, Highgate Hill (**Premises**), as a backpacker hostel. The Appellant lodged an appeal against the decision to the Court. The only issue for the Court to determine in respect of the enforcement notice, was whether there had been an unlawful increase in the intensity or scale of the use of the Premises, specifically in relation to the number of people accommodated there.

Determining the relevant regulatory regime

The lawful use of the Appellant's Premises was the subject of a development approval, dated 14 December 1989, for an extension to a community dwelling (**Development Approval**). The Development Approval included condition E.4.(Ak) which stated: "*the total number of people accommodated within the combined development is not to exceed the number stipulated on the license for the premises*". Additionally, condition 1.(A)(1) stated that all relevant Council ordinances continued to apply.

Under Chapter 5, Part 1 of the ordinances of the Council, the Premises were registered as multiple dwellings. The Court noted that section 14 of the ordinances expressly provided that the Council could impose a cap on the number of people that may be accommodated in the Premises.

However, these ordinances were repealed and the *Local Law (Accommodation Standards) 1999* (**Local Law**) and the *Local Law Policy (Accommodation Standards) 1999* came into effect, which provided for conditions relating to the maximum occupancy of a multiple dwelling as well as the calculation of the maximum occupancy for backpackers' hostels. Accordingly, 143 people were authorised to be accommodated on the Premises, and this remained the authorised number of occupants at the time of the repeal of the Local Law on 30 August 2005.

The Court found that the Council had failed to outline the precise regulatory regime for ascertaining the occupation density of the Premises that was in effect between 9 September 2005 and 4 April 2008. Nevertheless, it was clear to the Court that the state government had assumed responsibility for the task from 4 April 2008, and the task is currently undertaken under the Queensland Development Code which came into effect on 4 April 2008. Accordingly, the Court held that the Premises could currently lawfully accommodate a maximum of 291 people.

Compliance with the regulatory requirements in respect of the permitted maximum occupancy

The Court found that there was no evidence that the Appellant failed to comply with the regulatory requirements in respect of the maximum authorised occupancy of the Premises, which the Council expressly conceded. The Court stated that the regulation of the permitted number of residents accommodated at the Premises had always been the subject of additional regulatory assessment by both the Council and the state government. Indeed, this was effected at the time of the Development Approval, by the issuing of a licence in respect of the use of the Premises.

The Court interpreted condition E.4.(Ak) of the Development Approval to be the regulatory process which set out the number of people that could be accommodated at the Premises. If this condition continued to apply, despite the new regulatory process undertaken by the state government, then it was uncontentious that the Development Approval was being complied with. However, if the effect of the new regulatory regime was such that the condition no longer continued to apply, then the only cap on the occupancy of the Premises is that which was set by the regulatory regime currently in force. In either case, the current use of the Premises lawfully complies with both the Development Approval and the legislative requirements under the current regulatory regime for multiple dwellings.

Conclusion

The Court concluded that the Council had not discharged the onus of establishing that the appeal should be dismissed. Despite some uncertainty as to whether condition E.4.(Ak) of the Development Approval, or the current regulatory regime administered by the state government, has lawful effect in regard to the regulatory process for setting the maximum occupancy of the Premises, the Appellant was complying with both requirements. Thus, the appeal was allowed and the enforcement notice was set aside.

Planning and Environment Court has ordered a local government respondent to an appeal to pay an applicant appellant's costs under section 60(1)(b) of the Planning and Environment Court Act 2016

Cara Hooper | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPEC 9 heard before Williamson QC DCJ

June 2019

In brief

The case of *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPEC 9 concerned an application for costs to the Planning and Environment Court. The Appellant had successfully appealed against conditions which had been imposed by the Gold Coast City Council (**Council**) with the Court holding that the development application ought be approved subject to an amended suite of conditions (see *Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53).

The Appellant sought an order that the Council pay the Appellant's costs under section 60(1) of the *Planning and Environment Court Act 2016* (**PECA**) for the following reasons:

- the Council had no reasonable prospects of success in the appeal;
- the Council introduced new material in the form of revised conditions of approval;
- it was unreasonable for the Council to reject two settlement offers; and
- the Council failed to discharge its responsibilities in the proceeding.

The Court held that section 60(1) of the PECA was engaged and therefore ordered that the Council pay the Appellant's costs for the proceeding up to and including 11 September 2018 and the costs of the application for costs on a standard basis.

Background to the appeal

The original appeal concerned an appeal to the Planning and Environment Court against conditions imposed by the Council on an approval for reconfiguring a lot to create 67 community title lots, common property and two balance lots. The issue before the Court concerned the balance lots, being lots 900 and 901.

The Council had imposed a condition, being condition 7, requiring both lots to be combined and dedicated at no cost to the Council for "*Public open space for environmental conservation purposes*". The Council later withdrew condition 7 in respect of Lot 900, but maintained condition 8 in respect of Lot 900 which constrained future development on the land.

The Court ultimately held in favour of the Appellant as the Council had failed to provide sufficient evidence to establish that condition 8 was necessary.

The Council had no reasonable prospects of success in the appeal

A proceeding in the Planning and Environment Court requires each party to bear its own costs under section 59 of the PECA. An exception to that provision is contained in section 60(1) of the PECA, which confers a power on the Court to award costs in the following circumstances:

> *(1) The P&E Court may make an order for costs for a P&E Court proceeding as it considers appropriate if a party has incurred costs in 1 or more of the following circumstances—*
>
> *…*
>
> *(b) the P&E Court considers the proceeding to have been frivolous or vexatious;*
>
> *… .*

The Appellant submitted that the Council's defence was frivolous as it had no reasonable prospects of success. In order to consider this submission, the Court had to split the proceeding into two periods being the period leading up to 11 September 2018 and the period following 11 September 2018.

In relation to the period leading up to 11 September 2018, the Court noted the fundamental errors in the planning report which was relied upon the Council officer who recommended the approval of the development application and thus the conditions were bound to fail.

The Court noted that the Council changed its position after 11 September 2018 in response to the expert ecologist's joint report. The Council provided the Appellant with a revised suite of conditions which sought to impose restrictions on future development on Lot 900. The Court determined that although the Council's amended case was weak, it was well short of being bound to fail, frivolous or vexatious.

The Court therefore determined that section 60(1)(b) of the PECA was engaged in respect of the Council's defence of the appeal prior to 11 September 2018.

Did the Council introduce new material?

The Appellant argued the Council introduced new material in the appeal as it had sought leave to amend the issues in dispute. Section 60(1)(e) of the PECA allows the Court to make an order for costs when a party has introduced new material. The Court noted that "new material" for the purposes of section 60(1)(e) of the PECA includes documents that may be read as material before the Court and is not limited to evidence.

The Court determined that the Council did introduce new material as the material in issue was introduced as a consequence of an order of the Court dated 17 October 2018. The Council relied on this material and its use was critical for the Council. The Court was therefore satisfied the Council did introduce new material under section 60(1)(e) of the PECA.

Was it unreasonable for the Council to reject offers to settle the appeal?

The Appellant further submitted that the Council unreasonably rejected two offers to settle the appeal. In relation to the first offer made on 13 September 2018, the Court was not persuaded that the Appellant made an offer to settle as it was more of an intimation of what may have been accepted by the Appellant if the Council was to make an offer to resolve the appeal.

The second offer made on 25 September 2018 however, was regarded as an offer to settle the appeal. The Court determined that in this letter, the Appellant was prepared to resolve the appeal due to the amended suite of conditions. Although the Council did not accept the second offer, the Court did not consider that the Council acted unreasonably as there was no evidence to suggest that the Council ignored the offer or acted contrary to the advice of its legal team and expert witness.

Did the Council fail to discharge its responsibilities in the proceeding?

The Appellant also relied upon section 60(1)(i) of the PECA, which confers a power on the Court to award costs where it is satisfied that an assessment manager has not properly discharged its responsibilities. The Appellant argued that the Council did not properly discharge its responsibilities for the following reasons:

- the Council failed to assess the merits of the Council's case and failed to acknowledge the clear deficiencies in its case; and
- the Council ought to have realised the limitations in its case and acted reasonably to withdraw its opposition to the appeal.

The Court noted that section 60(1)(i) of the PECA should be construed as referring to a responsibility that arises from an obligation imposed on the named parties to do what the PECA and the *Planning Act 2016*, require of them when involved in litigation. Section 10(2) of the PECA imposes a responsibility on all parties to a proceeding for the purposes of section 60(1)(i) of the PECA to impliedly undertake to the Court and each other to proceed in an expeditious way.

The Court noted that section 10(2) of the PECA means that the parties are to proceed in a way which involves the litigation of only the real issues in dispute without undue delay, expense and technicality. The Court determined that the Appellant failed to demonstrate that the Council did not comply with section 10(2) of the PECA, as the Council reviewed its case and altered its position in an efficient and timely manner.

Conclusion

The Court determined that the Appellant had successfully demonstrated that section 60(1)(b) and (e) of the PECA were engaged. In order to determine the award of costs, the Court noted that in relation to section 60(1)(b) of the PECA, costs would only be awarded for the part of the appeal up to and including 11 September 2018, as the Council's approach to the litigation after that date was proper and reasonable.

The Court further noted that although section 60(1)(e) of the PECA was engaged, an order for costs under this sub-section was not warranted as the introduction of the new material by the Council was made in order to formalise the issues in the appeal. Therefore, the Court held that the Council was to pay the Appellant's costs on a standard basis for the proceeding up to and including 11 September 2018, and the costs of the application.

Supreme Court finds that a Councillor had not engaged in misconduct in refusing to leave the Council chambers

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Johnston v Brisbane City Council & Ors* [2019] QSC 130 heard before Wilson J

July 2019

In brief

The case of *Johnston v Brisbane City Council & Ors* [2019] QSC 130 concerned an application by a local government councillor (**Councillor**) of the Brisbane City Council (**Council**) to the Supreme Court (**Court**) seeking judicial review of a decision of the Councillor Conduct Review Panel (**CCRP**) in which the CCRP found that the Councillor had engaged in "*misconduct*" within the meaning of section 178(3)(v) of the *City of Brisbane Act 2010* (**COBA**) and ordered that the Councillor pay to the CCRP an amount equal to the monetary value of 50 penalty units.

The Councillor had initially contended that the *Judicial Review Act 1991* (**JRA**) applied to the application, but subsequently contended that the Court's inherent jurisdiction and powers enabled the Court to make orders having the same practical effect as orders which could be made under the JRA.

The Court found in favour of the Councillor and held that the CCRP had no jurisdiction to make its finding. The Court found that the power the CCRP sought to rely upon, being under Chapter 6, Part 2 of the COBA, could not be enlivened unless there was a failure to comply with a direction made by the Chairperson of the Council (**Chairperson**) in the due exercise of the Chairperson's power, which had not occurred in this instance.

The grounds of the application

The Councillor filed an application for a statutory order of review of the CCRP's decision on the grounds that the decision was made without jurisdiction, not authorised by the enactment under which it was purported to be made and contrary to law. The Councillor submitted that the decision exceeded the CCRP's jurisdiction for the following reasons:

- by virtue of section 178(2) of the COBA, the empowering legislature that creates the CCRP did not apply, with the result that the CCRP had no jurisdiction in respect of the conduct of councillors at a meeting of the Council except for a councillor's failure to comply with a direction to leave made by the Chairperson of the meeting; and
- the Chairperson's purported direction to the Councillor to leave was not made in accordance with any power of the Chairperson to direct the Councillor to leave.

The Councillor alternatively submitted that the CCRP failed to exercise its jurisdiction on the basis that it failed to inquire into the presence of a jurisdictional fact, namely whether the Councillor had failed to comply with a direction of the Chairperson to leave the meeting.

Background

On 22 June 2017, the Councillor had been in attendance at a Council meeting regarding funding for neighbourhood plans and development assessment. During the Council meeting, the Chairperson directed the Councillor to leave the meeting on a number of occasions following an exchange between the Chairperson and the Councillor in which the Chairperson suspended the Councillor from service of the Council for eight days. The Councillor refused to leave the Council chambers. Ultimately, the Chairperson adjourned the meeting and called on the Council representative to remove the Councillor from the chamber with the police being called to assist.

On 11 July 2017, a complaint was made by the Chairperson to the CCRP alleging that the Councillor had engaged in "*misconduct*" under section 178(3)(v) of the COBA by refusing to comply with a direction made by the Chairperson to leave a meeting of the Council.

The CCRP ultimately determined that the complaint was proven and that the Councillor had engaged in "*misconduct*" under section 178(3)(v) of the COBA. In considering the Councillor's complaint history and disciplinary action previously taken by the CCRP, the CCRP ordered the Councillor to pay the Council an amount of not more than the monetary value of 50 penalty units which was calculated in a tax invoice to equal the sum of $6,307.50.

The Councillor appealed the decision to the Court.

Was there a lawful or valid direction?

To determine whether the CCRP had jurisdiction to reach their decision, the Court firstly considered whether the Chairperson had made a lawful or valid direction to the Councillor when ordering the Councillor to leave the Council chambers.

The Councillor submitted that upon the proper construction of section 178(2) of the COBA, the CCRP did not have jurisdiction to make its finding, unless the Chairperson had made a valid or lawful direction for the Councillor to leave. Relevantly, section 178(2) of the COBA provides as follows:

> *However, this division does not apply to the conduct of councillors at a meeting of the council or its committees, other than a failure of a councillor to comply with a direction to leave a meeting of the council or its committees made by the chairperson of the meeting.*

The Councillor argued that the Chairperson had failed to comply with the preconditions which gave rise to lawful authority to make a direction. As such, the Councillor submitted that there had been no duly made or valid direction to invoke the jurisdiction of section 178 of the COBA and therefore, the CCRP had erred in its finding.

The Court agreed with the Councillor and held that a chairperson in a council meeting cannot have unfettered powers to direct councillors. The Court found that the term "*direction*" under sections 178(2) and 178(3)(v) of the COBA must have a statutory source or else a chairperson's whim or gesture could amount to a direction which consequently may result in misconduct and disciplinary action if there was a failure to comply. The Court therefore held that the interpretation of the term "*direction*" could not be so wide, and needed scope and definition which could only be derived from the procedures and powers given under the COBA and the *Meetings Local Law 2001* (**MLL**).

In considering whether the direction given by the Chairperson was made under any power, the Court firstly considered the power conferred by section 186A of the COBA. Relevantly, section 186A of the COBA states certain orders that a chairperson may make if disorderly conduct occurs in a meeting. The Court found that although it had no doubt that the Chairperson was aware of the powers under section 186A of the COBA, the direction of the Chairperson was not a valid direction in the context of the COBA as the orders and preconditions under the provision were not made or satisfied. The Court also found that although it was clear that the Chairperson was purporting to act under the MLL, in giving the Councillor a direction to leave, the preconditions were not met to invoke the power conferred under the provision which rendered the direction invalid.

Did the CCRP have jurisdiction to make its finding?

The Councillor submitted that a jurisdictional error had occurred as there was no failure by the Councillor to comply with a relevant direction to leave the meeting and therefore the decision of the CCRP fell outside of the scope of Chapter 6, Part 2, Division 6 of the COBA and the CCRP exceeded its role and jurisdiction prescribed under section 178 of the COBA.

The Councillor additionally submitted that as the CCRP's decision, and the complaint that prompted the decision, related to the Councillor's conduct at a Council meeting, the CCRP did not have jurisdiction to deal with the complaint and had acted beyond its jurisdiction in making its decision.

The Court agreed with the Councillor and held that the legislature only intended to confer a very narrow jurisdiction on the CCRP in relation to Council meetings. The Court found that the CCRP had no jurisdiction to hear or decide a complaint about a councillor's conduct at a Council meeting, other than a failure of a councillor to comply with a direction to leave a meeting made by a chairperson. The Court emphasised that the requirement of a direction made by a chairperson to leave a meeting anchors the jurisdiction of the CCRP under section 178(2) of the COBA.

The Court therefore held that a councillor can only commit "*misconduct*" as intended under section 178(3)(v) of the COBA, if the councillor fails to comply with a valid direction to leave a meeting made by a chairperson. The Court found that as the Chairperson had not made a valid or duly made direction to leave the meeting, the CCRP had no jurisdiction to review the Councillor's conduct in the meeting and to reach its findings.

Conclusion

The Court found that the Chairperson had not made a proper direction, in law, for the Councillor to leave the meeting, and therefore as there was no failure by the Councillor to comply with a relevant direction, the decision of the CCRP fell outside of the scope of the CCRP's jurisdiction. The Court set aside the decision of the CCRP.

Planning and Environment Court decision regarding the invalidity of infrastructure charges notices reversed by Court of Appeal

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Gold Coast City Council v Sunland Group Limited & Anor* [2019] QCA 118 heard before Fraser and Morrison JJA and Crow J

July 2019

In brief

The case of *Gold Coast City Council v Sunland Group Limited & Anor* [2019] QCA 118 concerned an appeal to the Court of Appeal against the decision of the Planning and Environment Court which held that the five infrastructure charges notices (**ICNs**) given by the Gold Coast City Council (**Council**) to Sunland Group Limited and Sunland Developments No. 22 Pty Ltd (**Sunland Group**) under the now repealed *Sustainable Planning Act 2009* (**SPA**) were invalid.

The Court of Appeal considered the interpretation of section 637 of the SPA which sets out the requirements for an ICN under the SPA and overturned the Planning and Environment Court's decision; instead holding that the ICNs were valid and partially satisfied section 637(2) of the SPA as read in conjunction with section 27B of the *Acts Interpretation Act 1954* (**AIA**).

This decision was based on the Court of Appeal's opinion that under the wide discretion to excuse non-compliance found in section 440 of the SPA, the Court ought to have decided that the minor non-compliance with respect to the failure to refer to the evidence on which the findings of fact were based, did not result in the invalidity of the ICNs.

The definition of 'reasons' in the Acts Interpretation Act 1954 was held to apply to an ICN under the SPA

The Planning and Environment Court, in its original decision (*Sunland Group Limited & Sunland Developments No. 22 Pty Ltd v Gold Coast City Council* [2018] QPEC 22), held that section 27B of the AIA applied to the construction of section 637 of the SPA. Section 637 of the SPA sets out the requirements that each ICN must contain under the SPA and relevantly includes as follows:

> ***637 Requirements for infrastructure charges notice***
>
> *(1) …*
>
> *(2) The infrastructure charges notice must also include, or be accompanied by, an information notice about the decision to give the notice.*

An '**information notice**' is defined in section 627 of the SPA as follows and, importantly, requires that an information notice include the reasons for the decision [emphasis added]:

> *information notice, about a decision, means a notice stating -*
>
> *(a) the decision and the <u>reasons</u> for it; and*
>
> *(b) that its recipient may appeal against the decision; and*
>
> *(c) how the recipient may appeal.*

Section 27B of the AIA defines the term "*reasons*" and relevantly requires that the giving of reasons includes setting out the "*findings on material questions of facts*" and referring to the "*evidence or other material on which those findings of fact were based*". The Court of Appeal found that section 27B was not displaced by the SPA, and therefore an ICN would need to include the requirement for findings and evidence as set out within the AIA.

Therefore, when read in conjunction with section 637 of the SPA, the ICNs were required to state the following:

- the decision to issue the ICNs;
- the reasons for the decision to issue the ICNs;
- the findings on material questions of facts;
- the evidence or other material on which those findings of fact were based.

Court of Appeal holds that the ICNs contained most of the relevant requirements under section 637 of the SPA and section 27B of the AIA

The Court of Appeal accepted that the ICNs satisfied the requirements in section 637(1) of the SPA. However, it went on to consider whether the ICNs satisfied the requirements of section 637(2) of the SPA, including the requirement for "*reasons*" as defined by section 27B of the AIA.

After considering the case of *Sabag v Health Care Complaints Commission* [2001] NSWCA 411, the Court of Appeal held, contrary to the Planning and Environment Court, that the sufficiency of the reasons was not akin to those that are expected of a judge, tribunal or arbitrator. As such, the Court of Appeal concluded that a statement of reasons for an ICN could be "*short and terse, as long as they were "proper, adequate and intelligible"*" (at [108]). Therefore the following statement within the ICNs was considered to be sufficient in substance to satisfy the requirement for the "*reasons*" of the decision to give the ICNs as understood in the context of the SPA and the AIA:

> *Council of the City of Gold Coast has issued this Infrastructure Charges Notice as a result of the additional demand placed upon trunk infrastructure that will be generated by the development.*

The Court of Appeal turned its attention to the requirement to set out the findings on material questions of fact required by section 27B of the AIA and held, contrary to the Planning and Environment Court, that the ICNs contained the following information which was enough to satisfy this requirement, being (at [111]):

> *(a) (implicitly) a development approval has been given;*
>
> *(b) (implicitly) an adopted charge applies for providing trunk infrastructure to the development;*
>
> *(c) (implicitly) the application was not one where a public sector entity was proposing or starting development;*
>
> *(d) there will be additional demand on trunk infrastructure; and*
>
> *(e) that additional demand will be caused by this development.*

Relevant to the Court of Appeal's decision was the consideration that "*if a development creates an additional demand for on trunk infrastructure, that is both the fact which warrants an ICN and the reason for giving it*" (at [112]).

However, the Court of Appeal held that the ICNs failed to adequately refer to the evidence or other material on which those findings of fact were based.

Court of Appeal held that the SPA did not intend that non-compliance automatically results in the ICNs being invalidated and that in this instance the ICNs were valid despite the minor non-compliance

Whether the ICNs were invalidated for non-compliance with the requirements of section 637 of the SPA is to be delivered by reference to the legislative intention of the SPA, because there is no express provision within the SPA stating the effect of non-compliance. The Court of Appeal therefore considered the SPA and noted, among other things, that where the SPA intended a document to be of no effect or of limited effect, the SPA expressly stated as such. The Court of Appeal therefore held that the absence of a statement that an ICN is of no effect and is a "*textual indication*" that validity was not intended (see [151]). Furthermore, section 440 of the SPA gives the court a wide discretion to deal with non-compliance in various ways, indicating that should non-compliance arise, it is a matter for the Planning and Environment Court.

The Court of Appeal considered what types of non-compliance would lead to invalidity and held that in this case, where the failure was to "refer to" the relevant evidence, rather than a failure to "state" or "set out" relevant information, that the SPA does not intend that the ICNs should be invalid. As such, unlike the Planning and Environment Court, the Court of Appeal concluded that the minor non-compliance ought to be excused and that the ICNs were valid.

Effect of legislative changes enacting the retrospective section 344 of the Planning Act 2016

The Court of Appeal also noted the existence of section 344 of the *Planning Act 2016* (**Planning Act**), which saves an infrastructure charges notice given under the SPA between 4 July 2014 and the commencement of the Planning Act where it does not contain an information notice. In this instance, section 344 of the Planning Act did not apply because of the nature of the legal proceedings before the Court of Appeal.

Conclusion

The appeal was upheld and the orders of the Planning and Environment Court were set aside, with the result that the ICNs were considered valid for the purpose of the SPA despite the minor non compliance with the requirement in section 27B of the AIA to refer to the evidence or other material on which the findings of the material questions of fact were based.

Effect on an infrastructure charges notice given under the Planning Act

It is relevant to note that the decision in this case relates to the requirement for reasons within an infrastructure charges notice under the SPA, and there is no requirement for an information notice which includes reasons within the equivalent section of the current Planning Act.

Colin Biggers & Paisley

The importance of an adequate EIA: the United Kingdom Court of Appeal has quashed the United Kingdom Planning Court's decision to uphold the grant of a planning permission for an intensive poultry farm due to an unlawful EIA

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the United Kingdom's Court of Appeal in the matter of *R (Squire) v Shropshire Council* [2019] EWCA Civ 888 heard before Lady Justice King and Lord Justice Lindblom

July 2019

In brief

The case of *R (Squire) v Shropshire Council* [2019] EWCA Civ 888 concerned an appeal to the United Kingdom Court of Appeal (**Court of Appeal**) against the United Kingdom Planning Court's (**Planning Court**) decision to dismiss a submitter's (**Submitter**) claim for judicial review of the decision by the Shropshire Council (**Council**) to grant planning permission to a landowner (**Landowner**) for the construction of four poultry buildings and associated development located in Tasley, England.

The Court of Appeal allowed the appeal on the basis the Council had not properly assessed the environmental information in respect of the proposed development's impacts on odour and dust emissions. The Court of Appeal held that the Planning Court had erred in concluding that the environmental permit would control the management of manure outside of the site of the proposed development, and that the environmental impact assessment (**EIA**) undertaken for the proposed development was adequate.

Background

The Landowner applied for planning permission for the proposed development, being an intensive poultry farm. The proposed development was intended to operate on a 48-day cycle and, in the course of a year, an estimated 1,575,000 broiler chickens would be reared and 2,322 tonnes of manure produced. The manure was to be stored and spread on the site of the proposed development and other farmland close to the site of the proposed development. An EIA was completed for the proposed development, and the Environment Agency in April 2017 issued an environmental permit for the facility. The Council consequently granted planning permission for the proposed development.

In the Planning Court, the Submitter argued that the grant of the planning permission was unlawful on the grounds that the Council had failed to consider the likely environmental effects of the proposed development and the position of the Environment Agency in respect of the development application. The Planning Court dismissed the Submitter's application for judicial review as it concluded that the environmental permit controlled the management of manure outside of the site of the proposed development, and that the EIA was adequate and lawful.

Issues

The Court of Appeal considered the following issues:

- whether the Planning Court was wrong to conclude that the environmental permit issued by the Environment Agency would control the management of manure outside of the site of the proposed development; and
- whether the Planning Court had been wrong to conclude that the EIA undertaken for the proposed development was adequate and lawful, particularly in respect of the likely effects of odour and dust arising from the storage and spreading of manure.

The Planning Court had erred in concluding the environmental permit would control the management of manure outside of the site of the proposed development

The Submitter argued that the Council misunderstood the scope of the environmental permit, and contrary to the Planning Court's decision, the environmental permit did not control the management of manure outside of the site of the proposed development.

The Council considered the effect of the environmental permit issued to the Landowner in making its decision to grant planning permission. Relevantly, the Council argued that the proposed development would be regulated by the Environment Agency, and that the environmental permit was sufficient to control noise, dust and odour pollution. Additionally, the Council argued that the transportation and spreading of manure on other land was subject to a manure management plan regulated by the environmental permit.

The Court of Appeal however concluded that the Council's view was not an accurate reflection of the environmental permit and turned to the advice given by the Environment Agency on 17 March 2017 and the Environment Agency's Sector Guidance Note EPR 6.09, 2010 (**Guidance Note**).

The Court of Appeal found that, under condition 2.3.3 of the Guidance Note, an operator must keep written evidence of the arrangements it makes when transporting and spreading manure and must record details of the land to which it is taken in accordance with the Code of Good Agricultural Practice (**COGAP**) and the manure management plan for the receiving land (see [52]). Consequently, the Court of Appeal found that the Guidance Note was clear that the spreading of manure, and its subsequent impacts on odour and dust, from a poultry facility is expected to be undertaken in accordance with the COGAP and is not an activity regulated by an environmental permit.

The Court of Appeal noted that the Environment Agency stated in its advice that the environmental permit "*would not control any issues arising from activities outside the [site of the proposed development]*", and that the Landowner ought to prepare a manure management plan with respect to the spread and storage of manure to reduce the risk of leeching into groundwater or surface water in accordance with the requirements under the *Environmental Permitting (England and Wales) Regulations 2010* (UK) No. 675 and COGAP. The Court of Appeal relevantly concluded that the advice was clear in that the environmental permit did not regulate conduct outside of the site of the proposed development, and that the manure management plan was only concerned with the proposed development in respect to the leeching of manure into groundwater or surface water, rather than odour and dust.

The Planning Court erred in concluding that the EIA was adequate and lawful

The Submitter argued that the EIA for the proposed development was unlawful as it failed to appropriately assess the effects of odour and dust caused by the storage and spreading of manure, including outside of the site of the proposed development.

The EIA relevantly stated as follows:

- the proposed development would produce an estimated 1,151 tonnes of manure that would be exported to and spread on, a "neighbouring arable farm" in accordance with COGAP (Appendix 4 of the EIA);
- the proposed development would cause odour emissions at nearby properties (Chapter 8 of the EIA);
- the proposed development will produce dust (Chapter 9 of the EIA).

The Council found that as the proposed development was to be controlled under an environmental permit, the "*likelihood of significant impact on the environment was negligible due to the strict regime of control*" (see [63]).

The Council additionally found that the proposed development could operate "*without causing a significant impact on the surrounding area*", and that although the spreading of manure would cause a "*localised odour*", it would be "*short lived*" in the event that "*agricultural best practice*" was adhered to.

The Court of Appeal held that the EIA was inadequate and unlawful on the basis that the EIA:

- failed to appropriately identify the third party land on which an estimated 1,151 tonnes of manure was to be spread;
- failed to meaningfully assess the impacts of dust and odour from the storage and spreading of manure on the site of the proposed development or on a third party's land;
- failed to anticipate a future manure management plan or arrangements for the storage and spreading of manure on the site of the proposed development;
- failed to predict the pollution caused by the proposed development and its associated activities;
- failed to consider any measures to be applied to third party land; and
- unsuccessfully assessed the impacts of the proposed development.

The Court of Appeal also held that the Council had failed to acknowledge, or make a conscious attempt to assess the proposed development, and that the Council had not gone beyond generalities, and as such had failed to make good the lack of assessment in the EIA.

No justification to withhold an order to quash the planning permission to enable the Council to properly comply with the EIA regulations

Approximately four months after the decision of the Court of Appeal, the Landowner entered into a planning obligation under section 106 of the *Town and Country Planning Act 1990* (UK) c. 8 in the form of a unilateral undertaking. The Landowner submitted that it would not house any poultry in the proposed poultry buildings until it had submitted to the Council a manure management plan and such plan was approved.

The planning obligation stated that the manure management plan must adhere to "*the relevant parts of the Department for Environment and Food Affairs Guidance*" and include restrictions on the spreading of manure to agricultural land to ensure that there are no unacceptable effects on residential and public amenity. Additionally, the planning obligation noted that arrangements for complaints in respect of odour and dust, and the recording of names of third parties to whom manure is transported to and disposed are to be in place. Lastly, the planning obligation stated that manure is only to be provided to a third party who agrees in writing to comply with the relevant parts of the manure management plan.

The Council argued that under section 31(2A) of the *Senior Courts Act 1981* (UK) c. 54, relief ought be refused because it was "*highly likely*" that the Council's decision "*would not have been substantially different*" had the planning obligation been before the Council.

The Court of Appeal rejected the Council's argument and found that the planning obligation illustrated the uncertainties of the environmental impacts of odour and dust in the EIA. Consequently, the Court of Appeal held that there was no justification to withhold an order to quash the planning permission.

Conclusion

The Court of Appeal allowed the Submitter's appeal and held that the Planning Court had erred in its decision.

Planning and Environment Court allows non-compliant development application to be remitted back to public notification stage

Christopher Vale | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *McKean v Council of the City of Gold Coast* [2018] QPEC 61 heard before Kent QC DCJ

July 2019

In brief

The case of *McKean v Council of the City of Gold Coast* [2018] QPEC 61 concerned an appeal to the Planning and Environment Court against a decision of a local government to refuse a development application for reconfiguring a lot at Tallebudgera, Queensland. The Applicant had failed to correctly identify the development under the development application as being impact assessable. The Court held that although the development application was ultimately null and void, the application was able to be remitted back to the public notification stage as impact assessable development.

Background

In January 2016, the Applicant made an application for reconfiguring a lot on land at Tallebudgera, Queensland. The Applicant had intended to reconfigure the land into six lots in accordance with the "park living domain" provisions under the Council's planning scheme. The Council refused the development application in December 2017.

The Applicant mistakenly lodged the development application as development which was code assessable instead of impact assessable. The *Sustainable Planning Act 2009* (**SPA**) defines code assessable development as development which is to be assessed by an assessment manager. Development which is impact assessable involves a consideration of the impacts on the surrounding environment for the proposed development and ways of dealing with such effects (see section 313 and section 314 of the SPA respectively).

The relevant provisions under the planning scheme required that where development for reconfiguring a lot resulted in average lot sizes that were less than 8000m^2, then the development would be impact assessable. Where a development requires impact assessment to be conducted, the public notification process is engaged under section 297 of the SPA.

The Council argued that because the development application had been made by the Applicant as code assessable, then the application had not been "properly made" for the purposes of section 261(1) of the SPA, and was in effect, a nullity. The Council also argued that as a result, the application had lapsed under section 302(1)(a) of the SPA, that the application was void, and therefore the jurisdiction of the Planning and Environment Court had not been engaged to entertain an appeal against the decision of Council.

Minor change application

A 'minor change' is relevantly described in schedule 2 of the *Planning Act 2016* (**Planning Act**) as a change which does not result in a substantially different development, and if the application including the change would not cause public notification where such notification had not been previously required (at [14]). The Planning and Environment Court cannot consider a change to a development application unless the change is only a minor change to the application: see section 46(3) of the *Planning and Environment Court Act 2016* (**PEC Act**).

The Applicant reconsidered the development's design, changing it from a community management scheme to freehold title by making the previous communal area part of Lot 1. The Council's position was that the Applicant's minor change application would "*change the manner in which the development would operate, casting communal responsibility, unacceptability, on Lot 1*" as to road and driveway ownership and maintenance, access to common property and a lack of a binding community management statement (see [14]).

Impact and public notification

The Council submitted that the proposed change would introduce new impacts or would exacerbate known impacts "*by removal of effective mechanisms to deal with problems such as bushfire management, road maintenance, slope stability, and vegetation management requirements*" (at [16]). The Council also submitted that a matter of "overriding importance" in the case was that because the application was defective in nature, it had an effect of "shutting out" the public from the development assessment process which the public was entitled to participate in. The Council further submitted that the exclusion of the public from that process was material in the circumstances as the definition of minor change under the Planning Act "*emphasises the importance of proper public involvement in the development assessment process*" (at [18]).

No lawful appeal

The Court held that it was unnecessary to determine the minor change issue as the fundamental problem with the Applicant's case was that there was "*no lawful appeal on foot to change [the application], whether the changes could be characterised as a 'minor change' or not*" (at [20]).

Properly made application

The Council submitted that it was mandatory for the Applicant to identify whether or not the development application was code assessable or impact assessable as the wrongful characterisation of the development application had rendered the application void (at [21]) and as such, the development application should not have proceeded to the subsequent stages of the development assessment process: see *Fox & Anor v Brisbane City Council & Ors* [2002] QPEC 49.

Amended application

The Court held that the situation was capable of remediation by the following means:

- the non-compliance of the original application could be excused under section 37 of the PEC Act;
- the development application was taken not to have lapsed;
- the development application would be remitted to the public notification stage in accordance with Chapter 6, Part 4 of the SPA;
- the appeal be otherwise dismissed.

Conclusion

The Court dismissed the appeal, excusing the non-compliance of the application as originally made and remitted the development application to the notification stage with each party bearing their own costs.

Two courts, same issues, but not vexatious: the Planning and Environment Court has refused to strike out an enforcement proceeding regarding alleged unlawful development even though the matter is also to be heard in the Supreme Court

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *BGM Projects Pty Ltd v Zacka & Ors* [2019] QPEC 20 heard before Kefford DCJ

July 2019

In brief

The case of *BGM Projects Pty Ltd v Zacka & Ors* [2019] QPEC 20 concerned an application in a pending proceeding commenced by a developer (**Developer**) against an adjoining landowner (**Landowner**) in the Planning and Environment Court to strike out an originating application commenced by the Developer which sought enforcement orders to require the Landowner to refrain from committing development offences and to remedy the effect of development offences allegedly committed under the *Integrated Planning Act 1997* (**IPA**) (**Originating Application**).

The Landowner sought orders that the Originating Application be struck out or permanently stayed, and that the Developer pay the Landowner's costs. In the alternative, the Landowner sought better particulars in respect of certain allegations in the Originating Application.

The Court found that it was not appropriate to grant the orders sought by the Landowner and therefore dismissed the application.

Background

The Developer had commenced two proceedings against the Landowner; one in the Supreme Court and the other in the Planning and Environment Court. Both proceedings related to drainage and overland flow issues in connection with their adjoining properties.

The Developer in the Supreme Court proceeding alleges that the Landowner had unlawfully constructed a concrete "bund" that had caused drainage problems on the Developer's land, an elevated access using 180m^3 of material, and additional works on State land (**Works**). The relief sought by the Developer included proposed orders that the Works are assessable development under the IPA and are unlawful, an injunction to require the Landowner to remove the Works, declarations that the Landowner is not entitled to cause a nuisance on the Developer's land as a result of the Works, and damages for nuisance.

The Developer in the Planning and Environment Court proceeding made identical allegations to those made in the Supreme Court proceedings. The relief sought by the Developer includes orders requiring the Landowner to remove the Works and an enforcement order to restrain the Landowner from committing further development offences.

Landowner's submissions

The Landowner commenced this application in pending proceeding and made the following submissions:

- the Planning and Environment Court proceeding commenced by the Developer is an abuse of process because it causes, or is likely to cause improper vexation or oppression, and therefore ought to be struck out or permanently stayed;
- the Originating Application ought to be struck out in accordance with rule 171 of the *Uniform Civil Procedure Rules 1999* (**UCPR**);
- the Developer ought provide better particulars in respect of the Originating Application;
- the Developer ought pay the Landowner's costs of the application in pending proceeding.

The Court found that the Originating Application is not vexatious or an abuse of process

The Landowner argued that the Originating Application was an abuse of process and made the following six arguments:

- *Submission 1* – the Supreme Court and the Planning and Environment Court proceedings are the same in substance.
- *Submission 2* – the remedies sought in each proceeding are equally effective and that an injunction by the Supreme Court and an enforcement order by the Planning and Environment Court are of "no moment".
- *Submission 3* – the decisions of *More v Inglis* (1976) 9 ALR 509 and *Slough Estates Ltd v Slough Borough Council* [1968] Ch 299 support the view that matters concerning the same parties and same issues being heard in separate courts is an abuse of process.
- *Submission 4* – all matters the subject of the Planning and Environment Court proceeding are capable of being heard in the Supreme Court proceeding.
- *Submission 5* – not staying the Planning and Environment Court proceeding would be to endorse a party pursuing enforcement proceedings in the Planning and Environment Court to remove unlawful development, and the same party at the same time, pursing proceedings in the Supreme Court seeking injunctions for the removal of the same.
- *Submission 6* – there is a risk of inconsistent findings.

Submissions 1 and 4

With respect to the Landowner's first and fourth submissions, the Court had regard to the Landowner's defence and counterclaim in the Supreme Court proceeding which relevantly stated that the Supreme Court lacked jurisdiction to determine allegations about unlawful development, and that the Supreme Court ought make consequential orders and declarations.

The Court held that the Landowner's defence and counterclaim was inconsistent with the submission that the Supreme Court proceeding is the same in substance as the Planning and Environment Court proceeding. The Court additionally found that as the Planning and Environment Court is a specialist court, it is well placed to make a determination on the common issues between the parties, creating an issue estoppel. On this basis, the Court found that the Originating Application was not vexatious or oppressive.

Submission 2

With respect to the Landowner's second submission, the Court did not accept that the remedies in each proceeding are "equally effective" or that the distinction between an injunction granted by the Supreme Court and an enforcement order granted by the Planning and Environment Court are of "no moment". The Court noted that under section 180(9) of the *Planning Act 2016* (**Planning Act**), an enforcement order attaches to the premises and binds the owner, the owner's successors in title and any occupier of the premises. Additionally, the Court noted that section 180(8) of the Planning Act makes it an offence to contravene an enforcement order. The Court noted that this is not true of an injunction, as an injunction is an equitable remedy in which a court orders a person to do or to refrain from doing something. As a result the Court rejected the Landowner's submission.

Submissions 3 and 5

The Court found that the Landowner's third and fifth submissions were unpersuasive. The Court found that unlike in *Slough Estates Ltd v Slough Borough Council* [1968] Ch 299, the Developer is not progressing both matters concurrently and noted that the Supreme Court proceeding has yet to proceed past the pleading stage. The Court noted that each proceeding is to be determined on its own facts. The Court held that each court has distinctive powers in relation to relief, as for example, the Planning and Environment Court is not able to determine claims for damages for nuisance.

Additionally, the Court noted a third related enforcement proceeding in the Planning and Environment Court commenced by the Fraser Coast Regional Council (**Council**) against the Landowner in which the Council has applied to join the Developer as a party. The Court noted that there is substantial cross over between the Council's proceeding and the Developer's proceeding in the Planning and Environment Court. The Landowner conceded that if the Developer's proceeding is not struck out or permanently stayed, the Developer's proceeding ought be joined with the Council's proceeding. The Court additionally concluded that any such joinder would reduce any vexing impact. The Court therefore rejected the Landowner's third and fifth submissions.

Submission 6

Lastly, the Court considered the Landowner's sixth submission that the two proceedings have the potential to result in inconsistent findings. The Court found that the submission does not sit comfortably with the Landowner's opposition to the Developer being joined as a party to the Council's enforcement proceeding in the Planning and Environment Court. The Court noted that if the Developer is not joined as a party to the Council's enforcement proceeding, the Developer will not be bound by the determination of the Court in that proceeding. The Court therefore noted that in those circumstances the risk of an inconsistent finding still existed in respect of the Council's enforcement proceeding and the Supreme Court proceeding.

The Court found that the Originating Application ought not be struck out

The Landowner sought to strike out the Originating Application under rule 171 of the UCPR on the basis that the Originating Application discloses no reasonable cause of action, and is frivolous and vexatious.

The Originating Application sought relief under the IPA to remedy the effect of a development offence and also sought to restrain the commission of future development offences constituted by carrying out assessable development without the necessary development permits.

The Court noted that the power derived under rule 171 of the UCPR is one to be exercised with caution as a party ought not be improperly deprived of the opportunity for a hearing. The Court found that even though the Originating Application did not clearly identify what development offence the Landowner allegedly committed, it was not persuaded that the Originating Application did not demonstrate a cause of action. The Court concluded that the Developer ought be given the opportunity to re-plead its case.

The Court therefore concluded that the Originating Application ought not be struck out.

The Court found that it was not necessary for the Developer to provide further and better particulars

The Court had "serious misgivings" about whether the Developer ought provide further and better particulars given that the Developer had filed extensive evidence.

The Court found that the evidence filed by the Developer "helpfully" revealed the nature of the case and therefore rejected the Landowner's argument.

The Court rejected the Landowner's argument that the Developer pay its costs

The Court noted that the Landowner did not specify the grounds on which an order for costs ought be made and therefore refused to make the order.

Colin Biggers & Paisley

Planning and Environment Court considers the criteria for determining whether to allow a question to be heard separately to the hearing

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wagner Investments Pty Ltd v Toowoomba Regional Council* [2018] QPEC 023 heard before Everson DCJ

July 2019

In brief

The case of *Wagner Investments Pty Ltd v Toowoomba Regional Council* [2018] QPEC 023 concerned an interlocutory application by the Toowoomba Regional Council (**Council**) to the Planning and Environment Court to determine whether certain issues in the pending proceedings being some 10 appeals could be heard as a preliminary point separate to the main hearing.

The Court dismissed the application on the basis that the resolution of the issues alluded to would not cause the whole dispute to resolve any sooner.

How the application arose

The pending proceeding related to 10 appeals commenced by Wagner Investments Pty Ltd and Marcoola Investments Pty Ltd (**Appellants**) against infrastructure charges notices (**ICNs**) given by the Council. The application by the Council in this case related to the interpretation of its Charges Resolution.

The Council's application would require the Court to determine, as a separate point, whether certain phrases in the Council's Charges Resolution obliged detailed modelling of trunk infrastructure charges or whether an appropriate "best fit" would suffice. The Council provided that a determination on a preliminary basis would assist the traffic engineering experts in calculating appropriate charges.

The Court considered that the Council's application misapprehended the procedure, and presentation of expert evidence. The Court said that experts should undertake the modelling exercises required of them and not delve into questions of statutory interpretation which are outside the province of expert evidence.

Preliminary point discretion

The discretion of the Court to allow the hearing of matters as a preliminary point at any stage of the proceeding is found in section 483 of the *Uniform Civil Procedure Rules 1999*. The Court highlighted that in exercising this discretion regard ought to be had to the following:

- whether the determination will be conclusive or final, based on concrete and established or agreed facts for the purposes of resolving a controversy between the parties;
- whether the issues proposed to be heard individually are "ripe" for separate determination.

Conclusion

The Court found the complexity of the different challenges to the various ICNs to be reason enough to suggest that the issues sought to be heard as a preliminary point were not equipped (or "ripe") for the Court's discretion to be exercised in the Council's favour.

Fantastic Beasts and Where to Find Them

Ian Wright

This article discusses the Kawana Waters Development Agreement made under IPA, in particular the negotiation of the agreement and the legal documentation of the agreement

August 2019

Introduction

The Sunshine Coast is world renowned for its stunning coastline and other ecological values, its vibrant economy, its unique character and its strong sense of community. It is also the home of rare species of planning creatures known as "*the master planned community*", including those borne of:

- rezoning approvals under the *Local Government Act 1936*, such as Pelican Waters and Peregian Springs;
- development control plans under the *Local Government (Planning and Environment) Act 1990* (**PEA**), such as Kawana Waters;
- development approvals under the *Integrated Planning Act 1997*, such as Sippy Downs and Brightwater;
- structure plans for master planned areas under the *Sustainable Planning Act 2009*, such as Palmview;
- development schemes for priority development areas under the *Urban Land Development Authority Act 2007*, such as Caloundra South, and under the *Economic Development Act 2012* such as the Maroochydore Principal Activity Centre.

In this paper we will examine the rarest species of them all – the Kawana Waters master planned community. Only three of these master planned communities were ever created; the other two being North Lakes, and Springfield Lakes.

Kawana Waters

On 6 September 1996 a Development Agreement was executed under the PEA between the then Minister of Natural Resources (**Minister**), the then Caloundra City Council now Sunshine Coast Council (**Council**), Kawana Estates Pty Ltd and Buddina Pty Ltd (**Master Developer**). The Development Agreement relates to land referred to as the "*developable area*" which was originally bordered by the Nicklin Way to the east, the Mooloolah River to the west and extended from Currimundi in the south to the Mooloolah River in the north.

The Development Agreement was supported by the following:

- A transport infrastructure agreement under the *Transport Infrastructure Act 1994* (**TIA**).
- Amendments to the development lease under the *Land Act 1994*.
- Amendments to the Council's Planning Scheme and the introduction of a development control plan (**DCP**) under the PEA.

Key principles

This paper discusses the following key principles, which were agreed by the parties and reflected in the legal instruments:

- A combined vision for the development of the developable area that represented world best practice in terms of urban design and was to be implemented by master planning design process.
- A subdivision process that implemented the outcomes of the master planning design process.
- The provision of infrastructure that was sufficient to achieve the vision for the development of the developable area.

Vision and master planning design process

The vision for the development of the developable area was agreed between the parties and set out in the proposed DCP and was to be implemented by a master planning design process, which was structured to address the following:

- The Master Developer agreed that almost all of its existing use rights could not be exercised until the master planning design process had been followed.

- The master planning design process involves the preparation and approval by the Council and the Minister of a series of development plans at the district, neighbourhood, precinct/estate and site levels.
- The Master Developer agreed not to develop the developable area until the development plans required by the master planning design process were approved.

Subdivision process

Given that the developable area comprised primarily leasehold land as well as some freehold land, the following innovative solution was developed to ensure the Council was to be involved in the subdivision approval process for the leasehold land:

- In relation to freehold land the Council would determine applications in accordance with its powers under Part 5 of the then PEA.
- In relation to leasehold land the Master Developer agreed in the Development Agreement not to seek the approval of the Minister under the *Land Act 1994* to the subdivision of leasehold land in the developable area until the Council had assessed the subdivision for compliance with the DCP and the approved development plans and provided its recommendation to the Minister. Also, the Master Developer and the Minister agreed that any subdivision of the leasehold areas had to be in accordance with the DCP and all development plans approved under the master planning design process.

Infrastructure contributions

Whilst the parties could agree generally about the vision for the developable area, the master planning design process and the subdivision process in respect of the developable area, it was when the parties turned to infrastructure contributions (ie money) that the real divisions between the parties became apparent. The agreements that were ultimately reached between the parties can be summarised as follows:

- In respect of infrastructure contributions for State controlled roads, the Master Developer executed a transport infrastructure agreement under the TIA with the Department of Main Roads.
- In respect of contributions for local government roads, it was agreed that these could be imposed as part of the approval of development plans under the master planning design process, the subdivision approval process as well as under the normal development approval process under Part 4 of the then PEA.
- In respect of open space and recreation contributions, the Master Developer agreed to provide significantly increased open space and recreation areas on the basis that its liability was capped to these levels.
- In respect of sewerage and water supply headworks, the previous agreements with the Council were terminated and new agreements were embodied within the Development Agreement.
- In respect of community facilities, the Master Developer agreed to provide contributions both in terms of money and land on the basis that its liability was capped to these levels.

Finalisation of documents

The legal arrangements were eventually finalised as follows:

- The Development Agreement was executed in September 1996.
- The Transport Infrastructure Agreement was executed in November 1996.
- The DCP was gazetted in December 1996.
- The amendments to the development lease were approved in early 1997.

The finalisation of the legal instruments, represented a new beginning which saw all parties committed, legally commercially and politically to a new process, which cumulated in the approval of a structure plan for the developable area in September 1999. It is a process which continues to unfold today, some 23 years after its rebirth.

New South Wales Court of Appeal provides clarity on the doctrine of fettering of government power

Cara Hooper | Ian Wright

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Searle v Commonwealth of Australia* [2019] NSWCA 127 heard before Bathurst CJ, Bell P and Basten JA

August 2019

In brief

The case of *Searle v Commonwealth of Australia* [2019] NSWCA 127 concerned an appeal to the New South Wales Court of Appeal (**Court of Appeal**) against a decision of the Supreme Court of New South Wales (**Supreme Court**) concerning an alleged breach of contract.

The Appellant was enlisted in the Royal Australian Navy (**Navy**) as a marine technician who had entered into a contract with the Commonwealth, which stated that the Appellant was to receive training in order to attain an engineering qualification (**Training Contract**). However, the training for the engineering qualification stated in the Training Contract did not occur. The Appellant therefore commenced proceedings in the Supreme Court and sought damages for breach of contract.

The Supreme Court held that the Training Contract had the effect of fettering the exercise of the Commonwealth's power of naval command and, therefore, it was beyond the power of the Commonwealth to have entered into the Training Contract.

The Appellant appealed the Supreme Court decision on the grounds that the Supreme Court had erred in finding:

- that the Training Contract constituted an impermissible fetter upon the exercise of the power of military command; and
- that the Training Contract was not supported by consideration.

In order to determine the appeal, the Court of Appeal considered the following issues:

- did the Training Contract have the effect of fettering the exercise of the Commonwealth's power of naval command;
- did the Appellant provide consideration for the Training Contract; and
- did the Supreme Court err in the assessment of damages.

The Court of Appeal held that the Training Contract was valid and was not void due to the fettering doctrine as it did not hinder the exercise of discretion in the public interest of military command. The Supreme Court decision was therefore overturned and the Appellant was awarded $60,000 in damages for breach of contract by the Commonwealth.

Did the Training Contract have the effect of fettering the exercise of the Commonwealth's power of naval command?

The fettering doctrine is a doctrine which states that a government or public authority may not fetter the future exercise of discretionary powers reposed in the executive or a public authority.

The Court of Appeal recognised that there has been considerable academic attention and debate surrounding the effect of the fettering doctrine. The debate surrounding the fettering doctrine has concerned the following two competing interests:

- the importance of a Minister, government department or public authority remaining free to act in the future in the public interest and for the public benefit; and
- the desirability of government being able to contract and of contractual counterparties having confidence that their bargains will be honoured.

The Appellant argued that the Training Contract was not void due to the fettering doctrine and relied upon the dissenting judgment of Mason J in *Ansett Transport (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 (**Ansett Decision**) which relevantly stated that at paragraph [76]:

> *… it has been suggested that the free and unfettered exercise of the discretion is sufficiently preserved if the validity of the contract is upheld, provided that it is enforceable only by way of action for damages and not by order or injunction.*

The Court of Appeal agreed with the Appellant's argument based on the judgment of Mason J in the Ansett Decision and determined that where a particular contract has been expressly authorised by statute, the fact that a discretion is fettered by the contract does not make it ultra vires.

The Court of Appeal noted that the starting point in order to determine whether the Commonwealth had the power to fetter the Training Contract was to evaluate the Commonwealth's legislative power to enter into the Training Contract.

The Commonwealth submitted that it had a broad power to enter into contracts; however, if there was potential inconsistency between contractual undertakings and the future direction by and in the exercise of naval command, that inconsistency amounted to a fettering of discretion and thus the contract would be void.

The Court of Appeal determined that when the Navy, through the Department of Defence, authorised the Training Contract, it would have considered that the training would be of some significant benefit to the Navy and the protection and defence of the Commonwealth. The Court of Appeal further held that the Training Contract would not have hindered the exercise of discretion in the public interest or fettered naval command in any real sense.

The Court of Appeal determined that from the facts of the case, it was clear that naval command felt no constraint in changing its views as to what training was appropriate and directed the Appellant to undertake training different to what was stated in the Training Contract.

The Court of Appeal therefore held that the Training Contract was within the Commonwealth's power to enter into, and did not fetter the power of naval command. It was further held by the Court that the award of damages would not have fettered the future exercise of the discretion reposed in naval command.

Did the Appellant provide consideration for the contract?

The Supreme Court had held that all of the training obligations assumed by the Appellant under the Training Contract were already imposed upon the Appellant by virtue of the Appellant's enlistment in the Navy, and accordingly the Training Contract was not supported by any consideration on the part of the Appellant, as the Appellant was bound to carry out any and all training, work experience, coursework, study and any other duties as directed, irrespective of the Training Contract.

The Court of Appeal accepted that upon the Appellant's enlistment, the Appellant was bound to undertake training at the Navy's direction. The Court of Appeal, however, found it was necessary to consider whether the Training Contract would extend the Appellant's minimum service period in the Navy.

The Court of Appeal noted that both the minimum service period in the Navy and the period of the Training Contract was for four years. The Appellant was enlisted into the Navy on 17 January 2011 and therefore, the minimum service period would conclude on 17 January 2015. The Court of Appeal also noted that the commencement date of the Training Contract was 4 April 2011 and would conclude on 4 April 2015.

The Court of Appeal determined that the execution of the Training Contract by the Appellant exceeded the existing statutory service period. Therefore, the Court of Appeal held that the Appellant furnished sufficient consideration to render the Training Contract binding upon the Commonwealth.

Did the Supreme Court decision err in the assessment of damages?

The Supreme Court held that if the Supreme Court decision was successfully appealed, the award of damages was assessed to be $60,000. The Commonwealth sought to challenge the assessment of the damages made by the Supreme Court on the basis that it had not been established that any damages were payable to the Appellant.

In order to determine the quantum of damages, the Court of Appeal noted various principles which have been applied in previous decisions of the High Court and Court of Appeal. The Court of Appeal noted that it was recognised in the case of *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; [1994] HCA 54 at [83] that:

> *The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can.*

It was also noted by the Court of Appeal that when assessing damages, it is not essential to nominate a particular percentage of probability to be attributed to the prospect of a particular situation occurring (see *Fightvision Pty Ltd v Onisforou* [1999] NSWCA 323 at [147]).

The Court of Appeal noted that the Supreme Court had identified a number of matters which were taken into account when determining the quantum of damages, which included the following:

- the evidence from the Appellant's remuneration and human resources consultant who suggested that a person with the engineering qualification stated in the Training Contract would earn $15,000 more per annum than what a person with the Appellant's current qualification would earn;
- the possibility that jobs suitable to the engineering qualification stated in the Training Contract would not always be readily available; and
- the value of the engineering qualification would likely diminish over time as the Appellant acquired and benefitted from practical experience in the workforce.

The Court determined that the figure of $60,000 in damages estimated by the Supreme Court plainly built upon the $15,000 differential in earnings and took into account the contingencies and considerations stated in the Supreme Court's reasons. The Court of Appeal therefore upheld the Supreme Court's assessment of damages.

Conclusion

The Court of Appeal held that the Training Contract entered into by the Appellant with the Respondent was not void due to the fettering doctrine and therefore set aside the Supreme Court's decision, which dismissed the Appellant's claim for breach of contract. The Court of Appeal ordered the Respondent to pay $60,000 in damages and also pay 70% of the Appellant's costs for the appeal.

Colin Biggers & Paisley

Not enough interest: Court of Appeal reverses the decision of the Planning and Environment Court to approve a service station and retail uses despite conflicts and finds that establishing a need for the proposed development was not sufficient to justify the approval

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132 heard before Sofronoff P, Fraser JA and Flanagan J

August 2019

In brief

The case of *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132 concerned an application by the Gold Coast City Council (**Council**) to the Court of Appeal for leave to appeal against a decision of the Planning and Environment Court to approve a proposed development for a service station, convenience store, take-away food premises and a fast food drive through premises despite its conflicts with the *Gold Coast City Planning Scheme 2003* (**2003 Planning Scheme**).

The Court of Appeal held that the Planning and Environment Court had erred in its decision to allow the development application despite its conflicts and found that the identified need for the proposed development was not enough to justify its approval. The Court of Appeal found that there had been a failure by both parties to apprehend and apply the applicable statutory requirements.

We have previously reported on the original decision of *K & K (GC) Pty Ltd v Gold Coast City Council* [2018] QPEC 9 in our April 2018 edition of Legal Knowledge Matters.

Grounds to the appeal

The Council contended that the Planning and Environment Court had erred in its decision to allow the appeal on the following grounds:

- The Planning and Environment Court had erred in determining the scope of the conflict that invoked the application of section 326(1)(b) of the now repealed *Sustainable Planning Act 2009* (**SPA**) in that the conflicts could be reduced by other considerations.
- The Planning and Environment Court had erred in holding that the need for the proposed development was sufficient, together with other grounds, to justify the approval of the development application despite the conflicts.
- The Planning and Environment Court had misconstrued the definition of "*neighbourhood centre*" for the purposes of the *Gold Coast City Plan 2016* (**2016 City Plan**), and that error had infected the exercise of discretion.
- The Planning and Environment Court had failed to appreciate the weight that should be afforded to the 2016 City Plan, which had supplanted the 2003 Planning Scheme.

Prior decision of the Planning and Environment Court

The Applicant submitted a development application to the Council for a development permit for the proposed development.

The Council refused the development application on the basis that the development conflicted with the 2003 Planning Scheme. The Applicant appealed the Council's decision to the Planning and Environment Court.

In the Planning and Environment Court proceedings, the Applicant submitted that the development should be approved despite the conflicts with the 2003 Planning Scheme as there were matters of public interest to justify the approval.

The Planning and Environment Court agreed with the Applicant and found that although the conflicts with the 2003 Planning Scheme arising from the proposed development were not "*simply technical or trivial, but, by reason of there being the result of an 'evident policy intention', were at the more serious end of the spectrum*" at [231], the serious conflicts were significantly reduced because the extent of the need for the proposed development was sufficient to justify the approval.

The Council appealed the decision to the Court of Appeal.

Conflict with the SPA cannot be reduced by other considerations

Section 326(1)(b) of the SPA relevantly states that "*the assessment manager's decision must not conflict with a relevant instrument unless there are sufficient grounds to justify the decision despite the conflict*". The Council submitted that the Planning and Environment Court had erred in its approach in determining the scope of the conflict that invoked the application of section 326(1)(b) of the SPA. The Council also submitted that the Planning and Environment Court was wrong to conclude that certain factors which were identified by the Planning and Environment Court in the appeal, had the effect of reducing the seriousness of the identified conflict. The Council further submitted that as a matter of principle, the level of conflict with such a binary provision could not be reduced by other considerations.

The Court of Appeal rejected the Council's submissions and held that the Planning and Environment Court was correct in its approach to consider the degree of conflict as it was not irrelevant that the uses that would create a conflict were uses that would be only a smaller part of a larger unobjectionable use. The Court of Appeal held that the examination of the nature and extent of an asserted conflict is a step that is required by section 326(1)(b) of the SPA.

Sufficient need

The Applicant submitted that there was a need for the proposed development which constituted a matter of public interest, and that the need was sufficient to overcome the conflict. The Court of Appeal noted that the Applicant had not advanced any argument in the appeal as to why the need was sufficient to overcome the conflict.

The Council contended that the exercise of considering whether there were sufficient grounds to justify approval despite the conflicts, required the following:

- the identification of grounds;
- an assessment of the role and importance to the relevant planning scheme of the provisions which would be infringed should the proposal be approved;
- a consideration of the adverse consequences which might flow from the infringement; and
- a consideration of the competing merits and the weight of the grounds relied upon to justify the approval.

The Court of Appeal agreed with the first two submissions advanced by the Council but dismissed the third and fourth submissions on the basis that those considerations were the process required by former legislation, namely the *Local Government Act 1936*. The Court of Appeal held that the SPA required there to be "*sufficient matters of public interest*" to justify a decision. As such, the Court of Appeal found that both parties had wrongfully prepared their evidence and submissions upon the need for a service station, rather than the other matters of public interest.

The Court of Appeal noted that although the words "*matters of public interest*" appeared in various places in the record, the case actually proceeded upon the basis of assumptions that considerations that were once relevant under repealed legislation were those that still applied under the SPA. The Court of Appeal found that determining the existence of a need for a particular kind of development was just the starting point to satisfy section 326(1)(b) of the SPA.

Importantly, the Court of Appeal found consistent with many case authorities including most recently, *Bell v Brisbane City Council & Ors* [2018] QCA 84, that, "*at the heart of decisions like these is the acknowledgement that conformity with the Planning Scheme is prima facie, in the public interest*" (at [47]). The Court of Appeal therefore found that it would never be enough for a party to merely prove that there is a need for the proposed development to satisfy section 326(1)(b) of the SPA.

The Court of Appeal held that for a party to appropriately address a provision, such as section 326(1)(b) of the SPA when there is a conflict, it must identify reasons as to why the terms of the relevant planning scheme ought not to prevail. The Court of Appeal found that otherwise there would be a risk that, rather than applying section 326(1)(b) of the SPA, the decision maker would be doing no more than performing a general weighing of factors in order to determine whether it would be better to permit the development.

Discretion to consider 2016 City Plan and interpretation of "neighbourhood centre" within the meaning of the 2016 City Plan

The Council submitted that the Planning and Environment Court should have exercised its discretionary power conferred by section 495(2)(a) of the SPA to give the provisions of the 2016 City Plan due weight. Section 495(2)(a) of the SPA relevantly provides that "*the court must decide the appeal based on the laws and policies applying when the application was made but may give weight to any new laws and policies the court considers appropriate*".

The Court of Appeal held that the weight to be given to discretionary factors such as the contents of the 2016 City Plan is a matter for the decision maker. The Court of Appeal held that a court that reviews an exercise of discretion that involves assessing the weight to be given to relevant factors, should not substitute its own view unless it has been shown that the decision was unreasonable in the *Wednesbury* sense.

The Council also submitted that the Planning and Environment Court had misconstrued the meaning of "*neighbourhood centre*" within the meaning of the 2016 City Plan and that this had infected the Planning and Environment Court's exercise of discretion. The 2016 City Plan relevantly defines "*neighbourhood centre*" as comprising "*a minimum of five separate commercial or retail tenancies located within a single centre or comprising a consolidation of separate but interconnected uses*".

The Court of Appeal accepted the Council's submission and found that the proposed development did not satisfy the definition of a "*neighbourhood centre*" as the proposed development involved fewer than five tenancies, and fewer than five separate but interconnected uses. The Court of Appeal held that the proposed development was a service station including ancillary businesses and was not a "*neighbourhood centre*" under the 2016 City Plan in any sense of the expression. The Court of Appeal held that this error in construction affected the exercise of the Planning and Environment Court's discretion, as the Planning and Environment Court had concluded that the consideration of the provisions of the 2016 City Plan concerning "*neighbourhood centres*" meant that "*neighbourhood centres*" could be located in medium density residential zones and low density residential zones in certain circumstances. As a consequence, the Court of Appeal found that this was an error of law that vitiated the exercise of discretion by the Planning and Environment Court.

Conclusion

The Court of Appeal therefore granted leave to appeal, allowed the appeal, set aside the orders made by the Planning and Environment Court and remitted the case back to the Planning and Environment Court. The Court of Appeal ordered that the Applicant pay the Council's costs of the appeal.

Planning and Environment Court fails to find sufficient grounds to justify approval of a service station development in a residential locality

Austyn Campbell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bennington & Ors v Sunshine Coast Regional Council & Anor* [2019] QPEC 11 heard before Long SC DCJ

August 2019

In brief

The case of *Bennington & Ors v Sunshine Coast Regional Council & Anor* [2019] QPEC 11 concerned an appeal commenced by adverse submitters (**Submitters**) to the Planning and Environment Court against a decision by the Sunshine Coast Regional Council (**Council**) to approve a development application for a development permit for a material change of use of premises for a service station and convenience restaurant development (**Proposed Development**).

The Proposed Development was in respect of an irregular shaped lot with a frontage of 340 metres to David Low Way, and an area of approximately 7 hectares (**Land**). The Proposed Development was limited to the northern part of the Land, involving an area of approximately 1.08 hectares.

The Submitters alleged that there was a significant and serious conflict with the relevant planning scheme being the now superseded *Maroochy Plan 2000* (**Planning Scheme**), and that no grounds of sufficient weight existed to support the approval despite the conflict.

The Applicant for the Proposed Development and the Co-Respondent to the appeal conceded that the Proposed Development did conflict with the Planning Scheme, however, there were sufficient grounds to justify the approval despite the conflict.

Proposed development

The development application was assessed and decided under the Planning Scheme and the *Sustainable Planning Act 2009* (**SPA**).

The Proposed Development is situated within a predominantly low density residential area, with detached dwelling houses located to the south, east and north. The Sunshine Coast Airport (**Airport**) is located approximately 300 metres to the northwest.

Two shopping centres containing a range of retail and commercial uses, are located 1 kilometre north and 1.2 kilometres south from the Land respectively. At the time of the appeal, the Council had granted a development permit for a service station approximately 1 kilometre south of the Land.

The size of the Proposed Development, with a total building floor space of 1,060m^2, was considered relevant to the Court's determination.

The Court noted that land uses in the locality of the Land were affected by and could affect the Airport's operations. The Planning Scheme specifically noted that future development in the locality should be limited to low density residential premises.

The Planning Scheme identified locations where commercial and industrial uses were appropriate in the relevant planning area. The Land was not one of those locations.

Conflict with the Planning Scheme

The Submitters contended that the Proposed Development conflicted with the Planning Scheme in the following ways:

- *Land use conflict* – The Proposed Development was not considered a preferred or acceptable use in the locality under the Planning Scheme, and approval would be undesirable (at [27]).
- *Retail and centres hierarchy planning* – The Planning Scheme expressed a strong planning policy that commercial uses were not to be established except where specifically identified.
- *Scale of use* – The Proposed Development would not, of itself, constitute a Local Centre, but the floor area was considered commensurate with that of a Local Centre as contemplated by the Planning Scheme.

- *Character and amenity impacts* – The concept of amenity was far broader than the empirical standards of noise and air quality, and the Proposed Development would impact on the 'sense of place'.
- *Ribbon development* – The Planning Scheme expressly stated that "*commercial ribbon development is not to occur along the David Low Way*" (at [30]).

The Council and the Applicant conceded that the Proposed Development conflicted with the Planning Scheme. However, the Council and the Applicant argued that the following sufficient grounds justified approval despite the conflicts:

- The Planning Scheme had not foreseen the growth and expansion of the Airport.
- The Proposed Development would support further expansion of the Airport.
- The Proposed Development would fulfil a gap in the service station network through increased convenience, choice and competition for local residents and the passing public.
- The zoned residential use for the site was not suitable and a commercial use would be more appropriate given the proximity to the Airport.

Nature and extent of conflict

The Court discussed the relevant test expounded under section 326 of the SPA, being the requirement to show sufficient grounds to justify the decision despite a conflict, in determining the nature and extent of the conflict. The Court noted the provision refers to sufficient "grounds" rather than "planning grounds" to justify an approval where a conflict exists.

The Submitters argued that the conflicts were not limited to a simple land use issue, but encompassed matters with respect to the scale of the Proposed Development and the reasonable expectations of the community. The Submitters argued that the conflict should be regarded as significant or serious and requiring substantial or compelling grounds to justify approval.

The Council and the Applicant conceded the Proposed Development was in conflict with the residential nature of the locality, but limited the conflict to a land use issue.

No sufficient grounds to justify approval despite conflict

The Council and Applicant argued that the need for the Proposed Development amounted to sufficient grounds to approve the Proposed Development despite the conflicts. The Council and Applicant arguments were as follows:

- A clear and strong need for the Proposed Development is demonstrated by its strong financial viability.
- The location of the Land is important and supports the conclusion that the public will find the Proposed Development both convenient and attractive, and therefore the community would be better off if the development is approved.
- The need for the Proposed Development is supported by the presence of the Airport and the tourism activity within the trade area.
- The resident population is not already sufficiently serviced by similar offerings.
- The Proposed Development will deliver choice, competition and convenience.

In its analysis of the Council's submissions, the Court made reference to *William McEwans Pty Ltd v Brisbane City Council* (1981) 2 APA 165, which relevantly states, at [65] (emphasis added):

> *it [need] connotes the idea that the physical wellbeing of a community … can be better and more conveniently served by providing the means for ensuring that the provision of that facility,* ***subject always to other considerations of the town planning kind*** *… depends on an acceptable residential amenity.*

The Court concluded that the need for the Proposed Development was not strong. The Court held that at best the Proposed Development would do no more than create a choice of facilities in circumstances where the existing facilities were not inadequate.

Conclusion

The Court held that the conflicts with the Planning Scheme were significant, if not serious, rather than minor or technical. It was noted that the Planning Scheme indicated an awareness of the Airport and other locational attributes of the Land, but nevertheless contained a clear indication that the Land was to remain residential in nature.

The Court did not find a requisite need in the community or sufficient grounds in the public interest to support the approval of the Proposed Development.

The Court upheld the Submitters' appeal, set aside the decision of the Council and refused the development application for the Proposed Development.

Planning and Environment Court grants two applications for a minor change in relation to two proposed developments as the changes would not result in a substantially different development

Cara Hooper | Ian Wright

This article discusses the decisions of the Queensland Planning and Environment Court in the matters of *Dickson Properties Pty Ltd v Brisbane City Council & Others* [2019] QPEC 29 and *Maroochydore Sands Pty Ltd v Sunshine Coast Regional Council & Ors* [2019] QPEC 30 heard before RS Jones DCJ

August 2019

In brief

The case of *Dickson Properties Pty Ltd v Brisbane City Council & Others* [2019] QPEC 29 (**Dickson Properties**) and *Maroochydore Sands Pty Ltd v Sunshine Coast Regional Council & Ors* [2019] QPEC 30 (**Maroochydore Sands**) both concerned minor change applications to the Planning and Environment Court (**Court**).

In both proceedings the respective Applicants sought orders from the Court that the proposed changes to the relevant developments were minor changes under the *Sustainable Planning Act 2009* (**SPA**).

In order to determine whether the respective applications were a minor change, the Court considered the following issues:

- Would the changes require an application for the developments to be referred to any additional referral agencies?
- Would the changes to the proposed developments change the proposed developments' level of assessment to impact assessable?
- Would the changes result in substantially different developments?

The Court held that the proposed changes to both developments were minor changes as they satisfied section 350(1)(d) of the SPA.

Background

The Dickson Properties proceeding concerned a change to a proposed residential development. There were a number of changes in relation to the proposed development, however, the most contentious change which was of concern to the first Co-Respondent, was the addition of an access easement over an internal road of the residential development, which was to provide a higher level of flood immunity than what was available with the original access easement which connected to a public road.

The Maroochydore Sands proceeding concerned a change to a proposed development for a quarry. The proposed changes to the proposed development concerned the haulage route and the reduction of the quarry's annual extraction limit.

The Court considered section 350(1)(d) of the SPA in respect of both applications, which relevantly provides as follows:

> *(1) A **minor change** in relation to an application, is any of the following changes to the application—*
>
> *…*
>
> *(d) a change that—*
>
> *(i) does not result in a substantially different development; and*
>
> *(ii) does not require the application to be referred to any additional referral agencies; and*
>
> *(iii) does not change the type of development approval sought; and*
>
> *(iv) does not require impact assessment for any part of the changed application, if the original application did not involve impact assessment.*

Would the changes require an application for the development to be referred to additional referral agencies?

The Court held that the changes in relation to both proceedings would not require referral to additional referral agencies. The Court noted that both of the proposed uses remain the same, and therefore the Court was satisfied that no additional referral agencies were required as a consequence of the intended changes to each proposed development.

Would the changes to the proposed developments change their level of assessment to impact assessable?

It was noted by the Court that each of the proposed developments did not require impact assessment. The Court held that the proposed changes to each proposed development would not change their proposed uses and therefore the nature of the development approval sought. The Court therefore held that the proposed changes did not change the level of assessment of each proposed development to impact assessment.

Would the changes result in substantially different developments?

In both proceedings, the Court stated that the main issue to be determined was whether the proposed changes would cause the proposed developments to be substantially different from the original development applications.

Dickson Properties

The first Co-Respondent in the Dickson Properties proceeding submitted that the proposed changes to the proposed development were not minor changes in respect of section 350 of the SPA, as they changed the ability of the proposed development to operate as originally intended, removed a component of the development which was integral to its operation, and introduced new impacts and increased the severity of known impacts.

As the subject land was prone to flooding, a number of expert consultants conducted an analysis of the proposed changes. It was concluded in the joint expert report that the proposed change of an access easement over the internal road of the residential development would provide the safest outcome for the residents of the proposed development in the event of a flood.

The Court was satisfied from the evidence of the expert consultants that the proposed change would result in a safer access route in the event of a flood compared to the original access easement. The Court therefore held that the proposed changes to the proposed development were a minor change as they did not result in a substantially different development.

Maroochydore Sands

In order for the Court to determine whether the proposed minor changes would cause the proposed development to be substantially different, the Court considered the following questions from the Statutory Guidelines dated 11 December 2009:

- Would it involve a new use with different or additional impacts?
- Would it result in the application involving a new parcel of land?
- Would it dramatically change the built form in terms of scale, bulk and appearance?
- Would the change involve significant impacts on traffic flow and the traffic network to such an extent to have serious ramifications?

The Court held that the proposed changes did not contravene the first three questions. In relation to the fourth question, the Court noted that the proposed change involved a change to the haulage route from the quarry and therefore would have some impact to traffic flow and the traffic network.

The Applicant in this case relied on a number of experts who specialised in geology, soils and groundwater, hydraulics/water resources, and traffic. The experts for the Applicant all came to the conclusion that the proposed change would not change the ability of the proposed development to operate as intended. It was further noted by the experts for the Applicant that the proposed changes would not cause any adverse impacts in relation to any of the areas of expertise in which each expert specialised.

The Court was satisfied with the conclusions by the Applicant's experts and held that the changes were minor changes for the purposes of the SPA.

Conclusion

The Court held, in both proceedings, that the proposed changes to each proposed development were minor changes for the purposes of the SPA.

Land Court of Queensland does not err in its decision to recommend an environmental authority for a mine and haul road

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Arcturus Downs Limited v Peta Stilgoe (Member of the Land Court of Queensland) & Ors* [2019] QSC 84 heard before Lyons SJA

August 2019

In brief

The case of *Arcturus Downs Limited v Peta Stilgoe (Member of the Land Court of Queensland) & Ors* [2019] QSC 84 concerned an application to the Supreme Court of Queensland for a statutory order of review of a decision made by the Land Court to dismiss a landowner's (**Landowner**) objection to two draft environmental authorities that were issued by the Department of Environment and Heritage Protection (**Department**) to a mining company (**Mining Company**) over the Landowner's land.

The subject land, which is located near Emerald in Queensland, was used for dry land cropping and cattle breeding (**Land**). The Mining Company made an application for a mining lease over the Land, and submitted two applications for environmental authorities. The first environmental authority application concerned a longwall thermal coal mine, whilst the second application concerned a haul road and associated infrastructure. The Department issued complementary draft environmental authorities to the Mining Company.

The Landowner subsequently objected to the Land Court regarding the grant of the mining lease and the issuing of the two draft environmental authorities. The Land Court dismissed the Landowner's objection, and recommended to the Minister that environmental authorities be issued in terms of the draft environmental authorities.

The Landowner applied to the Supreme Court to review the Land Court's decision on the basis that it involved errors of law and that the Land Court did not have jurisdiction to make the decision. The Supreme Court dismissed the Landowner's application as it found that the decision did not involve an error of law, and that the Land Court did have jurisdiction to make the decision.

Landowner's submissions

The Landowner argued that the Land Court's decision involved the following errors of law:

- The Land Court erred in construing section 155 of the *Environmental Protection Act 1994* (**EPA**) as not requiring a single application for an environmental authority for the proposed mining project, and therefore the Land Court had improperly exercised its power and did not have the requisite jurisdiction.
- The Land Court erred in relying on the criteria identified in section 113 of the EPA in respect of the proposed haul road and associated infrastructure.
- The draft environmental authorities were invalid as section 93 of the now repealed *Strategic Cropping Land Act 2011* (**SCLA**) required a decision under the SCLA before an environmental authority could be issued.
- The Landowner was denied procedural fairness in relation to the amendments to the draft environmental authorities.

Supreme Court held that the Land Court had properly construed section 155 of the EPA

The Landowner argued that the Land Court had erred in construing section 155 of the EPA as not requiring the Mining Company to make a single application for an environmental authority for all mining activities that formed the mining project.

Additionally, the Landowner argued that the environmental authorities were invalid as the Mining Company failed to comply with section 155 of the EPA.

At the time section 155 of the EPA relevantly provided as follows:

> *(1) This section applies to a person who may apply for an environmental authority (mining activities) for mining activities proposed to be carried out as a mining project.*
>
> *(2) The person may only make a single application for 1 environmental authority (mining activities) for all mining activities that form the project. …*

In considering the Land Court's decision, the Supreme Court found that attention must be given to the purpose of the statutory provisions of the EPA as a whole. The Supreme Court held that the EPA, when construed as a whole, offers flexibility to allow the issuance of more than one environmental authority, as the provisions of the EPA allow for non-compliance to be addressed at any stage of the process.

The Supreme Court therefore concluded that the Land Court did not improperly exercise its power in making its decision.

Supreme Court held that the Land Court did not err in relying on the criteria established under section 113 of the EPA

The Land Court held that the proposed mining project was not a "*single integrated operation*" within the meaning of section 113 of the EPA on the basis that the transportation of the coal was to be managed by an independent contractor. Consequently, the Land Court concluded that the Mining Company was not required to make a single application for an environmental authority. The Landowner argued that the Land Court erred in relying on section 113 of the EPA to determine that the proposed mine was not a "*single integrated operation*".

At the time the second application for an environmental authority was made, section 155 of the EPA had been replaced by section 118 of the EPA.

Section 118 of the EPA relevantly provides that if an entity proposes to carry out "*environmentally relevant activities [(**ERA**)] as an ERA project*" that entity "*may only make a single application for a single environmental authority for all relevant activities that form the project*". An ERA project is defined under section 112 of the EPA to include a "*prescribed ERA project*" or "*resource project*". Relevantly, a "*resource project*" includes a project that involves resource activities carried out, or proposed to be carried out, under one or more resource tenures, in any combination, as a "*single integrated operation*".

A "*single integrated operation*" is defined under section 113 of the EPA, which relevantly provides as follows:

> *Environmentally relevant activities are carried out as a single integrated operation if—*
>
> *(a) the activities are carried out under the day-to-day management of a single responsible individual, for example, a site or operations manager; and*
>
> *(b) the activities are operationally interrelated; and*
>
> *(c) the activities are, or will be, carried out at 1 or more places; and*
>
> *(d) the places where the activities are carried out are separated by distances short enough to make feasible the integrated day-to-day management of the activities.*

The Supreme Court rejected the Landowner's submission and held that the Land Court correctly relied on section 113 of the EPA to determine that the proposed mine was not a "*single integrated operation*". The Supreme Court held that the proposed mining activities were not of a kind which were integrated as they were not to be carried out under the day-to-day management of the same person and were different activities.

Supreme Court held that a draft environmental authority was validly issued by the Court and that an environmental authority was issued under the SCLA

The Landowner argued that the Land Court was required to make a decision under section 93 of the SCLA before an environmental authority could be issued, and as the Land Court failed to do so, the draft environmental authorities were invalid.

Section 93 of the SCLA provides as follows: "*An environmental authority for the resource activity cannot be issued until an SCL protection decision has been made for the environmental authority and the resource authority for the resource activity*".

In its decision, the Land Court found that draft environmental authorities were issued rather than an environmental authority. The Landowner consequently submitted that the definition of "*environmental authority*" was "*not a discrete reference to either a draft environmental authority or an environmental authority and therefore it ought apply to both*" (see [66]).

The Supreme Court found that Schedule 4 (Definitions) of the EPA makes a clear distinction between an environmental authority and a draft environmental authority. Consequently, the Supreme Court rejected the Landowner's submission and held that the Land Court did not err in its decision.

Supreme Court rejected the argument that the Land Court improperly exercised its power and that the decision was unreasonable

The Landowner argued that the Land Court's decision to recommend the issue of the draft environmental authorities was an improper exercise of its power under the EPA. Additionally, the Landowner submitted that the Land Court's decision was "unreasonable" on the basis that it inappropriately relied on a protocol to seek advice from the Department regarding how a condition of an environmental authority ought be drafted.

The Supreme Court noted that the Land Court's function is to make an administrative assessment of an application under the EPA. The Supreme Court therefore held that the Land Court did not improperly exercise its power as the Land Court was exercising its administrative function by seeking advice from the Department.

Supreme Court found that the Landowner was not denied procedural fairness

The Landowner argued that it had been denied procedural fairness by the Land Court in its decision to seek advice from the Department.

The Supreme Court noted that the parties were given advice from the Department on the same date and had the opportunity to respond to the advice. The Supreme Court found that as there was a full hearing and the parties were given the opportunity to respond to the advice, the principles of natural justice were not breached.

Conclusion

The Supreme Court dismissed the Landowner's application and held that the Land Court did not err in its decision.

Colin Biggers & Paisley

Planning and Environment Court determines a dispute between parties who cannot agree to the form of the draft orders which were to be used to progress a proceeding to a hearing

Cara Hooper | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v D Agostini Property Pty Ltd & Ors* [2019] QPEC 19 heard before Reid DCJ

August 2019

In brief

The case of *Sunshine Coast Regional Council v D Agostini Property Pty Ltd & Ors* [2019] QPEC 19 concerned an application to the Planning and Environment Court (**Court**) by the Sunshine Coast Regional Council (**Council**) seeking orders from the Court in circumstances where the parties were unable to agree on the form of such orders.

The originating application by the Council concerned a dispute in relation to the use of residential allotments located on levels two, three and four of the Sebel Pelican Waters Resort (**Resort**). The development application for the Resort was approved by the Council in 2003, where the Council approved a mixed-use 12-storey resort, with a condition that the premises located on levels two, three and four of the Resort were to be used as a hotel/motel, whilst the remaining levels were to be used for permanent residents (**Condition 5**).

The Council submitted that the allotments located on levels two, three and four of the Resort were not being used for temporary accommodation as outlined in Condition 5 of the development approval. The Council therefore sought an order from the Court that the allotments located on levels two, three and four could not be used for permanent accommodation and that any permanent accommodation must cease either on expiration of any fixed term tenancy or otherwise within three months.

The Respondents comprised the various owners of the allotments, as well as the body corporate and the owner of the common property.

As the parties could not agree the form of the orders sought in order to proceed to a hearing, the Court had to determine the following issues:

- Did the originating application or the service letter identify the Respondents as an entity "directly affected" by the relief sought?
- Which party had the most appropriate draft order to determine the interpretation point?

The Court held that the draft order submitted by the Respondents was more appropriate in order to progress the proceedings, and therefore the Court made orders reflective of the Respondents' draft order, with minor amendments.

Parties to the proceedings could not agree on orders to progress the proceedings

The draft orders to progress the proceedings could not be agreed upon by the parties. The Council sought the following orders:

> 6. *By 3 May 2019 the respondents are to file and serve on the applicant a statement of Facts, Issues and Contentions that outlines:*
>
> (a) *the matters in the Amended Originating Application that are admitted, and the matters that are in dispute;*
>
> (b) *for those matters that remain in issue, the matters of fact and law that form the basis of the dispute; and,*
>
> (c) *to the extent not dealt with in subparagraph 6(b) above, the grounds in respect of which the respondents contend that the relief sought in the Amended Originating Application should not be granted.*

7. *By 24 May 2019 the applicant is to file and serve upon the active parties the affidavit material that it intends to rely upon at the hearing of the Application.*
8. *By 14 June 2019 the respondents are to file and serve upon the applicant any affidavit material that they intend to rely upon at the hearing of the Application.*
9. *By 5 July 2019 the applicant is to file and serve upon the active parties any material in reply.*
10. *Any respondent that has given or at any time gives notice to the applicant to the effect that they will not take an active part in the application, is excused from participating in and appearing at the hearing (and any further reviews) of the application.*
11. *The Application be listed for a two day hearing commencing on 5 August 2019.*
12. *The Application be listed for review on 19 July 2019.*

Liberty to apply.

The Respondents sought the following draft orders:

6. *By 26 April 2019 the applicant file and serve on the respondents any material, including certificates, upon which it intends to rely to determine the interpretation point.*
7. *By 30 June 2019 the respondent file and serve any materials upon which they intend to rely to determine the interpretation point.*
8. *The interpretation point be set down for hearing for two days commencing on 5 August 2019.*
9. *The interpretation point is:*

   The interpretation of the decision notice dated 17 October 2003 for the use of premises for the purposes of a Hotel, Motel, Function Rooms, Restaurant and Multiple Dwelling, including condition 5 for that part of the premises identified as lots 201-218, 301-318 and 401-418 on SP 168156 and whether it:

   (a) *limits the use of that part of the premises to use for temporary accommodation of travelling and/or holidaymakers only; or*
   (b) *allows that part of the premises to be used for permanent and/or long term accommodation as well as temporary accommodation for travellers and/or holidaymakers; and*
   (c) *what temporary accommodation means.*
10. *The hearing of the proceeding relating to the courts discretion be deferred pending the determination of the interpretation point.*
11. *The application can be listed for review on 17 July 2019.*

Any party shall have liberty to apply upon the giving of two days' notice.

The Council submitted that the proposed orders by the Respondents only sought a preliminary determination of the effect of Condition 5 of the development approval and was inappropriate as the determination of the lawful use of the allotments should be determined by reference to the development approval as a whole and not solely by reference to Condition 5. It was further submitted by the Council that the draft orders by the Respondents did not allow for a Statement of Fact, Issues and Contentions and also limited the affidavit material only to the interpretation of Condition 5 of the development approval.

The Respondents submitted that the draft order sought by the Council was entirely inappropriate as it required the Respondents to produce material in proceedings which had a criminal nature, that order 6 of the Council's draft order reversed the onus of proof as it required the Respondents to file a Statement of Facts, Issues and Contentions and lastly, the draft order required the Respondents to file and serve affidavit material prior to the Council.

The Court did not accept the Respondents' submissions against the Council's draft orders as the Court determined that the Respondents were only required by the Council's proposed order 6 to file a Statement of Facts, Issues and Contentions and not to file material until the Council had done so. The Court further held that the Council's draft order did not reverse the onus of proof as stated by the Respondents.

Did the originating application or the service letter identify the Respondents as an entity "directly affected" by the relief sought?

The Respondents argued that the Council did not identify in the originating application or the service letter any Respondent who was "directly affected" by the relief sought. The Respondents submitted that an originating application must name as a respondent the entity "directly affected" by the relief sought and provide the grounds on which the relief is sought as stated under rule 8(1) of the *Planning and Environment Court Rules 2018* (**P & E Court Rules**).

The Court was not persuaded by the Respondents' submission and determined that the originating application and service letter clearly identified the Respondents, as the originating application and service letter identified the lot owners on the floors in question who were the persons in respect of which the order sought to do something or refrain from doing something.

The Court therefore determined that there was no breach of the requirements under rule 8(1) of the P & E Court Rules.

Which party had the most appropriate draft order in order to determine the interpretation point?

The Respondents lastly submitted that the orders sought in their draft orders allowed the interpretation point to be determined without the following:

- the need for the Council to identify particular allegations against a particular lot owner;
- avoided issues of any of the Respondents waiving privilege against self-incrimination; and
- avoided the need for undertakings about the use of evidence in the enforcement proceedings not being used in any subsequent prosecution action.

The Court was persuaded by the merit of the Respondents' approach for the following reasons:

- the orders sought in the originating application, other than paragraphs 1 and 3, raised issues of fact well beyond the determination of what was involved in the interpretation points and consideration of the development approval;
- the determination of the effect of the development application is necessary and is not likely to prolong litigation;
- the interpretation point was not confined to Condition 5 of the development approval, it instead involved interpreting the whole of the development approval; and
- there would be little to no overlap of issues raised on the interpretation point.

The Court therefore held that it would be appropriate to make the orders as set out by the Respondents with amendments to the dates therein.

Conclusion

The Court held that the draft orders submitted by the Respondents were more appropriate than the draft orders submitted by the Council with amendments to the dates.

Planning and Environment Court allows application to broaden the issues in dispute to consider new and significant information in a joint expert report

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Goldicott House Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 25 heard before Rackemann DCJ

September 2019

In brief

The case of *Goldicott House Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 25 concerned an interlocutory application to the Planning and Environment Court (**Court**) in respect of an appeal against the decision of the Brisbane City Council (**Council**) to refuse a development application for a development permit for building work to facilitate the demolition of a State and local heritage place, and a development permit for a material change of use and for reconfiguring a lot. The interlocutory application was brought by the Council seeking orders to broaden the issues advanced by the Council in the appeal.

The Court found that the main issue in contention was whether the Court ought to exercise its discretion to allow the application to broaden the issues advanced by the Council insofar as it related to the demolition of the additional weatherboard building that improved the land the subject of the appeal.

The Court held that the application should be allowed on the basis that the interests of justice were best served by allowing the issues in the appeal to be enlarged. The Court noted, however, that such orders would not be made as a matter of course and those who practice in the jurisdiction should be mindful of the need to promptly determine whether there is any tension between the scope of the expert reports and the issues in dispute as identified in the orders made by the Court.

Background

The land the subject of the appeal is located at 65 Grove Crescent, Toowong. The land is improved by a substantial residence known as Goldicott House (**Goldicott House**) and a small weatherboard building which is referred to as the "*music room*" (**Music Room**).

On 15 February 2018, the registered landowner (**Landowner**) lodged a development application with the Council for a development permit for building work to demolish the Music Room, a development permit for a material change of use to use the Goldicott House as a dwelling house, and a development permit to reconfigure a lot to create two separate lots.

The Council refused the application and the Landowner subsequently appealed the decision.

In the course of the proceeding, the Court made an order which limited the issues in the appeal to the Council's reasons for refusal together with the additional issues identified by the co-respondents. Relevantly, the Council's reasons for refusal did not expressly make reference to the Music Room at the time the order was made.

Following the delivery of the Historian and Heritage Joint Expert Reports (**Joint Expert Reports**), it was discovered that the Joint Expert Reports identified new and significant information about the Music Room in that, amongst other things, the Music Room demonstrated a rare, uncommon or endangered aspect of Queensland's cultural heritage.

The Council subsequently sought to broaden the issues to argue that the demolition of the Music Room would offend the relevant provisions within the Council's reasons for refusal and that the proposed development failed to conserve and protect, and would damage or diminish the cultural heritage significance of the heritage place contrary to the provisions of the strategic framework of the Council's Planning Scheme.

Application to broaden issues in dispute

The Council applied to the Court for orders to broaden the issues in dispute. The Council submitted that rule 20(5) of the *Planning and Environment Court Rules 2018* permitted the Court to make an order identifying the issues in dispute.

The Council further submitted that the additional issue which the Council sought to ventilate in the appeal raised matters of public importance and interest. This was on the basis that the number of submissions made during the public notification period and the number of co-respondents by election was indicative of the public importance of the issue. The Council also contended that the Department of State Development, Manufacturing, Infrastructure and Planning did not have the benefit of considering the new and significant information regarding the Music Room, and that it was required to provide its position on the new information in its capacity as a referral agency for the development application.

The Court agreed with the Council and found that the issues in dispute should be enlarged to the extent that they included the additional ground relating to the demolition of the Music Room as an issue in dispute.

To make its finding, the Court relied on the affidavit filed on behalf of the Council to consider the context in which the application was made and why it had been made at a late stage. The Court noted that the affidavit deposed that the appeal would proceed on the basis of the defined issues under the earlier order of the Court, as well as the issues elaborated on by the experts. However, the Court held that this was a misunderstanding of the role and effect of a joint expert report and that joint expert reports do not serve automatically to either confine or extend the issues in an appeal.

The Court noted that the application served as an illustration of the difficulties which can be encountered when experts participating in joint reports go beyond the issues as defined. The Court found that if a situation were to arise where a joint expert report goes beyond the issues in dispute, the solicitors for the parties should act promptly to either raise their objections to the reports or to change the issues so as to accommodate the further matters raised by the experts.

Despite the finding, the Court held that the subject matter of the application concerned the proposed demolition of the Music Room, which was a matter of heritage significance. As such, the Court found that it was an issue which related to matters of public interest and the interests of justice were best served by allowing the issues to be enlarged.

Conclusion

The Court held that the application should be allowed in the interest of justice.

A change application for a development approval was refused by the Planning and Environment Court as the proposed change would likely result in a substantially different development

Cara Hooper | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Burnett Street Nominees Pty Ltd v Sunshine Coast Regional Council* [2019] QPEC 35 heard before Long SC DCJ

September 2019

In brief

The case of *Burnett Street Nominees Pty Ltd v Sunshine Coast Regional Council* [2019] QPEC 35 concerned a change application to a development approval to the Planning and Environment Court (**Court**).

In 2014, the Court originally approved a development application for a development permit for a material change of use for a shopping complex and multiple dwelling units, after the decision by the Sunshine Coast Regional Council (**Council**) to approve the development application was appealed.

After the Court's 2014 approval, the Court had approved a further permissible change in relation to the development approval in 2016, and had granted an extension of the currency period for the development approval in 2018.

The Applicant applied to the Court under section 78(1) of the *Planning Act 2016* (**PA**) to make a change application to the development approval. In order for the Court to determine whether the change application should be granted, it had to consider the following:

- Was the proposed change a minor change to the development approval?
- Would the proposed change result in a substantially different development?

The Court held that the motivation behind the Applicant's change application to stage the development approval was to construct the shopping centre without the requirement of constructing the dwelling units. The Court therefore refused the change application due to the evident risk that the development approval would only be partially complied with, and therefore would result in a substantially different development.

Was the proposed change a minor change to the development approval?

The Applicant made the change application on the basis of seeking a minor change to the development approval, which also had the support of the Council. The Applicant sought to change the development approval in order to stage the development so that it could construct the shopping centre first (stage one) and then construct the dwelling units (stage two).

The Court noted that in order to grant the change application, the Court must be satisfied that the proposed change of the development approval was a minor change. Schedule 2 of the PA relevantly provides as follows:

> "***minor change*** *means a change that— ...*
>
> …
>
> *(b) for a development approval—*
>
> *(i) would not result in substantially different development; and*
>
> *(ii) if a development application for the development, including the change, were made when the change application is made would not cause—*
>
> *(A) the inclusion of prohibited development in the application; or*
>
> *(B) referral to a referral agency, other than to the chief executive, if there were no referral agencies for the development application; or*
>
> *(C) referral to extra referral agencies, other than to the chief executive; or*

(D) *a referral agency, in assessing the application under section 55(2), to assess the application against, or have regard to, a matter, other than a matter the referral agency must have assessed the application against, or had regard to, when the application was made; or*

(E) *public notification if public notification was not required for the development application.*"

In relation to paragraph (b)(ii), the Court accepted that the proposed change to the development approval did not engage any of the relevant criteria. The Court then considered whether the proposed change would result in a substantially different development.

Would the proposed change result in a substantially different development?

The Applicant submitted that although the proposed change to stage the development could introduce the potential of a partial delivery of the development, it should be considered as an irrelevant factor. The Applicant relied upon the statements made by the town planner who noted that the proposed change of staging the development of the shopping centre and the dwelling units would better facilitate the proposed development of the land.

The Applicant relied on Schedule 1, section 4(d) of the Development Assessment Rules, which states that a substantially different development may be a change that "change[s] the ability of the proposed development to operate as intended". The Applicant submitted that the intention of the development was to deliver the development approval in two stages, therefore a staged development would not change the ability of the development to operate as intended.

The Court noted that the main issue with the Applicant's submission was that, if accepted, it could raise the prospect that only part of the proposed development would eventuate and therefore be substantially different to the development approval. The Court noted that the prospect of a partial development was heightened due to the following factors:

- the history of the development approval through the Court;
- the evidence given by the town planner who expressly stated "*development of the land is not able to commence*" and that was "*due to difficulties experienced by the Applicant securing contracts for the sale of the proposed residential units*";
- the only evidence submitted to the Court was from the Applicant's town planner, where particular reliance was placed on the town planner's statements as to the advantages of the proposal; and
- the conditions set by the Council contemplated the prospect that stage two of the development would not commence, as condition 2B provided for the lapsing of the uncompleted aspects of the development and condition 2C provided for landscaping conditions in relation to the stage two site if it was not developed.

Court determined that the proposed change would result in a substantially different development

The Court determined that the motivation behind the change application was to construct the shopping centre without the units, as the developer was not prepared to commence the development without being satisfied of securing the financial ability to complete it.

The Court further determined that the conditions set by the Council in support of the change application by the Applicant served largely to demonstrate that there was a prospect that only part of the development approval would occur.

The Court held that the Applicant failed to establish, on the balance of probabilities, that the proposed change to the development approval would not result in a substantially different development.

Conclusion

The Court therefore held that the jurisdiction of the Court under section 78A(2)(a) of the PA was not engaged, and refused the application for a minor change to the development approval as the proposed change would result in a substantially different development and thus was not a minor change.

Planning and Environment Court orders the Respondents to comply with conditions of a development permit, including the payment of $1.14 million in outstanding infrastructure contributions

Claire Pekol-Smith | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Council of the City of Gold Coast v Ashtrail Pty Ltd & Anor* [2019] QPEC 12 heard before RS Jones DCJ

September 2019

In brief

The case of *Council of the City of Gold Coast v Ashtrail Pty Ltd & Anor* [2019] QPEC 12 concerned an application by the Council of the City of the Gold Coast (**Council**) for declaratory relief and consequential orders for non-compliance with the conditions of a development permit for a material change of use.

The land the subject of the proceeding was located at 38 Prairie Road, Ormeau (**Land**). The First Respondent, Ashtrail Pty Ltd (**First Respondent**), owns a business which conducts driving instruction and motor vehicle repairs on the Land, and the Second Respondent, Talranch Pty Ltd (**Second Respondent**), owns the Land.

The Council issued a Show Cause Notice to the First and Second Respondents in February 2007, which required the First and Second Respondents to show cause why an enforcement notice ought not be issued requiring them to cease using the Land for driving instructing and commercial equipment hire without a development approval. The Show Cause Notice required the First and Second Respondents to cease the alleged unlawful use and carry out remedial works, or to make a development application to regularise the use.

On 4 October 2007, the First Respondent lodged a development application, which lapsed on 16 February 2008. On 29 October 2008, the First Respondent lodged another development application for a material change of use for a Service Industry Type B (**Driving Instructing**), a Motor Vehicle Repair Station, and an Environmentally Relevant Activity 28 (**ERA 28**), being a Motor Vehicle Workshop (**Development Application**). On 15 February 2010, the Council issued a Negotiated Decision Notice approving the Development Application subject to conditions (**Development Approval**). The First and Second Respondents, however, accepted that they did not comply with the conditions of the Development Approval.

The Development Application was made under the *Integrated Planning Act 1997*, however, the Development Approval took effect under the *Sustainable Planning Act 2009*. The transitional provisions of the *Planning Act 2016* (**PA**) require that the Development Approval be treated as an approval made under the PA.

The Court considered the following issues in the appeal:

- whether the Land uses approved under the Development Approval were existing lawful uses;
- if the Land uses were not existing lawful uses, whether the Development Approval lapsed because of non-compliance with the conditions of the Development Approval;
- if the Land uses were not existing lawful uses, whether the Development Approval lapsed because of departures from the approved plans;
- if the Development Approval has not lapsed, whether the conditions of the Development Approval are enforceable despite the *Limitation of Actions Act 1974* (**LAA**);
- if the Development Approval has not lapsed, whether the conditions of the Development Approval are enforceable despite the *Acts Interpretation Act 1954* (**AIA**); and
- if a development offence was committed, whether the Court should exercise its discretion to deny the Council declaratory relief.

The Court held that the First and Second Respondents had breached the conditions of the Development Approval, and granted the declaratory relief sought by the Council and made consequential orders.

The uses the subject of the Development Approval were not existing lawful uses

The First and Second Respondents argued that the Development Approval had lapsed, but Driving Instructing and a Motor Vehicle Workshop were existing lawful uses.

Firstly, the First and Second Respondents argued that they did not rely on the provisions of the Development Approval that related to Driving Instructing. This was because they had an existing lawful use status since the Driving Instructing on the Land commenced in 1998. However, the Court held that Driving Instructing on the Land had intensified since 1998. Therefore, the scale of the Driving Instructing was materially more significant by the date the Development Approval took effect. Thus, the Court held that Driving Instructing was not an existing lawful use.

Secondly, the First and Second Respondents argued that a Motor Vehicle Workshop was an existing lawful use. The *Gold Coast Planning Scheme 2003* defines a Motor Vehicle Workshop as a use "*for the purpose of carrying out repairs to motor vehicles*". The First and Second Respondents argued that they had one workshop and the Motor Vehicle Workshop use was ancillary to the purpose of conducting educational activities. Thus, the First and Second Respondents argued that the Motor Vehicle Workshop was an ancillary use that did not require a separate development permit.

The Court held that promotional materials indicated that despite being one workshop structure, there were essentially two workshops, one for education and another for repairs. The Court held that the primary purpose of the workshop was to service and maintain the First Respondent's driver training fleet. The Court therefore held that it was necessary for the First Respondent to obtain a development permit for a material change of use for ERA 28, and that the uses the subject of the Development Approval were not existing lawful uses.

The Court thus considered whether the Development Approval had lapsed.

Development Approval did not lapse because of non-compliance with the conditions

The First and Second Respondents accepted that they did not comply with conditions 5, 6, 10, 12 and 16 of the Development Approval. However, the First and Second Respondents argued that the conditions were a pre-requisite to the commencement of the Development Approval. Thus, non-compliance caused the Development Approval to lapse.

Conditions 5 and 6 of the Development Approval required the payment of infrastructure contributions for the water supply network and sewerage network prior to the commencement of the use. However, because conditions 5 and 6 of the Development Approval did not expressly state that no work or use of the Land could be undertaken prior to payment, the Court held that the conditions were not pre-requisite conditions.

Conditions 10, 12 and 16 of the Development Approval, required the design and construction of roadworks, footpaths and bikeways and the dedication of land prior to the commencement of the use. The Court relied upon the decision in *Sunshine Coast Regional Council v Recora Pty Ltd & Anor* [2012] QPEC 8, in which the Court held that the failure to pay an infrastructure contribution prior to the commencement of a use, did not discharge the obligation nor sever the condition from the development approval.

Therefore, the Court concluded that the Development Approval did not lapse because of non-compliance with the conditions, and that the non-compliance constituted a development offence.

Development Approval did not lapse because of a departure from the approved plans

The Development Approval required that development be carried out generally in accordance with the approved plans. The Court held that the First Respondent made departures from the approved plans that were not minor.

The Court, however, concluded that a departure from the plans on its own was not sufficient to cause the Development Approval to lapse.

LAA did not apply to the proceeding

The Council sought to rely on various sections of the *Planning and Environment Court Act 2016* (**PECA**) and the PA to seek to recover the monies outstanding as a result of the non-compliance with conditions 5 and 6 of the Development Approval.

The First and Second Respondents argued that section 10 of the LAA prevented the Council from enforcing conditions 5 and 6 of the Development Approval, because the LAA states that actions to recover a sum by virtue of an enactment cannot be brought after six years from the day that the cause of action arose. In the current case, the First and Second Respondents had breached the conditions over a period of nearly eight years prior to the proceedings.

The Court held that the Council was not suing to recover a sum, but rather had brought a proceeding to enforce the conditions of the Development Approval, which required the First and Second Respondents to pay a sum to the Council.

Therefore, the Court concluded that section 10 of the LAA did not apply, because the proceeding was brought to enforce conditions of the Development Approval, and not to recover a sum.

Proceeding is not subject to the AIA

The First and Second Respondents also argued that the proceeding ought to be dismissed because it was not brought "as soon as possible" under section 38(4) of the AIA.

The Court held that section 38(4) of the AIA does not operate to limit or bar the availability of an enforcement proceeding. The passage of time is only a relevant consideration in the exercise of discretion, and is only usually exercised where a delay may cause a party material prejudice.

The Court concluded that section 38(4) of the AIA did not apply because the delay had not caused the First and Second Respondents sufficient prejudice to justify dismissing the proceeding.

No relevant discretionary grounds to warrant denying the Council declaratory relief

The First and Second Respondents argued that the Court should deny the Council declaratory relief using its discretionary powers under section 11 of the PECA. The Court referred to *Warringah Shire Council v Sedevcic* (1987) 63 LGRA 361, in which the Court stated that it was less likely to exercise its discretion where it was a local government that had brought a proceeding because local governments are seen "*as the proper guardians of public rights*".

The First and Second Respondents also argued that the Court ought to exercise its discretion to deny the Council the declaratory relief it sought on the following grounds:

- the Council's delay in bringing the proceeding caused the First and Second Respondents negative financial impacts and evidentiary prejudice;
- the First Respondent made an application on 1 February 2016 to regularise the Land use for educational activities without prompting from the Council, and where the Council was aware of the on-site activities since 1999;
- if the First and Second Respondents were required to pay the infrastructure contributions they would become insolvent, which would negatively impact employment and educational opportunities in the area;
- the infrastructure contributions are not a relevant or reasonable amount; and
- the Council failed to provide evidence of inappropriate associated activities or conduct, or provide evidence of negative consequences that would or could arise as a result of non-compliance with the conditions.

The Court concluded that none of the grounds put forth by the First and Second Respondents warranted the Court exercising its discretion to deny the Council the declaratory relief it had sought.

Conclusion

The Court concluded that the Development Approval had not lapsed and that the First and Second Respondents had breached the conditions of the Development Approval. The First and Second Respondents had therefore committed a development offence under section 164 of the PA. Therefore, under section 180 of the PA, the Court ordered that the First and Second Respondents comply with the conditions of the Development Approval.

Colin Biggers & Paisley

Payment of an infrastructure contribution may cause "irreparable harm" – Planning and Environment Court stays a previous order that the Respondents pay a $1.14 million infrastructure contribution

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Council of the City of the Gold Coast v Ashtrail Pty Ltd & Anor (No. 2)* [2019] QPEC 26 heard before RS Jones DCJ

September 2019

In brief

The case of *Council of the City of the Gold Coast v Ashtrail Pty Ltd & Anor (No. 2)* [2019] QPEC 26 concerned an application made by two related companies (**Respondents**) seeking to stay orders made by the Planning and Environment Court the subject of the decision in *Council of the City of the Gold Coast v Ashtrail Pty Ltd & Anor* [2019] QPEC 12 (**Original Decision**). In the Original Decision, the Council of the City of the Gold Coast (**Council**) sought declaratory relief and consequential enforcement orders against the Respondents with respect to alleged non-compliance with particular conditions of a development approval for a material change of use of the land.

The Court held that the orders ought to be stayed pending the determination of the application for leave to appeal, and the determination of the appeal if leave is granted, as the Respondents would suffer "irreparable harm" if they were to immediately meet the development approval conditions.

Background

In the Original Decision, the Court found that the Respondents committed a development offence under section 164 of the *Planning Act 2016*, as they failed to comply with the development approval conditions. The development approval conditions required the Respondents to pay the sum of $1.14 million to the Council for water and sewerage network infrastructure contributions, and to implement conditions relating to the design and construction of roadworks, footpaths, bikeways and land dedication. As a result, the Court ordered, among other things, that the Respondents comply with the development approval conditions.

The Respondents made an application for leave to appeal the Original Decision to the Court of Appeal. Relevantly, the Respondents sought to stay the effect and consequences of the Original Decision pending the outcome of its application for leave to appeal, and the subsequent determination of that appeal.

Issues

The Court considered the following issues:

- whether not granting a stay would result in "irreparable harm" to the Respondents and other third parties; and
- whether granting a stay would cause unwarranted prejudice to the Council.

Court found that the Respondents would face irreparable harm should the stay not be granted

The Respondents submitted that if the Order was neither suspended nor stayed, the outcome of the application for leave to appeal to the Court of Appeal would be rendered nugatory, as compliance with the development approval conditions would result in "irreparable harm" to its companies. Relevantly, the Respondents alleged that they would be required to close an industrial training business or sell their land if they were to comply with the Original Decision. The Respondents also argued that a failure to grant a stay would cause "irreparable harm" to third parties with respect to the industrial training business for the following reasons:

- the 1,419 students who are currently enrolled for traineeship and apprenticeship qualifications will have adverse financial consequences, as well as uncertainty in respect of their courses and credits;
- closure of the training business would remove roughly 6,000 units of competency courses for industry qualifications; and
- 72 employees would lose their means of employment.

The Respondents relied upon expert evidence of a chartered accountant (**Expert**) who was of the opinion that the Respondents did not have sufficient funds to meet the immediate requirement to pay the infrastructure contribution required to be paid as a consequence of the Original Decision in the sum of $1.14 million. The Expert found that if the Respondents were required to immediately pay the infrastructure contribution, the Respondents' businesses may cease to operate, an administrator or liquidator may be appointed, or the National Australia Bank may commence proceedings to protect its interests. The Expert identified that if any of the Respondents' businesses or properties were sold, particularly the property located in Ormeau at the Gold Coast, there would likely be "negative ramifications" for the Respondents, and that liquidation would result in adverse impacts not only for the Respondents but also the Respondents' employees and students.

The Council submitted that if the Respondents had to sell their real property it would not cause serious detriment as the Respondents could "*reinvest [the proceeds of the sale] and buy another property*". The Court rejected the Council's submission as the Court found that the payment or repayment of money in lieu of obtaining or retaining ownership of real property "*does not place the deprived proprietor in substantially the same situation*".

In considering the impacts upon the Respondents' finances and business operation, the Court referred to the decision of *Commissioner of Taxation of the Commonwealth of Australia v The Myer Emporium Ltd* [1986] 160 CLR 220; HCA 13, which concerned an application seeking to stay orders pending the hearing and determination of an appeal to the High Court. Relevantly, the High Court found that a stay ought to be granted if there was a real risk that it would not be possible for a successful party to be restored substantially to its former position if the judgment made in the first instance was executed.

The Court accepted the Expert's evidence, and concluded that in the short to medium term, the Respondents would not be able to meet the development approval conditions without the sale of the Respondents' real property. The Court found that the evidence established "*little room for doubt*" that if any of the Respondents' properties and associated businesses were to be sold, the Respondents would not be able to be restored substantially to their former position.

The Court consequently concluded that the Respondents would suffer "irreparable harm" should a stay not be granted.

Court found that there was no meaningful prejudice that the Council would suffer if a stay was granted

The Court noted that the Council was unable to point to any meaningful prejudice which might affect the Council or its constituents should the Court grant a stay.

The Council, however, expressed concerns to the Court that the Respondents may dispose their assets or dilute the net value of their assets by adding debt.

During the course of the proceedings, one of the Respondents' companies gave an undertaking to the Court that it would not dispose any of its real property and, following which, the other corporate entities linked to the Respondents followed suit. The Court found that such an undertaking would adequately protect against "*untoward consequences of the grant of a stay*" and that the undertaking would provide reasonable protection of the Council's interests.

The Court therefore held that the Council or its constituents would not suffer any prejudice should a stay be granted.

Conclusion

The Court held that the Order be stayed pending the determination of the application for leave to appeal and subsequent determination of an appeal should leave be granted.

Colin Biggers & Paisley

Waste of time and money: Planning and Environment Court vacates orders regarding a costs hearing as a consequence of a stay on enforcement orders pending the outcome of an application for leave to appeal to the Court of Appeal

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Council of the City of the Gold Coast v Ashtrail Pty Ltd & Anor (No. 3)* [2019] QPEC 27 heard before Jones DCJ

September 2019

In brief

The case of *Council of the City of the Gold Coast v Ashtrail Pty Ltd & Anor (No. 3)* [2019] QPEC 27 concerned an application made by two inter-related companies (**Respondents**) with respect to orders made by the Planning and Environment Court on 9 May 2019. Those orders were made to facilitate the hearing of a costs application made by the Council of the City of the Gold Coast (**Council**), which concerned the Planning and Environment Court's determination of an enforcement proceeding commenced by the Council against the Respondents that was decided on 29 March 2019.

The Respondents argued that if the costs hearing was to proceed, there would be a risk of costs being wasted, as the orders subject to the enforcement proceeding were stayed by the Planning and Environment Court pending the determination of the Respondents' application for leave to appeal to the Court of Appeal.

The Court ultimately decided to vacate the orders that required the Respondents to file and serve written submissions and a reply, and varied the order that required the Respondents to file and serve affidavit material.

Background

The Council commenced an enforcement proceeding in the Planning and Environment Court seeking declaratory relief and consequential enforcement orders against the Respondents with respect to alleged non-compliance with particular conditions of a development permit for a material change of use. The Court ordered that the Respondents comply with the development approval conditions.

The Respondents sought leave to appeal the decision to the Court of Appeal. In light of that application to the Court of Appeal, the Respondents made an application to the Planning and Environment Court to stay the original orders pending the determination of the application for leave to appeal, and the determination of the appeal if leave was granted. The Court ultimately decided to stay the original orders.

One day after the Respondents filed the application to stay the operation of the Planning and Environment Court's enforcement orders, the Council made an application to the Planning and Environment Court seeking costs associated with the enforcement proceeding and, following which, the Court made orders to facilitate a costs hearing.

Orders concerning the costs hearing

The Court made the following orders with respect to the costs of the enforcement proceeding:

- Order 1 – By 24 May 2019, the Council is to file and serve any affidavit material on which it intends to rely.
- Order 2 – By 21 June 2019, the Respondents are to file and serve any affidavit material on which it intends to rely.
- Order 3 – By 12 July 2019, the Council is to file and serve written submissions with respect to costs.
- Order 4 – By 2 August 2019, the Respondents are to file and serve written submissions with respect to costs.
- Order 5 – By 17 August 2019, the Council is to file and serve any written submissions in reply.
- Order 6 – The matter is to be set down for a one day hearing on 9 September 2019.

Court had concern with the notice given by the Respondents

The Respondents put the Council on notice of their intention to vacate the cost orders on 18 June 2019, three days before the Respondents were required to file and serve any affidavit material on which they intended to rely, and three weeks after the Council had filed and served its affidavit material.

The Court noted, amongst other matters, that the Respondents had given no reasonable explanation as to why they decided to wait until 18 June 2019 to put the Council on notice of their intention to have the cost orders vacated. The Court further noted that the Respondents had ample time to advise the Council that if their stay application was successful, they would then seek to vacate the cost orders.

The Court also found that the Council suffered detriment as a result of the Respondents' conduct as it incurred costs in preparing the affidavit material that was filed and served on the Respondents. Additionally, the Court found that if the cost orders were vacated, the Respondents would have a tactical advantage over the Council as they would be in possession of the affidavit material for an indeterminate period of time before having to respond to the Council.

Court ordered that certain orders be vacated

The Respondents argued that if adverse cost orders were made against them, and in turn their leave to appeal in the Court of Appeal was successful, there would be flow on consequences for any cost orders made by the Court. The Court noted that although the litigation process poses a risk that some of the costs expended by the parties will be wasted, all reasonable steps ought to be taken to avoid unnecessary and avoidable costs. The Court noted that such variables are finely balanced.

In balancing the risk, the Court found that it is ideal to address costs at a time close to the end of the substantive proceedings, such as the end of the enforcement proceeding. Additionally, the Court considered it appropriate to consider matters relating to the Respondents' late notice with respect to their application to vacate the cost orders.

On balance, the Court found that even in light of the Respondents' late notice, it is in the interests of both parties to adopt a course of action that will reduce the risk of wasted time and money. As a consequence, the Court made the following orders:

- Orders numbered 3 – 6 be vacated;
- the issue of costs thrown away as a consequence of the adjournment be reserved, as the Council incurred unnecessary costs by complying with order number 1; and
- the time frame in which the Respondents are required to file and serve their affidavit material be varied to 4 pm 25 June 2019.

Brisbane City Council to pay costs of appeal in defence of an enforcement notice

Angelina Vukovic | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Moramou2 Pty Ltd v Brisbane City Council (No. 2)* [2019] QPEC 22 heard before Everson DCJ

September 2019

In brief

The case of *Moramou2 Pty Ltd v Brisbane City Council (No. 2)* [2019] QPEC 22 concerned an application for costs to the Queensland Planning and Environment Court against the Respondent, the Brisbane City Council (**Council**), consequential upon the judgement in *Moramou2 Pty Ltd v Brisbane City Council* [2019] QPEC 18. The judgement was in respect of an appeal against the Council's decision to give an enforcement notice to Moramou2 Pty Ltd (**Appellant**) concerning the use of its premises as a backpacker hostel. In issue was whether the discretion of the Court to make an order for costs had been enlivened on the basis that the Council's conduct was frivolous or vexatious, and it did not properly discharge its responsibilities during the proceedings.

Background

The judgement in *Moramou2 Pty Ltd v Brisbane City Council* [2019] QPEC 18 concerned an appeal against the Council's decision to give an enforcement notice to the Appellant in respect of the use of its premises, located at 47 Brighton Road, Highgate Hill, as a backpacker hostel. The Council claimed that there had been an unlawful increase in the intensity or scale of the use of the premises, specifically, that the number of residents accommodated at the premises exceeded the maximum authorised occupancy. In dismissing the appeal and setting aside the enforcement notice, Everson DCJ found that the number of residents occupying the premises lawfully complied with both the conditions of the relevant development approval and the current statutory regime administered by the State government regulating this type of use.

The application for costs was brought under section 60 of the *Planning and Environment Court Act 2016* (**PECA**) upon a number of bases. Firstly, the Appellant argued that the Council's conduct in the proceedings was frivolous and vexatious. Secondly, the Appellant argued that the Council was not properly discharging its responsibilities in the proceedings. Thirdly, costs were sought on the basis that the adjournment on 10 December 2018 was solely for the purpose of introducing new material, that is, to permit the Council to give a substituted enforcement notice. Finally, the Appellant sought an order for costs in relation to its *Calderbank* offer made on 28 November 2018.

Enforcement notice

The Planning and Environment Court stated that the Appellant's right of appeal in the circumstances of this case was a right to appeal against an enforcement notice. The enforcement notice in question was dated 30 November 2017 and asserted that the Appellant had unlawfully increased the scale or use of its premises, and that it had undertaken unlawful building work on a pre-1946 building. The Court noted that in each instance, the Appellant was required to lodge a properly prepared development application by 20 March 2018 and "*do all things necessary to progress the application*". Importantly, the enforcement notice stated that the unlawful increase in intensity and scale of use of the premises arose in relation to the development approval granted on 13 July 1987.

When the appeal came on for hearing in December 2018, the parties agreed to an adjournment to permit the Council to issue a substituted enforcement notice. The Court observed that the substituted enforcement notice essentially re-pleaded the same allegations concerning the unlawful use of the premises, and asserted non-compliance with a development approval dated 27 February 1987, with no reference to the approval dated 13 July 1987. The allegations of unlawful building work were maintained on the same basis that the building work in question was assessable development.

The Appellant submitted to the Court that the development application to regularise the unlawful building work to a pre-1946 building had been made in circumstances where the Appellant conceded it was necessary. The Council submitted that whilst this development application had indeed been lodged with the Council, it had gone into abeyance as a consequence of the proceedings. Given these circumstances, the Council conceded that the Court need not deal with this aspect of the appeal.

Furthermore, the Appellant submitted to the Court that because it had dealt properly and expeditiously with the issue of the building work by lodging the development application, there was no need to include such a contention in either of the enforcement notices, nor should it have formed part of the proceedings generally. However, the Court did not accept this submission. As noted above, the enforcement notice required the Appellant to make the application and do everything necessary to progress the application. The application was also placed into abeyance upon the Appellant's request, pending the outcome of this appeal.

Council's defence of the enforcement notice was "frivolous and bound to fail" and the Council failed to discharge its responsibilities in the proceedings

The Court considered whether the proceedings were "*frivolous or vexatious*" under section 60(1)(b) of the PECA. The Court noted that the definition of "P&E Court proceeding" under Schedule 1 of the PECA included "*a part of a proceeding and an application in a proceeding*". Applying the Court's earlier analysis of this provision in *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPEC 9 at [26]-[27], the Court adopted the view that "*P&E Court proceeding*" included a defence to an appeal by a local government, and the term "*frivolous*" meant, *inter alia*, having no reasonable grounds.

Applying this interpretation of section 60(1)(b) of the PECA to the present case, the Court observed that the Council had issued an enforcement notice alleging the unlawful use of the premises in circumstances where it was uncontentious that the development approval would be construed in favour of the Appellant if any ambiguity arose. Moreover, the original enforcement notice failed to identify the correct development approval for the premises, and the substituted enforcement notice failed to disclose any basis for an unlawful increase in the intensity or scale of the use of the premises. Accordingly, the Court concluded that the defence to this part of the enforcement notice concerning the alleged unlawful use of the premises was frivolous and bound to fail.

Additionally, the Court found that the Council's maintenance of the allegations of unlawful use of the premises on such tenuous grounds, notwithstanding the onerous evidentiary burden it carried, amounted to a failure to discharge its responsibilities in the proceedings under section 60(1)(i) of the PECA.

Given these circumstances, the Court found that its discretion was enlivened under section 60(1) of the PECA to make an order for costs. However, its discretion was confined to the defence of the allegations in the enforcement notice concerning the unlawful use of the premises, not the unlawful building work. Accordingly, the Court found that it was appropriate to order that the Council pay only half of the Appellant's costs of the proceeding, subject to its findings in relation to the adjournment below.

Council to pay Appellant's costs as a consequence of the adjournment

The hearing of the appeal was adjourned on 10 December 2018 to allow the Council to issue the substituted enforcement notice. The Court was of the view that this fell within section 60(1)(e) and (i) of the PECA. Accordingly, the Court held that the Council was to pay the Appellant's costs thrown away as a consequence of this adjournment on the standard basis.

Court disregards the Calderbank offer

The Court also considered the Appellant's submission for a costs order in relation to a *Calderbank* offer made on 28 November 2018. The Court observed that in circumstances where a local government has an obligation to enforce compliance with the planning controls administered by it, public policy reasons dictate that a *Calderbank* offer would be an unattractive and irrelevant consideration in a costs application for an appeal of this kind. The offer also sought to dispose of the unlawful building work issue summarily, which the Court believed to be an unattractive outcome. Thus, the Court disregarded the Appellant's *Calderbank* offer.

Conclusion

The Court concluded that its discretion to award costs under section 60(1) of the PECA was enlivened. The Court found that it was appropriate to make an order for the Council to pay the Appellant's costs thrown away as a consequence of the adjournment on the standard basis, and to pay half of the Appellant's costs of, and incidental to the appeal, including the costs of the application for costs on the standard basis.

Colin Biggers & Paisley

High Court of Australia determination on the applicability of limitation periods under the Limitation of Actions Act 1974 to local government recovery of overdue rates and charges claim

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the High Court of Australia in the matter of *Brisbane City Council v Amos* [2019] HCA 27 heard before Kiefel CJ, Gageler, Keane, Nettle and Edelman JJ

October 2019

In brief

The case of *Brisbane City Council v Amos* [2019] HCA 27 concerned a special leave application to the High Court of Australia (**High Court**) against the majority decision of the Court of Appeal of the Supreme Court of Queensland (**Court of Appeal**), that the action for debt by the Brisbane City Council (**Council**) against the respondent (**Landholder**) to recover overdue rates and charges was subject to section 10(1)(d) of the *Limitation of Actions Act 1974*, and thus, a limitation period of six years.

The High Court allowed the special leave application and unanimously dismissed the Council's appeal with costs. The High Court upheld the majority conclusions of the Court of Appeal that the Landholder was entitled to argue that the shorter limitation period of six years in section 10(1) applied, where section 10(1) and the 12-year limitation period in section 26(1) overlapped.

Factual circumstances

The Landholder was the owner of seven lots of land for which the Council had levied various rates and charges that it sought to recover as a debt in the Supreme Court of Queensland. The rates notices issued by the Council were for periods between 30 April 1999 and 9 January 2012. The total amount the Council sought to recover was in excess of $494,000.00.

One issue for the Supreme Court in *Brisbane City Council v Amos* [2016] QSC 131 was the limitation period applicable to the Council's action. On the one hand, the Council's claim would be in time, if the 12-year limitation period in section 26(1) applied; whereas, on the other hand, some of the claim would be statute barred, if the six-year limitation period in section 10(1) applied.

The Supreme Court found in favour of the Council and section 26(1) was said to apply. On appeal, in *Amos v Brisbane City Council* [2018] QCA 11, the majority of the Court of Appeal set aside the Supreme Court's decision and held that the six-year period applied to the Council's action to recover unpaid rates and charges from the Landholder as a debt.

This limitation period point was the only issue to be considered by the High Court.

High Court's reasoning in upholding the Court of Appeal's determination that the Council's claim was subject to a limitation period of six years

The parties agreed that the proceedings brought by the Council were capable of falling within both sections 10(1) and 26(1) of the *Limitation of Actions Act 1974* due to the overdue rates and charges being a charge over the Landholder's property, as well as being a sum recoverable by the Council by virtue of the *City of Brisbane Regulation 2012* and, before that, its predecessors.

It was the Council's argument before the High Court that section 26(1) was the applicable section, and thus a limitation period of 12 years applied, because:

- the structure of the *Limitation of Actions Act 1974* was such that only one limitation period could apply to any action; and
- section 26(1), which related to an action to recover a principal sum of money secured "*by a mortgage or other charge on property*", was more specific than section 10(1)(d), which related to a sum recoverable "*by virtue of any enactment*".

Invoking a limitation period is not restricted to a specific section

The High Court examined the wording of sections 10 and 26, their predecessor provisions, and the approach of the courts historically, and particularly, in the case of *Barnes v Glenton* [1899] 1 QB 855, to issues of overlapping limitation periods.

The High Court referred to a long-settled understanding that the limitation periods within sections 10(1) and 26(1) do not operate so as to extinguish the rights of one to bring a suit, rather they permit a good defence to be pleaded by one subjected to suit (see reasons of Kiefel CJ and Edelman J at [7]).

The High Court observed that the Council's first argument (identified above) did not sit well with the fact that the limitation sections within the *Limitation of Actions Act 1974* only come into operation if invoked as a defence by a party to a proceeding (see reasons of Gageler J at [40]).

The significant issue for the High Court was whether, if section 26(1) applied, section 10(1) was excluded from having application.

Not exclusionary, advantageously

The High Court formed the view that the language within section 26(1) did not support the submission that if section 26(1) applied, the section operated so as to exclude the operation of section 10(1)(d) (see reasons of Kiefel CJ and Edelman J at [37]).

The High Court held that sections 26(1) and 10(1)(d) would operate consistently with their historical foundations, if both periods applied concurrently, and it is open to a defendant to choose to invoke the most advantageous period (see reasons of Kiefel CJ and Edelman J at [35] and reasons of Gageler J at [46]).

Conclusion

The appeal was dismissed with costs.

Colin Biggers & Paisley

Extension applications under the Planning Act 2016: Planning and Environment Court for the first time considers the statutory regime under the Planning Act 2016 relevant to an extension application for a development approval

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Room2Move.com Pty Ltd v Western Downs Regional Council* [2019] QPEC 34 heard before Williamson QC DCJ

October 2019

In brief

The case of *Room2Move.com Pty Ltd v Western Downs Regional Council* [2019] QPEC 34 concerned an appeal commenced by a company that specialises in temporary accommodation services (**Applicant**) against the decision of the Western Downs Regional Council (**Council**) to refuse the Applicant's application to extend the currency period for a development approval for a period of 12 months.

The Court found that there was an overriding need for the development approval and therefore ordered that an extension be granted for a period of 12 months.

The decision is the first decision of the Planning and Environment Court in respect of the legislative regime under the *Planning Act 2016* (**Planning Act**) relevant to an extension application for a development approval.

Background

The development approval was for a development permit for a material change of use for the establishment of non-residential workforce accommodation in Miles. Relevantly, the currency period for the development approval was stated to end on 15 April 2018.

Prior to the Applicant's extension application, the Applicant had already undertaken significant on-site works and spent the sum of $10 million dollars on the approved development since 2014. The approved development was subject to conditions which divided the development into 23 stages and stipulated that the approved development would be an interim use on the land for a total of 15 years, as the land had been commissioned for industrial uses.

The Applicant explained that the reason for the delay in taking up the development approval related to unfavourable economic conditions beyond its control.

The Council refused the extension application on the basis that the Applicant had not demonstrated that an overriding need exists for the approved development, and that the approved development is inconsistent with the Medium Impact Industry Zone (**Zone**) of the Western Downs Planning Scheme (**Planning Scheme**).

Issues

The Court considered the following issues in order to determine whether the extension application ought to be approved:

- whether the approved development is an inconsistent use within the Zone of the Planning Scheme; and
- whether there is an overriding need for the approved development.

Court found that the approved development is not an "inconsistent use" under the Council's Planning Scheme

The Council argued that non-resident workforce accommodation is deemed as "*inconsistent development*" within the Zone. The Court initially agreed that non-resident workforce accommodation is a non-industrial use and therefore is an inconsistent use under the Zone. The Court, however, went on to add that section 6.2.2.2 of the Zone does contemplate non-industrial uses that support medium impact industry uses if it does not compromise the long-term use of the land. The Court found that the approved development does not compromise the long-term use of the land due to its interim nature.

The Court additionally placed weight on Overall Outcome 18 of the Zone, which relevantly provides that "*where development is not consistent with the purpose and intent of the Zone, overriding community need will need to be demonstrated as well as valid planning justification provided as to why the proposed use cannot be reasonably established in a more appropriate zone*".

The Court found that the Council did not identify a more appropriate zone in which the approved development could be located and rather focused on the issue of need. The Court took no issue with the Council's approach as it found that non-resident workforce accommodation is an inconsistent use under all zones within the Planning Scheme.

The Court therefore went on to consider whether there was an overriding need for the approved development.

Court found that there was an overriding need for the approved development

The Court accepted the evidence of the Applicant's expert economist (**Expert**). The Expert concluded that there are known major projects within the region and that there is a current and anticipated ongoing demand for non-resident workforce accommodation. The Expert noted that there had been an increase in the non-resident workforce population in Miles in 2018, and that there is a projected increase in the non-resident workforce in Miles for the next five years. The Expert also concluded that the current non-resident workforce accommodation in Miles is limited, and does not accommodate for future growth and future spikes in demand.

The Court also had regard to the Council's Planning Scheme, in particular, section 3.2.2.2(3) of the Planning Scheme, which anticipates that mining and petroleum projects across the region are subject to demand spikes in non-resident workforce accommodation, as well as section 3.2.2.1(3) of the Planning Scheme, which provides that it is necessary to ensure that sufficient accommodation options are available for non-residential temporary workers, given that housing affordability can be an issue for people in low socio-economic brackets if non-residential workers reside in dwellings in residential areas.

The Court held that the Expert's evidence coupled with the relevant provisions of the Planning Scheme established that there is clear economic and social planning need to support the approved development.

Legal test under the Planning Act 2016

The Court noted that sections 86 and section 87 of the Planning Act are the relevant legislative provisions that concern an extension application.

Section 86(1) of the Planning Act provides that "*a person may make an application (an extension application) to the assessment manager to extend the currency period of a development approval before the approval lapses*".

The Court noted that section 86 of the Planning Act "*is a clear recognition by the legislature of circumstances where no town planning purpose is served by development repeating the statutory assessment and decision making process simply because the approval which authorises it has, or will lapse*" (see [124]).

The Court found that section 86 of the Planning Act informs the exercise of the discretion under section 87 of the Planning Act.

Section 87(1) of the Planning Act provides that "*when assessing an extension application, the assessment manager may consider any matter that the assessment manager considers relevant, even if the matter was not relevant to assessing the development application*".

The Court noted that the breadth of the assessment includes matters that are irrelevant to the assessment of the original development application, such as personal circumstances. The Court found that the Applicant's credible and accurate explanation for not starting development, the existence of significant on-site works and approvals, demonstration of town planning and community need for the approved development, and demonstration that the approved development is an interim use of the land, were relevant to the assessment of the extension application.

The Court noted that section 87(2) of the Planning Act provides that the Court may decide the extension application in one of the following ways:

- give the extension sought;
- refuse the extension; and
- extend the currency period for a period that is different from the extension sought.

The Court noted that sections 87(1) and (2) of the Planning Act offer a broad discretion, as they invite an assessment manager to "*ask itself…is there a town planning imperative for the development, and its approval, to be the subject of a fresh assessment and decision under the PA?*" (see [125]).

The Court concluded that the proposed development ought to not be assessed as a new development application as the extension does not give rise to a planning issue not already considered by the Council, the Planning Scheme is supportive of the proposed development, there is no public opposition to the proposed development, and the proposed development does not give rise to any unacceptable impacts.

Conclusion

The Court therefore held that an extension for a period of 12 months be granted.

Colin
Biggers
& Paisley

Failure to comply with an enforcement order results in punishment for contempt

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bundaberg Regional Council v Muller* [2019] QPEC 31 heard before Kefford DCJ

October 2019

In brief

The case of *Bundaberg Regional Council v Muller* [2019] QPEC 31 concerned an originating application to the Planning and Environment Court by the Bundaberg Regional Council (**Council**) seeking orders that a landowner (**Landowner**) be punished for contempt due to non-compliance with an enforcement order.

The Court found that the Landowner had failed to comply with the Court's enforcement order and was, therefore, in contempt of the Court.

The Court ordered that the Landowner be fined $5,000 and pay the Council's costs of and incidental to the proceeding.

Background

The Landowner caused a relocatable dwelling to be placed onto land in Bundaberg in accordance with a building development approval. The building development approval subsequently lapsed without various works being completed in order to secure the premises.

In December 2017, the Council commenced proceedings against the Landowner seeking enforcement orders to remedy and restrain the commission of a development offence with respect to carrying out of building works in the absence of an effective development permit. The Court found that the Landowner committed a development offence and made an enforcement order to the effect that the Landowner was required to take steps to facilitate the completion of the building works or remove the relocatable dwelling from the land.

The Landowner was required to:

- by 30 June 2018, lodge a properly made development application to a building certifier for a building development approval;
- by 14 August 2018, obtain an effective building development approval;
- by 21 September 2018, complete all works necessary so that a Form 16 Inspection Certificate could be given by a building certifier; and
- by 30 October 2018, complete all external works and provide to the Council a statement from a building certifier, and complete all necessary works to enable a Form 21 Final Inspection Certificate to be provided by a building certifier.

The enforcement order included a warning, which stated that if the Landowner failed to obey the enforcement order, the Landowner would be liable to Court proceedings to compel the Landowner to obey the enforcement order and punishment for contempt.

The Council argued that the Landowner failed to obey the particulars of the enforcement order, and therefore sought orders that the Landowner was liable for contempt.

Court held that the Landowner contravened the enforcement order

The Council argued that the Landowner did not attempt to comply with the enforcement order. The Council noted that it undertook four site inspections of the land and, as a result, the Council formed a view that no observable building works had been undertaken except for a temporary security fence.

The Council noted that it wrote to the Landowner urging her to apply to the Court to amend the enforcement order, and advised that if the Landowner did so, it would agree to the amended timeframes to facilitate the completion of the building works.

The Landowner did not dispute the Council's argument regarding her alleged non-compliance. The Landowner, however, argued that her non-compliance was a result of an ongoing proceeding being heard in the Queensland Civil Administrative Tribunal (**QCAT**) against her contracted builder with respect to the relocated dwelling.

The Council argued that the QCAT proceeding did not amount to a lawful excuse. The Court agreed with the Council and consequently held that the Landowner contravened the enforcement order.

Court found that the Landowner was in contempt of the Court

The Council argued that the Landowner displayed flagrant disregard to the enforcement order and failed to comply with the obligations the Court had imposed.

The Court found that as the Landowner failed to make any attempts to comply with the enforcement order, and ignored the Council's letter regarding an extension, the Landowner deliberately disobeyed the enforcement order. Therefore, the Court held that contempt had been established.

The Council submitted that the Court ought to exercise its discretion to impose a fine on the Landowner. The Court noted that under section 9 of the *Penalties and Sentences Act 1992*, a sentence of imprisonment ought be imposed as a last resort.

The Council argued that there was no evidence to suggest that the Landowner accepted any wrongdoing and no evidence that the Landowner had a reasonable excuse to not comply with the enforcement order, such as extenuating circumstances. The Court identified that in *Bundaberg Regional Council v Lammi Anor* [2014] QPEC 52 and *Bundaberg Regional Council v Bailey* [2017] QPEC 31, a more modest punishment was afforded to each respective respondent as there was evidence before the Court that the respondents displayed regret for their conduct, a willingness to take steps to achieve compliance, and evidence of financial and health issues that materially impacted on the ability to comply with an enforcement order. The Court found that in this instance there was no evidence of a willingness to comply with the enforcement order and rather, the Landowner had refused to comply with the enforcement order and had used the continuance of the QCAT proceeding to deflect any wrongdoing.

The Court noted that there needs to be a penalty which is sufficient to compel compliance and which also reinstates the community's faith in the judicial system. The Court therefore ordered that the Landowner be fined $5,000 for contempt and that the Landowner pay the Council's costs of and incidental to the proceeding fixed at $20,000, to be paid within 2.5 months of the order.

Colin Biggers & Paisley

Who has a right to make a complaint? District Court of Queensland dismisses an appeal that sought to stay a prosecution with respect to offences committed under the Environmental Protection Act 1994

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland District Court in the matter of *United Petroleum Pty Ltd v Sargent* [2019] QDC 93 heard before Jarro DCJ

October 2019

In brief

The case of *United Petroleum Pty Ltd v Sargent* [2019] QDC 93 concerned an appeal commenced by a petrol station company (**Company**) against the decision of the Magistrates Court to dismiss the Company's application to permanently stay a prosecution commenced against it by a public officer (**Public Officer**) of the Department of Environment and Heritage (**Department**), as it then was, with respect to alleged offences under the *Environmental Protection Act 1994* (**EPA**).

The Company argued that the complaint brought by the Public Officer was out of time under section 497(b) of the EPA and that the Public Officer was not a complainant for the purposes of section 42(1) of the *Justices Act 1886* (**Justices Act**). The Public Officer argued that the appeal ought not be heard as the Court did not have jurisdiction under section 222 of the Justices Act.

The Court found that the Company had a right to appeal the decision of the Magistrates Court under section 222 of the Justices Act. Consequently, the Court heard the appeal and found that the complaint made by the Public Officer was in accordance with section 497(b) of the EPA and not made out of time, and that the Public Officer had a right to make the complaint under section 42(1) of the Justices Act.

Background

The Company was building a new service station in Doonan, Queensland. The site was listed on the Environment Management Register. The Department was contacted by the Sunshine Coast Regional Council with respect to an alleged contamination incident. In August 2013, representatives of the Department attended the site and identified high environmental risks. Accordingly, an environmental protection order was issued against the Company, and a subsequent complaint was lodged against the Company by the Public Officer in October 2014.

A prosecution was commenced in the Magistrates Court in 2016, and in September 2018 the Company alleged that the continuation of the prosecution was an abuse of process and made an application to the Magistrates Court to permanently stay the prosecution. The Magistrates Court dismissed the Company's application, and the Company relevantly appealed the decision.

Issues

The Court considered the following issues:

- whether the Court was precluded from hearing the appeal;
- whether the time to commence the prosecution had expired;
- whether the Public Officer is not a "complainant" under section 42(1) of the Justices Act; and
- whether the Public Officer had the requisite knowledge.

Court found that it had jurisdiction to hear the appeal

The Company submitted that the application before the Magistrates Court concerned the deposition of the complaint made by the Public Officer, and following which, related to an order deposed of the complaint itself. The Company submitted that the Magistrates Court order was a final order that dismissed the Company's cause of action not to be prosecuted and therefore it had a right of appeal under section 222 of the Justices Act.

Section 222 of the Justices Act provides as follows: "*if a person feels aggrieved as a complainant, defendant, or otherwise by an order made by justices or a justice in a summary way on a complaint for an offence or breach of duty, the person may appeal within 1 month after the date of the order to a District Court*".

The Public Officer argued that it was the order of the Magistrates Court, not the relief sought by the Company's application, which precluded the Court from hearing the appeal.

The Public Officer relied on the authority of *Schneider v Curtis* [1967] Qd R 300 to argue its case. The Public Officer argued that the Queensland Court of Appeal in *Paulger v Hall* [2003] 2 Qd R 294 had noted that *Schneider* is the authority for the proposition that no appeal lies under section 222 of the Justices Act from a ruling made on an incidental application during the hearing of the complaint, and that the right of appeal is given only from any order made upon a complaint. Additionally, the Public Officer argued that the Queensland Court of Appeal in *Paulger v Hall* [2003] 2 Qd R 294 had found that there are several policy grounds for prohibiting the bringing of appeals against interlocutory rulings.

The Court distinguished the decision in Schneider as the application brought by the Company raised the question of the right of the Company not to be prosecuted. The Court noted that in this instance, it must consider whether an order is final, and in doing so, it must consider whether the order finally determines the rights of the parties in a principal case that is pending against them. The Court found that if an order finally deposes of the parties' substantive rights, then an appeal lies as of right.

The Court noted that the application brought by the Company raised the question of the right not to be prosecuted and relevantly, the Magistrates Court was required to quash that right. Consequently, the Court found that it is not considered to be a fragmentation of the criminal justice process in circumstances where the order concerned the substantive right of the matter to be determined once and for all.

The Court accepted the submission made by the Company and held that the order made by the Magistrates Court deposed of the Company's substantive right not to be prosecuted, and therefore the appeal had been competently brought.

Court found that the complaint brought by the Public Officer was within the limitation period

The Company argued that the complaint was brought outside of the scope of the limitation period stated in section 497(b) of the EPA, which provides as follows: "*A proceeding for an offence against this Act by way of summary proceeding under the Justices Act 1886 must start – (b) within one year after the offence comes to the complainant's knowledge, but within 2 years after the commission of the offence*".

The Court considered when the offences came to the Public Officer's knowledge and when the offences were allegedly committed.

The alleged offences against the Company involved one charge of material environmental harm and two charges of disposal of contaminated soil under section 438(2) and section 424(1)(a) of the EPA. The Court noted that the offences allegedly occurred between 26 July 2013 and 8 August 2013.

The Court noted that the Public Officer made a written complaint on 23 October 2014 regarding the alleged offences. The complaint provided that the Public Officer first had knowledge of the alleged offences on 23 October 2013. Consequently, the Court found that the complaint was brought within the limitation period specified under section 497(b) of the EPA.

Court found that the Public Officer is a "complainant" under section 42(1) of the JA

The Company argued that as the Public Officer is a "public officer" acting in their capacity under the EPA, the Public Officer is not a "complainant" acting in a private capacity and therefore contrary to section 42(1) of the Justices Act.

Section 42(1) of the Justices Act provides as follows: "*Except where otherwise expressly provided or where the defendant has been arrested without warrant, all proceedings under this Act shall be commenced by a complaint in writing, which may be made by the complainant in person or by the complainant's lawyer or other person authorised in that behalf*".

The Company argued that the Public Officer was acting in a public capacity. The Company argued that the Queensland Court of Appeal had found in *Ipswich City Council v Dixonbuild Pty Ltd* [2012] QCA 98 (**Dixonbuild Decision**) that the Ipswich City Council's "public officer" was acting on behalf of the Council and was precluded from making a complaint in the capacity of an agent under the *Local Government Act 2009*. The Court distinguished the Dixonbuild Decision from the current proceeding as the Public Officer was not acting as an authorised agent for the Department. Additionally, the Court noted that section 42(1) of the Justices Act does not expressly limit the complainant to be a person pursuing a complaint in a private capacity, and that a "public officer" is permitted to make a complaint under the JA.

The Company further submitted that the Public Officer was under the direction of the Department, and that it was clear that the "*complainant was and is the Department*". The Court, however, noted that the Department is not a prescribed entity under the EPA or the JA that has procedural power for the alleged offences, and therefore rejected the Company's argument.

The Public Officer argued that the appeal is "on all fours" with the discussion in *Cross Country Realty Pty Ltd v Peebles* [2007] 2 Qd R 254 (**Cross Country Decision**). The Court noted that the Queensland Court of Appeal held in the Cross Country Decision that a "complainant" means "*the complainant who brings the proceedings for an offence or offences under [an Act]*". Relevantly, the Queensland Court of Appeal found that a complainant is a person who brought a proceeding under an Act, where the complainant had knowledge of the facts sufficient to establish a person's contravention of the Act. Additionally, the Court noted that the Queensland Court of Appeal had found that similar proceedings may be brought by a public officer under the JA.

The Court accepted the Public Officer's argument and applied the Queensland Court of Appeal's findings in the Cross Country Decision to conclude that the Public Officer is a complainant under section 42(1) of the Justices Act.

Court found that the Public Officer had the requisite knowledge

Lastly, the Court considered whether the Public Officer had the requisite knowledge with respect to the alleged offences. The Court noted that the relevant inquiry is the named complainant's state of mind. The Court found that as it was the Public Officer who brought the complaint, the Public Officer had the requisite knowledge.

Conclusion

The Court held that the Public Officer is the "complainant" to the complaint made under section 42(1) of the Justices Act and that the complaint was not brought out of time. Consequently, the Court dismissed the appeal.

Recap of recent developments in NSW compulsory acquisition law

Todd Neal

This article discusses the decision of the New South Wales Supreme Court in the matter of *Joyce v Health Administration Corporation* [2018] NSWSC 1679 heard before Fagan J

October 2019

In brief – Further compulsory acquisitions for the M12 and Sydney Metro West projects serve as a timely reminder for stakeholders in the process to be across some of the emerging themes arising from case law

Declaration of interest: Colin Biggers & Paisley acted for the plaintiff in *Joyce v Health Administration Corporation* [2018] NSWSC 1679.

This article provides a snapshot of various recent developments in compulsory acquisition law in New South Wales over the last two years. These have the potential to dramatically impact the resumption process and the amount of compensation (if any) that can be claimed.

The 6 month pre-acquisition negotiation period

Section 10A of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) was only recently introduced with the 2017 amendments following the Russel Review into that Act. It provides a minimum period of six months during which the acquiring authority needs to make a "genuine attempt to acquire the land by agreement" before giving a proposed acquisition notice (**PAN**). The Russell Review provided the underlying rationale for the new negotiation period – to "encourage parties to direct substantial efforts towards reaching agreement by the end of the fixed negotiation period". Whether that is being delivered in practice remains debated; many applicants consider that it is being observed superficially.

Questions remain as to what a "genuine attempt" means and how substantial the efforts need to be. For example:

- Does an acquiring authority need to provide one at least offer of compensation to reach a genuine attempt status?
- Can the acquiring authority do nothing for five months and start negotiating in the last month?
- Can the negotiation change from being an acquisition about one interest in land and morph into something different?

In *Joyce v Health Administration Corporation* [2018] NSWSC 1679, landowners attempted to challenge the genuine attempts of the acquiring authority and to injunct that authority from proceeding with the PAN.

The Court found (against the applicant) that there was in fact eight months of negotiations for the purposes of section 10A, rather than five months. This was despite:

- the acquiring authority itself having asked for permission from the Minister seeking to reduce the six month period;
- some of the negotiation time being connected with an earlier (voluntary) EOI process rather than resumption compulsory acquisition process under the Just Terms Act; and
- the land that was the subject of that negotiation being ultimately different to the land that was to be compulsorily acquired.

This meant that the Health Administration Corporation's request to shorten the genuine attempt period to five months was stated by the Court to have been unnecessary.

Interestingly, the Court also vindicated the abridgement of the PAN period from six months to three months. Normally, the minimum period after a PAN is issued and before the gazettal of an acquisition notice is six months. However, it can be varied where the Minister responsible for the acquiring authority approves a shorter period, but only if that Minister is satisfied that the urgency of the matter or other circumstances of the case make it impracticable to give any longer period of notice. The stated urgency related to both the Tweed Valley community's need for a new hospital and also the lead times and constraints concerning obtaining site information, preparing construction plans and commencing the works. These factors were held to be sufficient.

All of the above points to the courts moving towards a more facultative interpretation of the processes involved with the Just Terms Act, and a more sympathetic view to project exigencies determining impracticability.

Desane decision highlights difficulties in challenging an acquisition

The well-known Court of Appeal decision in *Roads and Maritime Services v Desane Properties Pty Ltd* [2018] NSWCA 196 (**Desane**) highlights the difficulties landowners have in challenging more broadly the acquiring authority's power to acquire land or the validity of the acquisition because of flaws in the process. Some other recent decisions reinforce this (see *The Baptist Union of New South Wales v Georges River Council* [2017] NSWSC 347), despite the success one landowner had in the High Court almost a decade ago in *R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council* [2009] HCA 12.

Given the attention *Desane* received and the multi-faceted attack on the validity of the acquisition, it is an important decision to consider and will reverberate amongst those concerned about the process and an acquiring authority's power for years to come.

There were two issues said to invalidate the acquisition. The first related to the failure to properly follow the approved form for the PAN. The Court of Appeal's decision (anchored closely with *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28) was that the Just Terms Act was intended to establish procedural requirements for compulsory acquisitions, rather than act as a protection of the private rights of landowners. Against this light, the purpose of the Just Terms Act could not be said to disclose that a breach would result in invalidity.

The second issue related to a failure to identify the public purpose in the PAN. The precursor to the Just Terms Act (the *Public Works Act 1912*), contained such a requirement but the Just Terms Act does not. The Court held that this shift indicated an intention of the drafters to move away from this requirement. In addition, the fact the cover letter disclosed the purpose was also relevant to the findings.

In relation to the improper purpose argument put, namely that RMS was not acquiring the land in order to construct a road but rather to provide open space and green parkland, the Court focused on the intention at the time of the acquisition. Rather than retrospectively looking at the purpose, the Court held that one needs to consider the purpose at the time of the notice. The fact that over time an authority changes its proposed use of the acquired land to something different to that previously identified is not material.

Difficulties in claiming disturbance for lessees and business owners

The more recent Court of Appeal decision in *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41 has changed traditional thinking on compensation for business owners leasing land where their lease and business is extinguished. For example, almost 20 years ago, Lloyd J in *Fitzpatrick Investments Pty Limited v Blacktown City Council (No. 2)* [2000] NSWLEC 139 described section 59(1)(f) "as a 'catch-all' provision", the meaning of which "should not be read down".

However, the Court of Appeal has now changed the landscape adopting a purposive and contextual approach to the words in the section, rather than over relying on dictionary definitions and the plain reading of the provision.

The facts of the case were:

- United Petroleum ran a service station and restaurant business on land owned by two related special purpose companies.
- Those companies had an oral lease with United Petroleum, terminable on one month's notice.
- RMS acquired the land in August 2015, and United Petroleum could not relocate its business.
- United Petroleum claimed compensation for disturbance under the head of disturbance (section 55(d) and section 59(1)(f) of the Just Terms Act).
- The Land and Environment Court awarded (among other items) approximately $2,000,000 as the capitalised sum for the loss of the business.

To claim compensation, the cost needed to fall within category (f) within section 59(1):

> *any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition.*

Four different judgments were handed down, including a judgment from Chief Justice Preston of the Land and Environment Court sitting on the Court of Appeal for this matter in which he offered a "palinode" expressing a change of opinion to the decision in *George D Angus Pty Ltd v Health Administration Corporation* [2013] NSWLEC 212; 205 LGERA 357. While the different judgments make it difficult to distil a statement of unified principle, the judgments reign in the types of disturbance claims that are claimable by lessees.

For business owners leasing land, the important takeaway from the judgment is that there is now a "temporal" constraint applying to these claims – compensation will be fixed by reference to the term of the acquired interest.

This is having considerable impacts for matters that were in Court before the decision, as well as new acquisitions that have been proposed following the decision. It raises issues for both urban and rural acquisitions alike – anywhere where a lease is acquired. More contentious negotiations and new litigation may emerge as a result, as applicants try to "shoehorn" claims under the other heads of compensation opened up by this decision.

Betterment planning issue in Barkat v RMS

The most recent decision where "betterment" has been raised is the Court of Appeal's decision in *Barkat v Roads and Maritime Services* [2018] NSWLEC 209. A significant issue before the primary judge was the requirement in section 56(1)(a) of the Just Terms Act to disregard any increase in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired. RMS had acquired the land for the purpose of the WestConnex Project and argued planning and transportation strategies explained the WestConnex Project, which included the draft Parramatta Road Urban Transformation Strategy, published by Landcom (**PRUTS**). The Barkats contended that the PRUTS would have sent a significantly overt signal to the market that their land would be rezoned to R4 in the short term.

The Court of Appeal held there was no error of the primary Judge in the Land and Environment Court for finding that the WestConnex Project was specifically designed to be the catalyst for much more than a road development scheme. In that regard, it was purposely an urban renewal project from the outset, interfacing with the draft PRUTS and involving an integrated project team, including the WestConnex Delivery Authority, RMS, the Department of Planning and Environment, Strathfield Council and others. To that end, the Court of Appeal held there was no error in finding it is not necessary for RMS to be the rezoning authority, but it was sufficient for its WestConnex Project to be the intended catalyst for predicting urban renewal and associated rezoning that would most likely follow.

The decision will require careful interrogation of the causal connections between the public purpose and upzoning or planning betterment in future acquisitions.

Subsurface acquisitions and compensation

Finally, with long, expensive and complex tunnels being built around Sydney for new infrastructure, a question which arises time and time again is whether the interest in land being acquired is compensable.

The two statutes being used to justify an exception to the payment for compensation are section 62 of the Just Terms Act and Schedule 6B of the *Transport Administration Act 1988*.

Common to both provisions, if the land above the substratum is disturbed, or the support of that surface is destroyed or injuriously affected by construction, then the ability to claim compensation is reopened for the dispossessed landowner.

While numerous tunnels throughout NSW have now been built without any significant judicial analysis of these provisions, there are a few decisions of importance.

The most recent decision from Moore J in *Landan Development Pty Ltd v Sydney Metro; Opera Australia v Sydney Metro; Altomonte Holdings Pty Ltd v Sydney Metro* [2019] NSWLEC 65 provides some preliminary guidance on where future disputes might lie. In this decision, His Honour answers a "separate question" on whether the circumstances identified in Schedule 6B to the *Transport Administration Act 1988* are limited to circumstances after construction of relevant underground works. His Honour held that surface disturbance or the support of the surface needs to be destroyed or injuriously affected before a gateway is open to claim compensation.

As a result, we continue to have limited judicial consideration on two matters raised in the case:

- whether a reduction in the development or redevelopment potential of the land above the tunnel stratum as a consequence of the actual or future existence of such a tunnel would open the gateway to a claim for compensation, and
- whether a settlement of 5 mm would be significant enough to open the gateway to making a claim for compensation (something which the review of environmental factors for the Metro project had postulated as a worst case prediction).

These will no doubt be tested in the coming wave of acquisitions as tunnels are built beneath significant and expensive Sydney real estate with redevelopment potential.

A case involving section 62 of the Just Terms Act is a decision of Pain J in *Azizi v Roads and Maritime Services* [2016] NSWLEC 97 where land for the NorthConnex tunnel was compulsorily acquired from the applicants by RMS. That was also held to fall within the meaning of section 62(2) of the Just Terms Act, meaning there was no requirement to compensate the landowners for the acquisition of substratum interests. There was no actual disturbance of the surface of the applicants' land or injurious affection to the support of the surface.

Two cases that have considered section 62 of the Just Terms Act insofar as that provision relates to ground anchor easements are *Bligh Consulting Pty Ltd v Ausgrid* [2017] NSWCA 95 and *Pennant Hills Golf Club Limited v Roads and Traffic Authority of New South Wales* [1999] NSWCA 110. Both decisions have held that section 62 applies to ground anchors.

Conclusion

With the large tranches of compulsory acquisitions proceeding around the state and in particular within Sydney, navigating not only the process but the compensation principles is becoming more complex and requires a nuanced understanding of the law applied to the facts at hand. Stamp duty claims, novel disturbance situations, and special value claims are likely to be debated in the next few years of case law.

Colin Biggers & Paisley

Weighing "Relevant Matters": Planning and Environment Court gives guidance as to the appropriate weight to be given to relevant matters under the Planning Act 2016

Austyn Campbell | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Peach v Brisbane City Council* [2019] QPEC 41 heard before Williamson QC DCJ

November 2019

In brief

The case of *Peach v Brisbane City Council* [2019] QPEC 41 concerned a submitter appeal against a decision by the Brisbane City Council (**Council**) to approve an impact assessable development application for a high-rise office tower in Spring Hill, Brisbane made by the Co-Respondent developer (**Applicant**).

The Applicant made a development application in January 2018 to the Council for a 27 storey high-rise office tower on land situated at 152 Wharf Street, Spring Hill. Relevantly, the tower design had two identifiable components, a podium and a tower.

The Council's approval was based on a detailed assessment of the proposed development against the then current *Brisbane City Plan 2014* (**Planning Scheme**), being version 8 (**v.8**), and the planning scheme amendments that had been adopted, but not yet taken effect (**v.13**). The Court found that the Council had placed determinative weight on v.13 of the Planning Scheme, which were treated as favouring approval of the proposed development.

The Applicant accepted that the proposed development did not comply with the Planning Scheme in force at the time of the application, being v.8. It was contended that the proposed development was designed to respond to the shift in the Council's planning for the land, and Spring Hill, exemplified by v.13 of the Planning Scheme.

A submitter appellant (**Appellant**) appealed the Council's approval on the basis that it did not comply with, and was in conflict with, v.8 and v.13 of the Planning Scheme and there were no grounds, or relevant matters, to justify the approval.

The Court considered the following in its determination:

- Was v.8 of the Planning Scheme overtaken by events?
- Did the application comply with v.13 of the Planning Scheme?
- Was there a basis in town planning practice, or principle, to approve the development application in the face of non-compliance with v.8 and/or v.13 of the Planning Scheme?

The Court dismissed the appeal in the exercise of the planning discretion on the basis that compliance with the underlying planning objectives of v.13 of the Planning Scheme was appropriately demonstrated by the proposed development.

This case is significant for the Court's continued consideration of the statutory assessment and decision making framework for impact assessment under the *Planning Act 2016* (**PA**), and how it differs to the previous framework under the *Sustainable Planning Act 2009* (**SPA**). It closely follows the Court's reasoning in the decisions of *Smout v Brisbane City Council* [2019] QPEC 10 (**Smout**) and *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 (**Ashvan**).

Court affirms the statutory assessment and decision making framework under the Planning Act 2016

The Court observed that as the proposed development was impact assessable it was subject to the revised statutory assessment and decision making framework under the PA and the *Planning and Environment Court Act 2016*.

The Court made explicit reference to maintaining consistency with its earlier decisions in *Smout* and *Ashvan*, which considered the differences between the "relevant matters" test under section 45(5)(b) of PA and the previous "sufficient grounds" test under section 326(1)(b) of the SPA.

The Court stated that a central issue in the appeal concerned the weight to be given to the assessment of the proposed development under v.8 and v.13 of the Planning Scheme in the exercise of the planning discretion under section 60(3) of the PA. The Court affirmed the proposition that the planning discretion under the PA is more flexible than its statutory predecessor under the SPA.

The Court expressed, at [47], that the provisions of the PA which confer discretion to consider "relevant matters" do not purport to:

> *predetermine, or limit, the weight a relevant matter/s may be given in the assessment of a development application or in the exercise of the planning discretion.*

The Court held that while the PA gives limited guidance as to the weight that may be given to "relevant matters", it confirmed, at [47]:

> *The weight to be given to a prescribed matter, or a relevant matter, is for the assessment manager… to determine on an application by application basis.*

A strict application of *Brisbane City Council v Klinkert* [2019] QCA 40 (**Klinkert**), in seeking to limit the weight to be afforded to v.13 of the Planning Scheme, was rejected on the basis that *Klinkert* involved a code assessable development, and that no equally applicable limitation appeared in section 45(5)(b) of the PA.

The Court concluded its discussion of the statutory assessment and decision making framework by reiterating, at [64], its observation in *Ashvan* that section 45(5)(b) "*captures an expansive range of considerations, and includes matters for, and against, approval*".

It held that v.8 and v.13 of the Planning Scheme were both "relevant matters" which *may* be given weight, as accorded by the relevant decision maker, in this case being the Court.

Was version 8 of the planning scheme overtaken by events?

The Court stated that the statutory assessment and decision making framework mandated that the application be assessed against v.8 of the Planning Scheme. The Applicant conceded two non-compliances with v.8, namely the height of the proposed development and the "non-traditional" design of the podium component. The Court noted that these concessions did not represent the full extent of the non-compliances.

The Court found non-compliances in the development's height, bulk, scale and resulting form. Further, it noted that the proposed development's relationship with its neighbouring building, Quattro on Astor, could not be characterised as a "*sensitive transition*" as required by the then in force Petrie Terrace and Spring Hill neighbourhood plan (**PTSHNP**). The PTSHNP formed part of v.8 of the Planning Scheme.

The Court found that the nature of the non-compliances with v.8 of the Planning Scheme were significant and, taken in isolation, would represent a compelling reason to refuse the application.

The Applicant contended that the non-compliances should not be determinative of the appeal as v.8 of the Planning Scheme had been overtaken by events. The Court stated, at [85], that the Applicant's submission:

> *relies upon the long-established principle that a planning appeal court may depart from the intent expressed in a planning scheme where a local government has itself departed from that intent, or where it has been overtaken by events.*

The Court stated that though cases engaging this principle are rare, this matter was one of those rare cases as v.8 of the Planning Scheme no longer had planning relevance for the locality of the proposed development. The Court held that v.13 of the Planning Scheme should be determinative.

Does the development comply with version 13 of the Brisbane City Plan 2014?

The Court, in the exercise of its planning discretion, provided an assessment of the proposed development against the benchmarks regarding height, bulk, scale, character and amenity, and the weight to be given to "relevant matters".

The Court grouped the myriad of non-compliances alleged by the Appellant into nine categories, and found as follows:

1. Excessive height

The Court rejected the Appellant's contention that the proposed development was of an excessive height. It considered the Spring Hill Neighbourhood Plan (**SHNP**) code and the development approval for the land granted by Council in 2018 (**2018 Approval**), which both envisaged a development of 30 storeys larger than the 27 storeys proposed by the development. Relevantly, it held that the proposed development represented an intended transition in height between the CBD and Spring Hill.

2. Excessive bulk and scale

The Court noted the numerous and often repetitive non-compliances contended by the Appellant arising from the bulk and scale of the proposed development.

The Court rejected all of the Appellant's contentions and held that the bulk and scale of the proposed development was appropriate, having regard to v.13 of the Planning Scheme. The Court noted the importance of giving attention to the contextual features of the proposed development in assessing its compliance with the provisions of the SHNP and the Principal centre zone codes, and the Planning Scheme.

The Court relevantly noted its satisfaction that the design of the proposed development included appropriate and effective design measures to mitigate its bulk and scale in compliance with the SHNP code and Principal centre zone code.

3. Insufficient setbacks

In rejecting the Appellant's contentions on this point, the Court referenced its discussion of the proposed development's bulk and scale. Notably, the Court stated that a strict application of the separation distance required under performance outcome PO26 of the SHNP code would result in a built form unresponsive to the shape of the land, effectively sterilising a large proportion of the land.

4. Inappropriate form

The Appellant contended the proposed development's design was not one of a podium and tower and was an inappropriate form for the locality. The Court did not accept this.

In its analysis, the Court reviewed the definition of a "street building" introduced under performance outcome PO4 of the SHNP. The Court found a reference to "Figure c" in the SHNP code was for guidance, and did not preclude the proposed development's "subtle" tower and podium design from achieving the planning objectives under the SHNP code.

Further, in addressing the Appellant's concerns regarding the landscaping proposed by the development, the Court noted, at [266], that the proposed development would "*positively contribute to the streetscape and city skyline*".

5. Does not deliver high quality, subtropical architecture

The Court found that the evidence provided by the Applicant's expert, in stating that the proposed development would deliver high quality, subtropical design, was persuasive and not undermined in cross-examination.

6. Out of character with the existing and planned character

The Court found that the proposed development would be consistent with the existing and intended character of the locality, being one in a state of transition.

7. Adverse amenity impacts

The Court found that the proposed development would not give rise to any adverse amenity impacts, not otherwise anticipated by the SHNP and Principal centre zone code.

8. Undermines role and function of City Centre

The Appellant submitted that the intensity of the proposed development did not support the role and function of the locality. The Court found that the locality was within the Principal Centre and the City Centre expansion precinct, and that development of high intensity, such as the proposed development, was anticipated and promoted.

9. No appropriate landscaping

The Appellant made further separate submissions regarding the landscaping of the proposed development. The Court held that the submissions were not furthered as reasons for refusal, but rather as symptoms of overdevelopment of the land. The Court found that the Applicant established the proposed landscaping was appropriate and not a symptom of overdevelopment.

Conclusion

In exercising its planning discretion, the Court concluded that while the proposed development did not align with v.8 of the Planning Scheme, its compliance was to be drawn against v.13 of the Planning Scheme as the contemporary statement of planning intent at the relevant time. Further, though the proposed development was not consistent with the built form character of the locality, the Court was satisfied that it appropriately responded to the shift in the planning intent for the land and locality.

The Court, in dismissing the Appellant's appeal, noted that the proposed development generally complied with the SHNP code, would not give rise to unacceptable impacts on the amenity or character of the local area, and its design was of a standard that was envisaged by the SHNP code, and the Principal centre zone code.

A local government seeks declaration regarding non-compliance with the Building Act 1975 and the Planning Act 2016

Christopher Vale | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Council of the City of Gold Coast v McKean & Ors* [2019] QPEC 28 heard before Kent QC DCJ

November 2019

In brief

The case of *Council of the City of Gold Coast v McKean & Ors* [2019] QPEC 28 concerned a declaratory proceeding brought by the Council of the City of Gold Coast (**Council**) before the Planning and Environment Court (**Court**) in respect of land located at Tallebudgera, Queensland.

The Council had sought a declaration from the Court that a development permit for a material change of use ought to have been obtained by the developer prior to the issuing of a building permit by a certifier, and that as a consequence the building permit that was issued ought to have been taken as void and of no effect.

Background

The relevant land was unimproved and located at 110 Valley Drive, Tallebudgera within the Council's local government area. The developer had sought to improve the land with a two storey dwelling house, balcony and garage (**Building Application**), which required a development permit for a material change of use to be issued by the Council (**Development Permit**) under the *Planning Act 2016* (**Planning Act**).

The respondent certifier approved the building application without a development permit having been issued (**Building Permit**), thereby contravening section 83 of the *Building Act 1975* (**Building Act**) which required that a private building certifier "*must not grant [a] building development approval applied for [until] all necessary development permits are effective for development*".

The Council submitted that because the building permit had been issued prior to the developer obtaining the relevant development permit, the building permit should be declared by the Court as either void *ab initio* (that is, invalid from the outset) or voidable.

Planning Scheme

Under the *Gold Coast City Plan* (**City Plan**), the land was located within a Rural residential zone and was also subject to the Bushfire hazard overlay code (**Code**). Required Outcome 1 (**RO1**) of the Code relevantly provided that accepted development must comply with the following requirements:

- a written assessment by a bushfire management consultant confirming that the site is not in a "Bushfire Hazard Area" for the purpose of accepted development; or
- the development complied with an existing approved Bushfire management plan forming part of an approved reconfiguration of a lot; or
- the development is for a dwelling house that occurs on a lot smaller than 1,000m^2 and is serviced by reticulated water.

The Court found, firstly, that the related overlay map for the Code identified the site as falling within an area that had been rated as "high" and "very high" in terms of the likelihood of bushfire, and secondly, that no approved Bushfire management plan was in place, and thirdly that the site was significantly larger than 1,000m^2, namely being 48,990m^2.

The Code provides that failure to comply with RO1 would necessitate compliance with RO2 – RO6 to avoid the requirement for a Code assessable development application. In particular, RO3 (Access requirements) relevantly provides that the access driveway for development in such an area must have a length of no more than 70m from the street to the dwelling. The site had a planned driveway in excess of 500m and was found to be non-compliant by the Court.

Consequence of non-compliance

The Council submitted that given the building application (as acceptable development) was not in compliance with the Code, a development permit for a material change of use should have been sought by the developer prior to the building permit being granted.

Furthermore, the requirement to comply with section 83 of the Building Act was fundamental to the developer's purported application, and therefore the failure to comply with the section had rendered the building permit invalid.

The Council placed further reliance on the following reasons:

- sound public policy dictated that a "*proper outcome*" in the circumstances would be to declare the permit void *ab initio*, or otherwise having been issued in non-compliance with the Building Act;
- given that development permits "*run with the land*", it would be imprudent of a local government to allow a subsequent landowner to wrongly rely on a permit issued to its own detriment;
- the site was highly liable to bushfire, had no acceptable management plan in place, and therefore posed a considerable risk to public safety;
- the certifier had accepted the building permit's non-compliance with the statutory regime and had subsequently requested that the developer cancel the building permit.

Costs

The Court noted that the Council had made a "*Calderbank offer*" (that is, an offer made "without prejudice" save as to costs) to the developer in order to resolve the matter prior to the hearing. No response was received. Instead, the developer had opted to resist the Council's application for declaratory relief despite having had no reasonable prospects of success in the matter.

Whereas section 59 of the *Planning and Environment Court Act 2016* (**PECA**) provides that "*each party to a … proceeding must bear the party's own costs for the proceeding*", section 60 of the PECA relevantly provides that where the Court considers the proceeding was started or conducted primarily for an improper purpose, was frivolous or vexatious, or was brought without reasonable prospects of success, then the Court may grant costs to the successful party on the standard basis.

Conclusion

Having issued the orders for the declaration as sought by the Council, the Court also ordered that the building permit be set aside and that the developer pay the Council's costs on the standard basis.

Still Standing – Planning and Environment Court refuses to re-enliven a lapsed demolition approval for a pre-1947 house as the Applicant failed to make an application to extend the currency period of the demolition approval

Cara Hooper | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brassgrove KB Pty Ltd v Brisbane City Council* [2019] QPEC 42 heard before Kefford DCJ

November 2019

In brief

The case of *Brassgrove KB Pty Ltd v Brisbane City Council* [2019] QPEC 42 concerned an Originating Application (**Application**) to the Planning and Environment Court (**Court**) to re-enliven a lapsed demolition approval or, in the alternative, have a demolition approval revived so that the Applicant could apply to the Council for an extension of the currency period.

On 8 September 2016, a development approval was granted for demolition of the subject house. The development approval lapsed on 8 September 2018.

The Applicant had made a new development application for a demolition approval and requested that the development application be assessed against the superseded planning scheme, which the Council had ultimately refused. The Applicant then made a development application for demolition to be assessed against the current planning scheme, but suspended the development application in order to conduct these proceedings.

The Applicant sought the following relief:

> (a) *a declaration, pursuant to section 11 of the [Planning and Environment Court Act 2016] PECA, that the building works the subject of the Development Approval, being the demolition (the "Demolition") of a pre-1946 house (the "House") on the subject land, did not substantially start within the currency period for the Demolition Development Approval (the "Currency Period");*
>
> (b) *a declaration, pursuant to section 11 of the PECA, that the Applicant failed to make an application under section 86 of the Planning Act 2016 (the "PA"), prior to the expiry of the Currency Period;*
>
> (c) *a declaration, pursuant to section 11 of the PECA, that, as a result of the matters set out in paragraphs (a) and (b) above, the Demolition Development Approval lapsed, under 341 of the Sustainable Planning Act 2009 (the "SPA") or section 85 of the PA, upon the expiry of the Currency Period;*
>
> (d) *a declaration, pursuant to section 11 of the PECA, that:*
>
> (i) *the non-compliance with section 341 of the SPA or section 85 of the PA occasioned by the failure to substantially start the Demolition within the Currency Period ought to be excused; and/or*
>
> (ii) *the non-compliance with section 86(1) of the PA occasioned by the failure to make an application under section 86 of the PA prior to the expiry of the Currency Period ought to be excused;*
>
> (e) *an order, pursuant to section 11 of the PECA and/or section 37 of the PECA, that:*
>
> (i) *the Demolition Development Approval be taken not to have lapsed and the Currency Period be extended, or taken to have been extended , until a date that provides the Applicant with a reasonable opportunity to obtain a development permit for the Demolition (consistent with the Demolition Development Approval) and start the Demolition; or*

> (ii) *the Demolition Development Approval be taken not to have lapsed and the Currency Period be extended, or taken to have been extended, until a date that provides the Applicant with a reasonable opportunity to make an application under section 86 of the PA for extension of the Currency Period.*

In order to determine the Application, the Court had to consider the following issues:

- Should declarations (a), (b) and (c) be made?
- Should the relief sought in paragraphs (d) and (e) be granted?

The Court held that the grounds which the Applicant relied upon failed to establish that the lapsed demolition approval should be revived and thus refused the Application.

Should declarations (a), (b) and (c) be made?

In relation to declaration (a), the Court stated that the Applicant did not identify how the declaration resolves a genuine matter of concern. This was because it was an undisputed fact that the demolition did not substantially start within the currency period.

In relation to declaration (b), the Court stated that it was an undisputed fact that the Applicant failed to make an extension application under section 86 of the *Planning Act 2016* (**PA**).

Lastly, for declaration (c), the Court stated that both parties accepted that the demolition approval had lapsed.

Should the relief sought in paragraphs (d) and (e) be granted?

In order for the Court to determine whether the relief sought in paragraphs (d) and (e) could be granted, the Court had to consider the following considerations which were relied upon by the Applicant.

Absent the relief, the multiple dwelling approval cannot be utilised

The Court determined that the Applicant did not establish that this ground warranted the relief sought as the multiple dwelling approval could not be implemented without demolition of the subject house.

The Court further stated that demolition could not lawfully occur without a preliminary approval for building work.

The Council was supportive of the judgment

The Applicant submitted that since the Council consented to a previous judgment made on 8 September 2016, it demonstrated that the Council accepted that the proposed demolition was not in conflict with the Traditional building character (demolition) overlay code (**Overlay Code**), which was in force in the *Brisbane City Plan 2014* (version 2) (**City Plan**).

The Court stated, however, that this was not necessarily correct as consequent amendments to the City Plan have resulted in a strengthened character protection. The Court therefore did not accept the Applicant's submission in this regard.

The multiple dwelling approval envisages that demolition will occur

The Applicant submitted that by issuing the multiple dwelling approval, the Council had accepted a planning outcome which allowed for the demolition of the subject house, the partial demolition of the dwelling house on the adjoining land, and the construction and use of the proposed multiple dwellings on the subject land and the adjoining land.

The Court disagreed with the Applicant's argument as the multiple dwelling approval did not authorise the carrying out of the demolition of the subject house, as the only demolition it approved was the partial demolition of the dwelling house on the adjoining land.

The multiple dwelling approval has not lapsed

The Court stated that this ground was undisputed. However, the Court held that this ground alone was not a compelling reason to grant the relief sought.

The subject house is a concrete tile and timber house in an austerity style

With respect to this issue, the Court considered the evidence from heritage architects for the Applicant and Council.

Both experts agreed that the subject house had "austerity style" features. The Court was therefore satisfied from the evidence provided by the experts that the subject house was an austerity style concrete tile and timber house.

The Applicant further submitted that given the form and state of the subject house, there was no reason as to why the demolition should not proceed, as the subject house was not identified as a traditional building in the Traditional building character planning scheme policy.

The Court considered overall outcomes (2)(a), (d) and (e) of the Overlay Code and determined that there was an arguable case that the current Overlay Code seeks to protect pre-1947 houses in the austerity style. The Court therefore determined that this ground does not support the grant of relief sought.

The subject house is not "timber and tin"

The Court was satisfied that the subject house was not "timber and tin" as described in the Overlay Code.

Extensive modifications to the subject house compromise its traditional appearance

Over the past 80 years the subject house had been modified. The most contentious modification of the subject house concerned the original roof material.

The Court had concerns in relation to the evidence provided by the heritage architect for the Applicant. This was because the heritage architect for the Applicant did not disclose all of the material facts on which the expert's opinion was based in the expert's affidavit and therefore compromised the just and expeditious resolution of the issues presented.

The Court further noted that there was no conclusive evidence about whether the concrete tiles were original and therefore the Court was not prepared to determine this issue.

The Applicant has taken steps and incurred significant expense

The Applicant submitted that it had incurred considerable expense in progressing the development. The Applicant relied upon the evidence of Mr Pietrobon, a consultant for the Applicant, who failed to provide supporting documents to prove the expenses which were alleged, and also did not disclose the rental income received since 2016 for the subject house and the adjoining dwelling house.

The Court therefore did not place weight on this ground.

The Applicant has incurred cost penalties from contractors engaged to commence the development works

The evidence on this issue was limited to that given by Mr Pietrobon who stated "*… the Applicant had selected contractors to commence works for the Proposed Development. However, the engagement of those contractors has been deferred pending the outcome of this proceeding*".

From this statement alone, the Court could not place weight on this ground.

The Applicant would be forced to incur a significant financial burden

The Court stated that the Applicant did not identify the basis on which it asserted that it would be forced to incur a significant financial burden. Therefore, the Court could not place weight on this ground.

If a request to extend the currency period had been made, it is likely to have been granted

The Applicant submitted that, as the multiple dwelling approval envisaged the demolition of the subject house, the Council would have likely accepted the extension application.

The Court disagreed with this argument as the argument was mere speculation.

Absence of substantial or unexplained delay

The Applicant further submitted that there had been no substantial or unexplained delay in attempting to further its rights under the demolition approval.

The Court stated, however, that the Applicant did not take any steps to progress the demolition of the subject house until early 2018, which was almost two years after the approval was given.

The Applicant has acted with reasonable expedition to rectify the situation

The Court stated that the Applicant did not act with reasonable expedition to rectify the situation as it did not pursue an extension application before the approval lapsed, and instead pursued a new development application for the demolition approval assessable against the superseded planning scheme, and a new development application for demolition approval assessable against the current planning scheme.

Conclusion

The Court held that the grounds, which were relied upon by the Applicant, were insufficient to overcome the sound town planning purpose and public interest served by repeating the statutory assessment and decision making process with respect to the proposed demolition.

The Court therefore dismissed the Application.

Colin
Biggers
& Paisley

Queensland Court of Appeal allows an appeal against an interlocutory decision of the Planning and Environment Court to refuse a stay of a proceeding pending the final determination of a criminal proceeding

Rebecca Tang | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Bond v Chief Executive, Department of Environment and Science* [2019] QCA 137 heard before Fraser and Philippides JJA and Crow J

November 2019

In brief

The case of *Bond v Chief Executive, Department of Environment and Science* [2019] QCA 137 concerned an application for leave to appeal to the Court of Appeal against orders made by the Planning and Environment Court in an interlocutory decision in relation to an appeal against the issuance of an Environmental Protection Order (**EPO**) under the *Environmental Protection Act 1994* (**EPA**) by the Department of Environment and Science (**Department**).

The Applicant conceded that as each of the challenged decisions was interlocutory in nature, leave was unlikely to be granted unless the Court of Appeal considered a substantial injustice would otherwise result. Although the Applicant acknowledged that each of the challenged decisions involved an exercise of discretion by the Planning and Environment Court, the Applicant contended that each exercise of discretion was infected by an error of a kind which justified appellate correction and amounts to a legal error which may found an appeal by leave under section 63 of the *Planning and Environment Court Act 2016*.

The Court of Appeal dismissed the Applicant's claims of error in law on all grounds but one. The Court of Appeal found that the Planning and Environment Court had erred in failing to take into account the substantial overlap in evidence between the charges against the Applicant in the criminal proceedings.

As such, the Court of Appeal granted leave to appeal, allowed the appeal and set aside the orders made by the Planning and Environment Court, insofar as they dismissed the application to stay the proceeding in the Planning and Environment Court pending the final determination of the criminal prosecution involving the Applicant.

Grounds to the Appeal

The Applicant contended that the Planning and Environment Court had erred in refusing applications for:

- A stay of the Applicant's appeal in the Planning and Environment Court against a decision to issue an EPO pending the final resolution of a criminal proceeding against the Applicant.
- An order under section 535 of the EPA staying the decision to issue the EPO pending the final resolution of the Applicant's appeal against the EPO in the Planning and Environment Court.
- An order that one of the grounds to the Applicant's appeal to the Planning and Environment Court be heard and determined separately from and before the hearing and determination of the other grounds of the appeal.

Background

On 25 May 2016, an EPO was issued under section 358 of the EPA to the Applicant by a delegate of the Department. The EPO was issued to the Applicant as a related person of Linc Energy Limited (**Linc Energy**) in respect to the causing of environmental harm from contaminants arising from underground gasification activity. The EPO required the Applicant to take actions which are summarised as follows:

- By 25 August 2016, the Applicant is to deliver to the address of the Department, a bank guarantee to the value of $5.5 million to secure compliance with the EPO.
- By 26 September 2016, the Applicant is to submit to the Department, a report by a suitably qualified person or persons detailing work to be undertaken to achieve the rehabilitation and infrastructure cleaning work as described in the EPO.
- By 1 November 2019, the Applicant is to carry out the described rehabilitation and infrastructure cleaning work.

The EPO was issued to the Applicant as a related person of Linc Energy under section 363AB of the EPA. In making the decision to issue the EPO, the Department considered section 363ABA of the EPA and relevantly alleged that the Applicant had held the most senior operational position within Linc Energy for ten years and that the Department was not satisfied that the Applicant had taken all reasonable steps to ensure Linc Energy had complied with its obligations under the EPA and made adequate provision to fund the rehabilitation and restoration of the land.

On 4 August 2016, subsequent to the Department affirming the decision to issue the EPO following the institution of an internal review of the decision, the Applicant appealed the decision of the Department to the Planning and Environment Court. During the proceeding, it was ordered by consent that the operation of the decision to issue the EPO be stayed pending the final determination of the appeal, with that issue ordered to be determined as a preliminary point (**Preliminary Point**).

The Preliminary Point was heard and determined adversely to the Applicant, which was appealed to the Court of Appeal and subsequently to the High Court, with the High Court dismissing the application brought by the Applicant for special leave against the Court of Appeal’s decision. As a consequence, the order staying the operation of the decision to issue the EPO ceased to have effect on 13 December 2017.

On 13 September 2016, a criminal complaint was also brought against the Applicant charging three counts of failing to ensure that Linc Energy did not wilfully and unlawfully cause serious environmental harm. A further criminal complaint against the Applicant charging an additional two counts of the same offence was brought on 11 November 2016.

On 22 December 2017, the Applicant filed another application in the Planning and Environment Court for orders granting a stay of the decision to issue the EPO pending the final determination of the appeal and that the appeal be stayed pending the final resolution of the criminal proceeding against the Applicant.

The Planning and Environment Court handed down its judgment in March 2018 and found that the balance of justice favoured the refusal of both a further stay of the operation of the EPO and a stay of the Applicant’s appeal pending the final determination of the criminal proceeding, as there was a potential for the criminal proceeding to take months if not years, should the Applicant be committed for trial on all or some of the charges.

The Planning and Environment Court additionally found that any injustice or prejudice the Applicant might suffer due to the refusal of the applications was outweighed by the prejudice likely to be caused to the Department and the public by further uncertain lengthy delays to the judicial process. However, the Planning and Environment Court did not make orders to reflect the aforementioned conclusions, but instead adjourned the proceeding to a date to be fixed following the verdicts in the criminal proceeding against Linc Energy.

On 9 April 2018, Linc Energy was convicted of five counts of wilfully and unlawfully causing serious environmental harm through the operation of gasifiers.

Subsequent to the determination, the Applicant filed an application for orders granting leave to amend the Notice of Appeal, to stay the decision to issue the EPO pending the final resolution of the appeal by the Planning and Environment Court, and to stay the appeal pending the final resolution of the criminal proceedings against the Applicant.

On 15 June 2018, the Planning and Environment Court ordered that the applications be dismissed on all grounds, but granted leave to file an amended Notice of Appeal.

The Applicant subsequently appealed the decision to the Court of Appeal.

Decision to issue EPO stayed pending final resolution of appeal in Planning and Environment Court

The Applicant made numerous submissions contending that the Planning and Environment Court had made specific errors in refusing to stay the operation of the decision to issue the EPO pending the final determination of the appeal in the Planning and Environment Court.

The Court of Appeal dismissed the submissions and held that the Applicant had not established any of the specific errors which were contended for.

Stay of appeal in Planning and Environment Court pending the final determination of the criminal proceeding

The Applicant submitted that the Planning and Environment Court had erred in its application of section 79 of the *Evidence Act 1977* in failing to take into account that a conviction of the Applicant of the charges in the criminal proceeding would be directly relevant to the Applicant's defence in the appeal.

Section 79(2) of the *Evidence Act 1977* relevantly provides that "*in any civil proceeding the fact that a person has been convicted by a court of an offence is admissible in evidence for the purpose of proving, where to do so is relevant to any issue in that proceeding, that the person committed that offence*".

The Court of Appeal rejected the Applicant's argument on the basis that the Planning and Environment Court had in fact taken into account the matter expressed in the ground of appeal.

The Applicant further argued that the Planning and Environment Court had failed to take into account or to appreciate the substantial overlap between the charges against the Applicant in the criminal proceedings and the defences under the EPA that the Applicant was intending to rely on in the appeal. Additionally, the Applicant submitted that the Planning and Environment Court had failed to take into account the true impact on the due administration of justice of the Applicant's entitlement to claim privilege against self-incrimination if the appeal were to be heard before the determination of the criminal proceeding.

The Applicant relied on the determination of *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5, in which the High Court found at [42] that:

> *The risk of prejudice to the second respondent if a stay is not granted in the forfeiture proceedings and the exclusion proceedings is plain. It is not necessary for the second respondent to say any more than he did on the application for a stay in order to identify that risk, given that the offences and the circumstances relevant to both proceedings are substantially identical.*

In making its determination, the Court of Appeal emphasised the importance of the fact that the Applicant's evidence and arguments differed markedly between the March 2018 determination by the Planning and Environment Court and the June 2018 determination and orders.

As such, the Court of Appeal found that although the Planning and Environment Court did not err in concluding in March 2018 that although there was a clear and significant overlap of the facts, matters and circumstances in the respect of the criminal proceedings, the issues were not identical or near identical to those likely to arise in the criminal proceeding and there was in reality no significant factual overlap. The Court of Appeal held that due to the Applicant's subsequent amendment of the Notice of Appeal and additional evidence upon which the Applicant relied on at the June hearing, the issues became closely mirrored.

In these circumstances, the Court of Appeal found that the Applicant should not be forced to make the invidious choice between giving evidence in support of a ground in the appeal to the Planning and Environment Court and risk prejudice by self-incrimination in the prosecution against him or not giving evidence and incurring the risk of prejudice in the appeal.

The Court of Appeal therefore granted leave to appeal against the orders made by the Planning and Environment Court, insofar as those orders dismissed the application for a stay of the appeal pending the final resolution of the criminal proceeding against the Applicant.

The Court of Appeal otherwise dismissed the application for leave to appeal.

No leave required: Planning and Environment Court holds that leave is not required to rely on additional issues not included in an assessment manager's decision notice

Ella Hooper | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Village Retirement Group Pty Ltd v Brisbane City Council* [2019] QPEC 32 heard before Williamson QC DCJ

November 2019

In brief

The case of *The Village Retirement Group Pty Ltd v Brisbane City Council* [2019] QPEC 32 concerned an application for directions with respect to an order seeking to define the issues in dispute for an appeal by an applicant (**Applicant**) against the decision of the Brisbane City Council (**Council**) to refuse a development application for a material change of use for a retirement village located in Lota, within the Council's local government area.

The Council relevantly sought the following order,"*[t]he issues in dispute for this appeal are those stated in paragraph 13 to 15 of the notice of appeal and paragraph 4 of the [Council's] letter dated 9 May 2019 [(**Council's Letter**)]…*". The Applicant opposed the order sought by the Council and, in particular, opposed the Council's contention that the development application failed to comply with Overall Outcome 3(f) of the purpose of the Wynnum-Manly Neighbourhood Plan (**Neighbourhood Plan**), which was expressed in paragraph 4(d) of the Council's Letter.

The Applicant argued that the Council ought to apply for leave to enlarge the issues in dispute.

The Court held that the Council did not require leave to enlarge the issues in dispute as there was no prior order made by the Court which defined the issues in dispute, and that the Council was entitled to raise other matters not contained in its decision notice. The Court further held that the inclusion of Overall Outcome 3(f) of the Neighbourhood Plan was not irrelevant and did not prejudice the Applicant.

Issues in dispute

The Court noted that the threshold question for consideration was whether the Council required leave to rely on matters identified in the Council's Letter.

The Court considered the following issues:

- whether there was an existing order defining the issues in dispute;
- whether the matters raised in the Council's Letter were new matters for determination;
- whether the decision in *Waterman & Ors v Logan City Council* [2018] QPEC 44 (**Waterman**) was applicable to the present case;
- whether a party is able to rely on matters not expressed in a decision notice.

Council's Letter

The Council's Letter stated that the Council would be relying on a further five provisions of the *Brisbane City Plan 2014* (**City Plan 2014**). The Applicant did not oppose the first four provisions outlined in paragraph 4(a) - (c) of the Council's Letter as "*the tenor of those grounds were not novel, and reflected the substance of the Council's reasons for refusal…*". However, the Applicant did oppose the inclusion of Overall Outcome 3(f) of the Neighbourhood Plan.

Overall Outcome 3(f) of the Neighbourhood Plan relevantly states as follows:

> *… Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development.*

The Council argued that the development application failed to comply with Overall Outcome 3(f) of the Neighbourhood Plan for the reason that low density development of one to two storeys is expected in the area and no community need and economic need had been demonstrated to support the proposed development.

The Court held that the Council did not require leave to rely on the matters identified in the Council's Letter for the below reasons.

There is an established practice of the Court to define the issues in dispute by way of an order

The Court found that a party may only vary issues in dispute if leave is granted by the Court, but only if the issues in dispute have been defined by a pre-existing order. The Court held that as there was no prior order defining the issues in dispute, the Council was not required to apply to the Court for leave to vary the issues in dispute.

The matters raised in the Council's letter were not new matters for determination

The Court found that the nature of the matters raised in the Council's Letter had already been raised in the Applicant's Notice of Appeal.

The Court noted that the Notice of Appeal relevantly states that "*[t]he development application ought to be approved because the proposed development complies with all of the **assessment benchmarks** for the development*".

The Court found that the matters raised in the Council's Letter go to the issue of compliance with the assessment benchmarks as expressed in the Notice of Appeal, and as such the Court held that Overall Outcome 3(f) of the Neighbourhood Plan ought to be assessed as it is an assessment benchmark under the City Plan 2014.

Additionally, during the course of the hearing, the Applicant confirmed that it would be advancing a need argument in favour of the appeal. The Court found that Overall Outcome 3(f) of the Neighbourhood Plan involves the issue of town planning and community need. Consequently, the Court held that Overall Outcome 3(f) of the Neighbourhood Plan is not a novel issue for the Court to consider and is not irrelevant to the proceeding.

The Waterman decision does not apply

The Applicant argued that the Waterman decision was consistent with the present case, and as such argued that the Council is required to provide an adequate explanation for its intention to enlarge the issues in dispute beyond what was contained in its reasons for refusal.

The Court noted that the Waterman decision must be treated with caution as it is factually different from the present case. Relevantly, the local government in the Waterman decision decided to change its position with respect to its original decision to refuse a development application and therefore sought orders to vary the issues in dispute. On that basis, the Court in the Waterman decision held that the local government was required to provide an adequate explanation.

The Court found that the present case does not have existing orders to vary and is not seeking to change its position with respect to the development application. On this basis, the Court held that the Waterman decision was not relevant and dismissed the Applicant's argument.

The legislative regime does not require a party to obtain leave to resist an appeal for reasons other than those expressed in a decision notice

The Applicant argued that the Council ought to apply for leave to enlarge the issues in dispute as Overall Outcome 3(f) was not contemplated by the Council's reasons for refusal.

The Court found that the right conferred under section 230 of the *Planning Act 2016* is a right to appeal against a "decision" and not the "reasons" for the decision. Relevantly, the Court noted that when deciding an appeal, the Court under section 47 of the *Planning and Environment Court Act 2016* has the power to either confirm, change, or set aside a "decision".

Additionally, the Court noted that the nature of a Planning and Environment Court appeal is by way of hearing anew and as such, an assessment manager is not bound or limited to its reasons for refusal.

The Court further found that it has been long established by case authority that matters other than those defined in the decision notice can be raised at a hearing. Relevantly, the Queensland District Court found in *Chalk & Anor v Brisbane City Council* [1966] 13 LGRA 228 at 230, and *Walker v Noosa Shire Council* [1983] 2 Qd R 86 at 88, that the issues of an appeal are not restricted to the reasons stated by the Council for its refusal of the development application, and that a local government is not precluded from raising other such matters provided that they are relevant considerations. Additionally, the Court noted that the Planning and Environment Court in *LMRM v Brisbane City Council* [2017] QPEC 7 found that a local government that seeks an order to include additional reasons for refusal in its response to an applicant appeal need not explain why those issues were not originally stated.

Conclusion

The Court held that the Council was not required to apply for leave to vary the issues in dispute.

Planning and Environment Court refuses two related appeals against approval of a proposed development for a local centre in Brisbane's north

Christopher Vale | Nadia Czachor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46 heard before Kefford DCJ

December 2019

In brief

The case of *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46 concerned an appeal to the Planning and Environment Court of Queensland in respect of two proposed shopping centre developments for a local centre to be located at Narangba, 30 kilometres north of the Brisbane CBD.

The relevant developers of the proposed shopping centres were BGM Projects Pty Ltd (**BGM**) and Australian National Homes Pty Ltd (**ANH**). The first named appellant was a director of ANH, which was the second appellant.

The Court held that, although BGM's proposed development had not complied with all aspects of the Council's Planning Scheme, the proposed development had adequately demonstrated the planning policy underlying the relevant provisions of the Planning Scheme more so than ANH, such that the nature and extent of the non-compliance was not a compelling reason for Council to refuse the application.

Background

Council had approved BGM's application for a development permit authorising a material change of use of land for the purpose of establishing a local centre, which would feature a supermarket, specialty retail uses, fast food outlet and service station. ANH applied for a preliminary approval for a material change of use and a variation approval with respect to the use of the land as a local centre which would feature similar services to BGM's proposal such as a supermarket, specialty shops, medical centre, gym, service station and fast food outlet.

The director of ANH appealed against the Council's decision to approve BGM's proposed development. ANH appealed against the Council's refusal of its proposed development.

The issue for the Court to determine was whether either proposal was appropriately located and designed having regard to the Council's strategic intent for activity centres under the Planning Scheme, in addition to considering other relevant issues concerning need, traffic engineering, lighting and acoustic impact.

Deciding development applications

Section 60 of the *Planning Act 2016* requires the Court to exercise its planning discretion in deciding a development application. The Court said that "*a planning decision must strike the balance between the maintenance of confidence in a planning scheme on the one hand and dynamic land use needs and recognition that town planning is not an exact science on the other*" (at [22]; see also *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 at [60]).

Location

The Court was satisfied that BGM's proposed development was appropriately located as it was highly accessible by motor vehicle, as well as provided for other active transport modes such as walking, cycling or public transport (**active transport**), in that the development was "*reasonably well aligned with the requirement that new local centres be viable and service an unserviced catchment … consistent with the planning goals that there be a strong network of activity centres and that activity centres be vibrant and attractive places*" (at [86]).

The Court was not satisfied that ANH's proposed development would "*provide convenient accessibility by active transport from existing or developing residential areas*", and that although it was accessible by motor vehicle, the development was "*not well located to encourage a shift to greater access by active transport*" (at [265]).

Design

The Court held that although BGM's proposed development did not achieve a "*main street*" format or the extent of street-fronting retail activation as encouraged under the Planning Scheme, the development's design did not "*unsatisfactorily compromise the proposed local centre's ability to achieve the associated planning goals with respect to social interaction and encouraging access to active transport*" (at [174]).

The Court said that BGM's proposed development would result in "*a vibrant and attractive centre that promotes social interaction and community identity [and] an environment that encourages the public to access it by active transport and public transport*" (at [179]).

The Court was satisfied that ANH's proposed development would result in a vibrant and attractive centre which promoted social interaction and community identity within the site itself. However, it was noted that the proposed development would be more suited to access by car, therefore failing to achieve "*an active frontage that would encourage walkability in any meaningful way*" (at [311]).

Having considered ANH's proposed development against the assessment benchmarks under the Planning Scheme, the Court held that the proposal did not align with the Council's planning strategy for the location and design of local centres under the Planning Scheme, having failed to address the requirement for a "*walkable community*" (at [458]).

Need

The Planning Scheme recognises that a new local centre may be established to appropriately serve the needs of emerging communities provided that the economic need is "*sufficient to ensure it is viable, and that the establishment of a new local centre does not affect the vitality of other centres*" (at [469]).

Both BGM and ANH submitted that their respective proposals would meet an unmet economic, community and town planning need in light of the extensive residential development and emerging population occurring in the area at the time.

The Court determined that although either proposal would improve the services and facilities accessible by active transport and provide opportunities for social interaction, BGM's proposal favoured approval over that of ANH, given that it was more closely aligned with the requirements under the Planning Scheme that need be met by new local centres that have convenient accessibility by way of active transport (at [511]-[513]).

Conclusion

In refusing the appeal, the Court held that although BGM's proposed development did not comply with all aspects of the Planning Scheme or every requirement regarding the intended design of a local centre, the proposed development was aligned with the planning policy underlying the relevant provisions of the Planning Scheme, including location, design, amenity and character of the local area, walkability, and need (at [605]).

Tenant restrained: the Planning and Environment Court makes orders to remedy and restrain a tenant from committing further offences under the EPA due to non-compliance with an EPO in response to a major tyre fire

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Chief Executive v Di Carlo* [2019] QPEC 40 heard before RS Jones DCJ

December 2019

In brief

The case of *Chief Executive v Di Carlo* [2019] QPEC 40 concerned an application for enforcement orders commenced by the Department of Environment and Science (**Department**) against a tenant (**Tenant**) who allegedly failed to comply with an Environmental Protection Order (**EPO**) and allegedly caused serious and material environmental harm.

The Department sought relief under section 505(5) of the *Environmental Protection Act 1994* (**EPA**) to remedy or restrain the Tenant from further commission of an offence.

The Court found that the relief sought by the Department ought to be granted and held that the Tenant committed an offence by failing to comply with the EPO under section 361 of the EPA.

Background

The subject land is located in a developed industrial area at Grindle Road, Rocklea, and is subject to a tenancy agreement under which the Tenant is a lessee.

A company, for which the Tenant was a Chief Executive Officer in 2015, applied to the Department for an environmental authority for two environmentally relevant activities on the subject land, namely tyre recycling and transporting tyres. Subsequently, the Department issued the environmental authority for the environmentally relevant activities.

Proceeding the issuance of the environmental authority, the Tenant began to transport and store tyres on the subject land.

The tyres stored on the subject land have been the subject of two fires. After the first fire, the Queensland Fire and Emergency Service issued a requisition to the Tenant requiring him to take steps to reduce the risk of tyre fires. After the second fire, the Department issued an EPO requiring the Tenant to establish and maintain a 10 metre firebreak around the entire boundary of the subject land and to conform to specific storage and stacking requirements. The second fire was the largest of the two fires and resulted in approximately $68,000 of remedial costs.

The Department alleged that the Tenant had failed to comply with the EPO and therefore had committed an offence under section 361 of the EPA. Additionally, the Department alleged that the Tenant was guilty of unlawfully causing serious and material environmental harm under section 437 and section 438 of the EPA.

Issues

The Court considered the following issues:

- whether failing to comply with the EPO constituted the commission of an offence under section 361 of the EPA;
- whether the Tenant is a "related person" to respond to the EPO under section 363AB of the EPA;
- whether the Tenant has committed an offence under sections 437 and 438 of the EPA;
- whether the Court should make an order under section 505(5) of the EPA to remedy and restrain the Tenant from committing an offence.

Legislative framework

Section 361 of the EPA relevantly states that it is an offence to not comply with an EPO, and that the recipient of an EPO must not wilfully contravene it.

Sections 437 and 438 of the EPA make it an offence to wilfully cause serious or material environmental harm respectively.

Section 363AB of the EPA relevantly states who is a related person of a company to respond to an EPO. Relevantly, a related person may be any of the following persons:

- a person who is a holding company of the company;
- a person who owns land on which the company carries out a relevant activity;
- a person who has a relevant connection to the company;
- a person who is capable of significantly benefitting financially from the carrying out of the relevant activity by the company;
- a person who significantly influences the company.

Under section 363AC of the EPA an EPO may be issued to a related person.

Section 505(5) of the EPA relevantly states that if the Court is satisfied that an offence against the EPA will be committed or that an offence against the EPA will be committed unless restrained, the Court may make the orders it considers appropriate to remedy or restrain the purported offence.

Did the Tenant commit an offence under section 361 of the EPA?

The Court firstly considered whether an offence was committed under section 361 of the EPA. The Department relied on evidence of the Director of the Research and Scientific branch of the Queensland Fire and Emergency Services (**Expert**). The Expert opined that the estimated tyre mass on the subject land was between 6,214 to 9,957 tonnes. The Tenant, however, stated that the subject land at one stage contained up to 48,000 tonnes of rubber which has now decreased to an estimated 26,000 tonnes.

The Expert noted that when tyres are densely stacked and compacted, there is a genuine risk of combustion. The Expert observed that as a consequence of the current conditions of the subject land, there is a genuine risk of a major fire which may cause significant consequences on the environment and surrounding area. The Expert also identified that the current conditions on the subject land pose significant life safety hazards to firefighters because of the storage and access arrangements.

The Court accepted the Expert's evidence and held that the Tenant had committed an offence under section 361 of the EPA as the EPO had not been complied with.

Was the Tenant a related person to respond to an EPO under the EPA?

The Court considered whether it was reasonable for the Tenant to be held responsible for the offence under section 361 of the EPA. The Department had issued to the Tenant's company and the Tenant an EPO as a result of the second fire to secure compliance with the general environmental duty under section 358(d)(i) of the EPA. The Tenant throughout the proceeding, however, maintained an argument that the Tenant's company did not seek an environmental authority for conducting the environmentally relevant activities on the subject land and that the signature was forged on the application.

The Court rejected the Tenant's argument, as the Tenant provided no evidence to support the assertion that the signature was forged or another claim that two other people were in fact the Chief Executive Officer of the company. Additionally, the Court observed that on the two instances when the tyre fires occurred, the Tenant was on the subject land and assisted on both occasions in the firefighting effort. Furthermore, the Department had corroborating evidence that Departmental officers only dealt with the Tenant with respect to the subject land. The Court also observed that the Tenant significantly benefited financially from the operations being carried out on the subject land and was in a position of influence for at least two years with respect to the company's conduct. Consequently, the Court held that the Tenant was a related person under section 363AB of the EPA to respond to the EPO.

Was an offence committed under section 437 and 438 of the EPA?

The Court observed that the second fire constituted an offence of causing serious environmental harm under section 437 of the EPA.

The Court referred to section 17(1)(c) of the EPA, which defines serious environmental harm as being harm "*that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount*". Additionally, section 17(1)(d) states that serious environmental harm is harm "*that results in costs of more than the threshold amount being incurred in taking appropriate action to prevent or minimise harm and rehabilitate or restore the environment to its condition before the harm*", the threshold amount being $50,000.

The Court observed that the remedial cost of the second fire was just under $68,000, and therefore noted that the fire resulted in serious environmental harm in accordance with section 17(1)(d) and section 437 of the EPA. The Court found, however, that it was unnecessary to make a final determination on the issue as the evidence established that an offence under section 361 had been committed.

Whether the Court ought to make an order under section 505 of the EPA?

The Court held that if the Tenant is not restrained by appropriate orders it would be likely that an offence will be committed in the future. The Court therefore made the following orders under section 505(5) of the EPA:

- the Tenant must establish and maintain a clean 10 metre firebreak around the entire property of the subject land that is to be free from obstacles and flammable and combustible materials within 30 days of the order;
- the Tenant must maintain that individually stacked tyres must not exceed 45 m long x 5 m wide x 3 m high within 60 days of the order;
- the Tenant must maintain that baled tyres must not exceed 45 m long within 60 days of the order;
- the Tenant must maintain for all tyre stacks a batter slope not exceeding 1:1 within 60 days of the order;
- the Tenant must maintain a minimum of 10 m separation distance between stacks or stacks separated by a protective wall in accordance with the *Fire and Rescue Service Act Requisition (No. 1) 2011* within 60 days of the order.

Colin Biggers & Paisley

Planning and Environment Court applies discretion to revive lapsed development approval

Austyn Campbell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Annandale v Cairns Regional Council* [2019] QPEC 49 heard before Fantin DCJ

December 2019

In brief

The case of *Annandale v Cairns Regional Council* [2019] QPEC 49 concerned a lapsed development approval for operational work relating to a development permit for a material change of use for a dwelling house.

The Applicant lodged an impact assessable development application for a material change of use for a dwelling house with the Cairns Regional Council (**Council**) in 2010 under the now repealed *Sustainable Planning Act 2009* (Qld) (**SPA**). The Council refused the application and the Applicant appealed.

The development application was approved by the Court subject to conditions which included design requirements for a lengthy access driveway.

The Applicant obtained a development approval for operational work for the access driveway in 2011 (**Development Permit**). The Development Permit lapsed and in 2014 the Applicant sought, and was granted an extension to March 2017. The Development Permit lapsed again and the Applicant sought, and was granted a further extension to 25 March 2019. The Development Permit lapsed again. In July 2019, the Applicant became aware that it had lapsed and in September 2019, the Applicant filed an application with the Court to revive and extend it.

The Council did not oppose the application.

In making its determination, the Court considered the following:

- the Court's jurisdiction under the statutory framework;
- the assessment benchmarks of the *Cairns Plan 2016* version 1.3 (**Planning Scheme**);
- matters relevant to the exercise of the Court's discretion.

The Court held the Applicant's non-compliance in failing to lodge an extension application before the Development Permit lapsed is excused, and that any extension application lodged within four weeks of the date of the order by the Applicant was to be treated as a valid extension application.

Statutory framework

The Court considered its jurisdiction to deal with non-compliances under the *Planning Act 2016* (Qld) (**PA**) pursuant to section 37 of the *Planning and Environment Court Act 2016* (Qld). It noted the broad and unfettered discretion for the Court to take particular action in relation to a lapsed development approval.

The Court noted its jurisdiction extended to excuse the Applicant's failure to request an extension of the currency period before 25 March 2019, under section 86 of the PA.

The Applicant submitted that the Court should consider evidence and relevant matters under section 87 of the PA to extend the currency period of the development approval to 1 December 2020.

Assessment against the Planning Scheme

The Court observed that the Applicant appeared to be in default of condition 21 of the Development Permit, which related to bushfire management.

The Court reviewed the town planning report prepared by the Applicant's town planning consultant and concluded there was not compliance with the Bushfire Hazard Overlay Code in the Planning Scheme.

The Court noted the recommendation of the town planning consultant to incorporate an additional condition on the Development Permit should the extension be granted. It noted that, despite the acknowledgement of non-compliance, the draft order did not contain such a condition.

The Court stated that it would be in the public interest for the Council, as the responsible assessment manager, to undertake a proper assessment of any extension application by the Applicant, including with respect to bushfire hazards.

Matters relevant to the exercise of the discretion

The Applicant submitted ten (10) matters to support the granting of the relief. These matters included the following:

- there existed a reasonable explanation, described as "*an administrative oversight*", for the failure to apply for an extension;
- the Applicant had acted promptly in attempting to remedy the situation;
- the Council supported the application;
- it would be prudent to allow an extension which gave the Applicant ample time to finalise the entire development, including compliance;
- there would be no town planning purpose served by requiring the Applicant to make a new development application.

The Court accepted that the matters relied upon by the Applicant supported the granting of the relief to excuse the non-compliance. However, the Court noted that if the Court was to extend the currency period, the Applicant would be in a better position than if the Applicant had adhered to the requirement to make an extension application to the Council as the Applicant would avoid assessment by the Council of the appropriateness of the extension application and therefore the non-compliance with condition 21.

The Court therefore held that it is not appropriate for the Court to grant the extension application.

Conclusion

The Court excused the Applicant's non-compliance in failing to lodge an extension application before the development approval lapsed, and ordered that any extension application lodged by the Applicant with the Council within four weeks of the date of the order was to be treated as a valid extension application under section 86 of the PA.

Colin Biggers & Paisley

Planning and Environment Court finds that modifying a property boundary alignment constitutes a minor change

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Goldicott House Pty Ltd v Brisbane City Council & Ors (No. 2)* [2019] QPEC 47 heard before Rackemann DCJ

December 2019

In brief

The case of *Goldicott House Pty Ltd v Brisbane City Council & Ors (No. 2)* [2019] QPEC 47 concerned an interlocutory application to the Planning and Environment Court (**Court**) in respect of an appeal against the decision of the Brisbane City Council (**Council**) to refuse a development application for building work to facilitate the demolition of a State and local heritage place known as "Goldicott House", and a development permit to reconfigure a lot and for a material change of use. The interlocutory application was brought by the registered landowner (**Applicant**) seeking orders permitting the appeal to be heard and determined on the basis of a changed application.

The main issue in dispute was whether the changed application constituted a "minor change" for the purposes of the *Planning and Environment Court Act 2016* (**PECA**).

The Court held that the changed application was a minor change under the PECA as the proposed change did not result in a substantially different development. The Court therefore approved the application and ordered that the appeal be heard and determined on the basis of the changed application.

We reported on the previous decision of *Goldicott House Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 25 in our September 2019 edition of Legal Knowledge Matters: *Planning and Environment Court allows application to broaden the issues in dispute to consider new and significant information in a joint expert report*.

Changed application

The Applicant sought to make a minor change to its development application at the end of the hearing of the evidence relating to the reconfiguration of a lot aspect of the development application. The proposed change relevantly sought to modify the boundary line between two proposed lots, known as "lot 21" and "lot 22" with the effect of affording a greater frontage to lot 22 and a corresponding reduction in the frontage for lot 21.

The proposed change arose from a concern raised during the course of the appeal in relation to whether the reconfiguration to create lot 22 would compromise the safe and efficient operation of the driveway that provides access to the land the subject of the appeal.

Section 46(3) of the PECA provides that the Planning and Environment Court cannot consider a change to a development application unless the change is only a minor change to the application. Schedule 2 of the *Planning Act 2016* (**PA**) relevantly defines a minor change for a development application as "*a change that does not result in substantially different development …*".

The Court noted that the definition of a "minor change" also required attention to whether it would cause one of a number of things set out in paragraph (ii) of the definition under the PA, but found that the change would not be caught by reference to any of the matters in paragraph (ii). The Court also considered the Development Assessment Rules (**DA Rules**) made under section 68(1) of the PA and found that the proposed change did not trigger any of the circumstances set out under section 4 of Schedule 1 of the DA Rules, which would consider the change to result in a substantially different development.

In determining whether the changed application constituted a "minor change" under the PECA, the Court considered the evidence of the traffic engineers and town planners called upon by the parties.

The traffic engineers gave evidence to the effect that moving the proposed boundary would afford lot 22 a better opportunity to provide appropriate access for use for community facilities. However, the traffic engineers also asserted that the lesser frontage left for lot 21 would still be wide enough to provide an access for that lot if its uses were to be as a house, as the Applicant proposed, but not if it were to be used for some type of community facility.

In order to quell any concerns that the proposal might limit the future use of lot 21, the Applicant volunteered a condition that the proposed lot 22 be required to provide any easement that is reasonably necessary for vehicle and pedestrian access in favour of lot 21.

The town planner called by the Applicant additionally acknowledged that the change related only to one component of the application and expressed the view that the change was of no substantial planning significance. The Court considered the evidence of the traffic engineers and of the town planner called by the Applicant and found that the change was of no substantial planning significance.

The Council submitted that the changed application might in some way prejudice the use of lot 21 for community facilities in terms of whether onsite car parking for the community facilities would be appropriate having regard to the heritage considerations.

The Court held that the imposition of a condition as volunteered by the Applicant would address any concerns that the change to the boundary might result in some limitation on the utility of the use of lot 21 for community facilities.

The Court also noted that there was a broader point made in the course of the application as to whether the creation of the larger lot would impact upon the flexibility to use lot 21 for community facilities, but held that such concerns arose out of the proposed subdivision rather than the change to the boundary and was therefore not relevant.

The Court found that the magnitude of the changed application, being the change to the boundary line between the proposed lots, was relatively small, and that the changed application was made to address an issue that was raised in the appeal to reduce impacts rather than to exacerbate impacts or create new impacts. The Court held that the changed application did not affect the way in which the development was intended to operate and was therefore a minor change.

The Court exercised its discretion and ordered that the appeal proceed on the basis of the changed application.

Colin Biggers & Paisley

Document availability amendments to the Planning Regulation 2017 soon to commence – Planning (Infrastructure Charges Register and Other Matters) Amendment Regulation 2019

Alexa Brown | Ian Wright

This article discusses the subordinate legislation that will amend the Planning Regulation 2017 on 1 January 2020 which will require local governments to keep additional information within their infrastructure charges register and to publish more documents on their website, particularly in respect of LGIP documents and each infrastructure charges notice issued after 1 January 2020

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In brief

This article concerns the *Planning (Infrastructure Charges Register and Other Matters) Amendment Regulation 2019* (subordinate legislation 2019 no. 196) (**Amendment Regulation**), which contains amendments to the *Planning Regulation 2017* (**Planning Regulation**) which will commence on 1 January 2020.

The amendments to the Planning Regulation, commencing on 1 January 2020, include inserted sections and changes to current sections in respect of the following (Part 3 of the Amendment Regulation):

- The documents which a local government must keep available for inspection and purchase, including documents associated with a Local Government Infrastructure Plan (**LGIP**) or an Infrastructure Charges Notices (**ICN**).
- The documents which a local government must or may publish on their website.
- The documents which are "prescribed documents" for the purpose of section 264(6) (Public access to documents) of the *Planning Act 2016* (see section 9 of the Amendment Regulation).
- The definition of relevant words.

Section 70 of the Planning Regulation requires a local government to keep documents publicly available for inspection and purchase or for inspection only. The documents that must be kept publicly available are set out in schedule 22 of the Planning Regulation.

The amendments to the Planning Regulation that will commence on 1 January 2020 will require a local government to keep available additional documents relating to ICNs and to a local government's LGIP.

Documents that must be kept available for inspection and purchase

LGIP related material

The Amendment Regulation will remove the general requirement for a local government to keep "*each document mentioned in the local government's LGIP*" available for inspection and purchase, and instead the amended section will refer to specific documents "*prepared or used in relation to the making, amendment or review of the local government's LGIP*", which include the following:

- each schedule of works model;
- each review checklist;
- each appointed reviewer statement;
- a study or report.

In addition, after the commencement of the Amendment Regulation, these documents must also be published on a local government's website (see section 7 of the Amendment Regulation).

ICNs issued after 1 January 2020

The Amendment Regulation also inserts a requirement in the Planning Regulation that each local government must keep available for inspection and purchase an ICN issued after 1 January 2020 and any amended ICNs, where the original ICN was issued after 1 January 2020 as follows (see section 6(3) of the Amendment Regulation):

- schedule 22, section (1)(z) – "*each infrastructure charges notice given by the local government on or after 1 January 2020, other than an amended infrastructure charges notice*"; and
- schedule 22, section (1)(za) – "*each infrastructure charges notice to which paragraph (z) applies that is amended by the local government after 1 January 2020*".

In addition, after the commencement of the Amendment Regulation, these documents must also be published on the local government's website.

Infrastructure charges register

A new section, section 3A, will be inserted into schedule 22 of the Planning Regulation upon the commencement of Part 3 of the Amendment Regulation requiring a local government with a LGIP to publish on its website relevant information from the infrastructure charges register, which is currently required by schedule 22, section (1)(y) of the Planning Regulation (see section 8 of the Amendment Regulation).

Another new section, section 3B, will be inserted into schedule 22 of the Planning Regulation that will require a local government with a LGIP to keep available for inspection and purchase a document that includes the trunk infrastructure information that a local government is required to publish on its website under the new section, section 3A.

New definitions

The Amendment Regulation will insert the following definitions in the Planning Regulation (see section 10 of the Amendment Regulation):

- "*infrastructure charges register*";
- "*infrastructure charges information*";
- "*trunk infrastructure information*".

Importantly, the definition for "*infrastructure charges register*" includes the relevant information from ICNs issued before 1 January 2020 and additional information in respect of ICNs issued after 1 January 2020. The definition encompasses the definition of "*infrastructure charges information*".

The definition for "*trunk infrastructure information*" includes relevant information about trunk infrastructure provided by a local government, or under an infrastructure agreement, or a condition of a development approval.

Our Leaders

Ben Caldwell
Partner
+61 7 3002 8734
0427 533 098
ben.caldwell@cbp.com.au

Todd Neal
Partner
+61 2 8281 4522
0411 267 530
todd.neal@cbp.com.au

David Passarella
Partner
+61 3 8624 2011
0402 029 743
david.passarella@cbp.com.au

Ian Wright
Senior Partner
+61 7 30002 8735
0438 481 683
ian.wright@cbp.com.au

Colin Biggers & Paisley

Brisbane.

T +617 3002 8700

Level 35, 300 George Street
Brisbane QLD 4000 Australia

GPO Box 142, Brisbane QLD
4001 Australia

Melbourne.

T +613 8624 2000

Level 23, 181 William Street
Melbourne VIC 3000 Australia

GPO Box 4542, Melbourne VIC
3001 Australia

Sydney.

T +612 8281 4555

Level 42, 2 Park Street
Sydney NSW 2000 Australia

GPO Box 214, Sydney NSW
2001 Australia

cbp.com.au