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Assessment manager functions extend to include referral agency functions if section 54(3) of the Planning Act 2016 (Qld) is engaged

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Leeward Management Pty Ltd v Noosa Shire Council* [2022] QPEC 58 heard before Long SC DCJ

February 2023

In brief

The case of *Leeward Management Pty Ltd v Noosa Shire Council* [2022] QPEC 58 concerned an application by the Noosa Shire Council (**Council**) in a substantive appeal to the Planning and Environment Court (**Court**) against the Council's refusal of part of a development application by operation of section 60(6) (Deciding development applications) of the *Planning Act 2016* (Qld) (**Planning Act**), which states that "*If an assessment manager approves only part of a development application, the rest is taken to be refused*". The development application the subject of the appeal was for building work associated with the demolition of a structure and an extension to an existing shed (**Appeal**) on land located at 340 Dath Henderson Road, Cooroy Mountain (**Subject Land**).

It was common ground between the parties that the Council is under Table 1A of schedule 8 (Assessment manager for development applications) of the *Planning Regulation 2017* (Qld) (**Planning Regulation**) the assessment manager for the demolition component of the proposed development (**Demolition Component**), and under Table 3 (Design and siting) and Table 7 (Building work for removal or rebuilding) of part 3 (Referral agency's assessment), division 2 (Local government as referral agency) of schedule 9 (Building work under Building Act) of the Planning Regulation a referral agency for the extension component of the proposed development (**Extension Component**). However, the parties were in dispute as to whether the Council's decision for the development application ought to have included its referral agency response in respect of the design and siting for the Extension Component, and whether the failure to include such a response rendered the Extension Component refused by virtue of section 60(6) of the Planning Act.

The Council's application sought that the Appeal be struck out or dismissed on the basis that the Appeal was invalidly or incompetently brought for the following reasons:

- The Appeal was brought out of time.
- The development application for the Extension Component was not properly made, because the development application was not made to the appropriate assessment manager, being a private certifier, and the Applicant did not pay the required fee to the Council as a referral agency.
- The Appeal relates to the Extension Component which the Council was not the assessment manager for and thus the Appeal is not against "*the refusal of all or part of the development application*" as required under schedule 1 (Appeals), Table 1 (Appeals to the P&E Court and, for certain matters, to a tribunal) of the Planning Act.

The Court considered the legislative development assessment scheme under the Planning Act and held that the Council's application be dismissed for the following reasons:

- The Planning Act "*… contemplates that a singularly proposed development application may comprise components which are susceptible to different assessment and determination …*" (see [17], [40], and [48]).
- The assessment of a development application in accordance with section 54(3) (Copy of application to referral agency) of the Planning Act arises in circumstances where the development application provided to the assessment manager is the development application that would otherwise be required to be provided as a copy to the assessment manager as a referral agency to engage the referral agency's obligations prescribed in schedule 9 and schedule 10 (Development assessment) of the Planning Regulation (at [48]).
- The Council's submission that the development application was not properly made is misconceived, because section 54(3)(a) of the Planning Act operates to extend an assessment manager's functions and powers in respect of a development application to include those that would be had as a referral agency if the assessment manager is also a referral agency for the development application, and section 54(3)(b) of the Planning Act has the effect of dispensing with the required fee for the referral agency assessment (see [39] to [43]).

- Section 54(3) of the Planning Act operates so as to invoke the Council's functions and powers as a referral agency in respect of the Extension Component (at [49]).
- Section 60(4) of the Planning Act "*… is directed at the form in which the Council's decision, as assessment manger in respect of the approval of this application having regard to planning issues, was to be given*" (at [54]). Thus, "*… if the assessment was to be approved as far as any planning issues arose for assessment of the Council, the form of decision mandated by s 60(4) was approval of the entire application from a planning perspective, without qualification such as occurred here and any complication of the engagement of s 60(6)*" (at [54]).
- Subject to the issue in respect of the Appeal being brought out of time, the Appeal is not incompetent or liable to be struck out because the Appeal relates to part of the development application, being that part of the referral agency assessment of the Extension Component, and the Applicant has grounds for contending that the Council has not proceeded in accordance with section 54(3) and section 60(4) of the Planning Act (see [49], [56], and [60]). The Court relevantly made orders for the Applicant to file and serve an application in pending proceeding in respect of extending the appeal period for filing the notice of appeal for the Appeal.

Background

The Applicant lodged the development application with the Council, which relevantly proposed the demolition of an existing structure and extensions to an existing shed on the Subject Land. The Applicant lodged an amended development application form a month after its initial lodgement to include the answer "*yes*" in response to the question "*does this development application include any building work aspects that have any referral requirements?"*, and to include the "*Referral Checklist for Building Work*" which marked that a referral to the local government was required for "*design and siting*".

The Applicant and Council were involved in discussions about the appropriate fee to be paid to the Council in respect of the development application. The Applicant's position was that it was required to pay $1,195 for the assessment of the Demolition Component and $947 for the assessment of the siting variation for the Extension Component. The Council's position was that it was not the assessment manager for the Extension Component, and thus section 54(3) of the Planning Act did not apply. Accordingly, the Council required only the $1,195 fee to be paid.

The Council's decision notice for the development application issued an approval for "*Development Permit for Building Works assessable under the Planning Scheme – Removal or Demolition of Building from the site*", and relevantly included the Council's referral agency assessment response in relation to Table 7 of part 3, division 2 of schedule 9 of the Planning Regulation. The Council's notations on the plans of development relevantly stated that the Extension Component are "*not part of this approval*".

The Applicant requested a negotiated decision notice seeking the inclusion of the referral agency response for design and siting for the Extension Component, and to extend the currency period of the development approval from 12 months to 24 months. The Council gave a negotiated decision notice which extended the currency period.

The Appeal is in respect of the negotiated decision notice.

Legal principles for the interpretation of statutes and planning schemes

The Court in determining the issues in dispute had regard to the following relevant principles which apply to the construction of statutes and planning schemes (**Construction Principles**) (see [24], [52], *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* [2014] QCA 147; (2014) QPELR 686 at [52] to [58], and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69] to [78]):

- A relevant provision ought to be constructed "*… so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole' … the process of construction must always begin by examining the context of the provision that is being construed.*"
- "*A legislative instrument must be construed … to give effect to harmonious goals.*"
- "*[A] court construing a statutory provision must strive to give meaning to every word of the provision … no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.*"
- "*[T]he duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always …*"
- Regard may be had to explanatory notes for legislation "*… in order to inform the underlying purpose of a provision of a statute, and in that way, assist in the achievement of a purposive approach to statutory interpretation*".

Applicant may apply to extend time for bringing the appeal

Whilst the notice of appeal was served more than 20 business days after the Council's decision contrary to section 229(3)(g) of the Planning Act, it does not follow that the Appeal ought to be struck out or dismissed in circumstances where the Applicant may bring an application under section 37 (Discretion to deal with noncompliance) of the *Planning and Environment Court Act 2016* (Qld) to excuse the non-compliance and the strike out or dismissal of the Appeal would leave undetermined the substantive issue between the parties as to whether the development application was properly made and required the Council to assess the Extension Component (at [12]).

The Court ultimately heard from the parties as to appropriate orders in respect of the Council's application, and ordered that the Applicant file and serve an application in pending proceeding to extend the appeal period for filing the notice of appeal.

Development application was properly made

The Court considered the relevant provisions under the Planning Act in relation to development assessment, and relevantly held as follows:

- The legislative scheme contemplates that one development application may be made for multiple components of development, which are subject to different assessment and determination (at [17]).
- Section 54(3) of the Planning Act is engaged "*… if a person is the assessment manager for a development application …*", and the "*... usual requirement in respect of the fee for a referral agency, is separately provided for in s 54(1) and is not, unlike the provisions in s 51(1), made referable, by s 51(5) or otherwise, to the concept of a properly made development application*" (at [42]).
- "*[T]he Council's contentions as to the absence of a properly made application, including in the absence of the payment of the referral agency fee … are misconceived and beg the more fundamental questions as to whether s 54(3) and/or s 60(4) operated so as to require a decision of the Council in respect of its functions and powers as a referral agency for the proposed development*" (at [43]).

Planning Act contemplates referral agency response as part of development assessment

The Court described the issue to be decided in respect of the Council's application as follows (at [31]):

> *[T]he question is as to whether the appeal is appropriately brought in respect of the refusal of part of the development application which was made, having regard to the effect of section 60(6) and the antecedent question as to whether there was a development application which engaged any obligation to make that decision.*

The Court held that section 60(4) of the Planning Act, which relevantly states that "*The assessment manager must approve any part of the application for which, were that part of the application the subject of a separate development application, there would be a different assessment manager …*", is directed at the form of the decision of the Council as the assessment manager for the development application.

If the Council decided that the development application ought to be approved from a planning issues perspective, the form of the decision under section 60(4) was an approval of the development application from a planning perspective without qualification. This form of a decision would alleviate any complication about the engagement of section 60(6) of the Planning Act and is consistent with the legislative scheme under and the purpose of the relevant provisions of the Planning Act (see [54] to [55]).

The Court relevantly held as follows in respect of section 54 of the Planning Act:

- Section 54(3) of the Planning Act operates to avoid the duplication of a notification of a development application and abrogates the requirement for an additional fee, where a development application, which is otherwise made to the assessment manager, is that which is required to be provided as a copy to engage the obligations as a referral agency (at [48]).
- In respect of section 54(2) of the Planning Act, "*the obligation as to engagement as a referral agency for 'that type' of application, is to be determined by the discrimen contained in Schedules 9 and 10.*" (at [48]).
- Thus, the legislation contemplates a "*… coherent expectation of a single and complete exercise of power and obligation in respect of a development application, here including those of the Council, as engaged pursuant to s 54(3) in respect of that assessment to be undertaken as assessment manager and if s 54(3) was also engaged in relation to any referral agency function in respect of the building approval aspect, an expectation of inclusion of that determination, in order to properly inform the decision to be made by the private certifier.*" (at [49]).

The Court held that the Appeal is not incompetent or liable to be struck out and that the Applicant may contend that the Council has not proceeded in accordance with section 54(3) and section 60(4) of the Planning Act, in circumstances where the Council has under section 60(6) approved only part of the development application (see [56] and [60]).

Other observations of the Court

The Court also made the following observations in respect of the evidence and submissions before the Court:

- Evidence of examples of other approvals by the Council does not assist the Court "*… in determining the issues as to the correct interpretation and application of the relevant legislative provisions to this particular matter.*" (at [34]).
- That a response by the Council in respect of the Extension Component would not constitute an "*early referral response*" or engage section 57 (Response before application) of the Planning Act, "*… because as may be assumed by s 54(3) and was the case here, the application included the extension aspects of the proposed development and a further effect of s 54(3) is that the inclusion of that aspect in the development application, effectively serves as the giving of a copy of it to the referral agency, which would otherwise be required pursuant to s 54(1) and so that … the necessary building development approval, could be given.*" (see [40] and [47]).

Conclusion

The Court dismissed the Council's application on the basis that the Appeal is not incompetent or liable to be struck out, which did not have the effect of resolving the substantive Appeal, and permitted the parties to make further submissions as to the appropriate orders to be made.

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Redevelopment of Eagle Street Pier, Brisbane CBD

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Riverside Development Pty Ltd v Brisbane City Council & Ors* [2022] QPEC 53 heard before Williamson KC DCJ

February 2023

In brief

The case of *Riverside Development Pty Ltd v Brisbane City Council & Ors* [2022] QPEC 53 concerned an originating application by the landowner of Riparian Plaza (**Adjoining Owner**) to the Planning and Environment Court (**Court**) in respect of a development permit granted by the Brisbane City Council (**Council**) for a material change of use for a bar, hotel, and centre activities (**Approval**), which authorises the redevelopment of the Eagle Street Pier in Brisbane City.

The Adjoining Owner relevantly sought an order that the Approval be set aside, as well as the following declarations under section 11 of the *Planning and Environment Court Act 2016* (Qld) (**PECA**):

- A declaration that the development application was impact assessable.
- A declaration that the development application was not properly made.
- A declaration that changes made to the development application resulted in "*substantially different development*" and were not a "*minor change*".
- A declaration that the Approval is invalid.

The applicants for the Approval (**Applicants**) and the Council opposed the Adjoining Owner's originating application.

The Court dismissed the originating application, and relevantly held as follows:

- The Adjoining Owner did not establish that the category of assessment was impact assessable (at [178]).
- The Council's delegate (**Delegate**) was required by section 51(4)(a) of the *Planning Act 2016* (Qld) (**Planning Act**) to accept the development application because the Delegate was satisfied that the development application complied with section 51(1) to section 51(3) of the Planning Act (at [95]).
- The Delegate was permitted to accept the change to the development application without affecting the development assessment process because the Delegate was satisfied that the changes were in response to the information request from the Council and was thus not required to consider whether the change was a minor change, and further that the Court does not have the power to review the correctness of the Delegate's decision and replace it with its own because the proceeding is not a merits appeal (see [185] and rule 26.1(b) of the *Development Assessment Rules* (**DAR**)).
- Where a decision-maker is required under a statute to be "*satisfied*" of a particular matter, which "*… is a matter of opinion or policy or taste it may be very difficult to show that it has erred … or that the decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the Courts*" (at [186], which quotes *Buck v Bavone* [1976] HCA 24; (1998) 194 CLR 355 at [69] to [78] (***Buck* case**)).
- The establishment of legal unreasonableness involves "*a stringent test*", which is "*rarely established*"; does not involve a merits review; "*is not made out if the court disagrees with an evaluative decision or with the weight attributed to a factor taken into account in the decision*"; and "*the court's task [is] to examine the reasoning of the impugned decision to determine whether it was a decision that could be justified even though '… reasonable minds could reasonably differ' or whether the decision was so unreasonable that it lacked an evident and intelligible justification*" (at [190], which quotes *WB Rural Pty Ltd v Commissioner of State Revenue* [2017] QSC 141; (2018) 1 Qd R 526 at [64] and [65] (***WB Rural* case**)).
- There is no realistic possibility that a decision other than accepting the change to the development application could have been made based on the material before the Delegate. In any event, if the Delegate did not comply with the DAR in accepting the changes to the development application, the Court would excuse the non-compliance under section 37 of the PECA because the evidence did not suggest that the non-compliance had an adverse impact on the development assessment process and there would be no practical utility in requiring the development application to return to the confirmation stage (see [212] to [216]).

The Delegate had regard to the relevant overall outcomes in the *Brisbane City Plan 2014* (version 19) (**City Plan**) and assessed the development application against them (at [226]), and the Delegate's decision that the development application complied with all relevant assessment benchmarks was not legally unreasonable (see [315] and [321]).

Subject Land and proposed development

The Subject Land has a site area of 22,307m^2, with a primary frontage to Eagle Street, a secondary frontage to Mary Street and Felix Street, and a frontage of approximately 250 metres to the Brisbane River.

The Subject Land is included in the Principal Centre Zone and the River Precinct of the City Centre Neighbourhood Plan (**CCNP**) under the City Plan.

The development application was code assessable and was to be assessed against the relevant assessment benchmarks in the CCNP Code, Waterway Corridors Overlay Code, Bicycle Network Overlay Code, and Transport, Access, Parking and Servicing Code.

The development application relevantly proposed the following (at [8]):

- The demolition of existing buildings, the Riverwalk, pontoons, and in-river moorings.
- The reclamation of 1,800m^2 of a riverbed lease to facilitate the construction and expansion of an existing basement carpark.
- Two high rise premium grade office towers, each including basement carparking, a podium, and a public area.
- The construction of a new Riverwalk, approximately 274 metres in length.
- A shared access arrangement servicing the proposed development and Riparian Plaza.

The following change was made to the development application as part of the Applicants' response to an information request from the Council (**Information Request**) (at [18]):

- An increase of the towers and podium gross floor area, the total gross floor area for the project, and the building height.
- A reduction of the podium and setbacks to the eastern boundary, an increase in the setback to Eagle Street, changes to the setbacks from the Riverwalk, and an increase of the width of the Riverwalk.
- An increase in site cover from 44.5% to 48.8% and the area of landscaped open space from 56.5% to 68.1%, and a reduction in the tower site cover from 28.2% to 27.5%.
- An increase of the total number of carparking, visitor, motorcycle, and bicycle spaces.

The Council received 46 adverse submissions in respect of the development application, including some from the Adjoining Owner. The Delegate considered the adverse submissions in assessing the development application, but nevertheless under section 60(2) of the Planning Act granted the Approval on the basis that it complied with all of the relevant assessment benchmarks.

The Court held that, whilst the Delegate did not explicitly state the development complied with all of the relevant assessment benchmarks, it was evident by the "*Notice about decision assessment report*" prepared by the Delegate not including a statement of "*the reasons why the application was approved despite the development not complying with any of the benchmarks*" as required under section 63(5)(e) of the Planning Act and the statement that the Delegate was "*… satisfied the application accords with the requirements of the Planning Act 2016*" (at [40]).

Adjoining Owner's allegations

The Court relevantly considered the following allegations made by the Adjoining Owner (at [41]):

- *Adjoining Owner's consent* – The Council did not have jurisdiction to grant the Approval because the development application could not properly be made without the Adjoining Owner's consent.
- *Impact rather than code assessable* – The decision to grant the Approval was infected by jurisdictional error because the development application was impact assessable rather than code assessable.
- *Minor change not considered* – The Council did not have jurisdiction to grant the Approval based on the changed development application because the change was not in response to the Information Request and the Delegate did not consider whether the changes resulted in "*substantially different development*".
- *Relevant considerations* – The Delegate failed to take into account relevant considerations, including the overall outcomes of the relevant codes in the City Plan, non-compliances with the assessment benchmarks in the City Plan, and facts relating to easements. Thus, the decision to grant the Approval was unreasonable.
- *Decision made under wrong provision* – The decision to grant the Approval was infected by jurisdictional error because the decision was made under section 60(2)(a) of the Planning Act, rather than section 60(2)(b), which permits an assessment manager to approve a development application even if the development does not comply with some of the assessment benchmarks.

Development application was properly made

The Court held that the Adjoining Owner failed to demonstrate that the development application was not properly made for the following reasons (see [54] to [83] and [95]):

- The delegate was satisfied after the giving of a confirmation notice, but before the giving of the Information Request, that the Adjoining Owner's consent was not required for the development application, which from the time of satisfaction required the Delegate under section 51(4)(a) of the Planning Act to accept the development application, and by virtue of section 60(1) of the Planning Act enlivened the power to decide the development application.
- Whilst being satisfied about owner's consent after the giving of the confirmation notice did not comply with section 51 of the Planning Act, which relevantly states that an assessment manager must not accept a development application unless satisfied the application is in the approved form and is accompanied by relevant written consent of the owner, the non-compliance was not material for the following reasons and thus did not render the decision to grant the Approval invalid:
    - The Delegate formed and remained of the view that the Adjoining Owner's land was not required to form part of the development application.
    - The Approval does not authorise development on the Adjoining Owner's land or development that is inconsistent with an easement in favour of the Subject Land (**Easement AB**).
- The proposed development does not rely on Easement AB for access, and if it did, consent would only be required if the development was inconsistent with the terms of Easement AB.
- The Adjoining Owner's allegation that the driver of a service vehicle turning left from Creek Street into the Subject Land would be required to cut across the corner of Easement AB, or contrary to Queensland Road Rules straddle two lanes before turning into the Subject Land, was incorrect because in circumstances where it is not practicable to turn left from within the left lane, section 28(2) of the *Transport Operations (Road Use Management—Road Rules) Regulation 2009* (Qld) permits a service vehicle that meets the other requirements of section 28(2) to use the lane next to the left lane as well.
- The right to pass or repass over an easement is not lost because a vehicle exceeds the height of the volumetric easement.

Development application was code assessable

The Adjoining Owner did not establish that the development exceeds the building height or site cover stated in the CCNP (see [97] to [164]). Thus, the Court was satisfied that the development application was code assessable and the Delegate was correct to assess it on that basis (see [165] and [176]).

Delegate not required to decide whether the change was a minor change

A development assessment process is not required to stop because a change is made to a development application, if the assessment manager is satisfied that the change is a minor change under the Planning Act or if rule 26.1 of the DAR is satisfied in that the assessment manager is satisfied that the change "*only deals with a matter raised in a properly made submission for the application*", "*is in response to an information request for the application*", or "*is in response to further advice provided by an assessing authority about the application*" (see [183] and section 52(3) of the Planning Act).

The Delegate was satisfied that the change to the development application was in response to the Information Request, and was therefore not required to determine whether the change was a minor change under the Planning Act (at [184]).

The Court held that the submission by the Adjoining Owner that a change to a development application is in response to an information request only where the information request calls for the change or discussed the change or something akin to the change is too narrow of an approach, which is not called for by the Planning Act or the DAR (at [196]).

The Court held that the nature of qualitative objectives in and the number of design solutions to demonstrate compliance with the City Plan "*… needs to be borne in mind when considering whether a design change is responsive to an information request that calls for, in part, a re-design to demonstrate compliance with City Plan 2014*" (see [197] and [198]).

The Court was satisfied that the City Plan admitted of the prospect of more than one design solution to demonstrate compliance, and that it was open to the Delegate to accept the change to the development application as being in response to the Information Request (see [197], [199], [203], [205], [207], [209], and [210]).

In the event that the Delegate's decision to accept the change under rule 26.1(b) of the DAR was infected by legal error, the Court held that the decision is not invalid because "*… there is no realistic possibility that a different decision could have been made …*" and that the non-compliance, if any, "*represents a matter of form rather than substance*" (see [214] and [215]). The Court was also satisfied that if there was non-compliance by the Delegate with rule 26.1 of the DAR that the non-compliance was appropriate for excusal under section 37 of the PECA.

Relevant considerations were considered by the Delegate

A decision-maker will fall into error where it fails to have regard to a consideration that it was bound to take into account. The matters which a decision-maker is bound to take into account is to be determined by construing the statute conferring the decision-making power (see [89] and [218]).

The Court relevantly held as follows in respect of the Adjoining Owner's allegations that the Delegate failed to take into account relevant considerations:

- *Overall outcomes in the City Plan* – As a general proposition the Delegate was required to take into account compliance with overall outcomes in the City Plan, but "*… it does not follow [that] the delegate was bound to consider every overall outcome in every code prescribed for assessment of the development application*". For example, the failure to consider an overall outcome in the CCNP which relates to a precinct other than the River Precinct, in which the Subject Land is located, is not likely to be material. The evidence before the Court demonstrated that the Delegate considered compliance with the relevant overall outcomes in the applicable codes in the City Plan (see [223] to [226]).
- *Easement AB* – The Delegate considered and therefore did not fail to take into account relevant matters in respect of Easement AB (at [92]). The Queensland Road Rules were not a mandatory consideration for the Delegate because the considerations are not expressly identified in the Planning Act and there is little, if any, thing about the scope, subject matter, and purpose of the Planning Act which suggests that the Queensland Road Rules are a mandatory consideration as distinct from a consideration that may be taken into account by an assessment manager (at [91]).

The Adjoining Owner sought to have excluded from the proceeding evidence of the Delegate in respect of the Delegate's consideration of the relevant considerations. The Court held that "*… whilst a decision-maker is ordinarily bound by and confined to the reasons given for a decision, there are exceptions to this principle. Further evidence is admissible where its purpose is to elaborate on matters before the decision-maker and provide elucidation, rather than fundamental alteration or contradiction of the decision*", which is what the Delegate's evidence did (at [234]).

The Court held that the assessment carried out by the Delegate was "*entirely orthodox and practical*".

Delegate's findings of compliance with the assessment benchmarks was not legally unreasonable

The Court held that the language of the provisions in the City Plan are performance-based, and "*… provide a degree of elasticity, or flexibility, for the decision-maker to arrive at a finding of compliance*" (at [246]).

The Court considered the test for legal unreasonableness on the basis of the principles established in the *Buck* case and *WB Rural* case, and the Delegate's decision in respect of each relevant overall outcome and performance outcome of each relevant code. The Court held that the Adjoining Owner failed to establish that the Delegate's findings were unjustifiable or lacking an evident or intelligible basis and thus were not legally unreasonable (see [253], [257], [260], [265] to [266], [274] to [277], [280] to [282], [285], [287], [290] to [294], [297], [301] to [303], [306], [313], and [315]).

Delegate's decision to grant the Approval was rightly made under section 60(2)(a) of the Planning Act

The Delegate was authorised to make a decision to grant the Approval under section 60(2)(a) of the Planning Act on the basis that the Delegate was satisfied that the proposed development complied with all the relevant assessment benchmarks. Section 60(2)(b) of the Planning Act was therefore not enlivened (see [319] to [322]).

Conclusion

The Court held that the Adjoining Owner did not demonstrate that it is entitled to the relief sought and dismissed the originating application.

Colin Biggers & Paisley

Planning and Environment Court of Queensland gives decisive weight to the ecological provisions of a later planning scheme and refuses a development application for reconfiguring a lot

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Roseingrave & Anor v Brisbane City Council & Anor (No. 2)* [2022] QPEC 43 heard before Rackemann DCJ

February 2023

In brief

The case of *Roseingrave & Anor v Brisbane City Council & Anor (No. 2)* [2022] QPEC 43 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against a decision of the Brisbane City Council (**Council**) to refuse an impact assessable development application for a development permit for reconfiguring a lot (one lot into five lots) (**Proposed Development**) on land located at 155 Old Northern Road, Everton Park (**Site**).

The planning scheme in effect at the time the development application was properly made was the *Brisbane City Plan 2014* (version 9) (**Earlier Planning Scheme**) and the planning scheme in effect at the time the development application was decided was the *Brisbane City Plan* (version 17) (**Later Planning Scheme**).

The substantive issues in the appeal were whether the Proposed Development would result in unacceptable impacts, in particular, the following:

- Traffic impacts arising from an inadequate sight distance associated with the proposed new access to Old Northern Road.
- Risks from a bushfire hazard.
- Ecological impacts.

The Court's decision turned on the question of what weight ought to be given to the Later Planning Scheme. The Court found that the Proposed Development would not result in unacceptable traffic impacts or a bushfire hazard, but that the ecological impacts would be unacceptable having regard to the provisions in the Later Planning Scheme. The Court gave decisive weight to the provisions in the Later Planning Scheme about ecological impacts, and dismissed the appeal and upheld the Council's decision to refuse the development application.

Court finds that new access satisfies sight distance standards

The Proposed Development involves the creation of a new access to Old Northern Road, which is a State-controlled arterial road. The evidence of the traffic engineers was that access to a road of this type is generally not desirable from a traffic engineering perspective. However, the Court accepted that it could be considered in this instance due to factors including the substandard nature of the existing access, the absence of a lower-order road alternative, and the plausibility of a northern access eventually becoming available to the Site (at [14]).

The Court considered the sight distances provided by the Australian Standard for Off-Street Car Parking (AS2890) for the speed environment of the proposed access, that is 97 metres for the desirable five-second gap and 85 meters for the stopping sight distance (at [26]). The Proposed Development satisfies the stopping sight distance but falls short of the desired five-second gap. However, the Court was satisfied that the Proposed Development achieves the desirable five-second gap when the actual value of the speed environment is interpolated in place of the rounded value (see [27] to [28]).

Court finds that the risk of bushfire hazard does not justify refusal of the development application

The Applicants argued that the risk of a bushfire hazard in respect of the Site is low, whereas the Council argued that it is at the low end of medium. The variance in the parties' assessment of the risk of a bushfire hazard was primarily as a result of the Council's assessment assuming the revegetation of all land included within the Biodiversity Areas Overlay or Waterway Corridors Overlay under the Later Planning Scheme, in accordance with section 6 of the Later Planning Scheme's Bushfire Planning Scheme Policy.

The Court found that the Council's assessment of the risk of a bushfire hazard "*… represents the most conservative possible approach to the application of the policy*" (at [48]), and did not give it decisive weight. The Court concluded that the assessment benchmarks relating to the risk of bushfire hazard would not cause the Court to refuse the development application (at [49]).

Court finds ecological impacts are unacceptable having regard to the Later Planning Scheme

The Proposed Development involves significant vegetation clearing, including clearing 75% of the Site's existing trees, as well as some retention, compensatory planting, and rehabilitation. The Site is affected by the High Environmental Significance (**HES**) sub-category designation on the Biodiversity Areas Overlay (**HES Designation**) in both the Earlier Planning Scheme and the Later Planning Scheme.

Under the Earlier Planning Scheme, only a small part of the Site is affected by the HES Designation and the Council conceded that the Proposed Development complies with the Biodiversity Areas Overlay Code in the Earlier Planning Scheme.

The Later Planning Scheme incorporated major amendments which changed the biodiversity-related provisions and mapping (**Amendments**) and relevantly resulted in a much larger portion of the Site being affected by the HES Designation and parts of the Site being affected by the HES Strategic sub-category designation.

The Court accepted evidence from the Council that under the Later Planning Scheme the vegetation on the Site has a high ecological value because it forms part of a greenspace network and a stepping stone corridor, and is likely to be used by threatened and locally significant fauna (at [81]).

The Court assessed what weight the Later Planning Scheme ought to be given in the circumstances and found that it ought to be given decisive weight for the following reasons (see [103] to [113]):

- The Amendments went through public consultation before the development application was made and the development application was therefore made in full knowledge of the proposed Amendments.
- Due to an extended decision-making period, the Amendments came into force before the development application was decided.
- The Amendments had been in effect for almost three years.
- The ecological evidence demonstrated that the Later Planning Scheme reflected the ecological value of the Site better than the Earlier Planning Scheme.

The Court found that the clearing associated with the Proposed Development would have a significant undue adverse impact and that "*[t]o permit that to occur on the basis of mapping that does not reflect the true value of the vegetation without giving weight, indeed decisive weight, to the mapping that superseded it almost three years ago and which better reflects those values, would produce a poor and indeed … an unacceptable planning and ecological outcome*" (at [112]).

Accordingly, the Court gave decisive weight to the relevant provisions of the Later Planning Scheme and found that the ecological impacts render the Proposed Development unacceptable.

Conclusion

The Court found that the Applicants did not discharge their onus and dismissed the appeal.

Colin Biggers & Paisley

Planning and Environment Court of Queensland approves a high-rise multiple dwelling building on the Gold Coast

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *DVB Projects Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 40 heard before Kefford DCJ

February 2023

In brief

The case of *DVB Projects Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 40 concerned an appeal to the Planning and Environment Court of Queensland against the refusal by the Council of the City of Gold Coast (**Council**) of a development application made by DVB Projects Pty Ltd (**Applicant**) for a development permit for a material change of use for a multiple dwelling being 35 apartments in a 26-storey building (**Proposed Development**), on land on the corner of Broadbeach Boulevard, First Avenue, and Old Burleigh Road at Broadbeach (**Land**).

Relevantly, a development permit had previously been granted on 18 March 2019 for a material change of use for a nine-storey multiple dwelling building on the Land.

The Land is in the High Density Residential Zone under the *Gold Coast City Plan 2016* (Version 8) (**City Plan**). The area around the Land is of a changing built form consisting of low, high, and medium-rise multiple dwellings (**Subject Area**).

At the time of the hearing of the appeal, the Council opposed the Proposed Development on the grounds that it does not comply with the assessment benchmarks relevant to amenity impacts and built design.

The Court restated the principle from the case of *Smout v Brisbane City Council* [2019] QPEC 10; (2019) QPELR 684 at [54] that not every non-compliance will warrant refusal, and held that the amenity impacts and design of the Proposed Development satisfy all relevant assessment benchmarks of the City Plan and allowed the appeal.

Court finds that the amenity impact of the Proposed Development is acceptable

The Council argued that the Proposed Development will have an unacceptable impact on the amenity of residents in the Subject Area because of its bulk, overbearing design and no meaningful setback or varying site cover (at [42]). The Council argued that the amenity impact is materially inconsistent with the overall outcomes in section 6.2.3.2(2)(b)(vii), (d)(ii), and (d)(iv) and performance outcomes PO1(a) and PO2(b) of the High Density Residential Zone Code (**Zone Code**), and the overall outcomes in sections 9.3.10.2(2)(a), (c), and (e) and performance outcome PO5 from the High-rise Accommodation Design Code (**Design Code**) (at [43]).

The Court therefore had to determine the following (at [53]):

- Whether the form of the Proposed Development unreasonably impacts the amenity of the adjoining Subject Area and has sufficient setbacks.
- Whether the setbacks protect residential amenity in the Subject Area.
- Whether the Proposed Development incorporates varying site cover sufficient to reduce the building's dominance and provide areas for landscaping.

Court finds that the Proposed Development will not unreasonably impact the residential amenity of neighbouring residents and has sufficient setbacks

The Council argued that amenity impacts would be occasioned by a loss of privacy, noise, and outlook, by the bulk of the Proposed Development, and that the Proposed Development is unacceptably overbearing (at [74]). The Court heard evidence on these issues from the parties' architecture experts and visual amenity experts, but preferred the Applicant's expert's evidence over the Council's expert's evidence.

The Court heard from the remaining experts who were in some agreeance and held that the Proposed Development does not unreasonably impact the residential amenity in the Subject Area for the following reasons:

- The setbacks satisfy a level of privacy consistent with acceptable outcome AO1 of the Zone Code and that "*[a] degree of overlooking is to be expected in an area zoned for high rise buildings*" (at [66]).
- The outlook from neighbouring residents in the Subject Area will not be unacceptably impacted since the view would have been similarly obstructed from the approved nine-storey development (see [68], [69], and [73]).
- The Court preferred the evidence of the Applicant's architecture and visual amenity expert who opined that the Proposed Development "*… strikes an appropriate balance between the protection of the privacy of the adjoining residents and the articulation of the appearance of the building*" (at [80]) since the description was more consistent with the visual impact of the fluted wall panels, fenestration, and recessed corner balconies (see [86] and [89]).

Court finds that the setbacks protect residential amenity

The Applicant conceded that the Proposed Development exceeds the acceptable boundary setbacks prescribed in the acceptable outcomes of the Zone Code. The Court held that for the same design reasons in respect of the issue of amenity, the built form of the Proposed Development is "*setback from side and rear boundaries to protect the amenity of adjoining users*" (see OO6.2.3.2(2)(d)(i) of the Zone Code and [94]) and the setbacks "*… assist in the protection of adjacent amenity*" (see PO1(a) of the Zone Code and [94]). Thus, the Proposed Development achieved compliance with the Zone Code.

Court finds that the Proposed Development has varying site cover

The Council argued that the Proposed Development is inconsistent with overall outcome OO6.2.3.2(2)(d)(iv) of the Zone Code, which states that "*[the built form] has varying site cover to reduce building dominance and provide areas for landscaping*". The Council argued "*… that the requirement for 'varying site cover' should be construed as a requirement for variations in floorplate area between differing levels of development, with the floorplate areas decreasing in area with increasing height, to achieve the outcomes of reduced building dominance, and to provide areas for landscaping*" (at [103]).

The Court agreed in part with the Council's interpretation, but held that the context of overall outcome OO6.2.3.2(2)(d)(iv) does not "*… import a requirement for a reduction in floorplate area with increasing height*" (at [106]). The Court held that complying with overall outcome OO6.2.3.2(2)(d)(iv) does not require a reduction in the floorplates at the higher levels. The Court considered the following evidence of the parties' visual amenity experts and found as follows:

- The Council's visual amenity expert opined that a variation in 21.3% of site cover across the Proposed Development is not meaningful having regard to the acceptable outcomes (see [107] and [109]). The Court agreed that the variations are not significant, but held that "*… they are sufficient to appropriately reduce the building's dominance in its context …*" because of the design features of the Proposed Development (at [117]). The Court agreed with the expert's concession that the landscaping will assist to provide a human scale to the Proposed Development (at [115]).
- The Applicant's visual amenity expert opined that the evidence from the plans and schematic landscape design demonstrates that the landscaping, setting, and design satisfy the requirements of overall outcome OO6.2.3.2(2)(d)(iv) and performance outcome PO2(a) of the Zone Code (at [113]). The Court agreed and held that "*[h]aving regard to the photos (including those from Bedarra), the plans (including the elevations and sections), the schematic landscape design, the visual representations, [and] the photomontages*", the Proposed Development has varying site cover (see [116] and [117]).

Court finds that the Proposed Development has an appropriate design

The Council argued that the inappropriate design of the Proposed Development results in an "*… unduly bulky and monolithic built form that is inconsistent with the intended built form in the locality*" and "*… an adverse impact on the street's character*" (at [121]). The Council relied on assessment benchmarks in the Zone Code, Design Code, and Light Rail Urban Renewal Area Overlay Code (**Overlay Code**).

These assessment benchmarks relevantly gave rise to the following issues to be determined by the Court (at [131]):

- Whether the Proposed Development has a clearly defined tower and podium form and appropriately interface with the street.
- Whether the Proposed Development has a slender bulk form and promotes an open skyline.

Court finds that the Proposed Development has a defined form and appropriate street interface

The Council argued that the built form of the tower and podium is not "*orthodox and effective*" and does not satisfy the overall outcome in section 8.2.12.2(3)(e)(i)(B) of the Overlay Code and other assessment benchmarks of the Zone Code and Design Code (see [145] and [146]).

The terms "*podium*" and "*tower*" are not relevantly defined in the City Plan. The Court accepted the Council's argument that the purpose of a podium under the City Plan is to (at [158]):

> *(a) provide a space that interfaces and interacts with the street by providing an opportunity for passive surveillance of the street and for engagement with street life; and*
>
> *(b) complement the size and scale of existing lower-rise buildings in the locality.*

The Court held that applying this purpose, the podium is not required to be "*orthodox and effective*", but rather it is encouraged by section 8.2.12.2(3)(e)(iii) of the Overlay Code to be "*innovative*" (at [159]). The Court held as a matter of fact that the Proposed Development has a defined tower and podium built form with an appropriate street interface (at [171]) for the following reasons:

- The Court accepted the evidence of the Applicant's architecture expert who opined that the transitional height of the tower and podium results in a cohesive landscape and is an innovative visual aesthetic that promotes street interface (see [165] and [166]).
- The Proposed Development interfaces with the street and "*… does not dominate the streetscape or the character of the local area*", and there is a clear definition between the podium and tower as required by the City Plan (at [167]).
- The Court rejected the evidence from the Council's town planning expert as it was founded on the incorrect evidence of the Council's architecture expert (see [167] to [170]).

Court finds that the Proposed Development has a slender bulk form and promotes an open skyline

The Council argued that the Proposed Development does not exhibit a slender bulk form (at [172]). The Court found that the City Plan "*… calls for a value judgment about whether the proposed development, considered in its three-dimensional form, could properly be regarded as a slender tower and whether the site cover promotes a slender bulk form*" (at [177]).

The Council's visual amenity expert opined that the Proposed Development sought to take advantage of the height designations, high sight cover, and minimal setbacks, which resulted in "*… a particularly long, high-rise building that extends across most of the subject land with little variation in site cover*" (at [195]).The Applicant's architecture expert opined that the Proposed Development "*… will have a slender tower form that will be innovative, attractive and visually appealing and will advance and enhance views of the Gold Coast's iconic skyline*" based on the plans, elevations, perspective views, and photomontages (see [181] to [191]).

The Court preferred the evidence of the Applicant's architecture expert finding that the Council's expert "*… placed too heavy an emphasis on the built form metrics and gave little weight to the appearance of the proposed development in its context*" (at [200]). The Court held that the Proposed Development is a slender tower, and promotes slender bulk from in its site cover that enhances the skyline (see [200] and [206]). For the same reasons, the Court also held that the Proposed Development "*… will have no unacceptable visual or physical impacts*" and complies with all of the relevant assessment benchmarks (see [210] and [211]).

Conclusion

The Court allowed the appeal and approved the development application subject to reasonable and relevant conditions.

Planning and Environment Court of Queensland upholds a building envelope condition but strikes down a condition prohibiting additional vegetation clearing

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Trask and Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council (No. 2)* [2021] QPEC 7 heard before Kefford DCJ

February 2023

In brief

The case of *Trask and Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council (No. 2)* [2021] QPEC 7 concerned two appeals to the Planning and Environment Court of Queensland (**Court**) that were heard together, each in respect of development conditions imposed by the Moreton Bay Regional Council (**Council**) on a development permit for a material change of use (dwelling house) and a preliminary approval for building work in respect of a partly cleared lot in Rothwell (**Proposed Development**).

The following two development conditions were the subject of the appeals:

- Condition 1, which required the dwelling house and its ancillary structures to be located within a specified building envelope (**Condition 1**).
- Condition 3b, which prohibited vegetation clearing beyond what is required to implement an approved bushfire management plan (**Condition 3b**).

The Court assessed the development conditions against the "relevant or reasonable" test in section 65(1) of the *Planning Act 2016* (Qld) (**Planning Act**) which states as follows:

> *A development condition imposed on a development approval must—*
>
> *(a) be relevant to, but not 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 use of premises as a consequence of the development.*

The Court found that Condition 1 is reasonable and relevant for the purposes of the Planning Act and is necessary to secure compliance with the *Moreton Bay Regional Council Planning Scheme 2016* (Version 6) (**Planning Scheme**), but that Condition 3b is unlawful.

Court finds that the development condition requiring the Proposed Development to be built within a building envelope will not result in an unacceptable outcome

The Appellant proposed to build each dwelling house in a location which would require vegetation clearing. Condition 1, however, moved the building envelope so that no vegetation clearing would be required.

The Appellant argued that the alternative location stipulated by Condition 1 would give rise to additional costs and engineering difficulties because of the driveway gradient. The Court did not accept that the location of the building envelope in accordance with Condition 1 would result in an unacceptable outcome. Rather, the Court found that each residential lot will present its own design and construction hurdles and it is ultimately a matter for the owner or builder as to the engineering solution for the driveway that is adopted (at [75]).

Further, whilst the Court was not persuaded that Condition 1 would result in materially different engineering costs it found that to the extent there was a difference, the additional cost was not an unreasonable imposition given the significant ecological considerations affecting the Proposed Development (at [88]).

Court finds that the development condition reducing vegetation clearing is necessary to achieve compliance with the Planning Scheme

Both of the subject lots are identified as having biodiversity values of State significance on Overlay Map 1 and are subject to the Natural Features or Resources Overlay Code (**Overlay Code**) in the Planning Scheme. The evidence established that each lot contains high conservation value regional ecosystem associated with core threatened species habitat for koala. The Court accepted that the ecological values present on each lot align with the values prescribed by the Planning Scheme (at [99]).

Although the Appellant accepted that the proposed location of each house would result in the removal of valued vegetation, it argued that this would not result in significant additional impacts. The Court preferred the Council's evidence that the clearing of vegetation would result in a significant loss as it would remove the home range of an endangered species. The Court therefore found that the construction of each house in the location proposed by the Appellant would result in an unacceptable ecological impact and a non-compliance with the Overlay Code, which would warrant refusal of the proposed development absent Condition 1 (at [113]).

Court finds that vegetation clearing will only be exempt clearing work to the extent that it is necessary for essential management

The Council argued that Condition 3b is reasonable and relevant on the basis that without the condition vegetation clearing could be undertaken "*as of right*" as clearing for "*essential management*" up to 35 metres from the edge of a building or other structure, rather than the 12-metre wide zone that the bushfire experts said is the extent of necessary clearing (at [139]).

The Court considered what constitutes clearing for "*essential management*" and held that not all such clearing is accepted development as "*exempt clearing work*" under the *Planning Regulation 2017* (Qld), and is only accepted development where it is "*clearing vegetation that is necessary for essential management*" (at [140]). The Court held that the extent of clearing that is "*necessary*" is a question of fact to be determined by reference to the particular circumstances of the case (at [141]).

In this case, the Court accepted the evidence of the bushfire experts that a bushfire hazard protection zone with a width of 12 metres is the extent of clearing that is "*necessary*" for essential management (at [141]).

Therefore, the Court found that Condition 3b is not relevant to the Proposed Development, nor reasonably required in relation to the Proposed Development, and is therefore not a lawful condition under section 65 of the Planning Act (see [142] to [145]).

Court finds that it is necessary to impose two additional conditions concerning bushfire management and site rehabilitation

The Court found that additional conditions concerning bushfire management and site rehabilitation ought to be imposed on the Proposed Development.

The Court therefore ordered the addition of Condition 2, which incorporates recommendations from the Joint Expert Report of the Bushfire Experts to achieve compliance with Specific Outcome SO9 of the Reconfiguration of a Lot Code in the Planning Scheme.

The Court found that regardless of the location of the building envelope, the commencement of the use of the subject land brings the "*… potential for changes that could adversely impact the ecological values of the subject land, such as changes associated with construction of the houses and landscaping*" (at [118]). As a result, the Court ordered the addition of Condition 4, which requires the submission of a site rehabilitation plan prepared by a suitably qualified person for approval by the Council (**Rehabilitation Plan**) and the implementation of the Rehabilitation Plan. Condition 4 also requires that the Rehabilitation Plan include the recommendations of the ecological expert engaged by the Appellant (at [119]).

Conclusion

The Court allowed the appeals and remitted the development applications to the Council with directions, including the removal of Condition 3b and the addition of the two new conditions concerning bushfire management and site rehabilitation.

Use of excessive security cameras on easements in New South Wales

Annie Dong | Todd Neal

This article discusses the decision of the Supreme Court of New South Wales in the matter of *Au v Berlach* [2022] NSWSC 81 heard before Kunc J

February 2023

In brief

The case of *Au v Berlach* [2022] NSWSC 81 concerned proceedings in the Supreme Court of New South Wales (**Court**) by the Plaintiff who sought declarations and injunctions against the Defendants to limit the Defendants' use of an easement over the Plaintiff's property in the Central Coast. By cross-summons, the Defendants sought orders to stop the Plaintiff from interfering with the Defendants' rights under the easement, which included orders requiring the Plaintiff to remove certain signage, closed circuit television (**CCTV**) cameras, fencing, and other items from the land the subject of the easement.

The following issues were considered by the Court:

- As a matter of construction, what is the extent of the Defendants' express and ancillary implied rights under the easement?
- Could any of the declarations and injunctions sought by the Plaintiff be granted?
- Could any of the remedies sought by the Defendants be granted?

Whilst the easement did grant the Plaintiff some rights as the owner of the servient tenement, the Court found that it should be construed to give the Defendants the benefit of the widest possible rights, particularly because it was the sole means of access to the Defendants' property from the public road.

The Court declined to make any of the declarations and injunctions sought by the Plaintiff, as the orders "*[did] not reflect the relatively well settled rights and obligations … under the easement*" (at [6]).

The Court granted relief to the Defendants in relation to some of the specific matters raised during the proceedings, including orders requiring the Plaintiff to remove signage and CCTV cameras that are not reasonably required for the identification of the Plaintiff's property and security purposes, permitting the Defendants to erect a sign indicating the location of the Defendants' property, and restricting the Plaintiff's interference with a sign erected by the Defendants, and an injunction requiring the Plaintiff to at the Plaintiff's expense remove the fence on the eastern side of the easement and other items on or near the easement.

The Plaintiff was also ordered to pay the Defendants' costs of the proceedings.

Background

The parties' properties were created as a result of a Torrens subdivision. The subject easement was registered on both titles and its section 88B *Conveyancing Act 1919* (NSW) instrument (**Section 88B Instrument**) contained the following terms [our underlining]:

> *Right of way shown on the plan being 3.575 metres wide so shown on the plan and following the western boundary of [the Plaintiff's property] as shown on the abovementioned plan being a right of way or use or passage at all times and for all purposes for the benefit of the proprietor for the time being of [the Defendants' property], his heirs, executors, administrators and assigns and their servants, aides and workmen with or without vehicles or animals and is hereby declared that the said reserved right of way is appurtenant to the lot described as [the Defendants' property].*

The Defendants' property is located at the rear of the Plaintiff's property. But for the easement which provides a lawful means of access, the Defendants' property would be completely landlocked (at [3]).

The dispute arose as a result of different views about the breadth of the rights conferred by the easement, and concerns regarding an alleged excessive use by the Defendants of a leaf blower for easement maintenance.

The Plaintiff relevantly sought declarations and injunctions in the following terms in respect of the Defendants' use of the easement:

- *First Declaration* – "*The boundaries of the Easement cannot lawfully be crossed by the defendants and their associates and agents. Any pruning of foliage on the property is only legal if done precisely within the boundaries and only if reasonably required for use of the Easement as a right of way*" (see [59]).

- *Second Declaration* – "*The defendants have no right to enter the Easement to perform routine maintenance on the driveway*" (see [70]).
- *Third Declaration* – "*The defendants (personally) are not entitled under the terms of the Easement to operate leaf blowers on the Easement or perform any pruning of plants. Except that they may pay a professional gardener to blow leaves, trim vegetation strictly within the Easement only, up to twice per week*" (see [71]).
- *Fourth Declaration* – "*Parking or stopping vehicles on the Easement is not a legal use of the Easement except at the end near the boundary of the [Defendants' property] when it is not practical for a heavy vehicle to drive across the bridge*" (see [83]).
- *First Injunction* – "*The defendants must never, for any reason, breach the boundaries of the Easement and must never interfere with the plants, animals or anything else on the [Plaintiff's] property*" (see [91]).
- *Second Injunction* – "*The defendants personally, must not, [sic] operate leaf blowers on the [Plaintiff's] property*" (see [91]).

The cross-summons by the Defendants relevantly sought the following (see [16]):

- *Injunctions* – An injunction restraining the Plaintiff from interfering with the easement and the Defendants' use and enjoyment of the easement and an injunction restraining the use of CCTV cameras and other surveillance to monitor the Defendants' use of the easement.
- *Orders* – Orders requiring the Plaintiff to remove items from the easement.

Court finds that the terms of the easement should be construed in the widest possible terms in favour of the Defendants

When interpreting easements, a Court is to refer to the material in the folio identifiers, the registered instrument, the deposited plans, and the physical features of the tenements. If these sources clearly describe the easement, then there is no basis for reading down the clear and unqualified words of the easement (see [42] to [43], *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45; (2007) 233 CLR 528 (***Westfield Management* case**), and *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 (***Sertari* case**)).

The Court found that in this case it was not necessary to have recourse to other material beyond the mere words of the Section 88B Instrument itself, which conferred a right of "*way*", "*use*", and "*passage*", "*at all times*" and "*for all purposes*" for the benefit of the Defendants as the proprietor of the dominant tenement (at [52]). The Court observed the importance of the easement as the only lawful means of access to the Defendants' property (at [53]).

The Court in interpreting the broad expression "*for all purposes*" made reference to the High Court decision in the *Westfield Management* case, which at [30] interpreted the expression as encompassing "*all ends sought to be achieved by those utilising the Easement in accordance with its terms*". This interpretation emphasises that the broader the wording of an easement, the greater the burden upon the proprietary rights of the servient tenement owner.

Court refuses to grant the declarations and injunctions sought by the Plaintiff

First Declaration and Second Declaration

The Court found that the First Declaration and Second Declaration sought by the Plaintiff were contrary to the principle that the ancillary right of the dominant tenement owner to maintain and repair an easement includes a right to enter the servient tenement owner's land for this purpose, but only to do the necessary work in a reasonable manner (see [60], *Hare v van Brugge* [2013] NSWCA 74; (2013) 84 NSWLR 41 (***Hare* case**) and *Jones v Pritchard* [1908] 1 Ch 630). The Court held that the ancillary right extends to allowing the Defendants to, for example, enter the Plaintiff's property to use a chainsaw and cut a fallen tree leaning over the easement, but only as necessary to maintain the easement.

The Court observed that the right operates in tandem with the common law right to abate a nuisance, however, is broader than the common law right which only permits the cutting of overhangs from within the encroached property in the absence of consent from the neighbour to enter their land (see [61] to [62]).

The Court found that based on the ordinary experience of pruning gardens, good pruning practice sometimes requires particular plants to be pruned at particular points, and may also be required as a matter of safety. The Court held that in this case it may involve pruning some plants a few centimetres into the Plaintiff's property, such that it would not be practical nor feasible to insist on "*laser-like precision*" for pruning to only occur within the boundaries of the easement (at [68]).

The Court also found that the Plaintiff's purported exercise of rights under the easement amounted to an "*entirely unreasonable interference*" with the Defendants' enjoyment of their ancillary right to maintain the easement (at [68]). This is contrary to the "*reasonable user*" principle, which applies to both the dominant tenement and servient tenement owners and requires that they both exercise a degree of restraint in relation to an easement site. Neither the dominant tenement and servient tenement owners may exercise their rights in a way which unreasonably interferes with the enjoyment of the other's rights (see [46] and [24] to [26] of the *Hare* case).

Third Declaration

The use of a leaf blower, by whom, for what, and how frequently a leaf blower should be used, depends on the express terms of the easement and any ancillary rights they attach (at [75]).

Whilst the Court noted that there are no express terms about the use of a leaf blower in the Section 88B Instrument, the breadth of the express term "*use*" encompasses an entitlement for the Defendants to keep the easement visually appealing and well-kept because it is effectively the Defendants' front driveway. Therefore, the Defendants are entitled to keep the easement free of leaves and may do so more than once a day if necessary (at [82]). The Court interestingly cautioned that if there are only a small number of leaves, it might be prudent for the Defendants to remove them with a broom rather than a leaf blower (at [83]).

The Court refused to grant the Third Declaration and found that as a general proposition, the Defendants are entitled to use a leaf blower on the easement land personally or by an agent, such as a gardener, as an incident of the ancillary right to repair and maintain the easement (at [78]).

Any use of a leaf blower must occur within permissible hours (7 am to 8 pm on weekdays and 8 am to 8 pm on weekends) in order to comply with regulation 51 of the *Protection of the Environment Operations (Noise Control) Regulation 2017* (NSW).

Fourth Declaration

The Court refused to make the Fourth Declaration as the Defendants' rights under the easement extend to permitting visitors to leave their vehicle unattended for the duration of their visit to the north of the Plaintiff's garage, because to do so would not unreasonably interfere with the Plaintiff's rights with respect to the Plaintiff's property (at [89]).

With respect to stopping vehicles, the Court found that gardeners periodically stopping their vehicle and moving their utility down the easement in stages to clear vegetation would not be an unreasonable interference with the Plaintiff's rights provided that the vehicle could be moved upon request for anyone wishing to enter or leave the Plaintiff's property to do so (at [90]). Since the easement is a single lane, any vehicle using the easement at the Defendants' request is required to drive onto the Defendants' property to turn around or reverse back up the easement as it would amount to the tort of trespass if the vehicle went off the easement onto the Plaintiff's property to effect a manoeuvre.

First Injunction and Second Injunction

The First Injunction and Second Injunction were sought to give effect to the declarations sought by the Plaintiff. Accordingly, the Court refused to grant the First Injunction and Second Injunction for the same reasons it refused to grant each declaration (at [92]).

Court grants orders requiring the Plaintiff to remove misleading signs erected along the easement

The Defendants contended that the Plaintiff had set up multiple signs visible at the entrance of the easement where it met the main road which referred to the Plaintiff's street address number, and which had the effect of confusing people and dissuading people from entering the easement.

The Court accepted the Defendants' submission that the owner of a servient tenement cannot engage in conduct which has the effect of preventing or dissuading people from using an easement for its intended purpose (at [100]). Whilst the Plaintiff was entitled to erect a sign which identified the Plaintiff's street address number, it is impermissible if the identification is done in a way which interferes unreasonably with the enjoyment of the Defendants' rights under the easement.

Whether there has been an unreasonable interference with the Defendants' rights was to be determined from the objective effect of the Plaintiff's erection of the signs, and thus the Plaintiff's subjective intention to put up the signs to stop people from coming to the Plaintiff's property to ask how to get to the Defendants' property was irrelevant (at [103]).

The mere fact that the signage confused people and had the effect of dissuading people from entering the easement amounted to a breach of the obligation not to do anything which unnecessarily interfered with the Defendants' enjoyment of their rights.

The Court ultimately ordered for the Plaintiff to remove all relevant signage except for two signs at the entrance of the easement and to not interfere with a sign erected by the Defendants in the exercise of their ancillary rights to improve an easement to facilitate their rights under the easement (see [105] to [108], see also the *Westfield Management* case and *Sertari* case).

Court grants orders requiring the Plaintiff to remove CCTV cameras, which amounted to nuisance

The Court found that the Plaintiff's installation of four posts containing a total of 17 CCTV security cameras along the eastern side of the easement with a sign which stated "*Smile - you're being recorded*" caused personal distress to the Defendants and amounted to both a "*substantial interference*" with the Defendants' proprietary rights under the easement, as well as giving rise to a personal claim in nuisance because the extent of the surveillance demonstrated an intention by the Plaintiff to "*snoop*" on the Defendants' activities on the easement, as evidenced by the Plaintiff spending "*hours and hours*" reviewing the footage (at [117], see also *Raciti v Hughes* (1995) 7 BPR 14 (***Raciti* case**) at 837).

The *Raciti* case concerned a dispute between neighbours involving the installation of floodlights and camera surveillance to illuminate and record activities in a neighbour's backyard. The Plaintiff sought to distinguish the present case from the *Raciti* case based on the fact that what was being filmed was the Defendants' activity on the easement, rather than in their own property. However, this was rejected by the Court given that the easement was not relevantly different to the Defendants' property, for the purposes of an action in nuisance. The Defendants had substantial proprietary rights in the easement, which was effectively their front driveway (at [118]).

The Court also commented in obiter that even if a nuisance claim had not been made out, the distress caused by the excessive surveillance would have constituted a breach of the servient tenement owner's obligation not to interfere unreasonably with the dominant tenement owner's enjoyment of the easement, which would have led to the same result (at [119]).

The Court ultimately ordered the Plaintiff to remove all of the CCTV cameras except for the minimum number of cameras necessary to provide coverage along the easement for security, as opposed to monitoring or intimidating purposes (at [120]).

Court grants an injunction requiring the Plaintiff to remove a fence and other structures that did not comply with the restrictive covenant on the Plaintiff's title

The Defendants' adduced an expert report from a heritage consultant in the proceedings which opined that none of the materials or finishes used for items, including a fence, constructed by the Plaintiff on or near the easement on the Plaintiff's property was of an Australian Colonial style, contrary to the terms of the restrictive covenant which prohibited the building of any structures unless it was constructed in an "*Australian Colonial style in natural colours such as brown, green or beige*" (at [124]).

The Plaintiff submitted that the restrictive covenant had no effect due to clause 1.20 of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (NSW) (**Codes SEPP**), which enabled development on land to be carried out in accordance with the Codes SEPP except for in certain circumstances. However, the Court found that the Plaintiff failed to prove that the fence was exempt development under the Codes SEPP, such that issues of whether the covenant is suspended by clause 1.20(1) or saved by clause 1.20(2)(c) (which provides that clause 1.20(1) does not apply "*to a covenant imposed by an owner … of the land concerned, other than a covenant that has been required by a council to be imposed …*") did not arise (see [130] and [138]).

Ultimately, the Court found that the Defendants were entitled to an injunction for the removal of the fence and other items identified in the expert report which are to be removed at the Plaintiff's expense. The Court also found that the Plaintiff's desire to implement some sort of screening, in an Australian Colonial style as stated in the covenant, was reasonable to preserve privacy. Accordingly, the Court directed for the parties to reach agreement on what would replace the fence following its removal, and in the event they cannot agree, the Court would refer a suitable expert (at [139]).

Conclusion

The Court did not grant the relief sought by the Plaintiff and held that the Defendants had a right to use and enjoy the easement. To give effect to the Defendants' right, the Court relevantly ordered the Plaintiff to remove signage, CCTV cameras, and a fence from the easement land.

As the Court described, proximity between neighbours "*… will require, from time to time, a degree of give and take, tolerance and common sense to ensure peaceful co-existence*", which reminds owners to carefully consider the scope of ancillary rights granted under an easement and that excessive monitoring over an easement using surveillance devices may also give rise to an action in nuisance, which may be personally enforced.

Supreme Court of Victoria rejects claim for compensation under a development agreement

Amar Singh | David Passarella

This article discusses the decision of the Supreme Court of Victoria in the matter of *AM HT Development No. 4 Pty Ltd v Secretary to the Department of Transport* [2023] VSC 3 heard before Richards J

February 2023

In brief

In *AM HT Development No. 4 Pty Ltd v Secretary to the Department of Transport* [2023] VSC 3, the Supreme Court held that the development agreement in question did not necessarily constitute a compensable interest in land for the purposes of compulsory land acquisition.

Relevantly, the Court stated that "*whether the applicants had an equitable state or interest in the Divested Land depends entirely on the terms of the Development Agreement*". Further, any such agreement must have reached a point where the developer can obtain an order for specific performance before the Court is likely to consider that they have a compensable interest.

Therefore, in this case, the Court found that the rights granted under the development agreement were essentially contractual and, accordingly, a legal or equitable interest would not arise until specific performance is available under that contract.

Background

This case considered a claim for compensation under section 145 of the *Major Transport Projects Facilitation Act 2009* (Vic) (**MTPF Act**) for the compulsory acquisition of land in relation to the West Gate Tunnel Project (**Divested Land**).

The compensation claim was brought by three related developers (**AsheMorgan**) and concerned compensation for alleged legal or equitable interests in parts of the Divested Land. The Divested Land was subject to a development agreement (**Agreement**) between a number of developers, including AsheMorgan, and Development Victoria.

The Agreement contemplated that the Divested Land would be subdivided and sold in stages to various developers and included terms to this effect. However, the sale of land was subject to a number of conditions precedent including a condition stating the "*developer acknowledges that it has no right, entitlement or interest in relation to the Land until all conditions in clause 4.2 [i.e. the conditions precedent] are satisfied or waived*".

On 30 April 2019, the Governor in Council divested the relevant land pursuant to an order under section 134(1) of the MTPF Act (**Order**). Under the MTPF Act, on publication of the Order the Divested Land is taken to be unalienated land of the Crown and is freed and discharged from all trusts, limitations, reservations, restrictions, encumbrances, estates and interests. At the time of divestment, Development Victoria was the registered proprietor of the Divested Land. Relevantly, no land was sold before the time of divestment as, among other things, the conditions precedent had not been satisfied or waived.

Therefore, the Court was required to determine whether the Agreement gave rise to a relevant "interest" in the Divested Land within the meaning and for the purposes of section 145 of the MTPF Act.

Decision

The Court held that, pursuant to section 145 of the MTPF Act, the relevant "interest" required for a claim of compensation is a "*legal or equitable estate or interest in the land to which the Order applies*". The Court construed section 145 narrowly and concluded that Parliament deliberately limited the class of persons who may seek compensation to only those who hold a "*legal or equitable estate or interest*" in public land.

Accordingly, the Court held that AsheMorgan did not possess a relevant interest in the Divested Land for the following reasons:

- it rejected AsheMorgan's argument that the MTPF Act should be read in the context of the right to compensation granted under section 30 of the *Land Acquisition and Compensation Act 1984* (Vic) (**LAC Act**). Instead, the Court found that the relevant parts of the MTPF Act "*is a separate and distinct process from the compulsory acquisition of land under the LAC Act*" and "*the LAC Act is only applied in Div 4 to the determination of compensation payable under s 145 of the MTPF Act, and not more generally*";

- it acknowledged that it is settled law that a purchaser's interest in land under a sale of land contract is "*commensurate with the availability of specific performance*". Therefore, as AsheMorgan could not obtain an order for specific performance at the time the land was divested (because the relevant conditions precedent were not satisfied), it did not have a relevant interest; and
- in any case, the Agreement was not, in terms, a contract for the sale of land and therefore there was no contractual obligation for Development Victoria to enter into sale of land contracts at the time of divestment. Rather, the Court considered it to be an agreement to sell land "*pursuant to contracts for the sale of land that may be entered into in the future*".

Conclusion

This decision makes clear that a claim for compensation under a development agreement will turn on the particular facts of the case and the terms of that agreement. Nonetheless, given the broad application of the MTPF and LAC Acts to Victoria's Big Build projects, including the Suburban Rail Loop, Major Road Projects and the Metro Tunnel Project, this case is a useful reminder to purchasers and developers to be wary of making assumptions about their rights to compensation under incomplete contracts.

No need for a full-line supermarket in the Cairns Northern Beaches until 2031

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Trinity Park Investments Pty Ltd & Anor v Cairns Regional Council* [2022] QCA 261 heard before Bond JA, Henry and Crow JJ

March 2023

In brief

The case of *Trinity Park Investments Pty Ltd & Anor v Cairns Regional Council* [2022] QCA 261 concerned an application for leave to appeal to the Queensland Court of Appeal (**Court of Appeal**) against the decision of the Planning and Environment Court of Queensland (**P&E Court**) in the case of *Trinity Park Investments Pty Ltd v Cairns Regional Council* [2022] QPEC 15 to dismiss an appeal against the refusal by the Cairns Regional Council (**Council**) of the Applicant's development application for a development permit for a material change of use for a shopping centre in Smithfield located in the Cairns Northern Beaches (**Development Application**).

A summary of the P&E Court's decision is set out in our September 2022 article.

The Applicant alleged that leave to appeal to the Court of Appeal ought to be granted because the P&E Court erred in law in the following ways:

- By not considering the use that people in Kuranda make of supermarkets in the Cairns Northern Beaches and the impact of that use on the need for the proposed development (**Alleged Error 1**).
- By assessing the existing need for the proposed development having regard to a development permit for a Woolworths supermarket in a nearby suburb (**Woolworths Approval**), and not having regard to the proposed development's use being proposed to commence in 2026 (**Alleged Error 2**).
- By failing to consider whether compliance with the assessment benchmarks could in accordance with section 60(2)(d) of the *Planning Act 2016* (Qld) (**Planning Act**) be achieved by the imposition of conditions limiting the time within which the use of the proposed development may commence (**Alleged Error 3**).

The alleged errors were under section 63(1) of the *Planning and Environment Court Act 2016* (Qld) required to be on the grounds of an error or mistake in law or jurisdictional error in order for the appeal to be allowed.

The Court of Appeal observed that the process under the Planning Act for the determination of a development application involves the following two stages:

- The first stage is the assessment stage, which in this case required an assessment of the proposed development against the relevant assessment benchmarks in the *CairnsPlan 2016* (version 2.1) (**Planning Scheme**). Alleged Error 1 and Alleged Error 2 relate to the assessment stage.
- The second stage is the decision stage, which in this case was to be under section 60(2) of the Planning Act. Alleged Error 3 relates to the decision stage.

The Court of Appeal was not satisfied that Alleged Error 1 and Alleged Error 2 were errors of law and observed that they "*… have the appearance of attempts to clothe factual challenges in the cloak of an error of law*" (at [16]).

The Court of Appeal was not satisfied that any of the alleged errors of law had been made out and refused to grant the Applicant leave to appeal.

Background

The proposed development comprised a full-line Coles supermarket which is code assessable under the Planning Scheme.

There are relevantly three existing full-line supermarkets in the Cairns Northern Beaches, and a fourth full-line supermarket was approved by the P&E Court in the case of *Fabcot Pty Ltd v Cairns Regional Council & Ors (No. 3)* [2022] QPEC 12 some 10 days before the hearing in the P&E Court in respect of the subject Development Application (at [9]).

Relevant assessment benchmarks

The following relevant provisions of the Planning Scheme provided that need is important to the assessment of the proposed development:

- Part 3.3.2.1(1) of the Strategic framework, which relevantly states that "*[n]ew centres [which the proposed development would be] are only established where it is demonstrated that … there is a need for the development*".
- Part 7.2.8.4 of the Smithfield local plan code (**SLP Code**), which relevantly states in performance outcome PO1 that "*Development ... services develops in line with the need of the Cairns Northern Beaches communities to 2025*" and in acceptable outcome AO1.1 that "*Development … demonstrates an economic and community need*".
- Part 9.4.1.2 of the Centre design code (**CD Code**), which relevantly states that the purpose of the CD Code is to ensure centre activities and activity centres "*… are developed to support community need …*" that will relevantly be achieved through development that "*… meet[s] an existing need identified within a local plan area*" (see overall outcome (2)(a) of the CD Code).

The P&E Court held based on the interpretation and construction principles established in the case of *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QCA 147; (2014) 201 LGERA 82 that the Planning Scheme placed strategic importance on demonstrated need. The Court of Appeal endorsed the P&E Court's approach (at [46]).

P&E Court's decision

In respect of the issue of the need for the proposed development, the P&E Court preferred the evidence of the Council's need expert, who opined that the relevant area to be considered in determining whether there was a need for the proposed development did not include Kuranda and that there would not be a need for the proposed development until 2031 or later.

The P&E Court relevantly dismissed the appeal against the Council's refusal of the Development Application because it was not satisfied that there was a need for the proposed development as required in the relevant assessment benchmarks in the Planning Scheme, and furthermore that conditions could not be imposed to bring the proposed development into compliance with the relevant assessment benchmarks.

Alleged Error 1 is not an error of law

The Applicant submitted that the P&E Court erred in excluding Kuranda from the assessment of need because it is outside of the Cairns local government area and the Northern Beaches community (at [23]).

The Court of Appeal held that the P&E Court's findings ought to be understood in the context of the P&E Court's discussion of the expert evidence and preference of the evidence of the Council's need expert, who had excluded Kuranda from the assessment of need because of the improbability of residents of Kuranda using a shopping centre in the Cairns Northern Beaches as a primary supermarket because there are two full-line supermarkets in Kuranda (see [27] to [31]).

The Court of Appeal held that Alleged Error 1 was an allegation of a factual error, and even if it was a legal error, it would not grant leave to appeal because the allegation lacks merit and would be without material consequence unless the Applicant was also successful in respect of Alleged Error 2 or Alleged Error 3 (at [32]).

Alleged Error 2 is not an error of law and is unmeritorious

The Court of Appeal was not satisfied that the P&E Court erred in having regard to the Woolworths Approval in assessing need because the Woolworths Approval was relevant to determining whether there is an existing need. The Court of Appeal observed that "*… it must be logically relevant to consider the impact on that need of already approved developments, unless it is anticipated they will not proceed. To do otherwise would be to ignore the known impact of Council's already made decisions upon local capacity to service the known existing need*" (at [42]).

The Court of Appeal held that the proposed development's expected opening date of 2026 was irrelevant in circumstances where the P&E Court found that there would not be a need for the proposed development until 2031, and that overall outcome (2)(a) of the CD Code refers to "*existing need*" and performance outcome PO1 in the SLP Code refers to need "*to 2025*" (at [35]).

The Court of Appeal held that Alleged Error 2 was a complaint of a factual nature and involved an "*absurd approach*" in which the P&E Court would have had to disregard the fact that another full-line supermarket would be developed in the Cairns Northern Beaches (at [44]).

Alleged Error 3 is not made out

Section 60(2)(d) of the Planning Act relevantly states for development requiring code assessment that the assessment manager, after carrying out the assessment, "*may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance can not be achieved by imposing development conditions*".

The Court of Appeal held that in some cases it will be obvious based on the factual findings and the nature of a non-compliance that compliance cannot be achieved by the imposition of a condition (at [48]).

The P&E Court in this case did not have before it a proposal of conditions that may achieve compliance with the relevant assessment benchmarks, which deprived the Council and the P&E Court of the opportunity to consider the conditions (at [50]). The Court of Appeal held that this was a matter that trends against granting leave to appeal.

The Court of Appeal also held that the Applicant's submission that a condition could be imposed to restrict the commencement of the proposed use until 2026 or until the population in the relevant catchment reaches a certain number was not a means of achieving compliance, because the P&E Court found that there was no need for the proposed development until 2031 and would be at odds with PO1 in the SLP Code which refers to need "*to 2025*" (at [52]).

The Court of Appeal held that the proposed conditions would not achieve compliance with the relevant assessment benchmarks as required by section 60(2) of the Planning Act, but rather a condition of the kind proposed would avoid compliance.

Conclusion

The Court of Appeal did not grant leave to appeal because Alleged Error 1 and Alleged Error 2 were complaints of a factual nature, and Alleged Error 3 had not been made out.

Colin Biggers & Paisley

Convictions for felling 62 native trees in Kuraby, Queensland are not uprooted

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *En-Tzu Tseng v Brisbane City Council* [2022] QCA 222 heard before McMurdo and Dalton JJA and Boddice J

March 2023

In brief

The case of *En-Tzu Tseng v Brisbane City Council* [2022] QCA 222 concerned an application for leave to appeal to the Queensland Court of Appeal (**Court of Appeal**) under section 118 of the *District Court of Queensland Act 1967* (Qld) against the decision of the District Court of Queensland (**District Court**) in the case of *Tseng v Brisbane City Council* [2021] QDC 293 dismissing an appeal against convictions in the Magistrates Court of Queensland (**Magistrates Court**) in respect of 64 charges relating to the destruction of 62 native trees.

The Applicant had applied for, but did not have, the permission of the Brisbane City Council (**Council**) under the Council's *Natural Assets Local Law 2003* (**NALL**) to interfere with native trees on land located at Kuraby (**Subject Land**).

The Applicant was convicted of the destruction of 62 native trees on the Subject Land, as well as of two failures to comply with a compliance notice given by the Council under section 35(1) of the NALL requiring the Applicant "*… to either plant 823 native trees and shrubs of tube stock size, or 549 trees or shrubs of 45 litre stock size …*". If the planting could not be accommodated on the Subject Land, the Council had a right to issue the Applicant with a private works order to recover an amount of $143,282 which was calculated in accordance with Council's OS21 Tree Removal and Replacement Procedure (**Council's Procedure**).

The Magistrates Court imposed in respect of the destruction of the native trees a fine of $35,000 and in respect of the failures to comply with the Council's compliance notice a fine of $5,000. The Magistrates Court also required the Applicant to pay legal costs associated with the convictions.

The Court of Appeal, like the District Court, was not satisfied that the Applicant's grounds of appeal were meritorious and dismissed the appeal.

Grounds of appeal

The Applicant relied on the following grounds of appeal in the Court of Appeal:

- *Duplicity Ground* – The charges in respect of the interference with each of the 62 native trees were bad for duplicity.
- *Lack of Legislative Basis Ground* – The Council did not have a legislative basis to issue the compliance notice, because it was not a law of Parliament or made under the NALL.
- *Inadmissibility Ground* – The Council's overlay for significant vegetation and for waterway and wetland vegetation was not admissible and there was no evidence that the Subject Land was inspected in 2014 and 2016 when the overlays were created or at the time of the prosecution of the Applicant.
- *Identification of Native Trees Ground* – The measuring of the 62 native trees for the purpose of determining the amount of a private works order was not sufficiently scientific.
- *Insufficient Evidence to Convict Ground* – The interview with the Council in which the Applicant admitted to having a friend fell the 62 native trees ought not have been relied on by the Magistrates Court because the admission was not made under oath or in the presence of a lawyer and the Applicant was not warned of the legal consequences of making the admission.
- *Applications for Permits Ground* – The applications made to the Council to interfere with the 62 native trees were prepared without professional assistance and should not be relied upon as an admission that there were in fact native trees on the Subject Land.
- *Mango Trees Ground* – There was no proof before the Magistrates Court that the Applicant wanted to remove the 62 native trees to plant mango trees.

Court of Appeal's consideration

The Court of Appeal was not satisfied that any of the grounds of appeal alleged were meritorious, and relevantly held as follows in respect of each of the grounds:

- *Duplicity Ground* – This ground was not established because section 7(3) of the NALL relevantly states "*A person must not … interfere with, or cause or permit interference with … a protected tree*". The particulars of the complaint in each charge against the Applicant was on the basis of the Applicant causing or permitting a tree to be interfered with in accordance with section 7(3) (see [8] and [9]).
- *Lack of Legislative Basis Ground* – The Council had a right under section 35(3)(b) of the NALL to require a person in contravention of a provision of the NALL to "*... take specified action, within a time or times specified in the notice, to remedy the contravention*" (at [13]), and to apply the Council's Procedure in determining the calculation of the amount necessary to rehabilitate the Subject Land.
- *Inadmissibility Ground* – In relation to the Inadmissibility Ground, the Court of Appeal held as follows:
  - The Council's overlay for significant vegetation and for waterway and wetland vegetation apply in accordance with the relevant definitions of "*protected vegetation*", which relevantly comprises "*significant native vegetation*" and "*waterway and wetland vegetation*" in the NALL (see [16] and [17]).
  - Whilst "*protected tree*" is not defined in the NALL, it is reasonably clear in the scheme of the NALL that it is a tree which is captured by the definition of "*protected vegetation*" (at [19]).
  - It was sufficient for the Council to prove its case that the Subject Land was included in the overlays. The Applicant's arguments that the overlays were dated and that the Applicant's land was not inspected at the date the overlays were created or at the time the Applicant was prosecuted misunderstands the statutory purpose of the overlays (at [22]).
- *Identification of Native Trees Ground* – The evidence of the Council officer who measured the diameter of the fallen native trees and the photographs the Council officer took were sufficient for the Magistrates Court to rely upon (at [23]).
- *Insufficient Evidence to Convict Ground* – The interview was given voluntarily and Magistrates Court was right to rely upon the admissions made in the interview (at [27]). There was also sufficient evidence before the Magistrates Court to find the Applicant responsible for each of the 62 fellings of a native tree (at [28]).
- *Applications for Permits Ground* – There was no merit in this ground of appeal, because the evidence of Council officers was sufficient to establish that each of the 62 trees were a native tree (see [30] and [31]).
- *Mango Trees Ground* – This ground of appeal did not assist the Applicant and was irrelevant to the Council's case before the Magistrates Court and to the Magistrates Court's decision (at [32]).

Conclusion

The Court of Appeal dismissed the application for leave to appeal with costs, because none of the alleged grounds of appeal were meritorious.

Colin Biggers & Paisley

Reconfiguring a lot into four lots in a low density residential zone approved on appeal to the Planning and Environment Court of Queensland

Ashleigh Foster | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Saini and Muhar as Trustees v Redland City Council* [2022] QPEC 45 heard before McDonnell DCJ

March 2023

In brief

The case of *Saini and Muhar as Trustees v Redland City Council* [2022] QPEC 45 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against a decision of the Redland City Council (**Council**) to refuse a code assessable development application for a development permit for reconfiguring a lot (one lot into four lots) and an associated development permit for operational works (**Proposed Development**) in respect of land situated in Birkdale, Queensland (**Subject Land**).

Background

The Subject Land has an area of 2,003m^2 with a 54.55 metre frontage to Haig Road. The Subject Land is included in the Low Density Residential Zone under the *Redland City Plan 2018* (version 5) (**Planning Scheme**), and specifically within the Large Lot Residential Zone Precinct (**LLRZ Precinct**).

The Proposed Development involves reconfiguring the Subject Land into four regularly shaped residential lots, each with a proposed frontage of approximately 13.6 metres to Haig Road. One lot is proposed to have an area of 500m^2 and the other three lots are proposed to have an area of 501m^2.

The Court considered the following issues in respect of the applicable Low Density Residential Zone Code (**LDRZ Code**):

- Whether the Proposed Development would result in the LLRZ Precinct retaining a very low density residential character (see overall outcome (3)(a)(i) in section 6.2.1.2 of the LDRZ Code).
- Whether the Proposed Development would result in lot sizes that are consistent with the density and character of the surrounding established neighbourhood (see overall outcome (3)(a)(iv) in section 6.2.1.2 of the LDRZ Code).
- Whether the Proposed Development would achieve lots which provide for the establishment of dwelling houses with a high level of amenity and a sense of openness (see overall outcome 6.2.1.2(1) in section of the LDRZ Code).
- Whether the Proposed Development would avoid further fragmentation of land in the LLRZ Precinct (see performance outcome PO20 of the LDRZ Code).

The Court allowed the appeal and approved the Proposed Development subject to the imposition of lawful conditions for the reason that the Proposed Development complies with the relevant assessment benchmarks, in that the proposed lots are appropriately sized and configured so that they are low density and consistent with the pattern of the density of the surrounding established neighbourhood and can accommodate dwelling houses with high levels of amenity.

Court found that the Proposed Development complies with the Planning Scheme

The Court considered town planning evidence from the Council and the Applicant, including in relation to visual amenity, and relevantly held as follows in respect of the Proposed Development:

- The very low density residential character of the LLRZ Precinct will be retained if the Proposed Development proceeds as any building form developed on the proposed lots will need to comply with the LDRZ Code and the majority of lots in the LLRZ Precinct will still be in excess of 2,000m^2 despite an increase in the density of the Subject Land (see [40]).

- The Proposed Development is consistent with the established neighbourhood, which (see [48], [58], and [62]):
  - includes land outside of the LLRZ Precinct; and
  - contains a diversity of lot sizes and no uniformity, with the predominant lot size being significantly less than 2,000m^2; and
  - is characterised by single dwellings on parcels of land which vary in size.
- Given that the Proposed Development will create low density lots and any development on the lots will have to comply with the LDRZ Code, the Proposed Development will provide for residential areas with a high level of amenity and achieve a general sense of openness with a low density streetscape (see [73]).

Conclusion

The Court found that the Proposed Development complies with all of the relevant assessment benchmarks. Thus, the Court set aside the Council's decision and replaced it with an approval subject to conditions.

Colin Biggers & Paisley

Quality over quantity: Multiple dwelling in New Farm, Queensland, approved on appeal as compliance with the qualitative provisions of the planning scheme prevail over non-compliance with the quantitative provisions of the planning scheme

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Clarry & Anor v Brisbane City Council & Anor* [2022] QPEC 49 heard before Everson DCJ

March 2023

In brief

The case of *Clarry & Anor v Brisbane City Council & Anor* [2022] QPEC 49 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council to approve a development application for a development permit for a material change of use for a multiple dwelling (eight units) (**Proposed Development**) on land situated at 28 Maxwell Street, New Farm (**Subject Land**).

The Court considered the following issues which were in dispute between the parties having regard to the relevant provisions of the *Brisbane City Plan 2014* (version 20) (**Planning Scheme**):

- Whether the height, scale, and form of the Proposed Development is acceptable.
- Whether the Proposed Development's servicing arrangement for refuse collection is acceptable.
- Whether there are relevant matters justifying approval or refusal of the Proposed Development.

The Court held that the height, scale, and form of the Proposed Development satisfies the relevant qualitative assessment benchmarks in the Planning Scheme, that a minor non-compliance with the Planning Scheme in respect of refuse collection does not justify refusal of the Proposed Development, and that there were no relevant matters justifying refusal of the Proposed Development.

As the Proposed Development had been the subject of a minor change during the proceedings, the Court allowed the appeal only to the extent that new conditions of approval could be prepared.

Background

The Subject Land has an area of 842m^2 and is located in Maxwell Street, which has a residential character, within the Brisbane suburb of New Farm, which exhibits a mixed urban character (see [3] to [4]).

Relevantly, the Court described Maxwell Street as follows (at [4]):

> *The street is not characterised by any particular built form. It is a place where contemporary architecture adjoins traditional architecture. There is a preponderance of multiple dwellings of various heights and sizes. There is a range of storeys present and a range of styles, regardless of whether the building is a house or a multiple dwelling.*

Maxwell Street is comprised of areas of mixed zoning under the Planning Scheme. The land on both sides of Maxwell Street from the Merthyr Road intersection to the head of Maxwell Street's cul-de-sac, including the Subject Land, is included in the Low-Medium Density Residential (2 or 3 Storey Mix) Zone. The land to the west of and surrounding the head of Maxwell Street's cul-de-sac and the land along Raff Lane at the rear of the Subject Land is included in the Medium-Density Residential Zone (at [5]).

The Subject Land is also included in the New Farm and Teneriffe Hill Neighbourhood Plan and the Low-medium Density Precinct NPP-002 (at [6]).

The Subject Land was already improved by a four-storey multiple dwelling consisting of nine units which was described by the Court as being "*entirely devoid of architectural merit*" (at [3]).

The Applicants own and reside in a Spanish-mission style home adjacent to the Subject Land, which is listed as a Local Heritage Place (at [2]).

Court finds the height, scale, and form of the Proposed Development is consistent with the qualitative provisions of the Planning Scheme

Although the Proposed Development is non-compliant with the quantitative acceptable outcomes in the Low-Medium Density Residential (2 or 3 Storey Mix) Zone Code (**LMDR Zone Code**) with respect to height, scale, and form (at [23]), the Applicants submitted that the Proposed Development is consistent with the assessment benchmarks which involve qualitative rather than quantitative outcomes. In particular, the Applicants submitted that "*[t]o the extent that there are provisions in various codes which impose quantitative assessments, it is submitted that the [New Farm and Teneriffe Hill Neighbourhood Plan Code] applies to the extent of any inconsistency …*" (at [24]).

The Court found that the relevant acceptable outcomes were of no consequence to the Court's evaluation of the relevant qualitative assessment benchmarks (at [33]).

The New Farm and Teneriffe Hill Neighbourhood Plan Code (**NP Code**), which by virtue of section 1.5(d) of the Planning Scheme prevails over the LMDR Zone Code, relies entirely on qualitative measures to satisfy the overall outcomes and performance outcomes of the NP Code. Relevantly, overall outcome 3(m) of the NP Code permits development of a height, scale, and form which is not consistent with the amenity and character, community expectations, and infrastructure assumptions intended for the Subject Land in circumstances where there is both a community need and economic need for that development (at [28]).

The Court accepted evidence from the Applicants' economic analyst expert that the Proposed Development is consistent with the strong housing demand for units and apartments in New Farm. The Court found that there is a community and economic need for the Proposed Development so as to satisfy overall outcome 3(m) of the Planning Scheme (at [30]).

Further, with respect to a number of performance outcomes of the LMDR Zone Code and the performance outcomes applicable to the Low-medium Density Precinct of the NP Code, the Court found that Proposed Development is consistent with the mixed amenity and character of Maxwell Street and the wider locality (at [36]).

Court finds that minor non-compliance with the Planning Scheme in respect of refuse collection does not justify refusal of the Proposed Development

The servicing arrangement for the Proposed Development involved non-compliance with the Refuse Planning Scheme Policy, which is referred to in performance outcome PO32 of the Multiple dwelling code of the Planning Scheme, in that four refuse bins were at risk of falling over upon kerbside collection due to the contour of the frontage of the Subject Land (see [45] to [46]).

The Court found that this non-compliance was minor and did not justify refusal of the Proposed Development (at [46]).

Court finds that the Planning Scheme has not been overtaken by events

The Applicants argued that the planning strategy contained within the Planning Scheme had effectively been overtaken by events having regard to existing development and the history of development approvals in Maxwell Street. The Court was not satisfied that the Planning Scheme had been overtaken by events given that the Planning Scheme provides for "*performance based qualitative assessment benchmarks*" as the development controls for the Subject Land's locality (see [47] to [48]).

Conclusion

The Court allowed the appeal only to the extent of imposing new conditions of approval which are reflective of the Proposed Development that was the subject of a minor change during the proceedings.

Colin Biggers & Paisley

Planning and Environment Court of Queensland exercises discretion to approve the redevelopment of part of a residential aged care facility despite non-compliances with the assessment benchmarks relating to height

Pusti Patel | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Tricare (Bayview) Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 31 heard before Kefford DCJ

March 2023

In brief

The case of *Tricare (Bayview) Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 31 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Council of the City of Gold Coast (**Council**) to refuse a development application for a development permit for a material change of use to redevelop an existing residential care facility to increase the number of aged care places from 86 to 154 (**Proposed Development**) at 80-86 and 98 Bayview Street, Runaway Bay (**Subject Land**).

The Subject Land is within the Medium Density Residential Zone under the *Gold Coast City Plan 2016* (version 7) (**City Plan**). The existing retirement facility on the Subject Land is in several buildings, including a six-storey building and multiple buildings of one, two, and three storeys in height. The Proposed Development involves demolishing an older single-storey building and replacing it with a new four-storey building, with the rest of the buildings on the Subject Land to be retained.

The Applicant accepted that the Proposed Development does not comply with the City Plan because the proposed four-storey building is beyond 50 per cent above that indicated on the Building Height Overlay Map.

The Court considered the following issues in deciding the appeal:

- *Weight* – What is the significance of the non-compliance with the assessment benchmarks with respect to height.
- *Need* – Whether there is a need for the Proposed Development.
- *Discretion* – Whether the planning discretion ought to be exercised in favour of approval.

The Court concluded that if an assessment of the Proposed Development was undertaken only against the assessment benchmarks in the City Plan with respect to height, the non-compliances ought to be afforded decisive weight. However, the Court ultimately held that when assessed having regard to all relevant factors, the matters that support approval are compelling, in particular that there is a need for the Proposed Development and the existing lawful use on the Subject Land. Thus, the Court held that the Proposed Development ought to be approved subject to lawful conditions.

Court finds that the non-compliance with respect to height is not significant

The Proposed Development is assessable development requiring impact assessment under the City Plan (at [8]).

The Court found that the height of the Proposed Development does not comply with the specific outcome in section 3.3.2.1(10) of the Strategic Framework in the City Plan (**Strategic Framework**) and the overall outcome in section 6.2.2.2(d)(i) of the Medium Density Residential Zone Code in the City Plan (**MDRZ Code**) (see [85] to [93]), and that conditions could not be imposed to resolve those non-compliances (at [93]).

The Court also found that the City Plan included a "*forward planning*" strategy to limit development on land in the Medium Density Residential Zone to two storeys and nine metres and to the extent that the Proposed Development conflicts with the intended height for the Subject Land, it is also inconsistent with "*… the broader strategy to reinforce local identity and create a sense of place*" (at [116]).

The Court in deciding the weight to be attributed to the non-compliances relating to height considered the following:

- The existence on the Subject Land of lawful development, being the residential aged care facility and retirement facility. The Court held that the built form of the existing buildings did not reflect the intended building height pattern and the desired future character of the local area as depicted on the Building Height Overlay Map (see [136] and [382]).
- The Applicant's current intention to retain the taller buildings on the Subject Land and to continue to lawfully use them for a residential aged care facility and a retirement facility, and the absence of evidence which suggests that the Applicant's intention will change in the foreseeable future (see [136] and [382]).

The Court ultimately held that the combination of these factors diminish the potency of the non-compliances with the provisions in the City Plan relating to height, and that the specific outcome in section 3.3.2.1(10) of the Strategic Framework and the overall outcome in section 6.2.2.2(2)(d)(i) of the MDRZ Code should not be applied in an inflexible or unyielding way (at [137]).

Court finds a pressing need for the proposed development

Whether there is a need for the Proposed Development was contentious between the parties. The Council submitted that the need for the Proposed Development was hardly pressing (at [251]), and the Applicant submitted that there was a need.

The Court held that there is a pressing need for the Proposed Development for the following reasons, which was a compelling matter weighing in favour of approval (at [314]):

- *Quantitative analysis* – The Court accepted that the demand for aged care places in the relevant catchment area, being the area approximately five kilometres around the Subject Land, is expected to increase and there are currently insufficient facilities to meet that demand (see [291] to [301]). The Proposed Development will provide an additional 68 residential aged care places to meet some of the demand.
- *Qualitative analysis* – The Court accepted that it is in the public interest to provide residential aged care facilities that differ in terms of design from that traditionally provided to meet contemporary public expectations. The Court held that the design attributes of the Proposed Development will enhance the quality of life of older Australians (see [302] to [310] and [343]).

The Council argued that the economic need experts did not consider development approvals and future proposals for aged care facilities in assessing need and that there is more appropriately zoned land for the Proposed Development. Whilst the Court considered it unnecessary to address the Council's other arguments after finding that there is a pressing need for the Proposed Development, the Court considered them for completeness and held that they did not alter the Court's view about the weight to be given to need in this case (at [315]).

Court assesses other matters for and against the Proposed Development

The Council raised the following other matters against the Proposed Development, in respect of which the Court held as follows:

- Draft amendments to the City Plan propose to include the Subject Land in the Low Medium Density Residential Zone, which also does not anticipate buildings of the height proposed. The Court held that the draft amendments are a relevant consideration and deserving of weight, but the inconsistency with the draft provisions should not, of itself, be given determinative or decisive weight (see [176] to [194]).
- The Applicant did not demonstrate that the Proposed Development cannot be developed within a three-storey building. The Court held that there is a pressing need for the Proposed Development, and a three-storey building would not provide all the benefits associated with the Proposed Development (see [201] to [203] and [223] to [225]).
- The Proposed Development is inconsistent with reasonable community expectations, which is informed, at least in part, by the City Plan. The Court held that in this case there was an absence of significant community opposition, and as such the consideration of community expectations did not lend any meaningful weight to either a refusal or approval of the Proposed Development (see [228] to [231]).
- The cumulative effect of an additional building greater than two-storeys on the Subject Land involves material planning harm that warrants refusal. The Court found that the weight to be attributed to this matter was tempered by the following three considerations (see [245] to [249]):
    - A decision to approve the Proposed Development would not render it more difficult for the Council or the Court, as an assessment manager, to refuse other development applications in the local area where there is non-compliance with the relevant assessment benchmarks in the City Plan relating to height.

- The public confidence in the provisions of the City Plan relating to height being consistently applied will not be adversely affected, because the nature of the Proposed Development and the existing lawful use in this case "*… mitigate the prospect of a precedent that might be readily invokable by prospective developers of other land in the locality*" (at [247]). Whilst public confidence in the consistent application of the provisions of the City Plan is deserving of weight, it is not a matter that of itself warrants refusal of the Proposed Development.
- It can not be inferred, based on the evidence, that the Applicant will seek to develop the balance of the Subject Land in a manner which is inconsistent with the height strategy in the City Plan.

The Court considered the following other relevant matters weighed in favour of an approval of the Proposed Development:

- The Proposed Development is contemporary and the Subject Land is appropriate for an aged care facility and allows for residents to age in place over in the long term (at [361]).
- The Proposed Development has architectural merit, which is supported by the Council's acceptance of compliance with the many provisions of the City Plan that contain assessment benchmarks with respect to the design of development. The extent of compliance with City Plan is relevant to the exercise of the discretion (see [362] to [365]).
- The Proposed Development will not result in any unacceptable impacts, including visual impacts (see [366] to [371]).

Conclusion

The Court allowed the appeal and held that the development approval be granted subject to lawful conditions.

Planning and Environment Court of Queensland allows appeal for approval of a development application for short-term disability accommodation at Mount Tamborine

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *SDA Property Nominees Pty Ltd v Scenic Rim Regional Council & Ors* [2022] QPEC 39 heard before Williamson KC DCJ

March 2023

In brief

The case of *SDA Property Nominees Pty Ltd v Scenic Rim Regional Council & Ors* [2022] QPEC 39 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Scenic Rim Regional Council (**Council**) to refuse an impact assessable superseded planning scheme application made by SDA Property Nominees Pty Ltd (**Applicant**). The development application sought an approval to develop land at 1-11 Eagles Retreat Place, Mount Tamborine (**Site**), with 11 Tourist Cabins and a communal leisure facility for short-term accommodation for people with disabilities and their carers and families (**Proposed Development**).

The superseded planning scheme for the development application was the *Beaudesert Shire Planning Scheme 2007*, which was in force as at 20 June 2018 (**Planning Scheme**).

The Council's position in the early stages of the appeal was that the Proposed Development ought to be refused, but later supported its approval subject to the imposition of reasonable and relevant conditions. This included, principally, a condition requiring that the Proposed Development be designed for specialist disability accommodation, which was accepted by the Applicant. The appeal, and approval of the application, was opposed by two submitters (**Submitters**).

The issues for the Court to determine were whether the Proposed Development complied with the Planning Scheme and whether, ultimately, the development application ought to be approved or refused in the exercise of the discretion under section 60(3) of the *Planning Act 2016* (Qld) (**Planning Act**). In doing so, the Court also considered matters favouring both approval and refusal of the application and, in particular, whether there was a need for the Proposed Development.

The Submitters did not call any expert to give evidence in the appeal and did not cross-examine any of the Applicant's and Council's expert witnesses. The evidence of the expert witnesses engaged by the Applicant and Council demonstrated that either the Proposed Development complied with the Planning Scheme or that conditions could be imposed to bring the Proposed Development into compliance.

The Court was satisfied that the Proposed Development, with relevant conditions, demonstrated compliance with the Planning Scheme and allowed the appeal.

Court finds that the Applicant demonstrated compliance with all aspects of the Planning Scheme

The Submitters alleged that the Proposed Development did not comply with 27 provisions of the Planning Scheme. The Court had to determine whether there is compliance with the following (at [68]):

- The Specific Assessment Criteria for the Escarpment Protection Precinct (namely Specific Outcomes SO1, SO4, and SO5).
- The General Assessment Criteria for the Tamborine Mountain Zone Code (namely Overall Outcomes OO2, OO5, OO38, OO52, and OO58).
- The Tourist Cabin Code (namely Specific Outcomes SO1, SO2, and SO3(a) and Overall Outcomes (a) and (b)).
- The Desired Environmental Outcomes (namely sections 2.1.3(2)(1) and 2.1.3(3)(b)).
- The Strategic Framework (namely section 2.2.11(1), 2.2.11(2)(c), 2.2.11(3)(a) and (c), 2.2.11(6) and 2.2.11(11)).

After a detailed analysis of specific provisions in each aspect of the Planning Scheme and considering the relevant evidence provided by the experts engaged by the Applicant, the Court rejected the allegations of non-compliance and held that the Applicant had demonstrated that the Proposed Development complied with the Planning Scheme (see [102] to [275]).

Court considers other relevant aspects of the Proposed Development

The Court also had to determine the following (at [69]):

- Whether the Proposed Development is an appropriate use of the land.
- Whether the Proposed Development would result in unacceptable visual amenity impacts.
- Whether the Proposed Development is consistent with the amenity and character of the surrounding area.
- Whether there are relevant matters that individually, or cumulatively, favour approval of the Proposed Development.
- Whether there are relevant matters that individually, or cumulatively, favour refusal of the Proposed Development.

Court finds that the Proposed Development is an appropriate use of the Site

One of the Submitters argued that the Proposed Development was not an appropriate use of the Site, asserting that an appropriate use of the Site would be constituted by a dwelling. The other Submitter asserted that the Proposed Development was not an appropriate use of the Site as well, relying upon inconsistency with the amenity and character of the surrounding area; the inconsistent scale, bulk, built form, and intensity of the Proposed Development; the adverse impacts on the amenity of residents; the character of the surrounding area; and that not all the "*large adverse impacts can be mitigated by conditions*" (see [279]).

The Court did not accept the submissions, holding that they were inconsistent with the expert evidence and ignored that the Proposed Development complied with the Planning Scheme, and that the Proposed Development was consistent development in the relevant Tamborine Mountain Zone and Escarpment Protection Precinct (see [278] and [280]).

Court finds that the Proposed Development would not result in unacceptable visual amenity impacts

The Court took into account the expert evidence and held that an approval, including conditions, of the Proposed Development would not give rise to unacceptable visual impacts for the reason that the Proposed Development had a limited visual catchment and thus impacts would be confined to a small number of properties (at [281]).

Court finds that the Proposed Development is consistent with the amenity and character of the surrounding area

The Court had to determine whether the Proposed Development was consistent with the amenity and character of the surrounding area, and in doing so, referred to its earlier reasoning. The Court considered the protection and maintenance of the amenity and landscape character values in the Tamborine Mountain escarpment, in the context of Specific Outcome SO1 of the Escarpment Protection Precinct (see [107] to [113] and [117]).

In relation to amenity values, the Court accepted that the ecological values of the Site would be protected and maintained as the Proposed Development is setback from the well-vegetated south-eastern corner of the Site in respect of which rehabilitation and revegetation was proposed. The Court also held that the most pertinent contributors to the escarpment's amenity, namely, the escarpment itself and the absence of development in the national park and conservation area leading to the escarpment, would remain unimpaired (at [107]).

In relation to landscape character values, the Court agreed with the expert evidence that the Proposed Development "*… achieves an appropriate balance between built form and landscaping*" (at [113]).

Court finds that relevant matters favouring approval outweigh those favouring rejection

The Applicant's primary argument in support of approval was on the basis that the Proposed Development complies with, or can be conditioned to comply with, the Planning Scheme and, in this event, there are no planning reasons to warrant refusal (at 283]).

Even in the event of non-compliance with the Planning Scheme, the Applicant contended there were several matters that favoured an approval of the Proposed Development. The matters included that the Proposed Development would create a short-term tourism facility for people with disabilities in circumstances where such accommodation is not readily available in the region, that the Proposed Development is in the public interest, that the design of the Proposed Development provides for people with disabilities, that the Proposed Development will have no unacceptable impacts, and that there is a need for the Proposed Development (at [284]).

The Court accepted the Applicant's submissions that there was a need for the Proposed Development. The Court noted that the Planning Scheme "*… recognises the importance of, and need for, short-term tourist accommodation on Tamborine Mountain*" (at [294]). The Court accepted evidence from two economists, and held that "*… there is currently a limited supply of short-term accommodation to meet the reasonable demands and requirements of people with disabilities*" (at [301]).

The Submitters contended that several matters, either individually or cumulatively, favoured refusal. The Court's finding that the Applicant demonstrated compliance with the Planning Scheme negated the Submitters' contentions that the Proposed Development is an overdevelopment of the Site; that it is inconsistent with reasonable community expectations for development in the area on the Site; that local infrastructure in the location did not support a proposal for non-residential purposes; and that there is no community, economic, or planning need for a proposal that warrants non-compliance with the Planning Scheme (see [305] to [307]).

The Court discussed community expectations, acknowledging various adverse proforma and non-proforma submissions objecting to the Proposed Development, and the statements of the Submitters (see [71] to [99]). The Court accepted that the Proposed Development was contrary to community expectations and would be taken into account in the exercise of the discretion, but stated that "*[t]he content of the adverse submissions are not based on reasonable expectations …*" and "*… find little support in the technical evidence of the expert witnesses*" (at [308]). As a result, the Court held that the community expectations submissions were "*deserving of little weight*" (at [308]).

Court's exercise of planning discretion

The Court reiterated that the Proposed Development complied with the Planning Scheme and that such carried "*very significant weight*" in the exercise of the discretion under section 60(3) of the Planning Act (at [311]). The Court referenced the case of *Ashvan Investments Unit Trust v Brisbane City Council & Anor* [2019] QPEC 16; (2019) QPELR 793 at [61], quoting "*one would need strong reasons for refusing an application, which on its face, was consistent with the adopted planning controls*" (citing *Mackay v Brisbane City Council* (1992) QPELR 65 at 67).

The Court stated that the "*underwhelming*" reasons in favour of refusing an approval proffered by the Submitters "*... ought not to stand in the way of an approval*" (see [305] to [312]). The Court termed the Proposed Development "*a meritorious proposal*", and held that it would have "*no unacceptable impacts on amenity and character*", that it complied with the Planning Scheme, and that it would "*provide appropriate, and modern tourist accommodation, for a part of the community that are not well catered for*" (at [313]).

Conclusion

The Court allowed the appeal and approved the application, subject to relevant conditions.

Colin Biggers & Paisley

Strike out application in the Supreme Court of Queensland requires breach of construction contract claims to be re-pleaded

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Earthtec Pty Ltd v Livingstone Shire Council* [2023] QSC 22 heard before Freeburn J

April 2023

In brief

The case of *Earthtec Pty Ltd v Livingstone Shire Council* [2023] QSC 22 concerned an application in the Supreme Court of Queensland (**Court**) by the Livingstone Shire Council (**Council**) to strike out a statement of claim (**Strike Out Application**) in the substantive proceeding commenced by Earthtec Pty Ltd (**Plaintiff**) seeking a declaration in respect of amounts paid by the Council to the Plaintiff and claiming amounts alleged to be payable by the Council to Earthtec under various contracts, as well as an application by the Council seeking security for costs (**Security for Costs Application**).

The Strike Out Application was commenced under rule 171 (Striking out pleadings) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) and the Security for Costs Application was commenced under rule 670 of the UCPR (Security for costs) of the UCPR and section 1335 (Costs) of the *Corporations Act 2001* (Cth).

The Court relevantly considered the following issues:

- Whether the statement of claim complied with rule 149(1) (Statements in pleadings) of the UCPR and whether on the basis of that non-compliance particular paragraphs ought to be struck out.
- Whether specific paragraphs in the statement of claim ought to be struck out because they formed part of the without prejudice communications between the parties.
- Whether there is reason to believe that the Plaintiff will not meet an adverse costs order if one is made and whether the exercise of the Court's discretion warrants an order for security for costs.

The Court found that the statement of claim does not fulfil the function of a pleading under the UCPR (at [220]) for reasons including that a number of paragraphs comprised immaterial facts or evidence, required the drawing of unestablished inferences, and lacked clarity (see [38] and [219]).

The Court held that allowing the proceeding to continue on the basis of the statement of claim would risk a larger dispute than is justified and would require the Council to speculate about the case it is required to meet (at [220]). Accordingly, the Court held that a number of the paragraphs of the statement of claim ought to be struck out.

The Court held that relevant communications between the parties complied with the following and thus the without prejudice privilege was engaged to protect those communications:

- There is a dispute in which litigation might be reasonably contemplated.
- There is communication between the parties to that dispute, which is genuinely aimed at negotiating or settling the dispute or part thereof.
- The communication was stated to be "*without prejudice*", although this is not necessarily required for the privilege to be engaged.

The Court observed that the without prejudice privilege is a matter of right and not a matter of discretion (at [253]). The Court was unwilling to find against the privilege in circumstances where the Plaintiff's submission that the Council engaged in misleading or deceptive conduct in the communications and therefore an exception to the privilege applied was so flawed that it ought to be struck out (at [253]). The Plaintiff did not establish that there was a public interest in favour of permitting evidence of the without prejudice communications that outweighed the public interest in protecting the privilege (at [257]).

The Court was satisfied that security for costs ought to be granted because the Plaintiff did not produce any evidence of its assets which may be used to satisfy any adverse costs order, those standing behind the Plaintiff did not come out from behind the corporate veil, no evidence was put before the Court to suggest that "*… security for costs would be oppressive or stifle the litigation*", and the proceeding is broad in its scope with a broad level of costs (at [269]).

The Court observed that the quantum of security for costs involves a "*broad-brush*" approach (see [273] to [274]). The Court held it appropriate to make a staged order for security for costs because of the number of issues in the statement of claim and assessing the costs likely to be incurred up to the first day of trial would be onerous and involve a number of uncertainties (at [285]).

The Court ordered that the statement of claim be struck out and leave be granted for the Plaintiff to re-plead, as well as that the Plaintiff give security for the Council's costs of the proceeding up to a proposed mediation in the amount of $550,000.

Background

The Council in 2016 had sought expressions of interest relating to the construction of part of the Scenic Highway near Yeppoon (at [5]). The construction work comprised a "*down-slope component*" and an "*up-slope component*". The down-slope component related to the construction of a new road and all works required under that road, including the construction of a revetment wall. The up-slope work related to stabilising the rock-face above the road (at [7]).

The Plaintiff submitted an expression of interest for the down-slope work and the parties engaged in a tender process negotiating terms until the parties reached agreement (see [8] to [9]). The Plaintiff commenced design work for the down-slope work in October 2016 and the parties executed a deed comprising the written contract for the down-slope work in February 2017 (**DS Contract**) (at [11]).

The Plaintiff submitted a tender for the up-slope work and the parties engaged in negotiations between November 2016 and May 2017 (at [12]).

The superintendent of the project notified the parties in February 2017 that clay had been discovered in locations where the DS Contract provided for rock to be encountered. The parties engaged in negotiations and entered into a deed for the completion of the down-slope work (**Transition Deed**), which included a clause that if the parties could agree on a contract price for the up-slope work a new contract covering both the down-slope work and up-slope work would be prepared (at [13]).

After entering the Transition Deed, the Council accepted the Plaintiff's tender for the up-slope work (at [14]). Thus, under the Transition Deed a contract consolidating the down-slope work and up-slope work was required to be prepared (**Consolidated Contract**) (at [15]).

Plaintiff's claim

The Plaintiff's claim relevantly includes that the Council breached the Transition Deed by not preparing the Consolidated Contract and claims under the DS Contract, Transition Deed, or the Consolidated Contract for a declaration in respect of an amount of $1.9 million paid to the Plaintiff and for loss suffered by or money owed to the Plaintiff of approximately $4.7 million (see [15] to [31] and [293]).

Requirements of a statement of claim

The Court identified the following principles in respect of a statement of claim:

- A statement of claim identifies material facts in support of the claims made in the claim (at [33]). Material facts are those comprising the elements of the cause or causes of action or the defence, and "*… do not comprise the law, argument, reasons, theories or conclusions*" (at [35]) or mere facts that are alleged to be relevant (at [59]).
- The objective of a statement of claim is to reduce a case to its "*factual skeleton*". A statement of claim that pleads something other than material facts, requires a response from the defendant which results in false issues and unnecessary arguments between litigants (see [34] and [78]).
- Factors to be considered in determining if a statement of claim is deficient includes "*… whether it fails to fulfil the function of pleadings, which is to state with sufficient clarity the case that must be met and so define the issues for decision, ensuring procedural fairness; whether it is ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against them; and whether the pleader's case is not advanced in a comprehensible, concise form appropriate for consideration by both the court, and for the purpose of the preparation of a response*" (at [37] citing *Barr Rock Pty Ltd v Blast Ice Creams Pty Ltd* [2011] QCA 252 at [27] to [28]).
- Rule 149(1)(c) of the UCPR requires a pleading to "*state specifically any matter that if not stated specifically may take another party by surprise*". The Court held that the objective of this "*no surprise*" exception is to put a party on notice as to the case they are required to meet, but this does not mean that the pleader is required to guarantee that the opposing party will not encounter something unexpected at trial and it is not an "*open licence*" for the pleader to plead immaterial facts or evidence (see [46] to [48] and [67]).

Statement of claim to be struck out

In respect of the Strike Out Application, the Court was satisfied that a number of the paragraphs in the statement of claim ought to be struck out primarily on the following bases (see [51] to [218]):

- A number of paragraphs related to pre-contractual negotiations and there was no clear link between those negotiations and the Plaintiff's claim which was a contractual claim.
- Particular paragraphs related to documents prepared by a third party engineering service in circumstances where the engineering service was not a party to the proceeding and there was no clear reliance on the documents in support of the Plaintiff's claim.
- A number of paragraphs were not material facts, and a party is not permitted to plead immaterial facts or evidence.
- Particular paragraphs sought for the Court to draw an inference, but failed to identify the facts and circumstances which would entitle the Court to make the inference.
- Particular paragraphs were unclear and did not have an obvious connection to the Plaintiff's claim, nor did they allege a false or misleading representation or a loss or damage suffered.
- Allegations that the superintendent "*did not act honestly and fairly*" are serious allegations and ought to be pleaded with "*… a high degree of precision and particularity*", which the Plaintiff's pleading lacked.
- Parts of the statement of claim make alternative allegations, which the Court considered to be often pointless.
- The Plaintiff has not, in particular paragraphs, made clear the term of the contract alleged to have been breached, and the Court and parties before the Court should not be required to speculate as to the real case being pursued by the Plaintiff.

The Plaintiff also alleged that the Transition Deed included an implied term that the parties would cooperate to give each other the benefit of the Transition Deed or the Consolidated Contract or alternatively not conduct themselves so as to preclude the other party from the benefit of the Transition Deed or the Consolidated Contract, which it alleged included an implied term requiring the Council to provide specific designs to the Plaintiff (see [91] to [93]).

In respect of this allegation, the Court held that the general rule that each party to a contract agrees, by implication, to do all things necessary to enable each other party to have the benefit of the contract, is not a means for additional or extraneous obligations to be imposed on a party to the contract (at [197]). There was no express term in the Transition Deed that required the designs to be provided by the Council to the Plaintiff and there were no facts pleaded to demonstrate this obligation. The Court held that paragraphs of the statement of claim comprising this allegation required review.

Whilst the Court ultimately struck out the statement of claim, the Court did not strike out a number of paragraphs sought by the Council to be struck out on the basis that some paragraphs involved disputed issues that were inappropriate for determination as part of the Strike Out Application because they related to alleged misleading or deceptive conduct (at [118]) or issues of estoppel (at [145]) and the Plaintiff had satisfactorily amended its pleading in respect of some issues raised by the Council (see [134], [149], and [155]).

Court exercised discretion to make an order for security for costs

The Court observed that its discretion to make an order for security for costs is unfettered and is to be exercised having regard to all relevant facts and circumstances of a case, without any predisposition for or against awarding the security (at [266]).

The Court having regard to the factors it may take into account under rule 672 (Discretionary factors for security for costs) of the UCPR was satisfied that security for costs ought to be given (see [269] to [270]).

An additional factor the Court often considers which may weigh against an order for security for costs is where there is a counter-claim arising from the same facts and circumstances, such that the costs be incurred in any event (at [271]). The Court held that the counter-claim by the Council in this proceeding is defensive in nature and therefore the Court did not give weight to the counter-claim (see [292] and [293]).

Quantum of security for costs

In determining the quantum of security for costs, the Court considered whether a discount ought to be applied because of the risk of over-estimation or to cater for the probability that the proceeding may end early, whether a staged order for security for costs was appropriate in the circumstances, and any delay by the Council in bringing the application (see [284], [285], and [287]).

The Court relevantly held as follows (see [284], [285], [291], [299], and [300]):

- Whilst a discount may be applied, there is also a commensurate risk that costs are under-estimated and applying a discount disregards that a staged order for security may be given.
- This is an appropriate case for a staged security for costs up to a proposed mediation, because of the uncertainties associated with assessing the costs up until the first day of trial.
- There has not been, on the facts and circumstances relevant to the case, any delay by the Council which the Court in the exercise of its discretion ought to consider as a matter against awarding security for costs.
- An order for security for costs ought to be for the quantum of likely future costs and costs already incurred.
- It is a near-impossible task to assess costs that may be incurred in the future when the proceeding is in an embryonic stage, but applying a "*broad-brush*" approach security of $550,000 comprising approximately $200,000 for standard costs incurred and $350,000 for standard costs up to a proposed mediation ought to be provided.

Conclusion

The Court struck out the Plaintiff's statement of claim and granted the Plaintiff leave to re-plead and made an order that the Plaintiff provide security for costs in the amount of $550,000.

Colin Biggers & Paisley

Planning and Environment Court of Queensland gives material weight to a later planning scheme and refuses a development application for a preliminary approval for mixed use development

Pusti Patel | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Envisage Development Management Pty Ltd v Redland City Council* [2022] QPEC 57 heard before McDonnell DCJ

April 2023

In brief

The case of *Envisage Development Management Pty Ltd v Redland City Council* [2022] QPEC 57 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against conditions imposed by the Redland City Council (**Council**) on a preliminary approval for a material change of use for mixed use development comprising an apartment building, tourist accommodation, refreshment establishment, and shop (**Proposed Development**) on land located at 4 Harbourview Court and 144A Shore Street West, Cleveland (**Land**), which adjoins a railway station.

The planning scheme in effect at the time the development application was properly made was the *Redlands Planning Scheme* (version 7) (**Planning Scheme**) and the planning scheme in effect at the time the appeal was heard was the *Redland City Plan 2018* (version 6) (**New Planning Scheme**).

The substantial issues in the appeal were the following:

- Whether the Proposed Development has unacceptable traffic impacts.
- Whether the Proposed Development provides mixed use development.
- Whether the Proposed Development provides active frontages.
- The weight to be given to the New Planning Scheme.

The Court held that whilst most of the traffic issues could be resolved by the conditions proposed by the Applicant, the Proposed Development fails to provide the mixed used development envisaged by the Planning Scheme and active frontages. The Court gave material weight to the New Planning Scheme, which also included high-level requirements for mixed use development and active frontages.

The Court held that the exercise of its discretion favours a refusal of the development application.

Court finds that the Proposed Development has unacceptable traffic impacts

The Proposed Development on Lot 2 of the Land includes 143 commuter car parks with two vehicle accesses on the ground level of the proposed apartment building, as well as 124 car parks on the podium level. The proposed bin refuge was also located on the ground level (at [7]).

There were three issues in the appeal that related to traffic impacts, being the provision of on-site car parking, impact on on-street parking, and the adequacy of the circulation area between car parking bays and the accommodation of service vehicles. The Court's findings in respect of those issues were as follows:

- *On-site car parking* – The Court found that the proposed car parking is inadequate having regard to the considerations relating to off-street car parking in Specific Outcome S1(1)(b) of the Access and Parking Code (**A&P Code**) and that there is a shortfall of 38 car spaces adopting Probable Solution P1(1)(a) of the A&P Code, which refers to the minimum car parking requirements in Table 1 of the A&P Code (see [63] to [65] and [88]). The Court accepted expert evidence that the Proposed Development does not provide parking for visitors or the café use and will have adverse impacts on the capacity of the nearby railway commuter car park and on-street parking. The Court also accepted that the lack of adequate on-site car parking and the consequential impact on off-site car parking indicate that the Proposed Development is an over-development of the Land (at [87]).

- *On-street car parking* – The Proposed Development includes the establishment of a second driveway and cross-over for the residential use, which results in the loss of two on-street short-duration car parks which are highly utilised for dropping-off and picking-up railway patrons (at [93]). The Court was not satisfied that the Applicant had established that the two driveways improve ingress and egress of the Proposed Development, internal traffic operation, and pedestrian safety as required by Overall Outcome (2)(a)(ii), Specific Outcome S3.1(1)(g), and Specific Outcome S3.1(2) of the A&P Code (at [99]).
- *Circulation and service vehicles* – The Court held that the failure to provide a dedicated waste vehicle standing bay is inconsistent with Overall Outcomes and Specific Outcomes in the Apartment Building Code and A&P Code, as well as the identical requirements in the New Planning Scheme (at [100]). The Court accepted that the circulation and the service vehicle issues generated by the Proposed Development did not warrant its refusal and could likely be resolved by a redesign, but nevertheless reinforced that the Proposed Development is an over-development of the Land (see [107] to [109]).

Court finds that the Proposed Development is not a mixed use development

Whilst the Council refused to grant a development permit for the Proposed Development in June 2021, the Applicant submitted that the Court should derive comfort from the Council's decision to issue the preliminary approval as an indication that the Council accepts the mix of uses comprising the Proposed Development.

The Court rejected the Applicant's argument for the following reasons:

- The Council's prior decisions are not relevant to the Court's decision as the appeal is a hearing anew. Thus, the Court's task is not to determine the correctness of the Council's decision but rather to make a decision based on the evidence before the Court (at [121]).
- The Council's prior decisions related to a differently designed development and accordingly are not useful guidance for the Court and do not demonstrate that the Council has determined that the Proposed Development is mixed use (at [122]).

The Court held that the definition of "*mixed use*" in the administrative terms in schedule 3 of part 9 of the Planning Scheme "*… envisages integration of residential activities and tourist accommodation with commercial, retail or industry activities*" (at [131]). The Court was not satisfied that the Proposed Development complies with the definition of "*mixed use*" or the relevant Overall Outcomes and Specific Outcomes in the Major Centre Zone Code of the Planning Scheme (**MC Zone Code**), because the shop component on Lot 3 of the Land is not integrated in a physical and design sense with the two accommodation towers on Lot 2 of the Land and does not encourage mixed use development (see [131] to [133]).

The New Planning Scheme also maintains the requirement for mixed use development with activate frontages, which the Court gave material weight to (at [147]).

Court finds that the Proposed Development does not provide active street frontages

The term "*active frontage*" is not defined in the Planning Scheme, however, the Court accepted the following definition adopted by the town planning experts in their joint expert report (at [134]):

> *An active frontage is a concentration of activity or goings-on at the front of a site or building, adjoining a public area such as a street or park. Active frontages make a public space interesting and encourages people to linger and stay. To be an active frontage, many elements must be combined to ensure the space is interesting, inviting, walkable and safe. A key component to active frontages is the use itself, activities such as shops, small offices and cafes promote the most active street fronts. Residential buildings can also activate the street by providing a clear address, direct access from the street and direct overlook over the street …*

The Proposed Development on Lot 3 of the Land relevantly includes a café, shop, and external seating areas (at [9]).

The Court accepted that the proposed café activates the frontage of Lot 3 because of the pathway linkage to the rail station which encourages pedestrian movement (at [139]). However, the Court found that "*[t]he two driveways proposed in Lot 2 are the antithesis of an active frontage, conflicting with pedestrian movement and breaking up any visual interaction*" (at [140]).

The Court found that the lack of mixed use development adversely impacts the ability for the Proposed Development to activate the Lot 2 frontage and promote at the ground level a high-level of physical and visual interaction and pedestrian access (at [140]).

Thus, the Court held that the Proposed Development does not provide active frontages as required by Overall Outcomes and Specific Outcomes of the MC Zone Code and that these non-compliances could not be remedied by the imposition of conditions (see [141] and [151]).

Court finds material weight ought to be given to the New Planning Scheme

The Court held that material weight should be given to the New Planning Scheme for the following reasons (see [154] to [160]):

- The New Planning Scheme came into effect in 2018 and thus better reflects contemporary car parking requirements. The inclusion in the New Planning Scheme of requirements for one car parking space per dwelling was also accepted by the traffic expert engaged by the Applicant as a sensible approach.
- The car parking provisions are finely grained for the Land.
- The adoption of the New Planning Scheme indicates that the Council decided to apply a minimum parking rate, rather than the "*maximum parking rate*" advanced in the Growth Management Queensland – Transit Oriented Development Guideline.
- The New Planning Scheme also includes requirements for mixed use development with activated ground floor frontages, but goes further than the Planning Scheme in that it places more importance on limited frontages being activated.

Conclusion

The Court was not persuaded that the non-compliances with the Planning Scheme could be resolved by imposing conditions on a development approval and was not inclined to exercise its discretion to approve the development application because of the lack of mixed use development and active frontages. The Court set aside the decision of the Council to approve the development application and held that the development application is refused.

Dismissal of submitter appeal against approval of a four-storey multiple dwelling in Currumbin, Gold Coast

Matt Richards | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *McLucas & Ors, Gri & Ors & Vidjon & Ors v Council of the City of Gold Coast & Marquee Flora Pty Ltd* [2022] QPEC 56 heard before Rackemann DCJ

April 2023

In brief

The case of *McLucas & Ors, Gri & Ors & Vidjon & Ors v Council of the City of Gold Coast & Marquee Flora Pty Ltd* [2022] QPEC 56 concerned an appeal by submitters (**Submitters**) to the Planning and Environment Court of Queensland (**Court**) against a development approval, subject to conditions, given by the Council of the City of Gold Coast (**Council**). The development approval replaces two buildings on two lots with a four-storey, seven-unit multiple dwelling (**Proposed Development**) on land located at Pacific Parade, Currumbin (**Land**).

The Submitters asserted non-compliance with several provisions in the *Gold Coast City Plan 2016* (version 8) (**City Plan**).

The Court determined the following issues raised by the parties:

- Whether the absence of an on-site area for service vehicles is acceptable.
- Whether the Proposed Development satisfies the building height uplift provisions in the Strategic Framework of the City Plan (**Strategic Framework**).
- Whether the Proposed Development will have any unacceptable impact upon density, site cover, communal space, and intensity.
- Whether there are any relevant matters that support either an approval or a refusal of the development application.

The Applicant as the co-respondent to the appeal held the onus under section 45(2) of the *Planning and Environment Court Act 2016* (**PECA**) to establish that the Submitters' appeal ought to be dismissed.

The Court observed that the discretion under section 60(3) of the *Planning Act 2016* (**Planning Act**) to decide a development application that requires impact assessment is broad (at [8]). The Court restated the principles from the cases of *Abeleda v Brisbane City Council & Anor* [2020] QCA 257 and *Smout v Brisbane City Council* [2019] QPEC 10; (2019) QPELR 684 that the assessment of a development application involves a weighing and balancing exercise of the relevant factors by the decision-maker, and the flexibility of the approach in exercising the discretion will depend on the facts and circumstances of each case (at [8]).

The Court was satisfied that the Proposed Development was acceptable having regard to the relevant provisions of the City Plan, the adverse submissions received against the Proposed Development, and that there were no relevant matters weighing against approval of the Proposed Development.

The Court adjourned the proceeding for the parties to consider the appropriate conditions of the approval.

Court finds the absence of provision for an on-site service vehicle area is acceptable

The Submitters contended that the Proposed Development is a "*tower*" and accordingly fell within category three of Table 9.4.13-9 of the Transport Code in the City Plan, which is referred to in acceptable outcome AO5 and requires that a multiple dwelling include a standing area for service vehicles on-site if "*a vertical built form (tower) is proposed*".

The Court had regard to the ordinary meaning of a "*tower*", being "*a building … that is high in proportion to its lateral dimensions*", and concluded that the Proposed Development was "*… not disproportionately tall relative to its width*" and was therefore not a tower (at [26]).

The Court held, based on the expert evidence, that the need of the Proposed Development's occupants to use a service vehicle for removal purposes would be "*relatively infrequent*" (at [29]), that the delivery demands for the Proposed Development are unlikely to increase significantly, and that on-street parking spaces adjacent to the Land are likely to be the preference for the parking or standing of delivery vehicles (at [34]). Thus, the Proposed Development did not need to provide a standing area for a service vehicle.

Court decides that the Proposed Development meets the relevant building height uplift provisions

The Submitters challenged the Proposed Development's compliance with the design and amenity overall outcomes in section 6.2.2.2(b)(v) and (vi) of the Medium Density Residential Zone Code in the City Plan (**MDRZC**), as well as with the overall outcome in section 6.2.2.2(d)(i) of the MDRZC which requires that the built form not exceed the height indicated on the Building Height Overlay Map (**BHOM**).

The Land is relevantly within a "*3-storey (15 metre)*" designated area on the BHOM and within the "*Urban Neighbourhoods*" area under the Strategic Framework (see [44] to [45] and [49]).

The Court observed that overall outcome in section 6.2.2.2(d)(i) of the MDRZC and BHOM must be read subject to the provisions of the Strategic Framework because the Strategic Framework prevails over the other components of the City Plan to the extent of any inconsistency for impact assessment (see [50] and section 1.4(1)(b) of the City Plan). Section 3.3.2.1(9) of the Strategic Framework expressly provides for increases in building height up to a maximum of 50 per cent above the BHOM in Urban Neighbourhoods where the outcomes stated in section 3.3.2.1(9)(a) to 3.3.2.1(9)(h) are met (at [50]).

The Court considered compliance with each of the outcomes in section 3.3.2.1(9) in turn, except for section 3.3.2.1(9)(h) which relates to the functioning of the Gold Coast Airport and thus was not relevant.

Proposed Development reinforces local identity and sense of place (section 3.3.2.1(9)(a))

The Court accepted the following evidence of the experts engaged by the Council and Applicant, and held that the Proposed Development positively reinforces and contributes to a local identity and sense of place:

- The proposed landscaped rooftop reinforces an association with the "*… green vegetated backdrop to the west …*" thereby reinforcing this aspect of local identity (at [66]).
- The built form "*… is typically well-integrated with the landscape, has a human scale … and accommodates a broad mix of styles, periods, forms and colours*", such that the lift over-run exceeding 15 metres will be of no material effect (see [67] to [68]).
- The Proposed Development "*… represents an interesting and well-considered design outcome that is responsive to the local coast character*" (at [69]).
- The Proposed Development is not "*unduly wide or bulky*" given that it involves the amalgamation of two lots, thus accommodating a wider and larger building than if the lots remain separate (at [86]). That the Proposed Development would be one of the larger buildings along Pacific Parade in circumstances where the common height of buildings was three or less storeys did not persuade the Court to find otherwise (see [79] and [87]).

Proposed Development ensures a well-managed interface with, relationship to, and impact on nearby development (section 3.3.2.1(9)(b))

The Court accepted that the Proposed Development ensures a well-managed interface with, relationship to, and impact on immediate neighbours for the reasons that its height accords with the City Plan parameters, it is appropriately setback from its boundaries, it is not unduly "*overbearing*", it does not cause any privacy concerns, it presents attractively, and no adverse submissions were received from the immediate neighbours to the Land (at [94]).

With respect to the wider "*nearby development*", the Court was satisfied that the Proposed Development "*… would not … be detrimental to its setting, including in relation to the streetscape and the character of the area by reason of its height, bulk or scale*" (at [95]).

Proposed Development ensures a varied, ordered, and interesting local skyline (section 3.3.2.1(9)(c))

The Submitters argued that the Proposed Development does not have an ordered local skyline due to its height, visual dominance, interference with views, and insufficient landscaping (at [102]).

The Court had regard to the skyline in the surrounding area, including the roof forms, and preferred the evidence of the Council's expert that the Proposed Development "*… is appropriate for the locality and will bring variety, order and in particular interest to the local skyline*" (at [105]).

Proposed Development has an excellent standard of appearance of the built form and street edge (section 3.3.2.1(9)(d))

The Court held that whether the Proposed Development satisfies an "*excellent standard*" involves an evaluative judgement about which reasonable minds may differ (at [107]).

The Submitters' experts raised concerns about the frame and tint of the balustrades, the absence of solar mediating measures, the use of unattractive colours, and the "*overbearing*" sense of the development (see [110] to [111]).

The Court agreed with the Applicant's and Council's experts that the Proposed Development is thoughtfully-designed (at [108]) and will "*present 'an appealing range of materials and landscaping to provide visual interest and will offer form and furniture at street level that contributes to a comfortable pedestrian environment'*" (at [113]).

Proposed Development promotes housing choice and affordability (section 3.3.2.1(9)(e))

The Court construed this criterion by reference to what the other parts of the City Plan state about housing choice and affordability, and held that the City Plan envisages an increase in development intensity in the City's well-serviced urban areas (see [117] to [122].

The Court held that the City Plan seeks "*… a generous mix of affordability outcomes that meet housing needs for the locality*" for land in the Medium Density Residential Zone, which does not require the Proposed Development to offer a mix of accommodation or for it to be "*affordable housing*" as defined in the City Plan but rather requires that it support housing choice and affordability (at [127]).

The Court held having regard to the broad concept of "*affordability*" and the expert evidence before the Court that "*… to increase density by providing more units, of a kind under-represented in the area, in a way that increases choice, at a price point above the older stock, but below detached housing redevelopment and on appropriately zoned land … supports City Plan's strategy for choice and affordability and satisfies the criterion*" (at [131]).

Proposed Development does not offend local character or scenic amenity or built form contrast (section 3.3.2.1(9)(f) and section 3.3.2.1(9)(g))

In respect of section 3.3.2.1(9)(f) of the Strategic Framework, the Court was satisfied that the Proposed Development was appropriate having regard to height, bulk, and scale (at [136]).

In respect of section 3.3.2.1(9)(g) of the Strategic Framework, the Court held that the Proposed Development does not affect any "*… contrast in locations where building heights change abruptly on the BHOM*" because it is not within such a location. The Court was satisfied that this criteria could be met other than where there is an abrupt change on the BHOM (at [137]).

The Court held that the building height uplift provisions were satisfied and that the Proposed Development does not offend overall outcomes in section 6.2.2.2(b)(v) or (vi) of the MDRZC (at [139]).

Court finds that the Proposed Development complies with the assessment benchmarks relating to density, site cover, communal space, and development intensity

The Court held that the Proposed Development complies with other assessment benchmarks in the City Plan so far as they relate to density, site cover, and communal open space (see [143], [147], [153], and [158]).

The Court was also satisfied that the application of the Ridges and Significant Hills Protection – Overlay Map OMR3 (**RSHOC**) to the Land was not a concern, because it is on flat land removed from the vegetation cover of the hillside and not all land within the RSHOC will have equal risk of "*… development adversely affecting the slopes and vegetation cover of Currumbin Hill*" (see [159] to [160]).

The Court also held that the Proposed Development is not an overdevelopment of the Land (at [173]).

Court finds that adverse submissions do not attribute significant weight

The Court held that the weight to be attributed to the submissions is a matter of the validity of the concerns raised having regard to the statutory provisions, planning instruments, and the evidence put before the Court (at [176]).

Whilst the 252 adverse submissions were relevant, the Court held that the number of submissions does not necessarily reflect the views of the whole community and in circumstances where the Court has found compliance with the City Plan contrary to the submissions, they ought not be afforded significant weight (see [175] to [176]).

Court finds relevant matters unpersuasive

The draft amendments to the City Plan would move the Land to the Low-Medium Density Residential Zone, limit building height to 12 metres, and restrict the application of the building uplift provisions (at [178]).

The Court was not prepared to give determinative weight to the draft amendments because the approval of the Proposed Development would not cut across the amendments or make their application to other decisions of the Council more difficult, and the Proposed Development is not "*dramatically out of scale*" with development that may be expected once the City Plan amendments are in force (at [179]).

The Court was not persuaded that other relevant matters weighed against an approval (at [181]).

Conclusion

The Court dismissed the appeal and adjourned the proceeding for the parties to consider the appropriate conditions of approval.

Stock saleyard removed from the Queensland Heritage Register for failing to meet criteria for cultural heritage significance

Courtney Palmer | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Scenic Rim Regional Council v Queensland Heritage Council* [2022] QPEC 42 heard before Kefford DCJ

April 2023

In brief

The case of *Scenic Rim Regional Council v Queensland Heritage Council* [2022] QPEC 42 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by the Scenic Rim Regional Council (**Council**) against a decision of the Queensland Heritage Council (**QHC**) to enter the Beaudesert Pig and Cattle Saleyard (**Saleyard**) onto the Queensland Heritage Register (**Register**) as a State Heritage Place under section 53 of the *Queensland Heritage Act 1992* (Qld) (**Act**). The Council argued that the Saleyard did not satisfy any of the cultural heritage criteria and ought not be listed on the Register.

The Court considered the following four questions having regard to the relevant cultural heritage criteria under section 35(1) of the Act:

- Is the Saleyard important in demonstrating the evolution or pattern of Queensland's history? (see section 35(1)(a) of the Act).
- Does the Saleyard demonstrate rare, uncommon, or endangered aspects of Queensland's cultural heritage? (see section 35(1)(b) of the Act).
- Is the Saleyard important in demonstrating the principal characteristics of a particular class of cultural places? (see section 35(1)(d) of the Act).
- Does the Saleyard have a strong or special association with a particular community or cultural group for social, cultural, or spiritual reasons? (see section 35(1)(g) of the Act).

Whilst it was not binding on the Court, the Court referred to the guideline *Assessing cultural heritage significance: Using the cultural heritage criteria* (**Guideline**) to guide its decision making.

The Court answered no to each question and held that none of the criteria for inclusion on the Register are met. The Court set aside the decision of the QHC and replaced it with a decision not to enter the Saleyard on the Register.

Background

The Saleyard was constructed in the early 1960s and remained operational until its closure in March 2021. In January 2021, the QHC entered the Saleyard onto the Register.

The Council was given notice of the QHC's decision and subsequently commenced the appeal, which it had a right to do under section 161(1)(a) of the Act as an owner of the Saleyard.

If a place satisfies one or more of the criteria provided in section 35(1) of the Act, then the QHC has a broad discretion under section 51 and section 53 of the Act when deciding whether or not to enter the place on the Register. However, if a place does not satisfy any of the criteria in section 35(1) of the Act, then the place must not be entered onto the Register.

The Council argued that the Saleyard does not satisfy the cultural heritage criteria in section 35(1)(a), section 35(1)(b), section 35(1)(d), and section 35(1)(g) of the Act, meaning that the QHC ought not list the Saleyard on the Register. The Council bore the onus of establishing that the Saleyard does not satisfy the criteria according to the common law principles stated in the case of *Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union & Ors* [2022] QCA 94 (see [20] to [22]).

Criterion in section 35(1)(a) – Saleyard not important in demonstrating the evolution or pattern of Queensland's history

The parties agreed that the Saleyard is the only surviving saleyard remaining from a large complex of saleyards at the Beaudesert Railway Station. The key dispute related to the importance of the Saleyard in demonstrating the evolution or pattern of Queensland's history.

With reference to the Guideline, the Court noted that the word "*important*" should be interpreted broadly and that a place may still be important even where it does not fully demonstrate the evolution of Queensland's history (at [46]).

The experts agreed on the historical context of the Saleyard throughout the 20th century, including the major economic contribution of the pig and dairy industry to Queensland, the booming sales of pigs and calves, and the impact of World War II on the industry (at [101]).

The QHC argued that the Saleyard is important evidence of the dairy and pig producing industries in Queensland at the time. However, the expert for the Council disagreed and argued that the Saleyard is not evidence of the history of the industry in Beaudesert for several reasons including that the overall pig trade was larger in other Queensland towns, saleyards were not rare, the Saleyard was constructed well after the period of peak pig production, and the Saleyard is not distinctive or exceptional.

After considering the historical context of the Saleyard throughout the 20th century, the Court held that criterion (a) was not satisfied because the Saleyard is not important in demonstrating the evolution or pattern of Queensland's history (at [122]).

Criterion in section 35(1)(b) – Saleyard does not demonstrate rare, uncommon, or endangered aspects of Queensland's cultural heritage

The Court referenced the Guideline which states that a place may be significant under this criterion if it demonstrates a way of life, custom, function, land use, etc. that is now rare or uncommon. Factors such as the intactness, integrity, distinctiveness, and exceptionality may be relevant when establishing the level of significance (see [125] to [126]).

The QHC argued that the Saleyard is a largely intact surviving example of the saleyards which were once common in Queensland and have now become uncommon. The Council argued that the Saleyard is not rare or uncommon because nine out of forty saleyards still remain and because pig and calf saleyards are not an aspect of Queensland's cultural heritage.

The Court held that the Saleyard does not satisfy criterion (b) because it does not demonstrate an aspect of Queensland's cultural heritage, nor was the Saleyard rare (at [150]).

Criterion in section 35(1)(d) – Saleyard not important in demonstrating the principal characteristics of a particular class of cultural places

The Court referenced the Guideline which states that a place must demonstrate "*significance in the fabric*" and may be significant where it has made a strong contribution to Queensland's history. The Guideline also states that a cultural place is a place associated with human activity (see [154] to [155]).

The QHC's expert stated that a pig and calf saleyard associated with the dairy industry is a class of cultural place however the Court noted that the expert did not provide evidence to support this opinion. The Council argued that the Saleyard does not demonstrate any cultural significance as it lacks distinctive characteristics, and saleyards are not recognised as a class of cultural place.

The Court was not convinced that pig and calf saleyards are a class of cultural place, or that they are otherwise important. In particular, the Court found that there was a lack of relevant evidence from the QHC and it had failed to identify a "*range of human activity*" which took place at the saleyards to make them a class of cultural place, and thus criterion (d) was not satisfied (at [176]).

Criterion in section 35(1)(g) – Saleyard does not have a strong or special association with a particular community or cultural group

The Court referenced the Guideline which states that that there will be a strong or special association where a place has a "*perceived meaning or symbolic, spiritual, or moral value that is important to a particular community or cultural group and which generates a strong sense of attachment*" and that there should also be a readily defined group (see [179] to [181]).

The QHC argued that the Saleyard had been used as a frequent meeting place for livestock sales, an event which became embedded in the life of the community, meaning that it had a long and special association with the Beaudesert farming community. The Court also received lay witness statements which were largely in support of including the Saleyard on the Register.

The Court approached the submissions with caution and held that criterion (g) had not been satisfied as no "*readily identifiable community*" had been identified (at [233]).

Conclusion

Given that the Saleyard did not satisfy any of the cultural heritage criteria under section 35(1) of the Act, the Court set aside the decision of the QHC and ordered it to be replaced with a decision not to enter the Saleyard on the Register.

Colin Biggers & Paisley

What a storey: change to increase the number of storeys of a residential building in Mermaid Beach, Gold Coast, held to be for a minor change

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Kirra Developments Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 38 heard before Kent KC DCJ

April 2023

In brief

The case of *Kirra Developments Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 38 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against a refusal by the Council of the City of Gold Coast (**Council**) of an application to change a development approval for a multiple dwelling on land situated at Mermaid Beach, Gold Coast from four storeys to five storeys.

The original development application was for five storeys. The Applicant changed the development application after concern was raised by the Council about the number of storeys, such that the proposed development was for a 15-metre, five-level multiple dwelling comprising only four storeys because the fifth level comprised only an enclosed void. The Council approved the changed development application.

The current change application proposes that level five of the building, which is not currently a "*storey*" under the *Gold Coast City Plan 2016* (Version 8) (**City Plan**), be changed to include a master bedroom suite and a living area thereby making the fifth level a "*storey*" under the City Plan (**Proposed Change**).

The Council refused the change application on the basis that it was not for a "*minor change*", did not comply with the height provisions in the City Plan, and seeks to revert back to the proposal in the original development application which the Applicant had changed to get an approval.

The Court considered whether the change to the proposed development was for a "*minor change*" and, if so, whether the change application ought to be approved or refused in the circumstances.

The Court observed at [11] that determining whether a change results in "*substantially different development*" is a comparative task whereby the existing and changed plans are considered "*broadly and fairly, rather than pedantically*". The comparative evaluation can be both quantitative and qualitive, and will often involve matters of scale and degree having regard to the specific context and circumstances of the case.

The Court allowed the appeal based on its finding that the Proposed Change was for a minor change because the Proposed Change does not result in substantially different development given that it only changes the internal layout of level five, would not alter the height and bulk, architecture, setting of the building on the land, any external feature, or the use or intensity of the use.

Background

The Council submitted the following in relation to the Proposed Change:

- The Proposed Change would result in substantially different development contrary to the definition of "*minor change*" in schedule 2 of the *Planning Act 2016* (Qld).
- Even if the Proposed Change is for a "*minor change*", the Proposed Change conflicts with specific outcome 3.3.2.1(10) of the City Plan (**SO10**) because the change increases the building height beyond 50 per cent above the Building height overlay map and thus is not consistent with reasonable community expectations.
- There is no support in the City Plan for the Proposed Change, because matters relating to character and amenity of the locality and the impact or lack of impact on local character, built form in the locality, and the amenity of the locality were already taken into account as part of the development approval which permitted a 50 per cent uplift in the number of storeys (from three to four storeys) under specific outcome 3.3.2.1(9) of the City Plan (**SO9**).
- The City Plan adopts a "*stringent policy*" in relation to height.
- The rights of submitters would be adversely affected.

The Applicant submitted that whilst the Proposed Change alters the number of storeys, it does not alter the height of the multiple dwelling, its architecture or setting on the land, and it does not change the use or the intensity of the use (at [7]). The Applicant acknowledged non-compliance with SO10, but submitted that in any event a non-compliance with an assessment benchmark does not mandate a refusal.

Proposed Change would not invoke more submissions

The Court was not persuaded that further adverse submissions might have been provoked by the Proposed Change, because the Proposed Change is only to the internal layout and the original proposal, which at that time comprised five storeys, was publicly notified (see [20] and [29]).

Changes are minor

The town planning expert engaged by the Applicant gave evidence that there are no unacceptable town planning impacts and that the Proposed Change, including the built form, scale, and character of the proposed development, is suitable for the subject land and the surrounding locality (at [24]).

The Court accepted this evidence, and noted that the Proposed Change does not alter the external appearance or height of the multiple dwelling and thus does not impact on character or amenity (at [24]). The Court distinguished the Proposed Change from the proposed change the subject of another appeal before the Court in the case of *Bell Co Pty Ltd & Ors v Council of the City of Gold Coast & Anor* [2022] QPEC 32, which importantly involved changes to the development approval that were visibly obvious externally (at [18]).

The Court held that the proposed development remained compliant with SO9 (at [29]).

The Court held that the Proposed Change would not result in substantially different development and accordingly is a "*minor change*" (at [22]). The Court held given the limited nature of the Proposed Change an approval of the change application was warranted (at [29]).

Conclusion

The Court held that the Proposed Change was for a minor change and allowed the appeal.

Colin Biggers & Paisley

Planning and Environment Court of Queensland determines proposed lots are of an appropriate size and shape despite not meeting the minimum lot size of 100 hectares in the strategic framework

Courtney Palmer | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Torcross Investments Pty Ltd v Scenic Rim Regional Council* [2023] QPEC 6 heard before McDonnell DCJ

May 2023

In brief

The case of *Torcross Investments Pty Ltd v Scenic Rim Regional Council* [2023] QPEC 6 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Scenic Rim Regional Council (**Council**) to refuse to grant a development application for a development permit for reconfiguring a lot (one lot into two lots) in respect of land located at 27 Curtis Road, Canungra (**Subject Land**).

The Court considered the following issues, having regard to the relevant provisions of the *Scenic Rim Planning Scheme 2020* in effect from 16 April 2021 to 16 June 2022 (**Planning Scheme**):

- Whether the reconfiguration would result in lots of an appropriate size and shape considering the relevant assessment benchmarks.
- Whether the reconfiguration was compatible with, and would protect and enhance, the rural character of the relevant zone, being the Rural Zone.

The Court held that the minimum lot size provisions are an important consideration, but not a complete prohibition against a development approval. The Court weighed up other considerations, such as the planning principles underpinning the Planning Scheme, the lack of physical change to the Subject Land, and the adequacy of proposed lots to accommodate rural activities, in making its judgment.

The Court held that the proposed lots will be the appropriate size and shape, and that the reconfiguration is consistent with the existing pattern of development and existing character of the area which is largely comprised of small blocks.

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

Proposed lots are of an appropriate size and shape despite non-compliance with the Planning Scheme lot size provisions

The Court considered whether the reconfiguration will result in lots of an appropriate shape and size. The proposed lot sizes do not meet the minimum lot size of 100 hectares as provided in the Planning Scheme's Strategic Framework (**Strategic Framework**) (at [34]).

Despite the non-compliance with the minimum lot size provisions, the Court held that the proposed lots will be of an appropriate size and shape for the following reasons:

- *Consistency with the planning principles underpinning the Planning Scheme* – The planning principles underpinning the minimum lot size provisions for the Rural Zone relate to the protection of agricultural productive capacity and the protection of rural character (at [40]).

  Considering that a part of the Subject Land is unsuitable for most agricultural activities, the Court held that the reconfiguration will not have any material impact on the agricultural productivity of the Subject Land or the locality of the region (at [46]). Therefore, the proposal will not be inconsistent with the underlying planning principles (at [40]).

- *No physical change to the Subject Land* – The Subject Land is already divided into two portions by a public road, with one portion being 28 hectares and the other being 5 hectares. The Court noted that the reconfiguration would not result in any physical change to the Subject Land but would simply reflect its current physical boundaries (at [46]).

  The Court was of the view that the reconfiguration will simply formalise the existing physical boundaries of the Subject Land and therefore will not result in any further fragmentation of the Subject Land (see [51] and [67]). The shape and size of the proposed lots will, in practice, remain the same.

- *Proposed lots adequate to accommodate rural activities* – The Court was satisfied that the proposed lots will be of an adequate size and shape to accommodate activities and uses consistent with what is envisioned in the Planning Scheme for the Rural Zone (at [47]).

  The Court found that the reconfiguration will achieve the character and built form outcomes applicable to the Rural Zone (at [52]), and comply with the requirement that the rural character and use of land for agricultural production is protected and enhanced (at [50]). The proposal will also not change the uses which the proposed lots will be able to accommodate.

In summary, the Court found that, whilst minimum lot size is an important consideration, it is not a prohibition against a development approval. Other considerations under the Planning Scheme also need to be taken into account (at [73]).

Proposal is compatible with, and will protect and enhance, rural character

The Court noted that the Strategic Framework clearly requires a consideration of the existing character, as opposed to the intended character, when assessing development in the Rural Zone, which is evidenced by the requirement in the Planning Scheme that the proposal "*recognise respect and integrate with the existing character*" and "*protect and enhance*" rural character (at [56]).

The Court held that the reconfiguration is compatible with, and protects and enhances, the existing rural character (at [57]). The existing pattern of development in the area comprises of small blocks of less than 100 hectares, such that that the proposed lots will be consistent with the existing character of the area (see [58] to [59]).

Conclusion

The Court allowed the appeal and set aside the Council's decision. The Council's decision is to be replaced with a development approval subject to conditions agreed between the parties.

Colin Biggers & Paisley

Planning and Environment Court of Queensland dismisses appeal against proposed development of former theatre at Burleigh Heads

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Archer & Anor v Council of the City of Gold Coast & Ors* [2022] QPEC 59 heard before Kefford DCJ

May 2023

In brief

The case of *Archer & Anor v Council of the City of Gold Coast & Ors* [2022] QPEC 59 concerned an appeal by two submitters (**Submitters**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Council of the City of Gold Coast (**Council**) to approve an impact assessable development application for a development permit for a material change of use for a multiple dwelling building at Burleigh Heads (**Proposed Development**). JWZ Partners Development Group Pty Ltd (**Applicant**) sought to partially demolish and redevelop a building with local heritage significance, being the Old Burleigh Theatre Arcade, which occupies one of two lots adjacent to the Gold Coast Highway (**Subject Land**).

Notably, the Court rejected the Submitters' assertion that the *State Development Assessment Provisions* (**SDAP**) listed in schedule 10, part 9, division 4, subdivision 2, table 4 of the *Planning Regulation 2017* (Qld) were assessment benchmarks that an assessment manager must assess assessable development against for the purpose of section 45(5)(a)(i) of the *Planning Act 2016* (Qld) (**Planning Act**) (see [91] to [95]).

The relevant planning scheme for the assessment of the Proposed Development was version 7 of *Gold Coast City Plan 2016* (**City Plan**). *Temporary Local Planning Instrument No. 7 (Protection of the Old Burleigh Theatre Arcade) 2019* (**TLPI No. 7**) was in effect at the time the development application was properly made and ceased to have effect on 29 July 2021. Its successor, *Temporary Local Planning Instrument No. 9 (Protection of the Old Burleigh Theatre Arcade) 2021* (**TLPI No. 9**), came into effect on 30 July 2021 after the development application was properly made. TLPI No. 7 affected the operation of City Plan by (at [540]) [footnotes omitted]:

> *(a) amending the Heritage overlay map to identify the subject land as a local heritage place;*
>
> *(b) inserting a trigger to require impact assessment of building work that involved any removal, demolition, or partial demolition on the subject land;*
>
> *(c) nominating the Heritage overlay code of City Plan as the relevant assessment benchmark for assessing an application for building work;*
>
> *(d) inserting additional Strategic framework specific outcomes in s 3.8.4 of City Plan; and*
>
> *(e) inserting additional overall outcomes and performance outcomes in the Heritage overlay code.*

TLPI No. 9 amended the same parts of the City Plan as TLPI No. 7, however the content of the assessment benchmarks inserted were described by the Court as being "*materially different*" (at [541]).

The Court considered 11 broad issues, including principally the following:

- Will the Proposed Development unacceptably impact on the heritage value of the Old Burleigh Theatre Arcade?
- Is the built form of the Proposed Development appropriate?
- Will the proposed access arrangements result in unacceptable traffic impacts?
- Is the Proposed Development an appropriate redevelopment of a local heritage place having regard to TLPI No. 9?
- Is the Subject Land well-suited for the Proposed Development?
- Is the Proposed Development supportive of, and consistent with, the Gold Coast Light Rail Stage 3 project?

Whilst the Court held that the Proposed Development does not comply with all of the relevant assessment benchmarks associated with heritage value, the Court was satisfied that those non-compliances were not determinative so as to warrant a refusal of the development application.

The Court was also satisfied that the built form of the Proposed Development is appropriate and would not produce unacceptable traffic impacts, that the Proposed Development is an appropriate redevelopment of and is well-suited for the Subject Land, and is supportive of and consistent with the Gold Coast Light Rail Stage 3 project.

The Court held that the Submitters' appeal be dismissed and the Proposed Development be approved, subject to the imposition of reasonable and relevant conditions.

Court finds the Proposed Development's non-compliance with assessment benchmarks relating to heritage value weighs against approval but must not be considered in isolation

The Submitters alleged non-compliance with the overall outcomes in sections 8.2.9.2(2)(a), (b), (d), and (e) and performance outcomes PO1, PO3, and PO5 of the Heritage Overlay Code in the City Plan (**Heritage Overlay Code**). The Submitters also alleged non-compliance with the part of TLPI No. 7 that affected the operation of the City Plan by inserting a specific outcome in section 3.8.4(5) of the Strategic Framework in the City Plan (**Strategic Framework**), and overall outcomes in sections 8.2.9.2(2)(g), (h), and (i) and performance outcomes PO9 and PO10 in the Heritage Overlay Code.

The Court found that the proposed "*… demolition of the brick part of the existing structure that sits in about the middle of the [S]ubject [L]and, which was constructed around 1955*" (at [30]) renders the Proposed Development non-compliant with the specific outcome in section 3.8.4(5)(i) of the Strategic Framework, and the overall outcome in section 8.2.9.2(2)(h) and performance outcome PO10(a) of the Heritage Overlay Code (at [196]). The Court held that these assessment benchmarks "*adopt a rigid approach to demolition*" and, accordingly, "*… do not, on their face, admit the same degree of flexibility appearing in assessment benchmarks within City Plan itself*" (at [197]). The Court therefore noted that the Proposed Development demonstrates a clear departure from TLPI No.7 (at [199]).

The Court held that "*[t]he failure to comply with the stringent policy in [TLPI No.7] is a matter that, considered in isolation, weighs heavily against approval*" and indicates that the development application should be refused, although it was bound under section 45 of the Planning Act to have regard to other relevant matters (at [260]).

Court finds the built form of the Proposed Development is appropriate

The Submitters alleged that the built form of the Proposed Development does not comply with section 3.3.2.1(9) of the Strategic Framework, the overall outcomes in sections 6.2.2.2(2)(b)(v) and (vi) and sections 6.2.2.2(d)(i) and (iii) and performance outcomes PO1(c), PO2(b), PO3, and PO5 of the Medium Density Residential Zone Code in the City Plan (**Medium Density Residential Zone Code**), and the overall outcomes in sections 9.3.10.2(2)(a) and (c) of the High-Rise Accommodation Design Code in the City Plan (**HRAD Code**).

The Court considered these allegations of non-compliance having regard to the following ten considerations:

- *Accord with the intended building height pattern and the desired future appearance for the local area (section 6.2.2.2(2)(d)(i) and performance outcome PO3 of the Medium Density Residential Zone Code)* – The Applicant relied on the building height uplift permitted under section 3.3.2.1(9) of the Strategic Framework to achieve the proposed building height which will exceed the building height stipulated on the Building Height Overlay Map in the City Plan, being 29 metres, and to overcome non-compliance with section 6.2.2.2(2)(d)(i) and performance outcome PO3 of the Medium Density Residential Code. The Court recognised that the Proposed Development is 50 per cent more than the height stipulated on the Building Height Overlay Map in the City Plan, but stated that the significance of non-compliance with section 6.2.2.2(2)(d)(i) and performance outcome PO3 of the Medium Density Residential Code "*… is materially diminished as there is support in the Strategic framework for the height of the [P]roposed [D]evelopment*" (at [462]).
- *Reinforcement of local identity and sense of place (section 3.3.2.1(9)(a) of the Strategic Framework)* – The Court concluded that the Proposed Development will provide a reinforced local identity and sense of place, having accepted the opinions of the Applicant's visual amenity expert and architect (at [350]).
- *Achievement of a well-managed interface with nearby development (section 3.3.2.1(9)(b) of the Strategic Framework and section 9.3.10.2(1)(a) and (c) of the HRAD Code)* – The Court accepted evidence that the Proposed Development will achieve a well-managed interface with the adjoining property by adopting various design and layout measures that complement its design, setting, and orientation (see [360] to [361]).

- *Contribution to a varied, ordered, and interesting skyline (section 3.3.2.1(9)(c) of the Strategic Framework)* – Having regard to the evidence of the visual amenity experts and architects, and in particular the tendered photographs, the Court accepted the evidence that the Proposed Development will "*enhance the clarity*" between the high-rise area and open space (at [369]) and will "*provide a landmark skyline structure*" (at [370]).
- *Achievement of an excellent standard of appearance of built form and street edge (section 3.3.2.1(9)(d) of the Strategic Framework)* – The Court held that "*… the plans, elevations, and visualisations show an excellent standard of appearance of the built form and street edge*" (at [387]), and that the Proposed Development "*… is appropriately designed for the locality in which it is located and will make a positive contribution to the architectural built form of the local area*" (at [388]).
- *Contribution to housing choice and affordability (section 3.3.2.1(9)(e) of the Strategic Framework)* – The Court was satisfied that the Proposed Development will contribute to housing choice and affordability having regard to the observations of the Court in the case of *McLucas & Ors, Gri & Ors & Vidjon & Ors v Council of the City of Gold Coast & Marquee Flora Pty Ltd* [2022] QPEC 56, and the City Plan's provisions relating to those concepts (at [427]).
- *Protection of important elements of local character or scenic amenity (section 3.3.2.1(9)(f) of the Strategic Framework)* – The Court accepted that the Proposed Development will be highly visible, but did not believe that this necessarily impacted upon the important elements of local character and scenic amenity (at [434]).
- *Preservation of deliberate and distinct built form (section 3.3.2.1(9)(g) of the Strategic Framework)* – The Court found that the Proposed Development will preserve a deliberate and distinct built form in locations where building heights change abruptly on the Building Height Overlay Map in the City Plan (see [443] to [445]).
- *Safe, secure, and efficient functioning of the Gold Coast Airport (section 3.3.2.1(9)(h) of the Strategic Framework)* – The Court accepted the consistent opinions of each town planning expert that the Proposed Development will not interfere with the operation of the airport or other aeronautical facilities because the relevant overlay layers are far above the proposed building height (see [447] to [448]).
- *Density regarding the Residential Density Overlay Map (performance outcome PO5 of the Medium Density Residential Zone Code)* – The Court found that the density of the Proposed Development exceeds that shown in the Residential Density Overlay Map in the City Plan. However, the Court held that this did not weigh against approval having regard to the Medium Density Residential Zone Code's "*… underlying planning intention … to locate higher density residential development in locations that are near centres, the high-rise coastal spine, social and community infrastructure facilities, and areas well-serviced by public transport*" (see [455] and [459]).

Court finds the Proposed Development will not present unacceptable traffic impacts

The Submitters alleged that the Proposed Development will result in unacceptable traffic impacts and does not comply with paragraphs 1 and 3 of the purpose statement in section 1.1 and performance outcome PO16 of State Code 1: Development in a State-Controlled Road Environment in the SDAP. The Court also considered allegations of non-compliance with the overall outcome in section 9.4.2.2(2)(h) and performance outcome PO5 of the Driveways and Vehicular Crossings Code in City Plan.

The Court held that whether the Proposed Development demonstrates compliance with the above assessment benchmarks is to be determined by reference to whether the proposed access to the road is safe and whether it will worsen the operating conditions of the Gold Coast Highway.

The Court held that the proposed access arrangement is safe, having accepted the evidence of the traffic engineers engaged by the Applicant and the Chief Executive of the Department of State Development, Infrastructure, Local Government and Planning (**Co-Respondent by Election**) that the access area incorporates adequate sight lines in accordance with the Australian Standard AS2890 (at [513]) and that there were no operational or safety hazards associated with the proximity of the access to the u-turn facility at Brake Street (at [521]).

Also, the Court did not believe that the operating conditions of the Gold Coast Highway would be worsened if the turntable, proposed to be used to facilitate the on-site manoeuvring of medium rigid vehicles, was not properly staffed or operational, because the proposed access was approved by the Department of Transport and Main Roads under section 62(1) of the *Transport Infrastructure Act 1994* (Qld) and service vehicles would be able to undertake a three or five-point turn in the service area without requiring the use of the turntable (see [522] to [525]).

The Court concluded that the Proposed Development's access arrangements would not occasion any unacceptable traffic impacts.

Court finds the Proposed Development is an appropriate redevelopment of a local heritage place having regard to TLPI No. 9

Both TLPI No. 7 and TLPI No. 9 require the preparation of a Conservation Management Plan. Under TLPI No. 7, a Conservation Management Plan is required to be prepared to identify the pre-1976 elements of the former theatre. Under TLPI No. 9, a Conservation Management Plan is required to identify the pre-1976 elements that are "*significant and contribute to the cultural heritage significance*" of the former theatre (at [545]).

The Conservation Management Plan for the Proposed Development identified elements of "*high significance*" and "*significance*" in relation to the existing building, and the Court held that the Proposed Development will retain and conserve each of the elements of high significance (at [551]).

The Court held that TLPI No. 9 reflected the "*most recent and focussed planning intentions*" and thus, the Court exercised its discretion to find that compliance with TLPI No. 9 diminished the significance of the non-compliances with TLPI No. 7 (at [552]).

Court finds the Subject Land is well suited for the Proposed Development

The Court held that the Subject Land is "*… well suited for residential development because it is close to a centre, public transport services, open space, and recreation areas*" (at [554]), which is a factor that supports an approval of the development application (at [555]).

Court finds the Proposed Development supports the Gold Coast Light Rail Stage 3 project

The Applicant asserted that the Proposed Development is supportive of, and consistent with, the Gold Coast Light Rail Stage 3 project. This was not contested by the Submitters.

The Court accepted the Applicant's assertion and noted that, in line with relevant aspects of the City Plan, the Proposed Development "*… increases residential density, presents an interesting façade to the planned light rail corridor, and activates the ground plane immediately adjacent the planned bus interchange for the light rail and the proposed light rail station through its provision of commercial tenancies on the ground floor*" (at [559]).

Conclusion

The Court held that the Applicant had discharged its onus of proving that the appeal should be dismissed and accordingly dismissed the appeal. The Court adjourned the appeal for further review to allow the Council to prepare the necessary conditions.

Colin Biggers & Paisley

Planning and Environment Court of Queensland finds that development applications for development in the area to which the Mango Hill Infrastructure Development Control Plan applies must be made under the Integrated Planning Act 1997 (Qld)

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *JH Northlakes Pty Ltd v Moreton Bay Regional Council* [2022] QPEC 18 heard before Williamson QC DCJ

May 2023

In brief

The case of *JH Northlakes Pty Ltd v Moreton Bay Regional Council* [2022] QPEC 18 concerned an application to the Planning and Environment Court of Queensland (**Court**) for declarations and orders pursuant to section 11 of the *Planning and Environment Court Act 2016* (Qld) in respect of an action notice and associated letter issued by the Moreton Bay Regional Council (**Council**) on 3 November 2021 (**Action Notice**) in relation to a development application for a preliminary approval for a material change of use which includes a variation request (**Development Application**).

The Court considered the following issues:

- Whether the Development Application could be made and processed under the *Planning Act 2016* (Qld) (**Planning Act**) instead of the *Integrated Planning Act 1997* (Qld) (**IPA**).
- Whether the Council could receive the Development Application and, in particular:
  - whether it identifies the development; and
  - whether it seeks to vary the effect of a local planning instrument.
- Whether the Development Application was a properly made application under section 51 of the Planning Act and, in particular:
  - whether it was made in the approved forms;
  - whether mandatory parts of the approved forms were completed;
  - whether it addressed the correct assessment regime; and
  - whether it was accompanied by the relevant fee.

The Court found that the Applicant's request for relief failed on a threshold issue, that is, the Council was not required to receive and process the Development Application under the Planning Act (at [64]).

Nonetheless, the Court considered the other issues on the basis that the Development Application could be made under the Planning Act and found that whilst the Council could receive the Development Application, it was not a properly made application because it was not accompanied by the relevant fee (at [125]).

The Court did not grant the relief sought by the Applicant and listed the matter for a further mention to hear submissions from the parties regarding the need, if any, for a declaration about the validity of the Action Notice.

The Court, after hearing from the parties, ordered that the application be dismissed and that each party bear their own costs.

Development Application

The Development Application was made on 19 October 2021 with respect to land situated at Bridgeport Drive, Northlakes (**Land**) which was formerly used for a golf club. Relevantly, the Development Application was made under section 50 of the Planning Act.

The Development Application sought a preliminary approval for a material change of use. The development application form 1 (**DA Form 1**), which is the form approved under the Planning Act, identified the proposed new use of the Land as a retirement facility and residential care facility and the supporting information submitted with the Development Application (**Supporting Information**) indicated that there were additional new uses proposed, such as a food and drink outlet and market (at [21]).

The Development Application also sought to vary Sector Plan 003-1000 – Central Open Space Sector of the *Mango Hill Infrastructure Development Control Plan* (**Mango Hill DCP**), which applies to the Land, by replacing it with a new plan and code attached to the Supporting Information (at [24]).

Court finds that applications in the Mango Hill DCP area are to be processed, assessed, and decided under the IPA

The Court found that the Applicant's case relied on the following two assumptions:

- The right to make the Development Application is conferred by section 50 of the Planning Act.
- A development application that is made under the Planning Act is to be processed, assessed, and decided in accordance with the Planning Act (see [44] to [46]).

Section 316 of the Planning Act provides that section 86(4) and section 857 of the repealed *Sustainable Planning Act 2009* (Qld) (**SPA**) continue to apply to the Mango Hill DCP. Section 857(3) of the SPA provides that section 6.1.28 to section 6.1.30 of the IPA apply for assessing development applications subject to the Mango Hill DCP. Section 6.1.28 of the IPA relevantly provides that all development applications for assessable development must be made and processed under the IPA. The Court therefore found that section 857(3) of the SPA expressed a clear intention that development applications that are subject to the Mango Hill DCP are to be made and processed, as well as assessed and decided, under the IPA (see [48] to [56]).

As such, the Court concluded that the Council could not receive the Development Application as it was made under the Planning Act rather than the IPA. The Court considered that this was a "*compelling reason to deny the relief sought*" by the Applicant (see [61] and [64]).

Nevertheless, the Court also considered the relevant issues on the basis that the Development Application could be made under the Planning Act.

Court finds that the Development Application could be received by the Council if it could be made under the Planning Act

The Action Notice asserted that the Development Application could not be received because it does not identify the development for which preliminary approval is sought (at [67]).

Whilst there was an error in a relevant section of the DA Form 1, the Court was satisfied having regard to the entire completed DA Form 1 and the Supporting Information that the Development Application identifies that it seeks a preliminary approval for development that is a material change of use (see [68] to [73]).

The Action Notice also asserted that the Council could not receive the Development Application because it seeks to vary the effect of the Mango Hill DCP, which is not a local planning instrument under section 8(3) of the Planning Act.

The Council relied on section 23 of the *Statutory Instruments Act 1992* (Qld) and sections 86(3) and section 86(4) of the SPA to argue that the Mango Hill DCP is a document which is adopted or applied by the *Moreton Bay Regional Council Planning Scheme 2016* (version 4) (**Planning Scheme**), but is not incorporated such that it constitutes the Planning Scheme (see [35] to [36]).

The Court considered section 88 of the SPA, which applied at the time the Planning Scheme came into force, and found that a planning scheme made under the SPA is required to identify strategic outcomes and identify measures for facilitating the achievement of those strategic outcomes. The Court found that the Mango Hill DCP is doing the work of the Planning Scheme as it has been adopted and applied as a measure to achieve the strategic outcome in section 3.6.3 of the Planning Scheme and the Mango Hill DCP can therefore be regarded as part of the Planning Scheme (see [82], [91], and [95] to [99]).

Accordingly, the Court found that the Development Application identifies the development for which it seeks a preliminary approval and includes a request to vary the effect of a local planning instrument.

Court finds that the Development Application was not properly made

The Action Notice asserted that the Development Application was not properly made under section 51 of the Planning Act for the following reasons (at [38]):

- it was not made in the forms approved under the IPA (see section 51(1)(a) of the Planning Act);

- not all of the mandatory parts of the approved forms were completed (see section 51(1)(a) of the Planning Act);
- it did not address the correct assessment regime under the IPA (see section 51(1)(a) and section 51(1)(b)(i) of the Planning Act); and
- it was not accompanied by the relevant fee (see section 51(1)(b)(ii) of the Planning Act).

With respect to the first reason, the Court found that if it is the case that the Development Application could be made under the Planning Act then the relevant approved form is DA Form 1 (see [106] to [109]).

With respect to the second reason, the Court found that as the approved form is DA Form 1 the mandatory parts of the approved form had been completed (at [111]).

With respect to the third reason, the Court found that the Development Application complied with the requirements of DA Form 1 and compliance was therefore achieved with section 51(1)(a) and section 51(1)(b)(i) of the Planning Act (see [118] to [119]).

With respect to the fourth reason, the Court found as follows:

- the Council issued an invoice for the application fee of $169,029.08 on 1 November 2021;
- there was no evidence that the fee had been paid by the Applicant;
- there was no evidence that the fee had been waived by the Council;
- the Development Application was therefore not accompanied by the relevant fee as required by section 51(1)(b)(ii) of the Planning Act.

As such, the Court found that even if the Development Application could be made and processed under the Planning Act it was not a properly made application because it was not accompanied by the required fee.

Conclusion

The Court did not grant the relief sought by the Applicant and listed the matter for a further mention to hear submissions from the parties regarding the need, if any, for a declaration about the validity of the Action Notice.

After hearing from the parties, the Court ordered that the application be dismissed and that each party bear their own costs.

Postscript

The Queensland Department of State Development, Infrastructure, Local Government and Planning recently released a consultation paper "*Supporting and improving the operation of Development Control Plans*" in respect of proposed changes to Queensland's planning framework to support and improve the operation of Development Control Plans. The relevant consultation period in relation to the consultation paper concluded on 5 May 2023.

Variation request held to form "part of" a development application by the Planning and Environment Court of Queensland

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Yaralla Sports Club Inc v Gladstone Regional Council* [2021] QPEC 74 heard before Rackemann DCJ

May 2023

In brief

The case of *Yaralla Sports Club Inc v Gladstone Regional Council* [2021] QPEC 74 concerned an application in the Planning and Environment Court of Queensland (**Court**) for a minor change to a development application lodged with the Gladstone Regional Council (**Council**).

The development application relevantly sought a development permit for a material change of use for a theatre (**MCU Application**), a preliminary approval for a material change of use for the future expansion of an existing short-term accommodation (**Preliminary Approval Application**), and a request to vary the effect of the *Gladstone Regional Council Planning Scheme* (version 2) (**Planning Scheme**) in respect of the levels of assessment and assessment benchmarks for the short-term accommodation use (**Variation Request**).

The minor change application seeks to remove variations to the Planning Scheme that would trigger impact assessment for a short-term accommodation which exceeds a building height of 12 metres, to change the assessment benchmarks for development which is code assessment, and to include a master plan and site plan.

The substantive appeal was against the Council's refusal of part of the development application, being the Preliminary Approval Application which includes the Variation Request, in which the Applicant seeks that the Preliminary Approval Application be approved subject to reasonable and relevant conditions.

Section 46(3) of the *Planning and Environment Court Act 2016* (Qld) (**PECA**) relevantly states that "*The P&E Court can not consider a change to the development application unless the change is only for a minor change*". Where a change to a development application is for a minor change, the Court has a discretion to consider it (at [18]).

The Court relevantly considered the following issues:

- *First threshold issue* – Whether the Variation Request was appropriately made as part of the Preliminary Approval Application, because a variation request cannot be made in isolation (see [4] and section 50(3) of the *Planning Act 2016* (Qld) (**Planning Act**)).
- *Second threshold issue* – Whether the Court can consider a change to a variation request.
- *Substantive issue* – Whether the change to the Variation Request will result in substantially different development.

In respect of the first threshold issue the Court held that despite the "*inelegant*" drafting of the development application material, the material considered as a whole and the Council's confirmation notice indicated that the Preliminary Approval Application includes the Variation Request (see [5] to [9]).

In respect of the second threshold issue the Court held, having regard to the meaning of "*development application*" in section 46(3) of the PECA and the interpretation and construction of the relevant provisions of the Planning Act, that a variation request and a variation approval are "*part of*" a development application and development approval respectively (see [2] and [13]). Thus, the Court in considering a change to a development application may consider a change to a variation request which forms part of an application for a preliminary approval.

In respect of the substantive issue, the Court held that the change to the Variation Request would give greater certainty as to what is intended for the future short-term accommodation and decreases, rather than increases, the scope of the proposed development (see [22] to [23] and [25] to [26]).

Thus, the Court held that the change to the development application would not result in substantially different development and exercised its discretion in favour of the appeal proceeding on the basis of the changed development application (at [27]).

First threshold issue – Preliminary Approval Application includes the Variation Request

The Court was satisfied based on the following that the development application was made for the Preliminary Approval Application which included the Variation Request:

- The development application indicated that "*a preliminary approval that includes a variation approval*" was sought (at [6]) and the supporting planning assessment report included information relating to the Variation Request being for future short-term accommodation use.
- The confirmation notice given by the Council included details of the development application, which relevantly included the Preliminary Approval Application and the MCU Application (at [7]).

Second threshold issue – Variation request forms part of a development application

The term "*development application*" in section 46(3) and schedule 1 of the PECA is relevantly defined by reference to schedule 2 of the Planning Act, which means "*an application for a development approval*".

The term "*development approval*" is defined in section 49(1) of the Planning Act to include a "*preliminary approval*", "*a development permit*", or a combination of both.

The Court held that the following were consistent with a finding that a variation request forms part of a development application and that a variation approval forms part of a development approval, such that under section 46(3) of the PECA the Court cannot consider a change to a variation request unless it is for a minor change:

- The meaning of the terms "*variation request*" and "*variation approval*" under schedule 2 of the Planning Act state that a variation request and variation approval are "*part of*" a development application for a preliminary approval and a preliminary approval respectively (see [11] to [12]).
- Section 50(3) of the Planning Act states that "*A development application for a preliminary approval may also include a variation request*" and section 53(1)(b) of the Planning Act requires an applicant to give notice of a development application if "*the application includes a variation request*" (at [13]).
- Section 61(1) of the Planning Act states "*This section applies to a part of a properly made application that is a variation request*".
- An interpretation which treats a variation request as distinct from a development application would have consequences for the appeal rights of applicants.

Substantive issue – Change to the Variation Request is for a minor change

The Court held that the change to the Variation Request to confine the future short-term accommodation that would be code assessable to the existing building footprint, 94 units, and a maximum of 12 metres in height, rather than only by reference to height as originally proposed, and the inclusion of a master plan and site plan, gives greater certainty as to what is intended for future development and does not result in substantially different development (see [22] and [23]).

The Court held that a change to remove a vehicle parking rate schedule and a reference to "*any applicable overlay code*" was of no practical effect, because the vehicle parking rate schedule was called up in the Development Design Code in the Planning Scheme which is an assessment benchmark and evidence before the Court demonstrated that the applicable overlay codes did not include any practical requirements relating to short-term accommodation (at [24]).

Another change to replace the Mixed Use Zone Code of the Planning Scheme with the Yaralla Sport and Recreation Code was also held not to result in substantially different development because the Yaralla Sport and Recreation Code was largely the same as the Mixed Use Zone Code but omitted parts that are not relevant or not applicable to the proposed development (at [25]).

Conclusion

The Court held that the change to the Variation Request was for a minor change and that the matter proceed on the basis of the changed proposal.

The Court later gave judgment which allowed the part of the development application that was refused by the Council subject to conditions.

Planning and Environment Court of Queensland declines to make an interim enforcement order stopping quarry truck movements during certain school hours

Courtney Palmer | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Noosa Council v Cordwell Resources Pty Ltd* [2021] QPEC 67 heard before Long SC DCJ

May 2023

In brief

The case of *Noosa Council v Cordwell Resources Pty Ltd* [2021] QPEC 67 concerned an application by Noosa Council (**Council**) to the Planning and Environment Court of Queensland seeking to enforce the conditions of a development approval relating to the operation of a quarry located in Kin Kin.

The Council made an application for interim and final enforcement orders in respect of a condition of a development approval for a material change of use for extractive industry (**Development Approval**) relating to the preparation of, and compliance with, a traffic management plan which includes obligations about truck movements during the time the local school bus operates. The case was in respect of the interim enforcement order that the operator of the quarry, Cordwell Resources Pty Ltd (**Operator**), cease during certain school hours all heavy vehicle movements and reschedule other quarry truck and delivery movements.

The Court outlined the relevant test for whether the interim relief should be granted, being that the Court is to firstly consider whether the applicant has demonstrated a prima facie case for relief, and secondly whether the balance of convenience favours the granting of the relief (at [5]).

In relation to whether there was a prima facie case for relief, the Court found that two substantial issues were raised: one being the interpretation and construction of the relevant condition and the traffic management plan, and the other being whether there is an evidential basis to support a prima facie case as to a development offence (at [21]).

The Court declined to make the interim enforcement order for the following four reasons:

- There are substantial questions as to the interpretation of the relevant condition of the Development Approval and traffic management plan.
- There is a need for a full assessment of the evidence to determine whether there is non-compliance.
- The interim enforcement order would arguably go beyond what is the effect of the relevant condition of the Development Approval.
- The balance of convenience.

Background

The Operator operates a quarry at Kin Kin. The Council applied for both interim and final enforcement orders on the basis that there has been an increase in truck movements in contravention of the Development Approval, which relevantly includes the following condition [underlining added]):

> *8. The quarry is to be operated generally in accordance with the Quarry Management Plan dated May 2016 (the Approved Quarry Management Plan).*

The Quarry Management Plan dated May 2016 remains in effect, and includes a Traffic Management Plan which includes sections relating to rationale, issues/aspects/impacts, performance targets, and most relevantly special conditions which include the following [underlining added]:

> ***3.9.9 Special Conditions***
>
> *…*
>
> *The School Bus generally operates in school terms between the weekday hours of: 6:30 to 9:00am and 3:00 to 4:30pm. During these times, the quarry will seek to minimize truck movements by re-scheduling product deliveries from the site and discouraging unnecessary truck movements on the Kin Kin Pomona Road [sic], during these hours.*

The interim enforcement order sought by the Council was that the Operator cease all heavy vehicle movements along Pomona Kin Kin Road between 6.30 am to 9 am and 3 pm to 4.30 pm on weekdays during the school term dates, and reschedule all movements of quarry trucks to the quarry and product deliveries from the quarry during school hours.

Common law test and principles for granting interim relief

The Court confirmed that an application for interim relief is to be determined by reference to the following two enquiries (see [5] and cases such as *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; (2006) 227 CLR 57 at [65]):

- Whether the applicant has demonstrated a prima facie case, in the sense that, if the evidence remains as it is, there is a probability that there will be a finding of an entitlement to relief.
- Whether "*the inconvenience or injury which the applicant would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the respondent would suffer if an injunction were granted*".

The Court noted the decision in the case of *Mudie v Gainriver Pty Ltd & Ors* [2001] QCA 382; (2002) 2 Qd R 53 at [13] that there is to be a balancing of private and public interests in cases concerning planning approval compliance, however "*[a]mong potentially relevant matters is the aspect of discouraging potential developers from thinking that planning requirements may lightly be disobeyed*" (see [17] to [18]).

No prima facie entitlement to relief given questions as to construction and evidence

The Operator argued that the special conditions in the Traffic Management Plan required the minimisation, as opposed to the ceasing, of truck movements. The Court stated that the construction of the relevant part of special condition 3.9.9, being "*… will seek to minimize truck movements by re-scheduling product deliveries from the site and discouraging unnecessary truck movements …*", "*is far from being uncomplicated*" (at [23]).

The Court restated the recently espoused principle in the case of *Sunland Group Limited & Anor v Gold Coast City Council* [2021] HCA 35 at [1] and [58], being that "*… conditions of a development approval are not to be construed by reference to principles applicable to the construction of contracts 'but rather in accordance with the rules of construction governing the interpretation of Acts of Parliament and subordinate instruments'*" (at [25]).

The Court also acknowledged decisions that the phrase "*generally in accordance with*", which is used in condition 8 of the Development Approval, "*allows for some deviation from the approved plan, with the extent of allowable deviation dependent on the relevant circumstances*" and "*that determination as to whether something is generally in accordance with a relevant plan, will be by reference to the town planning consequences of the deviation*" (at [27]).

The Court however held that it was unnecessary to determine the arguments relating to construction at this interim stage, given that whether there is a prima facie case of entitlement to an enforcement order "*… still depend[s] on matters of fact and degree as to alleged non-compliance with condition 8 of the approval, in terms of operation not 'generally in accordance with' that part of the [Traffic Management Plan], and the evidential basis upon which any such conclusion might be premised*" (at [35]).

The Court then considered whether there was a substantial issue raised as to the evidential basis upon which it is contended that there is a prima facie case. The Court commented that, in addition to the construction of condition 8 of the Development Approval and the special conditions in the Traffic Management Plan, much of the outcome of the substantive hearing may depend on a full assessment of the evidence, which includes evidence as to truck movements, with the benefit of cross-examination (at [41]).

The Court found that even if a prima facie entitlement to relief was established, "*… there are reasons why the balance of convenience or appropriate exercise of discretion would not favour granting interim relief*" (at [43]).

Exercise of discretion not in favour of granting application for interim relief

The Court went on to consider the balance of convenience, as well as whether the case was one in which the exercise of the Court's discretion would favour granting the interim enforcement order. The Court noted that this is not just about any balance to be struck as between the potential impact of an interim enforcement order upon the economic interests of the Operator and the concerns of the Council with respect to road safety (at [44]). The Court was instead more focused on the exceptional nature of the relief sought, being an interim enforcement order which "*… would restrict truck operations to none and beyond what may be viewed as the effect of that condition*" (at [45]).

The Court therefore held that "*in the circumstances and on balance*" the appropriate exercise of the Court's discretion is to refuse the application for an interim enforcement order (at [45]).

Conclusion

The Court refused the Council's application for an interim enforcement order and offered the parties the earliest available hearing dates to determine whether final enforcement orders ought to be made.

Planning and Environment Court of Queensland dismisses an application to change a development application on appeal on the basis that the changes would introduce new adverse planning impacts

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Newkrop Pty Ltd v Sunshine Coast Regional Council & Anor* [2022] QPEC 41 heard before Cash DCJ

June 2023

In brief

The case of *Newkrop Pty Ltd v Sunshine Coast Regional Council & Anor* [2022] QPEC 41 concerned an application to the Planning and Environment Court of Queensland (**Court**) seeking a change to a development application (**Change Application**) the subject of the principal proceeding, being for a material change of use of premises to facilitate the expansion of a storage yard and warehouse facility (**Development Application**) located at 201 West Eumundi Road (**Land**) which was refused by the Sunshine Coast Regional Council (**Council**) as directed by the Chief Executive of the Department of State Development, Infrastructure, Local Government and Planning (**Co-Respondent**).

The Applicant sought to make six changes to the Development Application (**Proposed Changes**). Only the following change was contentious (**Proposed Easement**) (at [4]):

> *The provision of a 6 metre wide easement on a portion of the existing 10 metre wide access handle to the east of the site (on Lot 3 on SP170752), enclosed by a barrier, to ensure adequate manoeuvrability within the site …*

The Council argued that the scale of the Proposed Easement meant that the Change Application constituted "*substantially different development*" and is not a minor change (at [11]). The Court held that the Applicant did not demonstrate that the Change Application would not result in substantially different development because the Proposed Changes, which involved the expansion to a new parcel of land, would cause new planning impacts being adverse impacts on traffic, vehicle manoeuvring, and access to lots adjoining the Land (at [25]).

Background

The Applicant operates a storage yard and warehouse facility on 1.87 hectares of the Land in accordance with a development approval for a material change of use given by the Council in 2003 (**2003 Approval**). The Applicant's facility has since expanded and encroached into land that was not the subject of the 2003 Approval, which caused the Council to issue a show cause notice in 2018. The Applicant made the Development Application to regularise the expanded operations. The Council, following a direction from the Co-Respondent, refused the Development Application.

Court finds that the Proposed Changes introduce increased planning and traffic impacts such that Change Application amounts to a substantially different development

The Council argued that the Proposed Changes are not a minor change for the following reasons (at [11]):

> *(a) There are new planning impacts arising from the addition of a new parcel of land to the development application which have not been assessed; and*
>
> *(b) there are increased traffic impacts as a result of the proposed on-site manoeuvring by utilisation of the new land.*

The Court considered both issues in turn.

Court finds that the Proposed Easement adds new planning impacts to the Development Application

The Council's town planning expert submitted that "*… the real issue is the extension of the development application to a second lot in a manner that may further cut across the controls of State and Local Government planning instruments*", and that "*… this illustrates the likely need for further assessment of the changed application, a matter that may suggest the development is different*" (at [16]).

The Court also heard from the Council's traffic engineering expert who stated as follows (at [19]):

- "*… the [Applicant's] proposal will 'functionally amalgamate' a six-metre strip of Easement A, separating it from Lot 3 with a fence or bollards and leaving a maximum width of four metres for access by the other lots.*"
- "*… the change will cause Easement A to be no longer compliant with the Reconfiguring a Lot Code of the Sunshine Coast Planning Scheme 2014 …*".

The Court agreed and held that "*… the changed application raises a real question about the extent to which Easement A on Lot 3 would continue to satisfy the aims of the [Reconfiguring a Lot Code] if the changed development application was implemented*" (at [22]). The Court further held that irrespective of the outcome of this issue, the Proposed Easement "*… suggests that what the [Applicant] proposes is substantially different to its original application*" because of issues concerning access to the lots adjacent to the Land that were not part of the original Development Application (at [22]).

Court finds a prospect of increased traffic impacts and restrictive vehicle manoeuvring caused by the Proposed Easement

The Court held that the loss of half of the width of a 70-metre section of the existing easement as caused by the Proposed Easement raises the propensity for traffic issues and inconvenience (at [29]). The Court also held that the restricted manoeuvrability of vehicles on the Land caused by the Proposed Easement will be more severe than the original Development Application (at [30]). The Court agreed with the Council's traffic engineering expert that there was a prospect that vehicles will need to reverse around corners to exit the Land (at [24]).

The Court held that while each matter individually may not cause the Proposed Changes to not be minor, the cumulative effects means that the Change Application cannot be considered to be a minor change (see [29] and [30]).

Conclusion

The Court held that the Applicant had not demonstrated that the Proposed Changes would not result in substantially different development and dismissed the Change Application.

Costs awarded by the Planning and Environment Court of Queensland for a frivolous and vexatious proceeding that was bound to fail

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Danseur Pty Ltd v Cairns Regional Council & Ors* [2022] QPEC 54 heard before Morzone KC DCJ

June 2023

In brief

The case of *Danseur Pty Ltd v Cairns Regional Council & Ors* [2022] QPEC 54 concerned an application by the Second Respondents to the Planning and Environment Court of Queensland (**Court**) for costs against the Applicant as a consequence of the Court dismissing in the case of *Danseur Pty Ltd v Cairns Regional Council & Ors* [2020] QPEC 64; (2021) QPELR 1189 the Applicant's Originating Application seeking a declaration that a decision notice given by the Cairns Regional Council (**Council**) approving minor changes to a development permit for tourist and permanent accommodation offices is void (**Subject Proceeding**).

The Council did not have an active part in the application for costs.

We have previously published articles in respect of the Subject Proceeding and another application for costs by the Applicant against the Second Respondents in the case of *Danseur Pty Ltd v Cairns Regional Council & Ors* [2022] QPEC 4, which can be found in our February 2021 article and July 2022 article respectively.

The Court considered whether the following exceptions in section 60(1) of the *Planning and Environment Court Act 2016* (Qld) (**Act**) to the general rule in section 59 of the Act that each party must bear its own costs were engaged:

- Whether the Subject Proceeding was frivolous or vexatious in that the issues advanced were unmeritorious and bound to fail (see section 60(1)(b) of the Act).
- Whether the Applicant introduced new material, being the Applicant's amended Originating Application and amended Statement of Facts, Matters and Contentions (section 60(1)(e) of the Act).

The Court found that the Subject Proceeding was frivolous and vexatious such that the general rule was replaced and ordered the Applicant to pay the Second Respondents' costs on the standard basis.

Court finds that the Applicant's proceeding was frivolous and vexatious

The Second Respondents argued that the Subject Proceeding was frivolous and vexatious as it was bound to fail given the Applicant's "*… abandonment of issues, belated concessions, and the disposition of the remaining issues …*" [footnotes omitted] (at [8]).

The Applicant argued that each party should bear its own costs because the Applicant had a legitimate concern regarding body corporate consent and other issues which required the Court's adjudication, the Applicant appropriately reduced the issues in dispute, and the proceeding facilitated the correction of a historical planning inconsistency which is in the public interest (at [9]).

The Court considered the following principles from the relevant case law in respect of the meaning of "*frivolous or vexatious*" (at [10]):

- A "*… case is without reasonable prospects of success if it is so lacking in merit or substance as to be not fairly arguable*" (*Altitude Corporation Pty Ltd v Isaac Regional Council (No. 2)* [2014] QPEC 55; (2015) QPELR 139 at [25]).
- In *Mudie v Gainriver Pty Ltd & Anor* [2002] QCA 546; (2003) 2 Qd R 271 at [27], Justice Williams held "*… that frivolous meant 'of little or no value or importance, paltry'; 'having no reasonable grounds', and 'lacking seriousness or sense, silly'*". Justice McMurdo and Justice Atkinson in the same decision at [35] held that the ordinary meaning of "'*frivolous' was 'of little or no weight, worth or importance', and 'not worthy of serious notice'*" (see *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPEC 9; (2019) QPELR 662 (***Sincere* case**) at [27]).
- Frivolity is a high standard to be met and requires something much more than a lack of success (see [28] to [30] in the *Sincere* case).

The Court found that the Applicant's contention regarding the lack of owner's consent of the body corporate in respect of the minor change application was doomed to fail because the Court is not at liberty to go behind an ostensibly valid form of consent (at [24]).

With respect to the Applicant's abandonment of issues throughout the Subject Proceeding, the Court found that where this abandonment occurred in the face of poor prospects and the Second Respondents' meritorious opposition, "*… there is no kudos in reducing or limiting issues which were doomed to fail …*" (at [25]).

The Court found that the other issues advanced by the Applicant in the Subject Proceeding would not succeed in rendering the decision notice invalid even if they were made out (see [26] to [27]).

The Court held that the Subject Proceeding was frivolous and vexatious as the Applicant had no real prospect of succeeding to set aside the decision notice as contended (see [28] to [29]).

Court finds that the introduction of new material does not warrant costs

The Second Respondents argued that the Applicant's introduction of new material by way of an amended Originating Application and amended Statement of Facts, Matters and Contentions engaged the costs exception in section 60(1)(e) of the Act (at [30]).

The Court found that section 60(1)(e) of the Act was not engaged as the amended Originating Application was necessary and permitted with the Court's leave and the amended Statement of Facts, Matters and Contentions did not introduce issues that were beyond the scope of the originating proceeding (see [31] to [32]).

Whilst the Court found that these matters did not warrant the payment of costs under section 60(1)(e) of the Act, the Court noted that these matters are relevant to its finding that the Subject Proceeding was frivolous and vexatious (at [32]).

Court finds that costs should be awarded on the standard basis

Having found that the Subject Proceeding was frivolous and vexatious and the Applicant ought to pay the Second Respondents' costs, the Court turned to consider the Second Respondents' argument that such costs ought to be assessed on an indemnity basis for the reason that the Applicant's conduct could be described as including "*advancing issues that lacked merit and were bound to fail*", "*relying on pleadings that were irrelevant*", and "*proceeding with the application for summary judgment notwithstanding the matters notified by the Second Respondents …*" (at [35]).

The Court found that the Applicant should pay the Second Respondents' costs assessed on the standard basis as the Court could not discern an improper motive or purpose in the Applicant's pursuit of the Subject Proceeding, notwithstanding the finding that the Subject Proceeding was frivolous and vexatious and bound to fail (see [40] to [41]).

Conclusion

The Court allowed the application and ordered that the Applicant pay the Second Respondents' costs of and incidental to the Subject Proceeding, including any reserved costs, to be assessed on the standard basis.

Commonwealth's decision to enter into gas exploration contracts found to be legally unreasonable by the Federal Court of Australia

Courtney Palmer | Nadia Czachor | Ian Wright

This article discusses the decision of the Federal Court of Australia in the matter of *The Environment Centre NT Inc v Minister for Resources and Water (No. 2)* [2021] FCA 1635 heard before Griffiths J

June 2023

In brief

The case of *The Environment Centre NT Inc v Minister for Resources and Water (No. 2)* [2021] FCA 1635 concerned judicial review proceedings in the Federal Court of Australia (**Court**) in respect of two decisions of the Minister for Resources and Water (**Minister**) and one decision of the Commonwealth. The decisions related to gas exploration activities in the Beetaloo sub-basin located in the Northern Territory.

The Applicant, a community-sector environmental organisation in the Northern Territory, raised five grounds of judicial review in relation to the decisions of the Minister and the Commonwealth. The grounds raised issues of compliance with section 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**), legal unreasonableness, and whether the decision-makers had acted on incorrect advice in making the decisions.

The Court held that the Minister's failure to consider climate change matters did not make the Minister's decisions legally unreasonable and did not constitute a breach of the PGPA Act. However, the Court held that the Commonwealth's decision was legally unreasonable given the timing of the decision in relation to ongoing litigation and communications between the parties.

The fifth ground of review, being that the timing of the Commonwealth's decision was "*legally unreasonable, illogical and/or irrational*", was made out and the Court declared the Commonwealth's decision invalid. The remaining grounds of review were unsuccessful.

Relevant decisions

The relevant decisions made by the Minister and the Commonwealth are as follows:

- The Minister's decision to prescribe the Beetaloo Cooperative Drilling Program (**Program**) by a statutory instrument (**Instrument**). The Instrument was made by the Minister under section 33(1) of the *Industry Research and Development Act 1986* (Cth) (**IRD Act**), which allows the Minister to prescribe programs in relation to industry, innovation, science, or research.
- The Minister's decision to approve $21 million in funding for new exploration wells under the Program (**Approval Decision**). The Program provides a monetary incentive for exploration and appraisal activities.
- The Commonwealth's decision to enter into three contracts with Imperial Oil and Gas Pty Ltd (**Imperial**) which gave effect to the Approval Decision (**Contracts Decision**).

No failure to comply with section 71 of the PGPA Act or the Commonwealth Grants Rules and Guidelines 2017

The Applicant argued that, when making both the Instrument and the Approval Decision, the Minister failed to comply with section 71 of the PGPA Act by failing to consider climate change. Section 71 requires the Minister to make "*reasonable inquiries*" into whether a proposed expenditure is a "*proper use*" of relevant money. The Court did not accept the Applicant's argument.

Requirement to make "reasonable inquiries" not a jurisdictional pre-condition

In relation to the nature of the duties under section 71 of the PGPA Act, the Court held that the requirement to make "*reasonable inquiries*" is not an objective, jurisdictional pre-condition to the exercise of the Minister's powers, but rather one which requires the Minister's opinion or judgement (at [80]). The assessment required under this section will involve the weighing of competing considerations, and the nature and extent of such inquires is within the discretion of the Minister (see [63] to [66]).

Section 71 of the PGPA Act does not apply to the Instrument

The Court held that the making of the Instrument itself did not constitute an approval of a proposed expenditure by the Minister and therefore section 71 of the PGPA Act did not apply to the making of the Instrument. This was because of the statutory context of the IRD Act, which is primarily concerned with prescribing programs rather than financial management (at [83]).

No contravention of section 71 of the PGPA Act or the Guidelines when making the Approval Decision

Both section 71 of the PGPA Act and the *Commonwealth Grants Rules and Guidelines 2017* (**Guidelines**) applied to the Approval Decision meaning that the Minister was required to be satisfied that the funding for new exploration wells under the Program was a "*proper use*" of relevant money. However, the Minister did not breach the PGPA Act or the Guidelines when making the Approval Decision.

The Court held that there was no requirement under section 71 of the PGPA Act or the Guidelines for the Minister to make reasonable inquiries into climate change matters or economic risks in the following circumstances (see [89] to [93]):

- The funding related to exploration and appraisal activities, as opposed to extraction activities and the subsequent use of gas. There was no evidence before the Court that those activities contribute to climate change.
- Climate change risk matters would, where relevant, be considered by downstream decision-makers when managing risks in respect of the substantive recovery, extraction, and use of gas.

Thus, the Applicant's claim under this ground failed.

Decision to make the Instrument and the Approval Decision not legally unreasonable

The Applicant argued that when making both the Instrument and the Approval Decision, the Minister acted in a way that was legally unreasonable, illogical, or irrational by failing to have adequate regard to climate change risks and economic risks, and failing to act in a way that had an "*evident and intelligible justification*".

The Court held that the Approval Decision was amenable to judicial review due to the heavily regulated statutory regime for Ministerial expenditure decisions (at [110]). However, the Court held that the Approval Decision was not unreasonable in this case (at [112]).

The Court noted that the Applicant had misstated the standard of review for unreasonableness. Being a form of delegated legislation, the Instrument is subject to a higher standard of unreasonableness. The Court quoted the following passage from the judgment in *Athavle v State of New South Wales* [2021] FCA 1075 at [96] confirming the relevant test for unreasonableness:

> *… the proper test is not one of expediency but whether there is a power to make the subordinate instrument. Where there are difficult choices to be made, it is essential that the Court does not usurp the role of the maker of the impugned subordinate instrument ...*

The Court referred to the following discussion in the case of *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [11] which confirmed that:

> *… the test for unreasonableness is necessarily stringent … courts will not lightly interfere with the exercise of a statutory power involving an area of discretion.*

In this situation, the Court was not convinced that the Instrument nor the Approval Decision were unreasonable. Thus, the Applicant's claim under this ground also failed.

Minister did not act upon erroneous advice

The Applicant argued that when making the Approval Decision, the Minister relied on incorrect or unfounded advice from an assessment committee regarding the financial viability of the Program. It was argued that such considerations were central to the mandatory relevant considerations under section 71 of the PGPA Act.

The Court rejected this argument and held that the information was unlikely to have had a misleading effect on the Approval Decision given that the purpose of the Program was to accelerate investment and not to generate new investment (at [119]). The assessment committee had also assessed the proposed spending as per the requirements of the Program assessment criteria (at [121]).

The Court held that the Minister had not acted on erroneous advice. Thus, the Applicant's claim under this ground also failed.

Contracts Decision was legally unreasonable

The final ground of review related to the Contracts Decision made by the Commonwealth. The Applicant argued that the timing of the making of the Contracts Decision was legally unreasonable, illogical, or irrational. It argued that the Commonwealth had breached its common law obligations to act as a model litigant, being the Commonwealth's duty to act in a way which promotes the proper use and management of public resources, and had acted in a way that was legally unreasonable (at [159]).

By way of background, following the commencement of proceedings against the Minister's Approval Decision, the Applicant wrote to the Minister stating that any agreements entered into in reliance on the Approval Decision and the Instrument would be invalid, and would be "*contrary to the interests of justice*" given that the Minister's powers were before the Court. The Commonwealth nonetheless entered into three contracts with Imperial.

The Court confirmed that a decision will be unreasonable in the legal sense when it lacks "*an evident and intelligible justification*" or where it is a decision that "*no reasonable person could have arrived at*" (see [181] to [186]).

Emphasising the need for "*judicial self-restraint*", the Court referred to the decision in the case of *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11, which noted that there is "*an area of decisional freedom of the decision maker*" and that the concept of legal unreasonableness does not "*… provide a vehicle for the Court to remake the decision according to its view as to reasonableness …*" (see [183] to [184]).

The Court held that the Contracts Decision was legally unreasonable. The Court's reasoning included that the Applicant had put the Commonwealth on notice of its concerns, the Applicant had sought an undertaking from the Minister, there was no evident and intelligible justification for the Contracts Decision, the timing of the Contracts Decision deprived the Applicant of the opportunity to seek urgent injunctive relief, and the Commonwealth had failed to comply with the common law conduct standards for a model litigant.

The Court held that the Contracts Decision was legally unreasonable and thus the contracts themselves were void. Thus, the Applicant's claim under this ground was successful.

Conclusion

The Applicant was successful on one of the five grounds, and the Court therefore granted a declaration that the Contracts Decision is invalid and dismissed the remaining grounds.

Colin Biggers & Paisley

Development permitted by Land and Environment Court orders is not necessarily "approved" development in New South Wales

Mollie Hunt | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Verde Terra Pty Ltd & Ors v Central Coast Council & Anor* [2023] NSWCA 121 heard before Ward P, White JA and Kirk JA

June 2023

In brief

The recent Court of Appeal case of *Verde Terra Pty Ltd & Ors v Central Coast Council & Anor* [2023] NSWCA 121 arose in the context of a dispute about how one measures the environmental impacts of the total development against the development "approved" as this has a bearing on whether the development constitutes "designated development", which involves more onerous development assessment requirements.

The assessment of a development application altering an earlier "approved" development requires an understanding of what the earlier "approved" development is. The Court of Appeal in this case considered whether the earlier "approved" development is the original development consent granted by a consent authority, or whether it comprises development under rectification orders made by the Land and Environment Court in earlier enforcement proceedings.

The appeal

The proceedings concerned an appeal to the Court of Appeal against the Land and Environment Court's decision to dismiss an application by Verde Terra Pty Ltd (**Verde Terra**) for a declaration sought in the following terms [our emphasis]:

> *A declaration that the Mangrove Mountain Landfill & Golf Course **constitutes 'development (whether existing or approved)'** within the meaning of **clause 35** of Schedule 3 of the EPA Regulation.*

Clause 35 is now section 48 of schedule 3 of the *Environmental Planning and Assessment Regulation 2021* (NSW) and switches off a development from otherwise being designated development in certain circumstances. Section 48(1) states as follows [our emphasis]:

> ***48 Alterations or additions to existing or approved development***
>
> *(1) Development involving alterations or additions **to development, whether existing or approved**, is **not designated development** if, in the consent authority's opinion, the alterations or additions do not significantly increase the environmental impacts of the existing or approved development.*

Switching off the "designated development" categorisation would mean that a development application also avoids the more onerous development assessment requirements for designated development, for example:

- designated development applications must be accompanied by an environmental impact statement (see section 4.12(8) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**));
- designated development applications must have a minimum public exhibition period, which for an application for development consent for designated development is 28 days (see clause 8 of schedule 1, part 1, division 2 of the EP&A Act); and
- third party objectors dissatisfied with the determination of the consent authority can appeal to the Land and Environment Court against the determination (see section 8.8(2) of the EP&A Act).

In this context, the development application needs to be assessed or compared with whatever the "approved" development is.

In this case, the question was whether the "approved" development was the original 1998 development consent (**1998 development consent**), or the development required by the Land and Environment Court's 2014 orders (made with the parties' consent) in the enforcement proceedings. Verde Terra submitted it was the latter. To explain why requires further background being provided.

In 2012, the Central Coast Council (**Council**) brought proceedings against Verde Terra and others alleging breaches of terms of the existing development consent regulating the extractive industry and waste facility on the subject land.

The parties settled those proceedings by consent orders in 2014, which required works to be undertaken in accordance with conditions. Those works differed from the works approved by the 1998 development consent.

Verde Terra contended that those orders were "approved" development because either:

- those works were both permitted and required by the Land and Environment Court's orders (at [33]); or
- the development the subject of the 2014 consent orders was within the scope of the 1998 development consent, which had been approved by a consent authority. The development the subject of the 2014 consent orders merged with the 1998 development consent, and further development consent was not required for the works (at [34]).

The Court of Appeal determined that the consent orders did not constitute the "approved" development, based on the finding that the orders were not binding "*in rem*". That is, the Court of Appeal held that the orders only bind the parties, and not the whole world based on the following reasons (at [38]) [our emphasis]:

> ***Certain orders*** *of the Land and Environment Court* ***under the former s 124 and current s 9.46*** *of the Environmental Planning and Assessment Act* ***will operate in rem, as well as in personam****. That is, they will bind the parties and the whole world (PE Bakers Pty Ltd v Yehuda (1988) 15 NSWLR 437 at 445-446). Had the 2014 orders been made by the Court after a* ***contested hearing, rather than by consent****, they would have operated in rem. But, contrary to the submissions of Verde Terra,* ***orders made by consent will not give rise to a judgment in rem*** *(K R Handley, Spencer Bower and Handley: Res Judicata (5th ed, 2019, LexisNexis) at [2.19]; PE Bakers Pty Ltd v Yehuda at 446).*

As is clear from the Court of Appeal's findings, if the 2014 orders had not been consent orders, they would have been binding in rem, and it would not have mattered that the Court was not acting in its exercise of power as a consent authority in making orders in its enforcement capacity. Had that been the situation, those orders would still have resulted in "approved" development for the purposes of the comparison exercise. In that regard, White JA relevantly stated as follows (see [40] to [41]) [our emphasis]:

> *I do not accept that 'approved' necessarily means approved by a consent authority. I would accept that* ***if the 2014 orders had been made by the judge after a contested hearing so that they operated in rem****, the development 'approved' by the orders would fall within cl 35. That is not because the Council's cause of action merged in the judgment so that the development is to be taken to be within the 1998 development consent, but because the* ***development approved by the orders would be binding on the world****.*
>
> *A prior approval of designated development by a consent authority is binding on the world (unless overturned on appeal). An approval by the Land and Environment Court of designated development after a contested hearing is binding on the world (again, subject to appeal).* ***Either would fall within the words 'approved development' in cl 35****. But as cl 35 affects third parties' rights, the 'approved development' against which the environmental impact of the total development is to be assessed, is a development whose approval is binding on third parties.*

Conclusion

Although the circumstances of this case are based on quite specific facts, the judgment contains three timely reminders about the nature of certain types of orders the Land and Environment Court makes and the planning system in New South Wales (**NSW**) more broadly:

- The effect of orders made by the Land and Environment Court can only be properly understood with reference to the power that the Court is exercising in making those orders. The Land and Environment Court's power in Class 1 merits review is quite different to its power in Class 4 enforcement proceedings. Consent orders in those two different types of proceedings have quite different effects. Furthermore, consent orders in Class 4 proceedings will have a different quality to orders made after a contested hearing.
- Whilst the consent orders in the 2014 Class 4 enforcement proceedings led to circumstances for the regularisation of the breach of the earlier consent, the orders did not become part of, or merge, with the 1998 development consent. The exercise of the powers of approval by a consent authority is different to the exercise of powers by the Land and Environment Court in the context of enforcement proceedings. Once development deviates from the approval system in NSW, for example undertaking development in accordance with the EP&A Act, that not only brings with it difficulties in regularising the breach given the forward-looking nature of the EP&A Act, but it may also create limitations on the use of future approval pathways. This can have ongoing implications even for future landowners.
- If you are dealing with a site that has been the subject of past unauthorised works and enforcement activity where Court orders have been made, the nature and effect of those orders needs to be properly considered rather than assumed to form part of some sort of an approval. The effect of the orders also may not be binding on third parties.

Colin Biggers & Paisley

Victorian Civil and Administrative Tribunal dismisses an appeal against proposed development after a new amendment revokes the rights of review for objectors

Evie Atkinson-Willes | Ashleigh Pope | David Passarella

This article discusses the decision of the Victorian Civil and Administrative Tribunal in the matter of *Koneska v Greater Geelong CC (Red Dot)* [2023] VCAT 359 heard before Geoffrey Code, Senior Member

June 2023

In brief

The case of *Koneska v Greater Geelong CC (Red Dot)* [2023] VCAT 359 concerned an appeal to the Victorian Civil and Administrative Tribunal (**Tribunal**) by two objectors (**Objectors**) to the grant of a permit by the Geelong City Council (**Council**). For context, a "Red Dot" decision is a decision that the Tribunal has earmarked as being significant or notable.

The appeal proceeding was dismissed by the Tribunal because of an amendment of the *Greater Geelong Planning Scheme* (**Planning Scheme**) that came into force after the matter was heard by the Tribunal, but before a decision was reached. As a result, the Objectors' rights for review of a decision to grant a permit under section 82 of the *Planning and Environment Act 1987* (Vic) (**Act**) that existed at the time the proceeding was commenced were revoked by the amendment to the Planning Scheme and the proceeding was subsequently dismissed.

Background

The Council granted a permit application to build a telecommunications facility on land located 10 kilometres from Avalon Airport, and 25 kilometres from the Geelong central business district.

The appeal concerned applications by the Objectors for a review of the Council's decision pursuant to section 82 of the Act.

After the objections were heard, but before final orders were handed down by the Tribunal, Amendment VC226 (**VC226**) was approved and implemented by the State government. VC226 made changes to the Victoria Planning Provisions and all local government planning schemes to support emergency recovery, telecommunications, solar energy systems, and community care accommodation. The Explanatory Report for VC226 clearly stated an intention to exempt these facilities from notice, decision, and review requirements.

As a result of VC226, a clause was inserted into the Planning Scheme to the effect that an application to construct a building or construct or carry out works for a telecommunications facility became exempt from the review rights under section 82 of the Act. In short, it brought the validity of the Objectors' applications for review into question. Consequently, Telstra Corporation (**Telstra**) applied to the Tribunal for an order to dismiss the proceeding as misconceived on the grounds that the permit application had become exempt from review rights.

Court finds the application for a review of the decision to grant a permit by an objector is misconceived and cannot be heard

Telstra submitted that the Tribunal no longer had the jurisdiction to determine the Objectors' applications and relied on the reasoning of Supreme Court of Victoria (**Court**) in the case of *Von Hartel & Ors v Macedon Ranges Shire Council & Ors* [2014] VSC 215; (2014) 48 VR 632 in which the Court considered circumstances where a planning scheme had been amended to revoke the review right of objectors across all relevant provisions under which permission was required. The Tribunal noted that the Court in that case emphasised the effect of section 5 of the Act was "*to automatically pick up amendments to planning schemes*" when making a determination under a provision of the Act (at [13]).

The Objectors submitted that, given that the proceeding was heard before VC226 came into effect, the Tribunal should not apply VC226 retrospectively and must consider the Planning Scheme as it was at the time of the hearing of the Objectors' applications.

After considering the submissions, the Tribunal refused to accept the Objectors' argument on the basis that it would be contrary to well established case law and "*… the strongly persuasive authority of Von Hartel*" (see [22] and [56]). Accordingly, even though VC226 was not in force at the time of the hearing of the Objectors' applications, the amendments to the Planning Scheme were mandatorily considered by the Tribunal in making the final order. The Tribunal deemed that the applications were misconceived on the basis that the Planning Scheme barred the Tribunal from making a determination.

Impact of planning scheme amendments

This case demonstrates that it is important to be vigilant when an amendment is being considered for a planning scheme. This is particularly so because the Tribunal is bound to consider the law at the time of the Tribunal's decision rather than at the time the proceeding is heard, and thus any update to relevant planning law during this period has the potential to impact a development being considered by the Tribunal.

If an objector brings an action against a developer and that right of review is removed by an amendment to a planning scheme prior to the Tribunal's decision on review, the action will be considered misconceived and dismissed outright. Accordingly, an amendment to a planning scheme may result in the decision to grant a permit becoming exempt from review, and thus providing an easier and less expensive path to development.

Conclusion

The Tribunal is bound to consider the Act and all relevant legislation as at the time of the Tribunal's decision. The Tribunal in this case had regard to an amendment to the Planning Scheme which removed a right of review for objectors that came into force before the delivery of the Tribunal's decision and dismissed the Objectors' applications on the basis that they were misconceived for lack of right of review.

This case demonstrates that it is invaluable when deciding where to propose a new development to be aware of what, if any, amendments are being considered to the relevant planning scheme and what impacts these amendments may have on the development.

Colin Biggers & Paisley

NSW Land Valuations 2023 – Impacts on NSW Land Tax

Emily Webber | Anthony Landro | Mollie Hunt | Todd Neal

This article discusses the current problems with the land valuation process in New South Wales and provides recent case law examples of appeals to the Land and Environment Court of New South Wales regarding land valuation objections

June 2023

Key takeaways

- With land valuations for land tax purposes due to occur on 1 July, landowners should be ready to consider land valuations, and whether an objection is warranted.
- More unique properties with unusual characteristics warrant more careful attention to the valuation notices to ensure that the relevant circumstances are properly taken into account.
- Because of the way land tax is calculated, most landowners in NSW should expect an increase in their 2024 land tax assessment.

In brief

Volatility in the property market in recent years is leading to fluctuating land valuations and risks of valuations being inaccurate. Whilst the Valuer-General's valuations are less susceptible to these problems, it nevertheless serves as a reminder for landowners that they should be aware of the prospect of overvaluations and the impact that the Valuer-General's land valuations have on their liability for rates and land tax. If the Valuer-General's valuation is considered too high, it is important that landowners now start planning how they might address the overvaluation of their land holdings.

Problems with the land valuation process in NSW

Issues with the valuation process used to determine land tax in NSW have been raised since its inception well over a century ago, and reintroduction in 1956 (see Land Tax in New South Wales, NSW Parliamentary Library briefing paper).

Whilst there have been improvements in the process over this time, cyclical criticisms continue to arise.

In 2013, the Chair (Matt Kean MP) in his foreword to the report by the Joint Standing Committee on the Office of the Valuer-General stated that:

- "*this is a system that has systemic issues, particularly regarding the fairness in the way landholders are treated and the transparency surrounding how land is valued*"; and
- "*On volatility, independent analysis highlighted material and significant yearly fluctuations in land values. Such volatility risks creating a council rate lottery for landholders … Regarding procedural fairness, it is readily apparent that landholders are not currently afforded a fair hearing.*"

More recently the Joint Standing Committee on the Office of the Valuer-General in June 2023 made recommendations for the Office of the Valuer-General NSW to continue to work with the NSW Department of Planning and Environment to "*improve communication with the public about land valuation and related matters*".

In a media release by the Blue Mountains Council on 28 April 2023, the Mayor has unconventionally requested that the Valuer-General either maintain current valuations or subsidise rate increases. With new valuations affecting rates from 1 July 2023, that Council estimates that a quarter of its residents will face an increase in land tax bills. More scathing criticisms have been reported in the media from one of Blue Mountain Council's other Councillors.

Despite the criticisms, ultimately valuations by the Valuer-General are conducted under the methodology prescribed by the *Valuation of Land Act 1916* (NSW) and *Land Tax Management Act 1956* (NSW).

These valuations are then used to levy rates and form the basis for NSW Government land tax. In simple terms, a higher than justified valuation will correspond with land tax and rates above what they would otherwise legitimately be.

How land tax is calculated

Land is valued as at 1 July each year: section 14B *Valuation of Land Act 1916* (NSW).

Land tax is determined by averaging the current and two preceding land valuations: see section 9 and section 9AA *Land Tax Management Act 1956* (NSW). Given the large average increases in values over the last three years, owners of land can expect higher land valuations and by corollary larger land tax assessment notices and Council rates.

The liability for land tax then crystallises at midnight on 31 December: see section 3AL of the *Land Tax Act 1956*.

Land tax assessments based on valuation notices are then issued to landowners typically between January to mid-February.

The rate of land tax paid depends on the land value and the land tax thresholds.

For 2023, the rates of land tax are:

- General rate: $100 plus 1.6 per cent of land value above the General Threshold, up to the premium rate.
- Premium rate: $79,396 plus 2 per cent of land value above the Premium Threshold.

For 2023, the thresholds are:

- General threshold: $969,000.
- Premium threshold: $5,925,000.

With 1 July approaching, it is important that landowners, particularly landowners of high value parcels of land, are aware of the importance these valuations have, particularly in times of fluctuating property values.

Land valuation by the NSW Valuer-General

When valuing land, the Valuer-General assumes the land is vacant (eg excluding building improvements), and values the land based on the land's highest and best permitted use (by considering town planning considerations): see the Valuer-General's website, and section 6A(1) *Valuation of Land Act 1916* (NSW).

A "mass valuation" approach is taken unless properties with specific attributes require individual valuations, with the prescribed valuation method explained here.

However, Leeming JA in the Court of Appeal decision of *Olefines Pty Limited v Valuer-General of NSW* [2018] NSWCA 265 at [32] described section 6A as involving "unwieldy complexity" and involving, in that case, the "essential problem".

Objecting to Land Tax Assessments

Landowners who are dissatisfied with their land valuation can object within 60 days from the issue date on the valuation notice: section 35 *Valuation of Land Act 1916* (NSW). Valuation NSW was reported by the Sydney Morning Herald as stating that 1564 objections had been received in a single month from January 2023 to February 2023, with the Herald reporting this was on the basis that the months-old land valuations failed to capture property price falls.

Importantly, according to the Valuer-General's 2020-2021 Annual Report, of the 2,732 objections lodged in 2021-2022, 28.9% were allowed, and 55% of objections were disallowed.

If you are dissatisfied with the Valuer-General's determination of your objection, you may appeal to the NSW Land and Environment Court: section 37 of the *Valuation of Land Act 1916* (NSW). Obviously, the costs involved in commencing proceedings need to be weighed against the costs any overvaluation may create.

Land valuation and rating appeals counted for 26% of the Class 3 caseload in 2021 as set out in the NSW Land and Environment Court's Annual Review for 2021 (which also includes compulsory acquisition compensation appeals and Aboriginal land rights claims).

Appeals to the Land and Environment Court

The last decade has seen a relatively small number of judgments in the NSW Land and Environment Court regarding the Valuer-General's determinations of land valuation objections. A number of these have subsequently been appealed to the Court of Appeal.

Often the appeals involve more obscure property interests, for example the Sydney Fish Market, and Perisher ski resort. More unique properties with unusual characteristics warrant more careful attention to the valuation notices to ensure that the relevant circumstances are properly taken into account.

The Court of Appeal in *Valuer-General v Sydney Fish Market Pty Ltd* [2023] NSWCA 52 recently considered whether the Sydney Fish Market land was "*Crown lease restricted*" for the purposes of section 14I of the *Valuation of Land Act 1916*. After complex consideration of historical and transitional provisions and the factual circumstances, the Court of Appeal held that the land was "*Crown lease restricted*", and therefore is "*to have its land value determined taking into account the restrictions on the disposition or manner of use that apply to the land by reason of its being the subject of the lease concerned*", as stated in section 14I.

In *Perisher Blue Pty Limited as Trustee for the Snow Trust v Valuer-General* [2023] NSWLEC 41 the Land and Environment Court was required to consider the approach to valuing the Perisher ski resort. This comprised land the subject of a lease within Kosciuszko National Park (Consolidated Mountain Lease), and a further 1313ha of licenced land around the leased land. The appeal related to the Valuer-General's determination in two valuation years. The parties had agreed on the appropriate value to be attributed to licenced land. However, the Court was required to determine the value of the leased land, comprising accommodation and ski infrastructure. Ultimately, the Court preferred the valuation evidence of the Applicant's valuer, and determined that the valuation of the leased land at a significantly reduced amount. In total, for the leased and the licenced land, the Valuer-General had valued the land at approximately $39,000,000, whereas the Court determined the land valuation of the leased properties at approximately $14,000,000.

Property market volatility affecting the valuation process

Given the volatility in parts of the property market and the various unique land uses existing within NSW, the potential inability of the valuation process to adjust and capture nuances in the property market remains even if this arises just for a narrow set of property interests held within NSW.

According to the Valuer-General, land values increased across NSW by 26.3% from 2021 to 2022 constituting an increase by $600 billion at 1 July 2022.

Despite the correlation between higher land valuations and higher land tax, many either assume the immutability of the valuation conducted by the Valuer-General or ignore the opportunity to object to the valuation despite it underlying the significant amounts in rates and land tax paid and the potential for methodological and other flaws to exist.

Importantly, the arrival of the 2023 valuations will spell the end of the 2020 valuations in the averaging exercise that takes place. Most landowners in the State should therefore expect an increase in their 2024 land tax assessments by this fact alone, given there was according to the Valuer-General a 24% increase in the total value of land in NSW in the 12 months to 1 July 2021.

What landowners should remember

Where the land size is large or has a large underlying land value then the impact of an overvaluation can be quite significant. There will also be situations where businesses own multiple properties with a large property portfolio where the cumulative effect of increased land values causes significant increases in land tax liabilities.

Landowners should carefully examine land valuation notices in order to quickly identify any unusual increases in valuations or other features of the land that indicate an inflated value.

With land valuations due to occur on 1 July, landowners should be ready to consider land valuations, and whether an objection is warranted.

Victorian infrastructure projects put on hold, but Suburban Rail Loop is now underway

Evie Atkinson-Willes | David Passarella

This article discusses the ongoing developments of the Suburban Rail Loop and highlights the importance of legal guidance for landowners and occupiers navigating the compulsory acquisition process

June 2023

In brief

It was recently announced that the Australian government has commissioned an independent 90-day review of the $120 billion invested in infrastructure projects within Victoria. The review comes after projects were left without adequate funding or resources in the face of a backlog of debt and unforeseen budget deficits. In light of this, projects such as the Airport Rail Link and North East Link have been suspended.

Notwithstanding these other projects being put on hold, preliminary works for the Suburban Rail Loop (**Project**) began in June 2022 and are now underway to deliver a 90-kilometre rail line linking major train services through Melbourne's middle suburbs. As part of the delivery of the Project, land acquisition is required. Part of this process involves interests in the relevant land being vested in the Suburban Rail Loop Authority (**Authority**).

As the Project has progressed, we have acted for several landowners, tenants, and business owners with legal or equitable interests in land spanning from Cheltenham to Box Hill and served with a formal Notice of Acquisition.

For landowners and occupiers facing compulsory acquisition, it is important to seek legal representation to gain a greater understanding of:

- their rights and obligations under the *Land Acquisition and Compensation Act 1986* (**LACA**);
- the relevant information and documentation required for the process;
- how to maximise the compensation they may be able to claim from the Authority, including professional costs and expenses incurred during the process.

Along that train of thought, landowners should be aware of the following items that may be claimed under Part 4 of the LACA in the event that their land has been compulsorily acquired:

- *Market value of the land* – the amount that a willing but not anxious purchaser would have paid for that interest.
- *Special value* – the value of any pecuniary advantage in addition to market value which is incidental to ownership or occupation of the land.
- *Severance* – applies to land which is only partially acquired by the Authority and payable where the value of the balance of the land is reduced as a result of being severed from the acquired land.
- *Loss attributable to disturbance* – any pecuniary loss suffered by the claimant as a natural, direct and reasonable consequence of the acquisition under the LACA (ie business loss claim etc).
- *Solatium* – any intangible and non-pecuniary disadvantages that have resulted from the acquisition which is calculated up to 10% of the market value of the land.

Claimants are also entitled to reimbursement of any reasonable legal, valuation and other professional expenses that are incurred as a result of the acquisition.

As the Project continues, we anticipate more formal Notices of Acquisition will be issued over the coming months in order to stay on track for completion in 2035.

Colin Biggers & Paisley

High Court confirms the constitutional validity of notional GST paid by local governments

Carlos Gouveia

This article discusses the decision of the High Court of Australia in the matter of *Hornsby Shire Council v Commonwealth of Australia* [2023] HCA 19 heard before Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ

July 2023

In brief

The case of *Hornsby Shire Council v Commonwealth of Australia* [2023] HCA 19 concerned proceedings in the High Court of Australia (**Court**) by the Hornsby Shire Council (**Council**) against the Commonwealth and New South Wales in respect of the payment, under protest, of an amount of notional goods and services tax (**notional GST**) to the Commonwealth.

The Court found that notional GST paid by a local government was not a tax on the property of the State and did not offend section 114 of the *Commonwealth of Australia Constitution Act (The Constitution)* (**Constitution**).

Background

The Council paid, under protest, a notional amount of GST to the Commonwealth. The amount of notional GST arose from the sale of a motor vehicle by the Council.

Western Australia, South Australia, Victoria, and Queensland intervened in the proceedings.

The Council claimed that that the notional GST paid by it was a tax on property of the Council and the laws which related to payment of the notional GST were invalid under section 114 of the Constitution.

Section 114 of the Constitution provides that the Commonwealth must not impose any tax on property of any kind belonging to a State. The Council is considered to be the State for the purposes of section 114.

Legislative scheme

Goods and services tax (**GST**) is imposed by a legislative scheme which includes three imposition Acts. Each of those imposition Acts provides that the relevant Act does not impose a tax on property of any kind belonging to a State. This is to ensure that those Acts do not contravene section 114 of the Constitution.

Around the time that the GST legislation was introduced in 1999, the Commonwealth, States, and Territories entered into an Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations.

Under the Intergovernmental Agreement:

- the Commonwealth undertook to legislate to provide all of the revenue from the GST as imposed by the GST legislation to the States and Territories;
- the parties intended that the Commonwealth, States, Territories, and local governments, and their statutory corporations and authorities, would operate as if they were subject to the GST legislation and would make voluntary or notional payments of GST;
- the Commonwealth undertook to legislate to require the States and Northern Territory to withhold from any local government the amount of any notional GST that was not paid by that local government.

A further version of the Intergovernmental Agreement was entered into in 2009 in substantially the same terms as the 1999 Intergovernmental Agreement.

The parties to the proceedings agreed that the Intergovernmental Agreements were not intended to create legally enforceable rights and obligations, but were political arrangements setting out the fiscal relationship between the parties with respect to GST.

The Commonwealth and New South Wales enacted legislation to give effect to the Intergovernmental Agreements.

Under that legislation:

- the Commonwealth and New South Wales confirmed that each of them intended to comply with and give effect to the Intergovernmental Agreements;
- the Commonwealth undertook to pay GST (including notional GST) to the States;
- a State entity (including the Council) may pay to the Commissioner of Taxation notional GST and do things which would have been necessary or expedient if it had been liable for GST;
- it was a condition of receipt by a State of federal funding for local government purposes that the State agreed to:
  - withhold funding from a local government body where that body failed to pay notional GST, and
  - pay the amount withheld back to the Commonwealth.

Arguments of the parties

The Council argued that notional GST was a tax because it was a compulsory exaction of money for public purposes enforceable by law.

The Council argued that it was either compelled or practically compelled to pay notional GST. In the view of the Council, the legislative scheme legally compelled the Council to pay notional GST as a condition of receiving federal funding and it had no choice but to pay notional GST.

Alternatively, the Council argued that the legislative scheme was a circuitous device by which the prohibition in section 114 of the Constitution was impermissibly circumvented.

The other parties argued that payment of notional GST by the Council was an entirely voluntary and political act.

Decision of the High Court

The High Court unanimously found that there was nothing in the legislative scheme which imposed on the Council a liability to pay notional GST. Instead, the payment of notional GST was entirely voluntary and part of a political arrangement.

The conditions for receipt of funding for local government purposes which were imposed on the State only applied when the State chose to accept the funding. The State was able to refuse to accept the funding.

The Council had no entitlement to receive the federal funding. The State also had no entitlement to receive the federal funding, if it did not comply with the conditions in the legislative scheme.

In any case, if the Council failed to pay notional GST this would either result in a revenue neutral outcome for the Council, or leave it better off due to the time value of money. The Council was not compelled or practically compelled to pay notional GST.

It was also relevant that the funding provided by the Commonwealth accounted for only 2% of the Council's revenue.

Conclusion

Whilst the case concerned an isolated transaction undertaken by a particular local government in New South Wales, the Court noted that its decision would have wider application (at [5]):

> *Whilst the special case concerned only the sale of one car by the Council, the following reasoning would apply to any local government body that also chose to include, in any BAS [Business Activity Statement], notional GST in the circumstances described below.*

As the Intergovernmental Agreements were entered into by all States, and the legislative scheme described above has been entered into by all States on substantially the same terms, the reasoning would apply to notional GST paid by any local government body of any State.

It is clear that a local government body is free to decide whether or not to pay notional GST to the Commissioner of Taxation. But if the body chooses to pay notional GST, it will have no right to recover the amount paid because of the application of section 114 of the Constitution.

Colin Biggers & Paisley

Qld Court of Appeal dismisses a claim for injury suffered as a result of an individual falling into a concealed hole

Chloe Dickson | Megan Dudley | Georgina Wong

This article discusses the decision of the Queensland Court of Appeal in the matter of *Townsville City Council v Hodges* [2023] QCA 136 heard before Mullins P, Mitchell AJA and Crow J

July 2023

In brief

The Queensland Court of Appeal recently considered occupiers' liability in public places and the standard of care in *Townsville City Council v Hodges* [2023] QCA 136, a claim made for injuries following a fall into a concealed hole at a park.

Background

The respondent, Barbara Josephine Hodges, attended Sheriff Park which was owned by Townsville City Council (**appellant**). On 15 October 2015, the respondent stepped into a hole that was obscured by grass. This ultimately caused her to suffer spiral fractures in her ankle. Issues were raised with respect to the lack of evidence provided regarding the inspection and measurement of the subject hole.

Decision at first instance

This case was heard before His Honour Judge John Coker of the District Court in February 2022 and a decision was handed down on 7 December 2022.

In summary, the respondent argued that the appellant had been negligent due to the inadequate inspections of Sheriff Park. It was argued that if a thorough inspection had been conducted, then it would have been likely that the appellant would have been made aware of the hole, and remedied it.

His Honour found that the although the subject hole was obscured by grass, there was an obvious risk of injury due to the severity of the respondent's injuries and that the ambulance crew had also fallen in the hole when attempting to carry the respondent in a stretcher.

His Honour ordered that the appellant was to pay the respondent damages of $301,603.00 which was a sum that was agreed upon by both of the parties.

Issues on appeal

The decision was appealed by the appellant. The appeal decision of Mullins P, Mitchell AJA and Crow J was handed down on 11 July 2023. The grounds of appeal and findings are as follows:

Ground 1 and 2: "The Hole"

The appellant argued that the primary judge erred in finding that the depth of the hole had little consequence and that instead, the respondent merely fell on uneven ground that was approximately 20mm.

The primary judge concluded that there was a "hole", but was unable to provide any findings in regard to the precise characteristics of the hole which confirmed it to be "of little consequence." This served as an issue as "a hole" has a fairly broad definition and can be considered as either a small "pit" or a "depression in the ground".

The members of the respondent's family and employees of the Queensland Ambulance Service were able to validate that the subject hole existed. However, the hole was not photographed or inspected, so insufficient evidence was provided regarding the hole's diameter and depth.

The primary judge had described the hole as being of "ankle depth". However, "ankle depth" could easily be misinterpreted due to the broad nature of the term, as there are seven bones in the ankle. The photographic evidence obtained also contradicted this statement, as it showed the hole was large enough to fit three person's ankles.

The respondent argued that the appellant was not negligent for concealing the hole, but rather took inadequate steps when conducting inspections of the park. It was argued that if adequate inspections had been conducted, then the appellant would have been made aware of the hole and would have taken steps to rectify the hole.

However, the question arose as to whether a local authority is liable for concealed hazards or if they are merely liable for known hazards. It was stated that liability for hazards is completely dependent on what is reasonably required of the local authority, including the inspection systems used to locate these hazards.

The terms as stated in sections 35 and 36 of the *Civil Liability Act 2003* (Qld) concerned whether failure in detecting the subject hole could be considered a lack of reasonable care as the appellant was responsible for the whole park.

The Court of Appeal held that the primary judge erred in his findings in regard to his conclusion that the depth of the hole was of little consequence.

If the hole had not been obscured or concealed, the depth of the hole would have played a large part in determining liability.

Grounds 3 to 7: Inspections and sections 35 and 36 of the *Civil Liability Act 2003* (Qld)

The appellant argued that the primary judge erred in his determination that the appellant was negligent for its inadequate inspections in detecting the hole.

The primary evidence produced to the primary judge was a statement from the respondent's daughter, Ms Mains, who stated that "*[Y]ou wouldn't know that there was a hole until you fell in it.*"

The primary judge made a finding that the ambulance officers on the scene were unable to detect the subject hole despite being alerted of its presence.

Mr Radcliffe, the team leader in the Parks Department of the Townsville City Council, confirmed that he inspected Sheriff Park on Monday mornings and Fridays. The maintenance day was on Thursday when approximately five workers would conduct inspections.

The crew had attended Sheriff Park on the day of the incident. Mr Radcliffe stated that on the day of the incident, and the days on which he conducted inspections, he had never noticed the hole.

Mr Frank Thompson, the mower of Sheriff Park, stated that he would spend approximately four and a half to five hours on Thursdays conducting his mowing duties. Mr Thompson stated that if he had noticed a hole, he would have had it remedied.

An employee of the appellant, Ms Collier, attended the park on Thursdays and Fridays to conduct inspections and stated she had not seen the hole. Ms Miller who conducted ad-hoc inspections of the park also did not observe the subject hole.

The evidence supported that it would have been difficult to discern the presence of the hole. The question arose as to whether the appellant will be found liable.

The Court of Appeal held that the employees and officers involved in the park inspections and park maintenance duties would not be at fault because they were unable to detect the presence of the hole despite reasonable inspections.

Outcome and implications

This decision is important when determining what constitutes a reasonable inspection to identify a hazard. In this case, the appellant was required to demonstrate that it undertook reasonable inspections and such inspections would not have, and did not, identify the concealed hole in the ground.

This decision reinforced that although a local authority or occupier is responsible for consistent inspections and adequate maintenance of public areas, local authorities or occupiers will likely not be held liable for hazards that are concealed, provided the inspections are adequate and reasonable.

Colin Biggers & Paisley

Planning and Environment Court of Queensland allows appeal against conditions imposed restricting alterations to the interior of a State heritage building on the basis that such interior is not part of the building's cultural heritage significance

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *G Global 180Q Pty Ltd v Brisbane City Council & Anor* [2023] QPEC 5 heard before Rackemann DCJ

July 2023

In brief

The case of *G Global 180Q Pty Ltd v Brisbane City Council & Anor* [2023] QPEC 5 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against conditions imposed by the Brisbane City Council (**Council**) on a development permit for building work involving partial demolition, internal alterations, and on a development permit for a material change of use of premises for centre activities (**Proposed Development**) in respect of the National Australia Bank building situated at Queen Street, Brisbane (**Subject Building**). The Co-Respondent was the Chief Executive of the Department of State Development, Infrastructure, Local Government and Planning.

The Subject Building, and the premises on which it stands, is a State heritage place under the *Queensland Heritage Act 1992* (Qld) (**QHA**) and is also mapped in the Heritage Overlay under the *Brisbane City Plan 2014* (**City Plan**). The Heritage Overlay Code in the City Plan, supported by the Heritage Planning Scheme Policy, thus applies to the Subject Building.

The Subject Building is seven storeys. The specific conditions appealed against had the effect of preventing the Applicant from altering the internal layout of Levels 2 and 3 of the Subject Building, which, at the time of appeal, presented as individual and confined tenancy spaces, to create a more open design.

It was agreed by the parties that the only issue for the Court to determine was whether, on a proper construction of the entry in the Queensland Heritage Register (**QHR**), under the QHA, the layout and finishes of Levels 2 and 3 of the Subject Building are part of the cultural heritage significance of the Subject Building (at [5]).

The parties agreed that if this issue was answered affirmatively, the Proposed Development would have a detrimental or unacceptable impact on the cultural heritage significance of Levels 2 and 3 of the Subject Building, such that the disputed conditions would be lawful under section 65(1) of the *Planning Act 2016* (Qld) (**Planning Act**). If answered negatively, the Proposed Development would not have a detrimental or unacceptable impact on the cultural heritage significance of Levels 2 and 3 of the Subject Building, such that the disputed conditions would be unlawful under section 65(1) of the Planning Act (at [6]).

The Court found that the layout and finishes of Levels 2 and 3 of the Subject Building are not part of the cultural heritage significance of the Subject Building, and therefore allowed the appeal.

Background

The Court had to consider the "*statement about the cultural heritage significance of the place related to the cultural heritage criteria*" (**Statement of Significance**) relating to the Subject Building (at [13]). The Statement of Significance is required as part of an entry into the QHR under section 31(3)(e) of the QHA.

The Court identified that only Criterion D of the Statement of Significance was relevant to determining whether the layout and finishes of Levels 2 and 3 of the Subject Building are part of the cultural heritage significance of the Subject Building (see [13] to [15]). Criterion D states that: "*The National Australia Bank is a fine example of a 1920s bank with Classical elements reflecting the solidity of a financial institution*" (at [11]).

The Court noted the following propositions from *Goldicott v Brisbane City Council* [2020] QPEC 11; (2020) QPELR 1153 (at [10]):

- The cultural heritage significance of a place is determined by the description in a Statement of Significance, rather than by expert opinion based on a fresh assessment.
- Not every feature within a place necessarily contributes to its cultural heritage significance as described in a Statement of Significance.

- Other parts of an entry in the QHR, such as the description about the place and information about the history of the place, might provide context in assisting the construction of the Statement of Significance, but a reference to a particular feature does not necessarily ascribe cultural heritage significance to it.

Court finds the Proposed Development would not have a detrimental impact on the cultural heritage significance of Levels 2 and 3 of the Subject Building

The Council and Co-Respondent submitted that the Statement of Significance attaches significance to the Subject Building under Criterion D as a fine example of a 1920s bank because of the characteristics it shares with 1920s bank buildings more generally, that are not mentioned in the Statement of Significance for Criterion D, and, distinctly, for its "*Classical elements*" (at [17]).

The Council and Co-Respondent's submissions separated Criterion D into two limbs being, first, "*the National Australia Bank is a fine example of a 1920s bank*" and, second, "*with Classical elements reflecting the solidity of a financial institution*" (at [17]). The Council and Co-Respondent relied on expert evidence to support their contention that Levels 2 and 3 of the Subject Building are identifiable as part of what makes the Subject Building pertinent under the first limb only.

The Applicant submitted that to separate Criterion D of the Statement of Significance into two limbs is wrong and inconsistent with the definition in the Macquarie Dictionary of the term "*with*" which means "*characterised by or having*" (at [19]). The Applicant therefore asserted that the Classical elements are the significant characteristics of a 1920s bank building.

The Council and Co-Respondent submitted in response that if the Classical elements are the only matters of significance, then the Statement of Significance need not have referred to the Subject Building as a 1920s bank at all.

The Court disagreed with the latter submission and observed that there was a connection between the Subject Building's Classical elements and the fact that it was one built in the 1920s for a bank, having regard to the context provided by the history section of the QHR entry (at [20]). The Court observed that the history section cites that the Subject Building's neo-classical style was pervasive in commercial and civic buildings of a consistent scale and materials during the period, and that the use of a neo-classical style reflected the solidity of a financial institution, which was the effect referred to in the Statement of Significance (at [20]). As a consequence, the Court was of the view that the fact that the building was built in the 1920s for a bank and that it has Classical elements with the identified effect, work together.

In the history section of the QHR entry, there are references to the upper floors being occupied by professional tenants and, in the description section, Levels 2 and 3 retaining their original office layout and finish. The Council and Co-Respondent submitted that, if their construction of Criterion D is not accepted, these parts of the text in the history section and the description section would be irrelevant.

The Court did not accept this submission on the basis that both the history part and the description part observe the respective requirements of section 31(3)(b) and section 31(3)(c) of the QHA, to include information about the history of the place and to include a description of the place (see [23] and [24]). In this respect, the Court observed that not everything described in these parts of the entry need necessarily be an aspect of the Statement of Significance, and thus they remain relevant (at [24]).

Court finds expert evidence is not warranted in determining cultural significance

The parties sought to rely on the expert opinion evidence of historians to determine with respect to Criterion D of the Statement of Significance whether the layout and finishes of Levels 2 and 3 are part of what makes the Subject Building a fine example of a 1920s bank. Such findings would be relevant if the two-limb construction of Criterion D contended for by the Council and Co-Respondent was accepted.

There was no consensus between the historians on whether Levels 2 and 3 are significant elements of the Subject Building and the Court was not persuaded that the expert opinion evidence established that Levels 2 and 3 were aspects of the Subject Building which make it a fine example of a 1920 bank per se, for the purpose of Criterion D (at [42]).

However, this finding was not relevant because the Court found that the importance of the Subject Building, with regard to Criterion D, "*… lies in it being a fine example of such a building having (i.e. with) Classical elements reflecting the solidity of a financial institution …*" and that "*[t]here is no need or warrant for the recourse to the view of experts, as to whether, in their view, the place is also important in demonstrating things that buildings built for banks in the 1920s otherwise had. It is the Statement of Significance which is the effectual identification of the cultural significance of the place related to the criterion*" (at [28]). Upon this basis, the Court held that the appeal ought to be allowed.

Conclusion

The Court held that Levels 2 and 3 were not a part of the cultural heritage significance of the Subject Building and allowed the appeal. The disputed conditions were deleted.

Colin Biggers & Paisley

Controversial 'Parade development' in Ocean Grove, Geelong - 'monstrous overdevelopment' or new precedent for a growing city?

Evie Atkinson-Willes | David Passarella

This article discusses the decision of the Victorian Civil and Administrative Tribunal in the matter of *UXD Group Pty Ltd v Greater Geelong CC* [2023] VCAT 642 heard before Megan Carew, Member

July 2023

In brief

The case of *UXD Group Pty Ltd v Greater Geelong CC* [2023] VCAT 642 (7 June 2023) concerned a proceeding in the Victorian Civil and Administrative Tribunal (**Tribunal**) in relation to the refusal by the City of Greater Geelong Council (**Council**) to grant a permit application for a $10 million three-storey apartment building comprising 16 dwellings across a consolidated two-lot area (**Permit Application**).

Geelong's increasing population

According to figures from the Australian Bureau of Statistics, the population in Geelong is predicted to increase by 46.38% over the next twenty years, making it a place of interest for developers who aim to maximise on the city's development potential. In the wake of the pandemic, there has been an increase in remote work allowing more potential for people to live further from the city. In response, the Australian Government has identified Geelong as an area ripe for investment and has funded projects such as Geelong Fast Rail which encourages the relocation of city workers to Geelong. Moreover, according to The Urban Developer, the Central Geelong Framework Plan introduced in March 2023 is expected to deliver 60,000 jobs and 16,000 residents to the city by 2050. In turn, a significant attitudinal shift has occurred in the planning regulations controlling development in Geelong.

Background

Despite the growing demand for expansion in response to Geelong's rapid population growth, local residents protested against the Permit Application. The proposal attracted 170 objections from local residents with concerns in relation to amenity, traffic, and car parking. The Council refused to grant the permit on the basis that the proposal failed to contribute positively to its context and will have an impact on local views.

Tribunal grants the Permit Application

Notwithstanding the inordinate number of objections, the Tribunal set aside the Council's decision and granted the permit subject to conditions.

The objectors opposed the Permit Application on the basis that the proposal did not reflect the surrounding neighbourhood character and would have significant overlook and shadowing impacts (at [66]). Whilst the parties accepted that there was change occurring in the development of the region, their concerns were that permitting the proposed development would set a precedent that would degrade the character of Ocean Grove.

However, for context, the subject land falls within the Increased Housing Diversity Area allocated under Schedule 3 of the Residential Growth Zone of the *Greater Geelong Planning Scheme* (**Planning Scheme**). This provision encourages increased densities in buildings up to and including four storeys so long as pedestrian safety is promoted. The Planning Scheme also seeks to encourage the consolidation of lots to increase development potential (at [15]).

Therefore, the Tribunal found that whilst the development of a multi-storey building across two separate lots was an unprecedented application in Ocean Grove, a change in rhythm of a street can be expected where the surrounding policy context of the Planning Scheme encourages a transition from the existing neighbourhood character (at [28]). The Tribunal was satisfied that, on balance, the proposed built form was acceptable as it did not exceed 10.5 metres above natural ground level and presented appropriate setbacks to break down the horizontal mass of the proposed building (at [28]). The Tribunal also found the proposed development would not have a significant visual impact on the public realm and does not fail to contribute positively to its context (at [28]).

Conclusion

The Tribunal set aside the Council's decision to refuse the Permit Application and approved it subject to conditions.

Melbourne's housing crisis exacerbated by stringent planning policies

Evie Atkinson-Willes | Ashleigh Pope | David Passarella

This article discusses the need for local government planning schemes to respond to the demand for housing in Victoria

July 2023

In brief

As the demand for housing continues to outweigh supply in Victoria, Melbourne planning schemes must adapt by accommodating greater built form in appropriate locations, build-to-rent developments, and other sustainable development solutions to meet the needs of Melbourne's growing population.

Background

The housing crisis is not new. Rapid population growth, the rising cost of living, and a decline in the average household size have amalgamated into a demand for more housing at an affordable price. However, the spike in development costs and restrictive planning policies pose a serious risk to the future of development in Melbourne. To protect the city from developmental stagnation and help resolve these issues, the Victorian government ought to consider introducing a range of planning policy amendments.

Causes

On 9 May 2023, the Australian Government announced that permanent migration for 2023-2024 will be capped at 190,000 spaces. However, over 300,000 migrants have been forecasted for that period, with 70% expected to head for Sydney or Melbourne. As a result, it is anticipated that this population increase will require Melbourne to generate 1.3 million new homes in the next few decades.

Were it not for restrictive planning regulations and objectors, it is estimated that approximately 1.3 million additional homes could have been built over the past 20 years in Australia. Due to height and storey restrictions, and council refusals to permit mid-sized development in residential areas, development has slowed significantly, leading Victoria to fall short of what will be required in the next twenty years by 282,694 homes. As a result, Melbourne's 'middle ring' has been underutilised in the face of a surging populace, with gaps emerging in the inner suburbs where new builds are being restricted to heights of two storeys.

However, a large body of Australian and overseas research observed by the Centre for Independent Studies shows that planning restrictions have significantly increased the cost of housing by up to 69% in Melbourne. Therefore, while planning restrictions have been put in place deliberately to ensure consistent liveability, amenity, and sustainability for different land uses and occupants within them, it could be said that planning systems are prioritising the interests of current residents rather than those predicted to arrive in the future.

Solutions

As development costs have skyrocketed in the wake of COVID-19, it has become increasingly difficult for developers to invest in build to sell projects. This has been exacerbated by a decline in offshore buyers, high interest rates and market uncertainty. Accordingly, the focus has turned to build-to-rent developments (**BTR**) as the solution to meet the surge in demand for housing across the state. BTR developments are one or more buildings constructed or substantially renovated for the purpose of providing multiple dwellings for lease. By increasing the quantity of multi-storey buildings with these kinds of projects, Melbournians can capitalise in areas deficient in land use density.

Similarly, as the BTR sector grows, Victoria could benefit from introducing other forms of housing. For example, 'co-living' spaces present a viable solution for residents struggling to find affordable property close to the city. 'Co-living' homes consist of various private and shared spaces like kitchens, living rooms, and laundries and have been popularised in major cities like London and New York.

While these projects depend on funding from local and international investors, the anticipated increase in levels of migration to Melbourne indicates a promising market for developers. Those unable to buy a house may begin to compete for affordable housing or apartments, increasing the demand for these solutions.

Also, given the necessity of BTR in tackling the housing supply issue, developments in Victoria may be eligible for reductions on taxable land value of up to 50%. The Federal Budget announced on 9 May introduced a tax reform which brings BTR developments in line with the reduced holding taxes for foreign investors associated with other long-term property investments.

However, while demand and reform provide incentive for developers to embark on BTR projects, Councils have often imposed permit conditions which limit the use of the land to BTR only, despite being assessed under standards set by planning controls for freehold residential apartments. In doing so, it restricts landowners from later selling units within a development. If responsible authorities continue to issue permits for BTR developments subject to a land use condition, it should follow that developers should receive some uplift or similar benefit to account for their loss of opportunity to sell in the future.

Moreover, despite the forecasted influx of people into Melbourne, recent focus has been placed on expanding heritage overlays in areas that may be more useful as centres for further development. Several heritage reviews have come to fruition in some of Melbourne's inner suburbs that do not necessarily align with the Government's ongoing concern for housing supply. For example, a multi storey carpark in Carlton was listed earlier this year in the Carlton Heritage Review. The decision was criticised by residents for encouraging vehicle use and restricting future development of more sustainable land uses. While it is important to protect architectural heritage and maintain the fabric of Victoria's built environment, controversial protections like the Carlton carpark are at risk of being seen to contradict the present needs of society.

Conclusion

The problems associated with the housing crisis will likely be exacerbated in coming years with development desperately needed to stem the increasing demand for housing in Melbourne.

Planning controls in Melbourne's 'middle ring' should contribute to more of the heavy lifting by supporting development where it is needed most. For example, areas close to major arterial roads, train or tram lines provide prime opportunities for multi storey development. Planning policy should also integrate specific provisions for BTR developments and other sustainable development solutions as government and developers alike shift their focus towards economical solutions to meet the demands of rapid urbanisation.

Accordingly, we think a re-evaluation of planning provisions and policy in Victoria is necessary to encourage more efficient and sustainable uses of the limited residential spaces in and surrounding the suburbs of Melbourne.

NSW Land and Environment Court says integrated development scheme is not a "one-stop shop" for an Environment Protection Licence

Bethany Burke | Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Crush and Haul Pty Limited v Environment Protection Authority* [2023] NSWLEC 60 heard before Pritchard J

July 2023

In brief

The case of *Crush and Haul Pty Limited v Environment Protection Authority* [2023] NSWLEC 60 involved a class 4 judicial review proceedings in the NSW Land and Environment Court challenging the NSW Environment Protection Authority's (**EPA**) refusal to grant an Environment Protection Licence (**EPL**) for the scheduled activities of "extractive activities" and "crushing, grinding or separating" at a quarry in Dirty Creek, near Coffs Harbour.

Background

This decision follows the Land and Environment Court's judgment on 8 September 2022 in *Environment Protection Authority v Crush and Haul Pty Ltd; Environment Protection Authority v Cauchi* [2022] NSWLEC 113 to convict Crush and Haul Pty Limited (**Crush and Haul**) for its failure to hold an EPL.

On 20 September 2022, Crush and Haul lodged an application for an EPL under section 53 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

On 10 November 2022, the EPA issued a letter providing notice of its intention to refuse the application on the basis that Crush and Haul was not a "fit and proper person".

That application was then deemed refused and so, on 21 November 2022 Crush and Haul commenced class 1 merit review proceedings. In class 1 proceedings, the Court metaphorically steps into the decision maker's shoes to make or remake the decision.

Before the class 1 matter was heard, on 19 April 2023, Crush and Haul commenced class 4 judicial review proceedings seeking a declaration that the EPA is required, by operation of section 4.50(1) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**), to issue an EPL to Crush and Haul, subject to conditions that are not inconsistent with Development Consent No. 0328/16DA issued by Coffs Harbour City Council on 24 November 2020.

The following issues were considered by the Court:

- Whether by operation of section 4.50(1) of the EPA Act, the EPA was required to issue an EPL subject to conditions that are not inconsistent with the development consent.
- Whether the question of a fit and proper person in section 83 of the POEO Act, which is also a consideration in section 45(f) of the POEO Act, can be considered by the EPA after having issued general terms of approval for an integrated development application.
- What relief, if any, should the Court grant in its exercise of discretion.

In short, the Court dismissed Crush and Haul's summons determining that the EPA was not required to issue an EPL subject to conditions that are not inconsistent with the development consent.

The EPA was not required to issue an EPL subject to conditions that were not inconsistent with the development consent meaning that the EPA can consider whether an applicant for an EPL is a fit and proper person at the time such an application is made

The Court was required to undertake an exercise of statutory construction to determine whether the EPA was required to issue an EPL with conditions that were not inconsistent with the development consent.

In doing so, the Court found section 4.50(1) of the EPA Act does not compel the EPA to issue an EPL after a development consent is granted for integrated development. The Court said at [9]:

> *… there arise distinct exercises of power by the approval authority in relation to the decision about the general terms of approval in relation to the development application … and the issue of an environment protection licence*.

That is, there are separate exercises of power conferred on the approval authority to issue general terms of approval under the EPA Act and to issue an EPL under the POEO Act. The Court found that even if there was an inconsistency, the POEO Act provisions would prevail because of section 7(2)(a) of the POEO Act.

Furthermore, the Court said that if section 4.50(1) of the EPA Act were to be interpreted as though the integrated development scheme is a "one-stop shop", that would render "nugatory" the EPA's obligation to consider whether an applicant for an EPL was a "fit and proper person" at the time an EPL application was made (at [92]). Such an interpretation could result in the EPA being bound to issue an EPL to an environmental offender who was not the applicant for a development consent (at [94]). The Court said that result could not have been intended by Parliament and:

> *To impose an obligation on the EPA to issue an environment protection licence to an applicant it considers not to be a fit and proper person would be inimical to the attainment of those objects [of the POEO Act].*

There was no utility in the Court granting the relief sought

The Court concluded that it would not be useful for the relief that was sought to be granted. This was because the EPA tendered evidence that it was of the view that Crush and Haul was not a "fit and proper person" and as such, would revoke the EPL under section 79 of the POEO Act if it was required to issue one.

While the Court was not required to consider whether Crush and Haul was a "fit and proper person" to hold an EPL in the judicial review proceedings, the EPA referred the Court to Preston CJ's 2022 decision to convict Crush and Haul for an offence against section 48 of the POEO Act. Section 48(2) of the POEO Act requires an occupier of premises at which a scheduled activity is carried on to hold an EPL authorising that activity to be carried on at the premises. Preston CJ found that Crush and Haul committed the offence "recklessly" (at [81]).

Conclusion

This case confirms that the grant of an integrated development consent does not automatically mean that an EPL is to be issued. Those wanting to carry out scheduled activities under the POEO Act must make a separate application for an EPL and should not assume that one will be granted following general terms of approval being issued by the EPA under a development consent.

Consent authorities do not need to consider the "fit and proper person" test when considering the merits of an integrated development application. However, the test applies under the POEO Act in considering whether to issue subsequent environmental protection licences for certain types of development that may have earlier been approved through a development consent. If an EPL is not granted, the proposed activity cannot be carried out above the threshold in Schedule 1 of the POEO Act. As such, while there may be a development consent permitting certain activities to be carried out, those activities cannot be carried out lawfully if an EPL is not issued as well.

While this case dealt with the issue of an EPL under the POEO Act, there are other types of approvals required as part of the integrated development regime. For example, aquaculture permits, mining leases, section 138 *Roads Act 1993* approvals, and activity approvals (controlled activity and aquifer interference approvals) under the *Water Management Act 2000*.

This case may have implications for any authorities issuing general terms of approval and subsequently issuing separate approvals, as the Court has determined there are separate exercises of power conferred on approval authorities. Those relying on integrated development consents need to be aware of the requirement to obtain further approvals which may be separate to the integrated development process. It should not be assumed that the further approvals will be granted.

The case also highlights the ramifications a criminal conviction can have for the carrying out of certain types of development given the "fit and proper person" test applies to those types of activities which require an EPL.

NSW Land and Environment Court finds private prosecutor commenced a number of proceedings out of time, except for proceedings commenced for the unlawful disposal of asbestos waste

Emily Webber | Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *M&S Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd* [2023] NSWLEC 65 heard before Pepper J

July 2023

In brief

The case of *M&S Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd* [2023] NSWLEC 65 concerned a series of notices of motion filed in class 5 criminal proceedings commenced in the NSW Land and Environment Court. The motions sought to have a number of prosecutions commenced by a private company struck out or permanently stayed on the ground that the prosecutions were statute barred as they were commenced out of time.

M&S Investments (NSW) Pty Ltd (**the prosecutor**) commenced prosecutions against a number of defendants including Affordable Demolitions and Excavations Pty Ltd for the alleged transport to and deposition of, waste material at a property in Edmondson Park that was part owned by M&S Investments (NSW) Pty Ltd. Unusually, this case involved a private prosecution under section 219 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), whereas more commonly prosecutions are commenced by authorities such as the NSW Environment Protection Authority or local councils.

The central issue for the Court to determine was whether the class 5 proceedings were commenced outside of the three year limitation period in section 216 of the POEO Act. Section 216(2) states (emphasis added):

> ***216 Time within which summary proceedings may be commenced***
>
> *…*
>
> *(2) Proceedings for an offence under this Act or the regulations may also be commenced—*
>
> *(a) in the case of a prescribed offence—within but not later than **3 years after the date on which evidence of the alleged offence first came to the attention of any relevant authorised officer** ..."*

The prosecutor led evidence that the alleged offences first came to the attention of a relevant authorised officer of Liverpool City Council (**Council**) on 12 September 2018 based on a letter sent on behalf of Council. The summonses were filed on 8 September 2021 which was a short time before the three year limitation period lapsed.

The defendants relied on correspondence from the Council to submit that a relevant authorised officer was aware of the unlawful stockpile of waste material as early as 2016, and as a result, the proceedings were statute barred and should be dismissed because they were commenced later than three years.

To determine the central issue as to whether the proceedings were commenced out of time, the Court considered:

- The interpretation of "the relevant authorised officer" under the POEO Act.
- The date the alleged environmental offences came to the attention of the relevant authorised officer.
- The meaning of "evidence of the alleged offence" and the elements of the environmental offences.

In short, the Court held that the proceedings for all offences other than those under section 144AAA of the POEO Act were commenced out of time and statute barred. The Court therefore dismissed 22 out of 27 summonses and the prosecutor was ordered to pay the defendant's costs.

The offences under section 144AAA of the POEO Act were not statute barred because asbestos was only detected in the allegedly deposited material in August 2019 and the presence of asbestos was a central element to the creation of that offence. As such, the summonses relating to section 144AAA of the POEO Act were issued within the three year limitation period in section 216 of the POEO Act.

Court finds that any authorised officer can be "the relevant authorised officer" for the purposes of the POEO Act

The prosecutor submitted that the relevant authorised officer was an Assistant Environmental Health Officer who observed the alleged offences in 2018. That submission relied on correspondence between the prosecutor and Council where the prosecutor asked Council to identify the authorised officer who had first obtained evidence of the offences for the purpose of section 216(2)(a) of the POEO Act. Council's lawyer responded as follows:

> *Identity of the authorised officer who first obtained evidence and the date that evidence was first obtained.*
>
> *Council's records seem to confirm that the authorised officer who first carried out an inspection of the land was Mr Cameron Theys. Mr Theys is no longer employed by Council. Councils records seem to confirm that the first inspection of the land took place on 12 September 2018.*

Conversely, the defendants submitted that two Land Development Engineers were the relevant authorised officers as they referred to the alleged illegal fill in an email when the prosecutor was applying for a construction certificate in 2017.

The Court adopted a broad interpretation and found at [65] and [76] that **any** employee of the Council who is appointed as an authorised officer under Part 7.2 of the POEO Act and had dealings with the property can be a "relevant authorised officer" for the purpose of section 216(2) of the POEO Act. The person does not have to be appointed under Part 7.2 of the Act as a compliance and enforcement officer.

As such, the Assistant Environmental Health Officer and the two Land Development Engineers were all relevant authorised officers for the purpose of section 216(2) of the POEO Act.

Court identified propositions to assist with determining what is meant by "evidence of the offence" and finds that a physical inspection of a property is not the only means by which evidence of the alleged offence could be brought to the attention of any relevant authorised officer

The Court acknowledged that there has been limited judicial consideration of what is meant by the phrase "evidence of the offence" in section 216(2) of the POEO Act. Following a review of the relevant cases, Pepper J set out propositions to assist with the interpretation of the phrase at [101] which we have extracted in summary below:

- Evidence of an offence means evidence of any act or omission constituting the offence.
- What is required by way of knowledge will depend on the offence charged and its elements.
- Evidence of all of the elements of the alleged offence is not required.
- Mere speculation or belief, even if reasonable, will be insufficient to constitute the requisite degree of knowledge of the commission of the alleged offence.
- The phrase must be judged by reference to the contemporaneous knowledge of the prosecutor and not by hindsight.
- The fact that the prosecutor merely has access to information that would constitute evidence of the alleged offence will not be sufficient to establish the requisite knowledge.

The Court went further and rejected the prosecutor's proposition that a physical inspection of the property was the only means by which evidence of an alleged offence could be brought to the attention of any relevant authorised officer pursuant to section 216(2) of the POEO Act (at [127]). The defendants were successful in relying on email correspondence that established there was fill material considered to be waste that had been disposed of in a manner that harmed, or was likely to have harmed, the environment that had been transported to, deposited on and polluted the property. That correspondence was "evidence of the offence" for the purpose of section 216(2) of the POEO Act and started the clock on the statutory limitation period.

An offence of polluting land is completed when the material is placed in or on, or otherwise introduced into or onto the land with the effect described in the definition of "land pollution"

As a fallback position, the prosecutor argued that the offence under section 142A of the POEO Act of polluting land was a continuing offence and the offence continued until the land was restored. This was based on section 242 of the POEO Act which relevantly says (emphasis added):

> ***242 Continuing offences***
>
> *(1) A person who is guilty of an offence because the person contravenes a requirement made by or under this Act or the regulations (whether the requirement is imposed by a notice or otherwise) to do or cease to do something (whether or not within a specified period or before a particular time)—*
>
> *(a)* ***continues, until the requirement is complied with*** *and despite the fact that any specified* period *has expired or time has passed, to be liable to comply with the requirement, and*
>
> *(b) is guilty of a continuing offence for each day the contravention continues.*

As the waste had not yet been removed from the property, there would have been no statute of limitations for the offence under section 142A of the POEO Act because the offence was continuing.

The Court applied by analogy the reasoning in *Environment Protection Authority v Bathurst City Council* (1995) 89 LGERA 79 to find at [139] that once the material is placed in or on, or otherwise introduced into or onto land, with the effect described in the definition of "land pollution" or "pollution of land" in the Dictionary to the POEO Act, the offence is complete.

The Court concluded that the offence arose and was completed when it was deposited on the land. As such, the Court dismissed the argument made by the prosecutor.

The Court went on to clarify that the above does not mean land pollution offences under section 142A of the POEO Act cannot be continuing offences. Each case would depend on the facts.

Take away messages

- Before commencing criminal proceedings, careful attention should be paid to whether the proceedings will be commenced before the expiration of the relevant limitation period as there are consequences for proceedings that are struck out and dismissed. In this case, reliance on a letter from Council was not sufficient. Earlier email correspondence referring to evidence of the alleged offences was central to starting the clock on the limitation period.
- Any employee of the Council appointed as an authorised officer under Part 7.2 of the POEO Act and who has dealings with a property can be a "relevant authorised officer" for the purpose of section 216(2) of the POEO Act.
- A relevant authorised officer does not need to physically inspect the evidence of an offence for the evidence to be brought to their attention for the purpose of section 216(2) of the POEO Act and starting the clock on the statutory limitation period. Evidence of an email chain with photos was sufficient in this case.
- Careful consideration needs to be given whether there is evidence of a "continuing offence" under section 242 of the POEO Act. For land pollution offences, the offence may be complete at the time the material is deposited on land, but is dependent on the facts of the case.
- Finally, it is unclear why class 5 criminal proceedings were commenced rather than class 4 civil enforcement proceedings. Criminal proceedings are punitive in nature and require the prosecutor to prove their case beyond reasonable doubt. In civil enforcement proceedings, orders to remedy or restrain breaches of the POEO Act can be sought and need to be proved on the balance of probabilities which is a lower standard of proof than criminal proceedings. In any event, those carrying out development and other associated activities on land should be aware not only of civil enforcement options that landowners, neighbours and competitors have under planning and environment legislation, but also criminal prosecution options.

Colin Biggers & Paisley

Queensland Court of Appeal orders a rehearing in respect of an appeal against the refusal of a temporary works camp, which is again refused after the rehearing

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *QCoal Pty Ltd & Anor v Isaac Regional Council* [2022] QCA 237; (2022) 254 LGERA 228 heard before Morrison and McMurdo JJA and Burns J

August 2023

In brief

The case of *QCoal Pty Ltd & Anor v Isaac Regional Council* [2022] QCA 237; (2022) 254 LGERA 228 concerned an application for leave to appeal to the Queensland Court of Appeal (**Court of Appeal**) in respect of the decision by the Planning and Environment Court of Queensland (**Court**) in the case of *QCoal Pty Ltd & Anor v Isaac Regional Council* [2021] QPEC 60; (2023) QPELR 116 in which the Court dismissed an appeal against the decision of the Isaac Regional Council (**Council**) to refuse a development application for a development permit to make a temporary works camp permanent and to expand the temporary works camp to accommodate 600 people and 650 rooms (**Development Application**).

The Court's decision is summarised in our May 2022 article.

The Applicants applied for leave to appeal on the grounds that the Court erred in law in the following three ways:

- The interpretation of the relevant planning instruments.
- The finding that the Applicants bore an onus of proof in the negative.
- An error in reasoning in respect of the consideration of "need".

The Court of Appeal rejected the Applicants' first two arguments but held that the Court did err in law in respect of its consideration of "need".

Background

The Council granted a development approval to the Applicants to establish a temporary works camp to house 30 percent of the workers for a maximum of four years. The Council subsequently refused a development application which sought to make the works camp permanent and to house 98 percent of the workers (**Proposed Development**).

On appeal to the Court of Appeal, the Applicants argued that there was a strong need for the Proposed Development, and that it complied with the relevant assessment benchmarks. The Court refused the appeal and held that the Proposed Development was not the preferred accommodation model, and that there was suitable land and infrastructure in the nearby town of Glenden to satisfy the needs of the workers.

Court of Appeal upholds the Court's interpretation of the planning instruments

The Applicants argued that the Court made errors in law in interpreting the *Nebo Shire Plan 2008* (**Nebo Planning Scheme**), and in particular the overall outcome in section 4.2.3.2(i) of the Rural Locality Code and Desired Environmental Outcome DEO(16).

The overall outcome in section 4.2.3.2(i) of the Rural Locality Code relevantly contemplates residential uses "*… only where they cannot be practically located in an Urban Locality, are located, designed and operated so as not to adversely affect or restrict the operation of rural uses and associated buildings, structures and/or infrastructure. In such cases, there location should desirably be adjacent to an Urban Locality …*".

The Applicants argued that the definition of "*residential uses*" does not include a works camp. The Court of Appeal understood the Applicants' position to be that the definition "*… is intended to be exhaustive and not, as is the usual case where the expression 'includes' is used in a definition, intended to add to the ordinary meaning of the defined term*" (at [54]).

The Court of Appeal held that "*... the better view is that the word 'includes' is to be understood in this case as being used in order to add to the ordinary meaning of the defined term. The term 'Residential Uses' should be understood as including a works camp and there is no apparent reason for excluding a works camp from that provision of the scheme*" (at [57]).

DEO(16) relevantly provides as follows:

> *The urban localities accommodate a range of uses, new coal mining workers camps, associated services and residential types and lot sizes to reflect community needs. Isolated workers camps, that is not within or adjoining the urban localities or Coppabella, are not envisaged within the Shire unless located adjacent to mines in locations not able to be conveniently serviced by accommodation within an urban locality or within Coppabella.*

The Applicants argued that the Court erred in interpreting the overall outcome to include adjoining land (at [49]).

The Court of Appeal held that the effect of Desired Environmental Outcome DEO(16) is not to be considered in isolation from the other parts of the Nebo Planning Scheme and the relevant provisions in the *Mackay, Isaac and Whitsunday Regional Plan* (**Regional Plan**) (at [50]). In this context, the Court of Appeal held that the intent of Desired Environmental Outcome DEO(16) "*… was that there should be a workers camp beyond an area within or adjoining an urban locality only where the camp was adjacent to the mine and the mine could not be conveniently serviced by accommodation within or adjoining an urban locality*" (at [51]).

Court of Appeal finds that the Applicants' complaint is of an error of fact

The Applicants argued that the Court erred in holding that the Applicants had the onus of proving that there was not suitable land in and adjoining Glenden, which required the proof of a negative (at [60]).

The Court of Appeal overserved that the Court "*… [w]as not persuaded as to the unavailability of suitable land in Glenden, but nor was [the Court] persuaded that suitable land was available in Glenden*" and that the Court "*… made no finding that [the adjoining areas] were or were not suitable for the purpose*" (at [64]). The Court of Appeal relevantly held as follows (at [65]):

> *[The Court's] reasoning in these respects could not be criticised upon the basis that [the Court] found facts for which there was no evidence. Rather, the complaint would have to be that [the Court] ought to have gone further, and made the findings for which [the Applicants] contended. That would be a complaint of an error of fact, not of law.*

Court of Appeal finds that the Court erred in assessing the reasonableness of workers living in Glenden

The Court found that "*one essential plank*" to the Applicants' argument was that 98 percent of the current and prospective workers would in all likelihood prefer to reside at the Proposed Development rather than in Glenden. The Applicants argued that such reasoning was in error for the following reasons (at [66]):

> *(a) [the Court] proceeded upon a misunderstanding of [the Applicants'] evidence;*
>
> *(b) the issue was not one which was identified by the parties in an agreed List of Issues; and*
>
> *(c) the issue imposed upon [the Applicants] an unnecessary and irrelevant burden.*

The Court of Appeal rejected the first limb of the Applicants' argument as it did not pertain to an error of law. The Court of Appeal was however satisfied that there was substance in the second and third limbs and found that the Applicants did not contend that 98 percent of the workforce would in all likelihood prefer to reside at the mine, as was the finding of the Court (at [67]). The Court of Appeal held that "*… the preferences of a percentage of the workforce were irrelevant to any issue …*" and could not be considered essential to the Applicants' argument (at [68]). The Court of Appeal held that the relevant issue "*… was whether in the way the mine was and would be operated, it was reasonable to expect the [A]pplicants to accommodate their non-residential workers in Glenden*" (at [69]).

Court of Appeal remits proceeding back to the Court

The Court of Appeal held that the Court erred in law, and such errors were material to the judgment of the Court. The Court of Appeal therefore granted the application for leave to appeal, allowed the appeal, set aside the order made by the Court, remitted the proceedings to be re-heard by the Court, and ordered that the Council pay the Applicants' costs of the application for leave to appeal and the appeal.

Court dismisses the appeal at the remitted hearing

The Court in the case of *QCoal Pty Ltd & Anor v Isaac Regional Council (No. 2)* [2023] QPEC 18 re-heard the appeal against the Council's refusal of the Development Application to determine "*… whether … the [Development Application] should be approved or refused having regard to whether, in the way the Byerwen Mine was and would be operated, it is reasonable to expect the [Applicants] to accommodate their non-residential works in or adjacent to Glenden …*" (at [16]).

The Court held that there is a significant need for accommodation for the workers at the mine, but that the Applicants have not discharged their onus in that it has not been proved that the need cannot be met in Glenden in accordance with the relevant assessment benchmarks (at [20]).

The Court remained unpersuaded by further evidence adduced by the Applicants and held that the Proposed Development is inconsistent with the assessment benchmarks in the Regional Plan, the Nebo Planning Scheme, and the *Isaac Regional Planning Scheme 2021*, an approval would be determinantal to the utilisation of social and administrative infrastructure at Glenden, and it is reasonable to expect the non-residential works to be accommodated in or adjacent to Glenden (see [33] and [34]).

Conclusion

The Court of Appeal ordered that the proceeding be remitted to the Court for rehearing and required the Court to determine whether it is reasonable for the Applicants to be expected to accommodate their non-residential workers in Glenden. The Court, following the rehearing, held that such expectation is reasonable and thus dismissed the appeal.

Planning and Environment Court of Queensland refuses a submitter appeal against a gymnasium and rock climbing facility in a locality approved for warehouse and industry uses

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cannon Hill Investments Pty Ltd and Australian Country Choice Production Pty Ltd v Brisbane City Council & Anor; Wilmar Trading (Australia) Pty Ltd v Brisbane City Council & Anor* [2022] QPEC 16 heard before Kefford DCJ

August 2023

In brief

The case of *Cannon Hill Investments Pty Ltd and Australian Country Choice Production Pty Ltd v Brisbane City Council & Anor; Wilmar Trading (Australia) Pty Ltd v Brisbane City Council & Anor* [2022] QPEC 16 concerned a submitter appeal to the Planning and Environment Court of Queensland against a decision of the Brisbane City Council (**Council**) to approve a development application for a development permit for a material change of use to facilitate a gymnasium and rock climbing facility (**Proposed Development**) in an existing building which forms part of the "The Depot" on the south-eastern corner of Colmslie, Lytton, and Junction Roads at Morningside (**Premises**).

There are three large buildings on the Premises with approvals for warehouse, low impact industry, and medium impact industry uses. The Premises is adjacent to operators of an abattoir and a bulk shipping terminal, who each lodged a submission with the Council opposing an approval of the development application (**Submitters**). The Applicant sought to carry out the Proposed Development for only a period of two years.

The Submitters argued that the Proposed Development is an inappropriate use of the Premises and will result in unacceptable traffic impacts and adverse impacts on existing industrial uses. The Applicant argued that there is a need for the Proposed Development, and its approval is supported given its temporary nature and other relevant matters, and the Council supported the Applicant's position. The Court considered the issues that were in dispute between the parties and reached the following conclusions:

- The Proposed Development satisfies many relevant assessment benchmarks, and there is no unreasonable risk of constraint on industrial uses, impacts on the road network, or inadequate car parking.
- Other relevant matters supported the approval of the Proposed Development.

Court finds that the Proposed Development satisfies substantive assessment benchmarks

The Submitters contended that the Proposed Development is inconsistent with several assessment benchmarks in the *South East Queensland Regional Plan 2017* (**SEQ Regional Plan**), *Brisbane City Plan 2014* (version 18) (**City Plan**), and Temporary Local Planning Instrument 02/21 – Colmslie Road Industry Precinct (**TLPI**). The assessment benchmarks and the Court's consideration of them was as follows.

Proposed Development is of neutral appropriateness

The Submitters argued that the Proposed Development is an inappropriate land use because of the type of use, and the scale and form (at [15]). The Submitters relied on chapter 3, part A, goal 2 of the SEQ Regional Plan, and the "*core*" provisions of the City Plan in particular the Strategic Framework, Industry Zone Code, River Gateway Neighbourhood Plan Code, and Indoor Sport and Recreation Code as "*core*" provisions (at [20]). The Court's consideration and conclusions of these provisions is set out below.

Proposed Development is neutral with the purpose of the Industry Zone Code

The purpose of the Industry Zone Code is described in section 6.2.5.2.1 of the City Plan as follows:

> *The purpose of the industry zone is to provide for:*
>
> *a. a variety of industry activities; and*

b. other uses and activities that:

i. support industry activities; and

ii. do not compromise the future use of premises for industry activities.

The Court held that the Proposed Development is not for an industrial or warehouse use and is therefore inconsistent with section 6.2.5.2.1(a) of the City Plan (at [27]).

In assessing whether the Proposed Development complies with section 6.2.5.2.1(b) of the City Plan, the Court examined overall outcomes OO4(f) and OO4(g) in section 6.2.5.2, which excludes stand-alone offices and identifies anticipated uses. The Submitters conceded that the proposed use is not a use anticipated in overall outcome OO4(g) as the Proposed Development is not an ancillary use to any other use on the Premises (at [38]). The Court held that the assessment equally does not support the approval of the Proposed Development, but also does not reveal the use to be non-compliant with the Industry Zone Code.

River Gateway Neighbourhood Plan Code does not support the approval of the Proposed Development

The Submitters argued against the Applicant's interpretation that the River Gateway Neighbourhood Plan Code, which contains five distinct precincts, encourages development that supports additional facilities (at [41]).

The Court observed that under section 7.2.18.3.2.2 of the City Plan, "*[t]he purpose of the River gateway neighbourhood plan code is to be achieved through the overall outcomes, including overall outcomes for each precinct of the neighbourhood plan area*" (see [42] and [44]).

The Court held that there are no non-compliances between the Proposed Development and the River Gateway Neighbourhood Plan Code because the Proposed Development does not involve the consolidation of existing uses as encouraged by the City Plan (at [53]). However, the Court went on to find that the assessment against the River Gateway Neighbourhood Plan Code did not give weight to an approval of the Proposed Development.

Proposed Development offends the planning policy in the Strategic Framework

The Applicant argued that the support provided by the Proposed Development for business and workers within industrial areas is within the scope of the Strategic Framework (at [55]).

The Court examined the Strategic Framework and found that it places emphasis on the industrial economy (see strategic outcome 1(g) in section 3.3.1) and on the preservation of industrial land for its intended use (see specific outcome SO7 in section 3.3.4). The Court held that the Strategic Framework has a "*… strongly expressed planning policy to preserve and protect land in the Major Industry Area from encroachment by non-industrial use and to prioritise and maximise its use for industrial purposes*" (at [72]).

The Court held that the Proposed Development is "*at odds*" with the planning policy in the Strategic Framework, but that this was significantly reduced by the proposed condition to limit the duration of the approval to a two-year period (at [72]).

The Court also held that the Proposed Development would not pose an unacceptable risk to existing or future industrial uses by reason of reverse amenity impacts for the following reasons:

- The Applicant's town planning expert conceded that the potential for odour nuisance from passing cattle trucks is low (at [199]).
- There is limited risk in introducing the Proposed Development to an industrial area when there are existing sport and recreation facilities in the immediate locality, and the cattle trucks pass within 18 to 30 metres of residential areas classified as sensitive uses under the City Plan of which there have been no complaints pertaining to odour nuisance (see [200] to [201]).
- There is minimal risk to the Submitters that they would be required to adjust operating hours as the potential odour nuisance is "*… within the reasonable expectations of individuals at a location proximate to a cattle haul route*" (at [202]).

Indoor Sport and Recreation Code supports the Proposed Development

The Submitters argued that the Proposed Development is an inappropriate land use when assessed against overall outcome OO2(b) in section 9.3.11.2 of the Indoor Sport and Recreation Code, which "*… ensures that facilities are appropriately located and designed*" (at [74]).

The Court held that the Proposed Development would not provide for unacceptable impacts on the privacy and amenity of residents because it is separated from residential dwellings and that the Indoor Sport and Recreation Code supports its approval (at [78]).

Proposed Development aligns with the mixed-use context anticipated in the SEQ Regional Plan

The Applicant argued that the SEQ Regional Plan supports the Proposed Development because it accommodates a mix of commercial uses in major enterprise and industrial areas (at [80]). The Court held that the strategies in the SEQ Regional Plan seek to protect Regional Economic Clusters and to accommodate a mix of commercial uses in major enterprise and industrial areas. The Court rejected the premise of inferring that the zonings in the City Plan ought to reflect the competing strategies of the SEQ Regional Plan and stated it is a "*… question of fact to be determined by reference to the circumstances of this case*" (see [93] to [96]).

The Court held that the Proposed Development represents an appropriate support use that aligns with the mixed-use context anticipated in the SEQ Regional Plan for the following reasons:

- The Proposed Development does not involve an incompatible land use on the Premises when considering the existing and planned industrial uses in the locality. The Court accepted the expert evidence from the Applicant's and the Council's town planners that "*... there is no inherent incompatibility between large format indoor sport and recreation uses and industrial uses, and that the co-location of large scale indoor recreation uses and industrial uses is not uncommon*" (at [151]).
- The Proposed Development will provide to local workers convenient access to recreational opportunities, and will support and serve the industry area (at [159]).
- There is an appropriate level of accessibility as the Premises is on the edge of the industrial area and complies with overall outcome OO2(b) in section 9.3.11.2 of the Indoor Sport and Recreation Code (see [161] to [163]).
- The two-year period of operation means that the Proposed Development does not compromise the role and function of the industrial area (see [164] to [181]).

Conclusion as to the appropriateness of the land use

The Court held that the Proposed Development is an appropriate use of the Premises having particular regard to the two-year period of operation from an existing building (at [186]).

Court finds that the Proposed Development will not adversely impact the safety, efficiency, and function of the road network

The Submitters argued that the Proposed Development will result in unacceptable impacts on freight routes and relied on the assessment benchmarks in the SEQ Regional Plan and the Strategic Framework in the City Plan. Whilst the "*strong language*" of safety and efficiency are present in the assessment benchmarks relied upon by the Submitters, the Court held that the "*… provisions should be construed in a way that is practical, recognising that City Plan contemplates that development will occur*" (at [222]).

The Court accepted the evidence from the Applicant's traffic engineer as he provided a "*cogent explanation*" (at [243]) and "*… gave appropriate regard to what might be considered reasonable or tolerable traffic arrangements …*" (at [252]) to reach the following conclusions:

- The Proposed Development will not have an unacceptable impact on the roundabout adjacent to the Premises since the generated traffic will not "*materially affect freight movements*" or operate during the Submitters' peak operating hours (at [246]).
- The Proposed Development will not create a traffic safety issue since "*… the geometry and topography of [the locality] provides ample sight distance for vehicles*" (at [251]).

The Court held that the Proposed Development complied with the assessment benchmarks in the SEQ Regional Plan and the Strategic Framework in the City Plan relevant to sensitive land use, impacts on freight movements, the road network, the road hierarchy, and the safe and efficient operation of development and its surrounds (see [256] to [259]).

Court finds that the adequacy of car parking is not an issue that warrants refusal

The Submitters argued that the Proposed Development does not provide adequate car parking and does not accord with the overall outcomes in sections 9.4.11.2 2(a) and (j) and performance outcomes PO1, PO13, and PO14 of the Transport, Access, Parking and Servicing Code. The Court was satisfied that a condition limiting the number of patrons within the Proposed Development at any one time to 300 would adequately deal with the car parking demands (see [269] and [270]), and that there is compliance with the relevant provisions of the Transport, Access, Parking and Servicing Code (at [271]).

Court finds that the TLPI is a relevant consideration but did not give it decisive weight

The Submitters argued that the TLPI introduced on 29 June 2021, 14 months after the development application was lodged and seven months after it was approved, tells against the approval of the Proposed Development and should be given weight (at [275]). The Court held that whilst the TLPI "*is a relevant consideration and deserving of weight*", the inconsistency between the Proposed Development and the TLPI ought not be given determinative or decisive weight (at [317]). The Court's reasons included that "*… the obligation to assess the [P]roposed [D]evelopment against the assessment benchmarks relates to those that were in effect when the development application was properly made*" (at [277]), and the Proposed Development does not offend the provisions of the TLPI because it will cease operation within two years and preserve "*… the integrity of the land in the Industry zone for industry use …*" (at [303]).

Court considers other relevant matters and exercises its planning discretion

The Court considered other relevant matters relied upon by the parties and reached the following conclusions:

- There is a discernible need for the Proposed Development that will serve a catchment wider than the industrial locality, but in this case need is not decisive on its own (at [382]).
- The Proposed Development is an efficient use of an existing industrial building that will provide an economic benefit to the community without jeopardising the long-term planning intent for the Premises (see [383] to [386]).
- The balance between the Proposed Development not being within the community's reasonable expectations as informed by the City Plan and the overall benefit to the community is an issue that "*… does little to advance the case for approval or refusal as compared to the substantive issues that have already been addressed*" (at [426]).

The Court held that matters telling against approval "*… should not stand in the way of an approval given the considerations that … identified that support approval*" (at [436]).

Court's decision

The Court dismissed the appeal and the decision notice was amended to include a condition that limits the patrons to no more than 300 at any one time.

Appeal against the Court's decision

The Submitters sought leave from the Queensland Court of Appeal (**Court of Appeal**) to appeal the decision of the Court. The Court of Appeal's decision is set out in the case of *Cannon Hill Investments Pty Ltd and Australian Country Choice Production Pty Ltd trading as Australian Country Choice Group v Brisbane City Council & Anor* [2022] QCA 246.

The Submitters argued before the Court of Appeal that there were nine errors of law which were summarised into the following two "*central issues*" (at [5]):

- The Court erred in law, in a material way, in failing to find that the Applicant held the intention to change the two-year temporary approval condition.
- The Court erred in law, in a material way, in failing to find that the Proposed Development would be the largest gymnasium in Australia.

Court of Appeal finds that the two-year condition was not an irrelevant consideration and that it was open to the Court to make factual findings

The Court of Appeal noted that the Submitters did not appeal the Council's imposition of the condition that limited the duration of the approval to a two-year period and held that the Court was required to consider the condition (at [13]). The Court of Appeal further held that the Submitters' argument was not an error of law, but rather a complaint about a fact (at [16]), and that the Court was not required to consider the subjective intention of the Applicant since "*… such future intention can only be implemented by an application lawfully made under the statutory scheme and determined on its merits at that time*" (at [17]).

Court of Appeal finds that the primary judge made no error of law when assessing the Proposed Development

The Submitters argued that the primary judge did not make findings regarding the large scale of the Proposed Development (at [18]). The Court of Appeal held that the primary judge adequately addressed the size and scale of the Proposed Development in the context of the proposed land use and need, and concluded that there had been no error of law (at [18]).

Conclusion

The Court of Appeal held that no error of law was identified and dismissed the application for leave to appeal with costs.

Colin Biggers & Paisley

Planning and Environment Court of Queensland knocks the house down in finding that a pre-1947 dwelling house does not contribute to traditional building character

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ficca & Ors v Brisbane City Council* [2022] QPEC 52 heard before Muir DCJ

August 2023

In brief

The case of *Ficca & Ors v Brisbane City Council* [2022] QPEC 52 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to refuse a development application for a development permit for the demolition of a pre-1947 dwelling house (**Proposed Development**) located at 56-58 MacDonald Street at Norman Park (**Land**).

The Land is included within the Character Residential Zone (**Zone**) and the Traditional Building Character Overlay (**Overlay**) of the *Brisbane City Plan 2014* (version 23) (**City Plan**). As a consequence, any building work on the Land is to be assessed against the Traditional Building Character (Demolition) Overlay Code (**Demolition Code**) (see [9] and [10]).

The Council refused the Proposed Development on the grounds that the demolition would result in an unacceptable loss of traditional building character from MacDonald Street.

The Court held that the Proposed Development complies with the relevant assessment benchmarks and allowed the appeal.

Issues considered by the Court

The Court determined the following issues as agreed by the parties (at [17]):

- Whether the Proposed Development complies with acceptable outcome AO5 of the Demolition Code, which relevantly states the following:

  > *Development involves a building which:*
  >
  > *a) has been substantially altered or does not have the appearance of being constructed in 1946 or earlier; or*
  >
  > *b) an engineering report prepared by a Registered Professional Engineer Queensland which certifies that the building is structurally unsound and not reasonably capable of being made structurally sound; or*
  >
  > *c) if demolished will not result in the loss of traditional building character; or*
  >
  > *d) is in a section of the street within the Traditional building character overlay that has no traditional character ...*

- Whether the Proposed Development complies with performance outcome PO5 of the Demolition Code, which relevantly states the following:

  > *Development involves a building which:*
  >
  > *a) does not represent traditional building character; or*
  >
  > *b) is not capable of structural repair; or*
  >
  > *c) does not contribute to the traditional building character of that part of the street within the Traditional building character overlay.*

- Whether the Proposed Development complies with overall outcome OO2(a) of section 8.2.21.2 of the Demolition Code, which relevantly states the following:

  > *Development protects residential buildings constructed in 1946 or earlier that individually or collectively contribute to giving the areas in the Traditional building character overlay their traditional character and traditional building character.*

- If the Proposed Development does not comply with acceptable outcome AO5, performance outcome PO5, or overall outcome OO2(a) of the Demolition Code, whether the Court ought to exercise its discretion and approve the Proposed Development.

Court finds that the Proposed Development complies with acceptable outcome AO5 and performance outcome PO5 of the Demolition Code

The Applicants' primary argument was that the Proposed Development complies with acceptable outcome AO5(c) of the Demolition code.

The Court applied the same principle from the case of *Taylor & Anor v Brisbane City Council* [2020] QPEC 5; (2020) QPELR 1080 at [18] that "*[t]he question is whether a demolition will result in a loss of traditional building character that is meaningful, or significant, rather than any loss at all*" (at [33]). The Court held that the Proposed Development complies with acceptable outcome AO5(c), and acceptable outcome AO5 more generally, for the following four reasons:

- The dwelling house does not display any of the typical characteristics of "*traditional character*" or "*traditional building character*" prescribed in the Traditional Building Planning Scheme Policy (see [36] to [37]). The Court relied on the evidence of the Applicants' heritage architecture expert that the dwelling house "*… has a form similar to that of Austerity-era construction (circa 1950s), which is similar to that of the post-1946 houses at 52 and 67 MacDonald Street*" (at [37]).
- The dwelling house is not recognisable as "*Georgian style*" as opined by the Council's heritage architecture expert, as the Court held that the dwelling house "*… does not exhibit many of the typical Georgian style features and is not easily recognisable as Georgian style architecture*" (at [23]).
- There is a limited visual catchment of the dwelling house for the reasons that it is well set back from the boundary, it is either partially or entirely obscured by vegetation, and the built form surrounding the Land is more dominating (see [40] to [41]). The Court noted from the case of *Williams v Brisbane City Council* [2021] QPEC 26; (2022) QPELR 580 at [38] "*… that care must be taken in considering the contribution of a house to traditional character where vegetative screening obscures views because it could result in owners undermining the provisions of the Demolition Code 'by taking steps to screen their buildings so as to get permission to demolish them'*" (at [42]). However, the Court held that this was not a concern in the present case since the vegetation is well established and that there is no evidence that the Applicants had taken steps to screen the dwelling house (at [42]).
- There is "*… limited, if any, visual connection …*" between the dwelling house and the other 31 pre-1947 houses on MacDonald Street within the Overlay (at [43]). The Court's reason was that the Land is surrounded by post-1946 dwellings which has the consequence that "*... any view of the house from Katherine Street does not reinforce the traditional building character of MacDonald Street*" (at [43]).
- For the same reasons, the Court held that the Proposed Development also complies with performance outcome PO5(c) (at [45]).

Court finds that the Proposed Development complies with overall outcome OO2(a) of the Demolition Code for the reason it complies with acceptable outcome AO5 and performance outcome PO5

The Council argued that the compliance with overall outcome OO2(a) of the Demolition Code "*… is not wholly answered by PO5 and AO5*" because the relevant area to be considered in the context of the overall outcome is broader than a "street" or "part of the street" (see [46] and [47]).

The Court rejected the Council's argument and held that "*… there was no evidence that the word 'areas' was to be read to extend beyond that of the street, or streetscape under consideration …*" (at [48]). The Court relied on the evidence of both parties' heritage architecture experts that the "*… 'relevant extent of the street, streetscape, area and precinct under consideration' [is] the same location*" (at [48]).

The Court therefore held that the compliance with acceptable outcome AO5 and performance outcome PO5 is consistent with compliance with overall outcome OO2(a) (at [49]).

Conclusion

The Court held that because the Proposed Development complies with all relevant assessment benchmarks that it was unnecessary to address issue four (at [51]), and allowed the appeal.

Colin Biggers & Paisley

Planning and Environment Court of Queensland refuses a master planned community on ecological and residential character grounds

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stockland Development Pty Limited v Sunshine Coast Regional Council & Ors* [2022] QPEC 30 heard before Everson DCJ

August 2023

In brief

The case of *Stockland Development Pty Limited v Sunshine Coast Regional Council & Ors* [2022] QPEC 30 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the refusal by the Sunshine Coast Regional Council (**Council**) of an impact assessable development application made by Stockland Development Pty Ltd (**Applicant**) for a preliminary approval for a material change of use including a variation request to vary the effect of the *Sunshine Coast Planning Scheme 2014* (Version 17) (**Planning Scheme**) and a development permit for reconfiguring a lot, to facilitate a master planned community to be called "Twin Waters West" (**Proposed Development**).

The site of the Proposed Development is a former cane farm at Pacific Paradise on the northern side of the Maroochy River (**Premises**). There is a large freshwater wetland with high ecological significance which covers part of the site (**Wetland**), and that links to the Maroochy River Conservation Area. The Premises also borders the Sunshine Motorway to the west, and the Twin Waters residential development to the east (**Twin Waters**).

The Premises is subject to ten overlays under the Planning Scheme. Relevantly, the Proposed Development features a flowing 1.05 million cubic metre saltwater lake system pumped with a daily inflow of 43,200 cubic metres that discharges into an outfall in the Maroochy River (**Lake**).

The issues in dispute were broadly in respect of ecology, water quality, flood emergency management, residential character, impacts on a recreation park, community expectations, and other relevant matters.

The Court dismissed the appeal and held in particular that the Lake has "*a real prospect of detriment to or destruction of this [Wetland]*" and that the residential character of the Proposed Development is not consistent with Twin Waters (at [70]).

Ecological issues in dispute

The issues in dispute relevant to ecology were as follows (at [22]):

> *(a) the adequacy of the proposed buffers to environmentally significant areas including the central wetland and linkages for fauna;*
>
> *(b) the adequacy and practicality of measures proposed to protect the ecology of the central wetland, Maroochy River and Maroochy Conservation Park from unacceptable impacts caused by changes to surface water quality and saline intrusions; and*
>
> *(c) whether the proposed lake system and pipe outlet into the Maroochy River will cause unacceptable ecological impacts.*

The Court relevantly held that the Applicant bore the onus to demonstrate that any adverse ecological impact could be mitigated by imposing lawful development conditions on subsequent development approvals (see [23] to [29], and [46]).

Court finds that the proposed buffers are non-compliant with the Planning Scheme

Performance outcomes PO26 and PO27 of the Maroochy North Shore Local Plan Code (**Local Plan Code**) relevantly contemplate a constructed water feature that extends the existing watercourses adjacent to the Proposed Development. Performance outcome PO35 of the Local Plan Code also relevantly requires development in the Emerging Community Zone to provide for "*… the protection, buffering, connection and rehabilitation of ecologically important areas…including the Maroochy River …*".

The Court heard from the parties' ecological experts as to the adequacy and environmental consequences of the proposed buffers. The Court preferred the evidence of the Council's ecological experts, who opined that "*[t]he proposed setbacks, of as little as 6m in width, do not minimise exposure of fauna and fauna habitat to negative edge effects introduced by an extended construction phase or by a highly urbanised environment*" (at [37]).

The Court therefore held that the proposed buffers do not comply with the relevant assessment benchmarks and that there is no justification for the non-compliance (see [39] to [40]).

Court finds that the Applicant's proposal to protect the Wetland from saline intrusion is inadequate and impractical

A consequence of the Lake was that "*… natural groundwater flow is in a south-easterly direction across the [Premises] and [the Lake] is likely to cause an interception of the freshwater groundwater flowing from the west toward the [Wetland]*" (at [41]). The Applicant's engineering expert gave evidence of "*… a system of bio-retention basins and infiltration basins 'for water quality and aquifer hydration purposes'*" by means of harvesting rainwater from the Proposed Development and being deposited into the Wetland (**Engineering Solution**) (at [41]).

The Applicant made the following arguments in respect of the saline intrusion (at [45]):

- The Engineering Solution is "*capable of being designed*" and it will protect the Wetland.
- The threshold of proof in the context of the appeal only requires a theoretical demonstration of the Engineering Solution and therefore only the elements of the Engineering Solution need to be identified.
- It is not necessary to consider whether the effects of the Engineering Solution comply with the Planning Scheme in the appeal since they can be considered in the subsequent development application for operational work.

The Court considered the evidence from the Council's engineering expert and held the modelling of the Engineering Solution to be insufficiently "*… rigorous or accurate to provide a sound basis for a hypothetical engineering solution …*" for the following reasons (at [42]):

- The modelling relied on rainfall data from 2006 to 2015 and accounted for a 10% increase from climate change. However, "*[n]o allowance is made for climate change leading to drier than average periods as well as wetter than average periods*" (at [42]).
- The uncertainties of weather events caused by climate change creates doubt in relying on only 9 out of 120 years of data (at [43]).
- There was "*… a lack of anything resembling a design demonstrating with any precision where the bioretention basins and infiltration basins … are to be located*", and they were indicatively shown to be placed within the ecological buffer areas between the Lake and the Wetland (at [44]).

The Court held that the Engineering Solution is impractical and inadequate in protecting the Wetland from saline intrusion, and that saline groundwater leaching into the freshwater was the biggest threat to the Wetland (see [41] and [45]). The Court also rejected the Applicant's argument that the effects of the Engineering Solution need not be assessed for compliance with the Planning Scheme now because a preliminary approval "*… sets the footprint for the [Proposed Development], including the location of the [Lake] …*" (at [45]).

Court finds that the pipe outlet into the River will not cause unacceptable impacts on threatened species

The Court held that there will not be unacceptable impacts on the water mouse habitat located in the vicinity of the Premises because the construction of the pipe outlet and its presence would have limited interference with the species (at [48]).

Court finds that the residential character of the Proposed Development is inconsistent with the adjoining Twin Waters

The Applicant sought to vary building heights, dwelling design provisions, and the permitted residential densities prescribed in overall outcome OO2(p) and the relevant overall outcomes and acceptable outcomes in Table 7.2.18.4.1 of the Local Plan Code (see [55] to [56]). The Applicant relied on submissions from its visual amenity expert to argue that the resulting changes from the variation request will not be readily perceptible (at [59]).

The Court heard submissions from the parties' town planning experts and preferred the evidence from the Council's expert for the following reasons:

- The Applicant's town planning expert conceded that "*… there was no public benefit to the variations sought, rather it was 'just about the developer getting a better yield from the site'*" (at [60]).
- The Court agreed with the Council's town planning expert who stated that "*… it is the difference in the scale and intensity of the [Proposed Development] caused by a smaller average allotment size, that will have the greatest impact upon the character and amenity …*" (at [62]).

The Court held, on the basis of the expert evidence, that the scale and intensity and configuration of the residential uses in the variation request are inconsistent with and unsympathetic to the low density residential character of Twin Waters (at [63]). The Court further held that the average residential lot size for the Proposed Development, being 23% smaller than Twin Waters, is inconsistent with the densities prescribed by the Planning Scheme (at [63]).

Court considers other relevant matters and finds that they do not outweigh the non-compliances with the Planning Scheme

The Applicant argued that relevant matters, including locational benefits, other compliances with the Planning Scheme, and benefit to the community support approval of the Proposed Development (at [69]).

The Court held that these relevant matters are insufficient to overcome the non-compliances with the protection and enhancement of the Wetland and the unacceptable impacts on residential character caused by the variation request.

Conclusion

The Court dismissed the appeal.

New South Wales Land and Environment Court extensively considers the "fit and proper person" test for issuing an environment protection licence in Crush and Haul Pty Ltd v Environment Protection Authority [2023] NSWLEC 1367

Joanne Queiros | Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Crush and Haul Pty Ltd v Environment Protection Authority* [2023] NSWLEC 1367 heard before Targett AC

August 2023

In brief

The case of *Crush and Haul Pty Ltd v Environment Protection Authority* [2023] NSWLEC 1367 involved a class 1 merits review in the New South Wales Land and Environment Court (**Court**) relating to the deemed refusal of an application for an environment protection licence (**EPL**) for "crushing, grinding or separating" and "extractive activities" (**Activities**) at a quarry in Dirty Creek, near Coffs Harbour.

The sole issue of dispute before the Court was whether the applicant, Crush and Haul Pty Ltd (**Applicant**), was a "fit and proper person" under section 45(f) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

This question is becoming increasingly prominent in EPL applications, and so provides some helpful judicial guidance as to how the "fit and proper person" test is to be applied in an environmental context.

Background

On 20 September 2022, the Applicant lodged an application for an EPL with the Environment Protection Authority (**EPA**) to carry out the Activities as listed in schedule 1 of the POEO Act. The consequence of the EPA not issuing an EPL was that the Activities could not lawfully be carried out above the relevant threshold identified in schedule 1 of the POEO Act.

On 21 November 2022, the Applicant commenced class 1 proceedings appealing the EPA's deemed refusal of the EPL application pursuant to section 287 of the POEO Act. Generally, under this section, the EPA has 60 days to determine an application for an EPL before it is deemed to be refused. The applicant can then file a class 1 appeal where the Court metaphorically steps into the decision maker's shoes to make or remake the decision.

The only issue in dispute was whether the Applicant was a "fit and proper person" to hold an EPL under section 45(f) of the POEO Act. The term "fit and proper person" is not defined in the POEO Act. However, when determining whether an applicant is a "fit and proper person", the appropriate regulatory authority, being the EPA in the first instance and the Court on appeal, is to take into consideration any or all of the matters identified in section 83 of the POEO Act which is a lengthy, non-exhaustive list of discretionary matters. Such matters include whether the person, or any current or former directors if the person is a corporation, has contravened environment protection legislation, whether the management of the activities will be in the hands of a technically competent person, as well as any financial circumstances of relevance.

Consideration of meaning and scope of term "fit and proper person"

The Court had regard to the following in determining whether to grant an EPL:

- The circumstances and facts of the case.
- The legislative context of the term "fit and proper person".
- The three characteristics of "fitness" for office, being honesty, knowledge, and ability.

Having regard to the evidence led by the parties and the above considerations, the Court upheld the appeal and issued the EPL to the Applicant for the following reasons identified at [178] of the Court's judgment:

- The Applicant had only one prior conviction under section 48(2) of the POEO Act for carrying out a scheduled activity without an EPL that did not result in environmental harm. Whilst the Court held in the case of *Environment Protection Authority v Crush and Haul Pty Ltd; Environment Protection Authority v Cauchi* [2022] NSWLEC 113 (**Conviction Decision**) that the offence was carried out recklessly, it was deemed to be of low to medium objective seriousness.
- The current director of the Applicant had only one prior conviction which was an executive liability offence under section 169A(2) of the POEO Act following the Conviction Decision and was also found to be of low objective seriousness.
- The current director was found to be honest, genuine and remorseful for the Applicant's 2022 convictions.
- The Court placed significant weight on the current director's evidence that he would have sole control of the Applicant, was aware of his obligations as a director, and wished to abide by the law.
- The Court also acknowledged the "more concerning compliance history" of the former director, but did not assign it material weight and found that there was no evidence that refuted the current director's intentions in controlling the Applicant moving forward.
- No evidence was led by the EPA to suggest that there would not be a technically competent person managing the Applicant and so the Court accepted that the Activities would be managed by a technically competent person.
- Similarly, the EPA did not contend that the Applicant lacked the financial capacity to comply with its obligations imposed under the EPL and so the Court accepted that the Applicant had the financial capacity to comply.
- The Applicant's outstanding costs of 2016 were given little weight as they were not pursued by the EPA. The outstanding costs from the previous matters were only six months old, and the current director gave undisputed evidence that the costs would be paid.

In addition to the above, the Court also found as follows:

- The two penalty notices issued to the Applicant in 2016 did not establish a pattern of non-compliance with environmental legislation and were given little weight.
- It was accepted that the other entities (Wyanga Holdings Pty Ltd, Rixa Quarries (No. 2) Pty Ltd, and J&L Cauchi Civil Contracting Pty Ltd) with contentious histories were not "related bodies corporate" for the purpose of the definition of the POEO Act and section 50 of the *Corporations Act 2001* (Cth). However, given section 83(2) of the POEO Act is not an exhaustive list of matters to be considered when determining whether someone is a "fit and proper person", the Court considered the compliance history of the other entities that had the same former director of the Applicant. Ultimately, the compliance history was not given material weight.

Conclusion

This is the first case to extensively consider the application of the "fit and proper person" test in the granting of an EPL. Previously, other cases have not rigorously applied the non-exhaustive list of considerations in section 83 of the POEO Act.

This case highlights the wide discretionary powers that are available to the EPA and the Court when considering whether an applicant is a "fit and proper person". The discretion was held by the Court to be constrained by reasonableness and must be based on "evident and intelligible justification". The general conclusion that can be drawn is that just because an applicant has contravened environmental legislation in the past, even "recklessly", it does not automatically rule an applicant out from being a "fit and proper person". However, each case will depend on its facts.

Whilst the discretion did not go beyond the list of matters for consideration in section 83 of the POEO Act, applicants should be aware that the EPA and the Court can consider other matters of relevance as the list is not exhaustive.

Whilst this case related to the application of the "fit and proper person" test under the POEO Act, a similar test is also applied by decision makers under the *Home Building Act 1989* (NSW), the *Mining Act 1992* (NSW), and the *Petroleum Act (Onshore) 1991* (NSW) to applicants for or holders of authorisations, licences or certificates under those Acts. Decision makers have the power to refuse to issue an authorisation or to suspend or cancel an authorisation if the decision maker is of the opinion that the applicant or authorisation holder is not a fit and proper person. The findings of the Court in this case may have some influence on how the test is applied under other similar legislation.

Solicitor's file note of opinions expressed by an expert held by Queensland Court of Appeal not to amount to a "statement or report of an expert"

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Enkelmann & Ors v Stewart & Anor* [2023] QCA 155 heard before Bond and Flanagan JJA and Bradley J

September 2023

In brief

The case of *Enkelmann & Ors v Stewart & Anor* [2023] QCA 155 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) against the decision of the Supreme Court of Queensland (**Supreme Court**) in the case of *Enkelmann & Ors v Stewart & Anor* [2023] QSC 111 which would require the disclosure of a solicitor's file note of a discussion between the solicitor and an expert about the expert's preliminary views in respect of a report prepared by other experts in circumstances where it was alleged that legal professional privilege applied to the file note.

The Supreme Court held that legal professional privilege did not apply to the file note on the following alternative bases:

- The file note records a "*statement or report*" of an expert on an issue directly relevant to the pleadings and is captured by rule 212(2) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), which states "*A document consisting of a statement or report of an expert is not privileged from disclosure*", and thus any legal professional privilege is abrogated (at [65]).
- Alternatively, it would be unfair to maintain a claim of privilege over the file note in circumstances where the expert expressed an oral opinion to the solicitor about a report of another expert, which opinion was recorded in the file note but not in the expert's report (at [77]).

The Court of Appeal disagreed with the Supreme Court's reasoning in respect of both alternatives bases and held that a file note that reports or notes an opinion expressed by an expert at a conference does not fall within rule 212(2) of the UCPR (see [22] and [32]).

The Court of Appeal held that, in this case, legal professional privilege was impliedly waived because the expert's recollection of the conference and the expert's opinion said to be recorded in the file note were expressed orally in evidence and the party seeking to rely on the privilege did not object to the questions asked of the expert during the course of the expert's evidence (see [39] to [42]).

Background

In 2016, the plaintiffs commenced proceedings for claims in nuisance and negligence against the defendants. The substance of the plaintiffs' claims is that work on and modifications to the respondents' land had flooding impacts on the plaintiffs' land.

The plaintiffs engaged a hydrology expert (**First Expert**) to give expert evidence about hydrology issues associated with their claims, and during the course of the proceedings engaged a new hydrology expert (**Second Expert**). After the engagement of the Second Expert, the plaintiffs changed their pleading consistent with that expert's opinions and no longer relied on the evidence of the First Expert.

The defendants made an application to the Supreme Court seeking the disclosure of file notes taken by the plaintiffs' solicitors in respect of any statement of advice given by the Second Expert and any document, including file note discussions, which may reflect the Second Expert's state of mind during his engagement as an expert for the plaintiffs. The plaintiffs argued that legal professional privilege protected documents of the type sought from being disclosed to the defendants.

Supreme Court finds legal professional privilege is abrogated

After a consideration of the disclosure rules under the UCPR and the meaning of the term "*document*" in schedule 1 of the *Acts Interpretation Act 1954* (Qld), the Supreme Court held that a file note of a discussion between the plaintiffs' solicitors and the Second Expert which included notes of the Second Expert's opinion about reports of the First Expert and the hydrology expert engaged by the respondents was "*a document consisting of a statement or report of an expert*" and thus was not privileged from disclosure in accordance with rule 212(2) of the UCPR.

The Supreme Court held that if it is wrong about the application of rule 212(2) of the UCPR, then it would be unfair to permit the plaintiffs to rely on legal professional privilege because the Second Expert's evaluation of the reports of the First Expert and the hydrology expert engaged by the respondents, which was expressed orally to the plaintiffs' solicitors, formed the basis of the Second Expert's approach and movement away from the First Expert's report.

Court of Appeal overturns finding about the application of rule 212(2) of the UCPR

The Court of Appeal held that a proper construction of rule 212(2) of the UCPR is that it applies to "*… a document brought into existence to be a statement or report of an expert …*", including where that statement or report is taken or prepared by a solicitor and where it is in draft form (at [21]).

The Court of Appeal held that the words "*consisting of*" in rule 212(2) of the UCPR do not extend the application of the rule to include a solicitor's file note which notes or reports an opinion expressed by an expert, and thus is not "*a document consisting of a statement or report of an expert*" (at [22]).

In this case, there was no evidence to suggest that the file note was prepared by the plaintiffs' solicitors as a statement or report or that it was made to be a draft report of the Second Expert (at [26]), and the file note could therefore properly be the subject of a claim of legal professional privilege.

Court of Appeal finds that legal professional privilege was impliedly waived

The Court of Appeal disagreed with the Supreme Court's finding that it would be unfair to permit the plaintiffs to maintain a claim of legal professional privilege over the file note, because the Court of Appeal did not find the conduct of the plaintiffs or the Second Expert to be inconsistent with the maintenance of confidentiality (see [30] to [33]).

Nevertheless, the Court of Appeal held that any legal professional privilege applicable to the file note was impliedly waived by the plaintiffs during evidence given by the Second Expert about what was said at the conference with the plaintiffs' solicitors. Once the Second Expert had disclosed the discussions at the conference with the plaintiffs' solicitors, the discussions were no longer confidential and thus could not be the subject of a legitimate claim of legal professional privilege (at [39]).

The Court of Appeal importantly observed that during the cross-examination of the Second Expert the plaintiffs did not object to the questions asked in respect of the conference, which was inconsistent with the maintenance of legal professional privilege and amounted to the implied waiver (see [40] to [41]).

Conclusion

The Court of Appeal held that rule 212(2) of the UCPR does not abrogate the legal professional privilege applicable to a file note prepared by a solicitor where the file note is not brought into existence to be a statement or report of an expert, but that in this case legal professional privilege had been impliedly waived by the plaintiffs who could not now maintain a claim of privilege.

Planning and Environment Court of Queensland dismisses appeal against proposed development of quarry in the Cassowary Coast hinterland having regard to an existing extraction approval

Matt Richards | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bronco Dino Pty Ltd & Ors v Cassowary Coast Regional Council & Anor* [2023] QPEC 15 heard before Fantin DCJ

September 2023

In brief

The case of *Bronco Dino Pty Ltd & Ors v Cassowary Coast Regional Council & Anor* [2023] QPEC 15 concerned an appeal by three submitters (**Submitters**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the Cassowary Coast Regional Council (**Council**) to approve a superseded planning scheme application for a development permit for a material change of use for a basalt quarry and for an environmentally relevant activity (**Proposed Development**) on a partly cleared and partly vegetated parcel of land in the Cassowary Coast hinterland (**Subject Land**).

The Court considered the following issues and whether there were any relevant matters under section 45(5)(b) of the *Planning Act 2016* (Qld) (**Planning Act**):

> *(a) impacts on the ecological function of surrounding areas of ecological value from blasting, noise, dust, and groundwater;*
>
> *(b) whether the quarry could be operated efficiently (given its relatively small size and depth of overburden covering the hard rock resource);*
>
> *(c) whether there is sufficient area for stockpiling, acoustic bunds, and stormwater management (sediment pond and water storage); and*
>
> *(d) whether acoustic measures to mitigate noise will be effective, and can be practically implemented.*

The Court held that the Proposed Development will not have an unacceptable adverse impact on surrounding areas of ecological value and can be operated efficiently. The Court dismissed the appeal and approved the Proposed Development subject to conditions.

Background

The Subject Land benefits from an existing development approval for an extractive industry use (**Extraction Approval**) consistent with the designation in the relevant superseded planning scheme (**Planning Scheme**) and an associated environmental authority permit for an environmentally relevant activity, being extracting and screening. The Court noted that the assessment of the Proposed Development starts from a position favouring approval because of the existence of the Extraction Approval and environmental authority permit (see [10] to [13]).

The Court identified the principle differences between the Extraction Approval and the Proposed Development and that the additional blasting causes a change in the proposed land use from an "extraction" to a "quarry" use (at [50]). In this regard, the Court endorsed the approach taken in the case of *Carbone v Esk Shire Council* [2006] QPEC 16; (2006) QPELR 496 "*… that in assessing the impacts of the proposal, the relevant comparison was between what may occur under the existing approval on the one hand, and on the other, the likely impacts if the proposal were to go ahead*" (see [54] and [55]).

The Submitters alleged that the Proposed Development contravened assessment benchmarks in the Planning Scheme and the following State planning instruments (at [74]):

- The *State Planning Policy 2016* (**SPP 2016**), which was in effect at the time the development application was properly made.
- The *Far North Queensland Regional Plan 2009-2031* (**Regional Plan**), which was in effect at the time the development application was properly made.
- The *State Planning Policy 2017* (**SPP 2017**), which came into effect after the development application was properly made.

In particular, the Submitters asserted that the Proposed Development would have indirect adverse impacts on the ecological function of the surrounding areas of ecological value from blasting, noise, dust, and groundwater.

Court does not find non-compliance with the relevant assessment benchmarks

The Court relevantly held as follows in respect of compliance with the relevant provisions in the Planning Scheme, SPP 2016, SPP 2017, and Regional Plan associated with ecological value:

- Section 1.2.2 of the Strategic Framework in the Planning Scheme, which sets out strategies for ecological sustainability, is not an assessment benchmark "*… but rather summarises what later parts of the scheme seek to achieve*" (at [111]). Thus, it is not necessary to assess the Proposed Development having regard to section 1.2.2.
- The Proposed Development complies with the Desired Environmental Outcomes in section 3.1.1(2) and section 3.1.1(4), which relate to the protection and enhancement of ecological systems, environmental qualities, and scenic landscape values, and the maintenance or enhancement of the quality of waters, because the "*… approval of the quarry would cause no further direct loss of the relevant vegetation community represented in the remnant patch*" (at [121]), conditions could be imposed to achieve compliance (at [146]), and dust and noise impacts will not have an unacceptable adverse impact on the protection of ecological values and processes (at [142]).
- The Submitters' allegations of non-compliance with Specific Outcomes SO5, SO6, and SO7 of the Shire Wide Measures, Natural Area Code in the Planning Scheme which relate to the maintenance, protection, and enhancement of riparian and coastal corridors lacked merit because the corresponding Probable Solutions were achieved (see [158] to [166]) and "*[c]ompliance with the Probable Solution is one way of achieving the corresponding Specific Outcome*" (at [160]).
- The Proposed Development complies with items 2 and 6 of the purpose statement of the Rural Zone Code in the Planning Scheme, because expert evidence supported a finding that any impact on the quality of the agricultural land could be rehabilitated and there are no unacceptable impacts on the ecological function of the areas of ecological value surrounding the Subject Land (see [170] to [173]).
- The Subject Land is a sufficient area and dimension to comply with the requirements of the Extraction/Quarry Code in the Planning Scheme (**Extraction/Quarry Code**) relating to the nature of the use, impacts on amenity, the protection of environmentally sensitive areas, ground or surface water quality or quantity, and rehabilitation (see [174] to [197]).
- The Proposed Development complies with the biodiversity State interest in Part E of the SPP 2016 in that it identifies potential impacts and manages the identified impacts by "*protecting from*" or "*otherwise mitigating*" the identified impacts (at [199]). The Proposed Development also complies with the biodiversity State interest in Part E of the SPP 2017 because it "*avoids significant impacts*" on the matters of national environmental significance and "*maintains ecological processes and connectivity*" (at [203]).
- The biodiversity conservation land use policies in Part E of the Regional Plan, which seek to ensure that "*urban development*" adjacent to areas of "*high ecological significance*" or "*general ecological significance*" is located, designed and operated to avoid adverse impacts on the area's ecological values, do not apply because the Proposed Development is not for "*urban development*" as defined in the Regional Plan (see [205] to [212]).

Court finds the Proposed Development will not result in dust impacts that would adversely impact the ecological function of surrounding areas of ecological value

The Court considered whether the Proposed Development will result in off-site dust impacts that would adversely impact the ecological function of surrounding areas of ecological value and accepted the evidence of the air quality experts that the dust deposition rates upon land external to the site predicted by dispersion modelling were far below the thresholds identified in the literature for detrimental effects on vegetation and that the high rainfall recorded in the region is likely to mitigate the effects of dust deposition on vegetation (see [215] to [218]).

Court finds that issues related to noise do not warrant refusal of the Proposed Development

The Court accepted the following evidence in relation to its consideration of whether the Proposed Development will result in off-site acoustic impacts which would adversely impact upon the ecological function of surrounding areas of ecological value (see [224] to [226]), and held there will be no unacceptable adverse impact (at [229]):

- In respect of mobile diurnal species, any impact will be of a small scale due to blasting infrequency and the proposed revegetation "*… would provide an enduring benefit that significantly outweighed the minor, localised short-term negative impacts …*".

- In respect of mobile nocturnal species, "*… to the extent that the species may use the remnant patch as a forage habitat at night, it will not be affected, and proposed habitat revegetation will provide tangible long term benefits for that species*".
- In respect of non-mobile species, the longer-term ecological benefits of the proposed rehabilitation outweigh the relevant minor, localised and short-term negative impacts arising from blasting.

In respect of noise, the Court also considered the appropriateness and practical implementation and effectiveness of the acoustic measures identified by the acoustic experts.

The Court was satisfied that matters related to noise could be appropriately managed by the imposition of conditions (at [247]) and that the Proposed Development can operate as intended and meet the noise criteria agreed upon by the acoustic experts (at [257]).

Court finds that issues related to stormwater or groundwater do not warrant refusal of the Proposed Development

In relation to issues related to stormwater and groundwater, the Court accepted expert evidence that there are no stormwater management issues that cannot be addressed by engineering assessment, especially having regard to the Applicant's acceptance of a condition requiring the preparation and submission of an updated stormwater quality management plan as part of the development application for operational work (at [261]).

The Court also accepted evidence that existing groundwater sits at a level below the hard rock basalt to be mined and that the Proposed Development will not generate unacceptable adverse impacts on stormwater and groundwater external to the Subject Land (at [288]). Thus, the Court rejected the application of the precautionary principle because the evidence did not support a finding of serious or irreversible environmental damage (at [290]).

The Court concluded at [293] that, in terms of ecological impacts generally, the Proposed Development complies with the relevant assessment benchmarks and any impacts will be sufficiently mitigated by the proposed conditions of approval.

Court finds the Proposed Development is efficient and that there is sufficient area for stockpiling, acoustic bunds, and stormwater management

The Submitters asserted that implications regarding the efficiency of the Proposed Development arise by virtue of section 3.1.2(6) of the Desired Environmental Outcomes and Specific Outcome SO1 of the Extraction/Quarry Code, and contended that the Proposed Development is not an "*efficient*" extraction or quarrying of material with respect to the use of the word in Specific Outcome SO1 because it is "*overburden-driven*", the quality of hard rock and basalt has not been adequately assessed, and the processing areas and working areas for stockpiling are too small (at [308]).

The Court accepted the evidence of the geological expert nominated by the Applicant who opined that the basalt in the Subject Land was ideal for quarrying and the production of construction materials (see [317] to [320]), and found that the overburden extracted may be sold for use as construction materials (at [337]).

In respect of the area for stockpiling, acoustic bund, and stormwater management, the Court held that there is no suggestion that the area is of insufficient size for the conduct of the quarry operations (at [346]).

The Court was satisfied that the Proposed Development could operate as intended and did not contravene any of the relevant assessment benchmarks (see [350] and [351]).

Court finds that no other relevant matter warrants refusal of the Proposed Development

The Submitters relied on numerous matters under section 45(5)(b) of the Planning Act which the Submitters alleged support a refusal of the Proposed Development. The Court considered these matters but did not find that any warranted refusal of the Proposed Development (see [354] to [380]).

Conclusion

The Court held that the Applicant established that the appeal ought to be dismissed and accordingly dismissed the appeal.

Colin Biggers & Paisley

Nothing to sea here: Planning and Environment Court of Queensland dismisses application alleging jurisdictional error in local government's decision to approve tidal works

Ashleigh Foster | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Heather & Anor v Sunshine Coast Regional Council & Ors* [2022] QPEC 37 heard before Cash DCJ

September 2023

In brief

The case of *Heather & Anor v Sunshine Coast Regional Council & Ors* [2022] QPEC 37 concerned an application to the Planning and Environment Court of Queensland (**Court**) for declarations and orders pursuant to section 11 of the *Planning and Environment Court Act 2016* (Qld) (**Act**) in respect of a decision by the Sunshine Coast Regional Council (**Council**) to approve a development application for a development permit for operational work to construct a gangway, deck, and pontoon (**Proposed Development**) protruding into a canal from land located at Oak Court, Minyama (**Decision**).

The Applicants own a property that is "*practically adjacent*" to the subject property, separated only by a small public park, which was purchased shortly after the Council made the Decision and the Proposed Development was carried out (**Applicants' Property**) (at [4]).

The Proposed Development was code assessable and, in accordance with section 45 of the *Planning Act 2016* (Qld), only required assessment against schedule 3 of the *Coastal Protection and Management Regulation 2017* (Qld) (**Tidal Works Code**).

In making the decision, the Court considered the following issues (at [36]):

- Whether there was a misapplication of Acceptable Outcome AO10.1 of the Tidal Works Code (**AO10.1**) in making the Decision.
- Whether the Council's delegate erred in his assessment of the Proposed Development against Performance Outcome PO10.1 of the Tidal Works Code (**PO10.1**).
- Whether the Decision is legally unreasonable, including whether the conditions of approval for the Proposed Development (**Conditions**) are unreasonable.

The Court dismissed the application as it found that the Applicants did not demonstrate that the Decision involved any jurisdictional error in that there was no misapplication of, or error in, the assessment of the Proposed Development against the Tidal Works Code and the Decision was not legally unreasonable.

Court finds that there was no misapplication of AO10.1

The Applicants argued that the Council misapplied AO10.1 because its delegate wrongly concluded that the Proposed Development complies with AO10.1 and deemed this to also cause compliance with PO10.1 (at [38]).

The Applicants relied upon an email sent by the Council's delegate subsequent to the Decision which stated that the Proposed Development complied with AO10.1(a)(i), which relates only to works involving a water allocation area whilst the Proposed Development did not affect a water allocation area (at [39]).

However, the Court accepted testimony from the Council's delegate that this statement in the email was an error and that he did not consider that the Proposed Development complied with AO10.1 at the time the Decision was made (at [39]).

Court finds the Council did not err in its assessment of PO10.1

The Applicants argued that the Council's delegate did not consider PO10.1 or, in the alternative, erred in the assessment of PO10.1 in that the Council's delegate did not consider the need for vessels to manoeuvre near the Applicants' Property or access the boat ramp on the Applicants' Property (at [44]).

The Council admitted that it did not consider the manoeuvring of vessels in the water near the Applicants' Property or access to works and structures associated with the Applicants' Property (at [46]).

The Court found that a requirement to consider the ability to manoeuvre a vessel in the water near the Applicants' Property or access to any improvements on the Applicants' Property is not included in the express terms of PO10.1 or called up by the language of the purpose of the Tidal Works Code (see [48] to [52]).

Further, the Court found that the consideration of the manoeuvrability of vessels would involve uncertainties, such as sizes and types of vessels, which proved good reason for the Court's conclusion that this is not a consideration required by the Tidal Works Code (at [53]).

Accordingly, the Court found that the Applicants failed to demonstrate that the Council's delegate failed to have regard to a matter that the legislation required him to consider (at [56]).

Court finds that the Decision was not legally unreasonable

The Applicants argued that the Decision was legally unreasonable, however they accepted that this argument depended upon successfully demonstrating that the Council's delegate was required to consider the ability of vessels to manoeuvre near the Applicants' Property (see [57] to [58]).

Whilst the Court found that this issue fell away because the Applicant did not demonstrate that this consideration was required in making the Decision, the Court observed that the Decision was reasonable due to the existence of a six metre-wide access corridor (at [59]).

The Court dismissed the Applicants' argument that the Conditions were unlawful for two reasons. Firstly, because there was no evidentiary basis for concluding that the Conditions would be impossible to enforce as claimed by the Applicants. Secondly, the Court found that the Applicants' criticism of the Conditions was truly an attempt to attack the merits of the Decision and section 11 of the Act does not allow the Court to consider the merits of the Decision (at [63]).

Conclusion

The Court dismissed the application.

Colin Biggers & Paisley

Planning and Environment Court of Queensland exercises its discretion to dismiss an appeal about the demolition of a pre-1911 detached dwelling house

Hugh Russell | Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Harrison v Brisbane City Council* [2023] QPEC 12 heard before Rackemann DCJ

September 2023

In brief

The case of *Harrison v Brisbane City Council* [2023] QPEC 12 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to refuse a code assessable development application for a preliminary approval for building work for the demolition of an existing detached dwelling house constructed between 1903 to 1904 (**Proposed Development**) located at 1-5 Mole Street, Teneriffe (**Land**).

The Land is relevantly included within the Character Residential (**Infill Housing**) Zone and the Traditional Character Overlay of the *Brisbane City Plan 2014* (version 24) (**City Plan**). As a consequence, any building work on the Land is to be assessed against the Traditional Building Character (Demolition) Overlay Code (**Demolition Code**) (at [4]).

The Applicant conceded that the Proposed Development did not and could not be conditioned to comply with all of the relevant assessment benchmarks, and instead sought a favourable exercise of the Court's discretion to approve the Proposed Development (at [6]).

The Court held that there were no matters significant enough so as to exercise its discretion in favour of an approval in the face of a sensible application of the relevant assessment benchmarks and dismissed the appeal (see [44] to [45]).

Court finds that a consideration of traditional building character is not significant in the face of other non-compliances

The Applicant argued that the Proposed Development complies with Performance Outcome PO5(c) and corresponding Acceptable Outcomes AO5(a) and AO5(c) of the Demolition Code in that the dwelling house does not contribute to traditional building character and concerns a building which has been substantially altered and that if demolished "*… will not result in the loss of traditional building character*" (at [19]).

The Applicant also argued for the same reasons that the Proposed Development would not offend Overall Outcomes OO(a) and OO(d) of the Demolition Code, which relate to the protection of a building constructed in 1946 or earlier, or part thereof, if the building contributes to traditional character and traditional building character or forms part of a character streetscape comprising dwellings constructed in 1946 or earlier.

Whilst the Applicant's heritage expert gave evidence that the Land is "*… effectively surrounded by post 1946 development*" (at [14]) and may be viewed as being within a section of the street that has no traditional character (at [18]), the Court preferred the evidence of the Council's heritage expert that there is a "*diverse range of sightlines*" that form the streetscape which is not outweighed by contemporary houses and altered pre-1947 dwellings (at [16]).

The Court held in the context of Overall Outcome OO(d) that "*[t]here is … sufficient traditional character within the relevant section of the street such that it has traditional character and traditional building character*" (at [18]).

However, the Court held that it was unnecessary to make findings in respect of compliance with Performance Outcome PO5(c) and Acceptable Outcomes AO5(a) and AO5(c) of the Demolition Code, because the Proposed Development does not comply with other assessment benchmarks in the Demolition Code relating to structural soundness. The Court observed that it would not exercise its discretion to grant an approval even if it assumed that compliance with those assessment benchmarks could be resolved in the Applicant's favour (at [32]).

Court finds that the protection afforded to the dwelling house ought to remain

The following assessment benchmarks in the Demolition Code were also relevant to the assessment of the Proposed Development:

- Overall Outcome OO(b), which states that "*Development protects buildings constructed prior to 1911 by limiting demolition or removal to only where a building is structurally unsound.*"
- Performance Outcome PO6, which states that "*Development involves a building which is not capable of structural repair.*"

The Applicant conceded that the Proposed Development does not comply with these provisions as there was no suggestion of structural unsoundness, and argued that "*… the noncompliance is not serious because the pre-1911 building fabric that remains is limited and largely unable to be seen from the street, such that the public gains no appreciation of Brisbane's history from it and there would be no planning harm done in allowing those elements to be lost through demolition.*" (at [35]).

The Applicant described the pre-1911 flooring, external walls, roof framing, and brick chimney fireplace elements that remain of the dwelling house as "*… disparate and discrete items that float within a contemporary structure and ought not be protected.*" (at [35]).

The Court rejected the Applicant's characterisation of the pre-1911 elements of the dwelling house and held that the pre-1911 elements are not so "*trivial, insubstantial, or insignificant*" (at [44]) and that the Court's discretion ought not be exercised to retract the protection offered by the Demolition Code for the following reasons (see [36] to [38]):

- The protection in Overall Outcome OO(b) is not conditional upon a finding of character, but rather relates to structural unsoundness. This protection is not diminished where a proposal does not offend other Overall Outcomes.
- Performance Outcome PO6 and its Acceptable Outcomes apply even where Performance Outcome PO5 and its Acceptable Outcomes are satisfied, and thus a proposal does not comply with the Demolition Code where it involves the demolition of a structurally sound pre-1911 building. This finding was also supported by the Court in the case of *Birleymax Pty Ltd v Brisbane City Council* [2017] QPEC 44.
- There is no assessment benchmark requiring a consideration of traditional building character in respect of a full demolition, which "*… affords a high level of protection …*".

Conclusion

The Court refused to exercise its discretion to approve the Proposed Development and dismissed the appeal.

Colin Biggers & Paisley

New South Wales Court of Appeal narrows the gateway to compensation for acquisition of substratum land for underground rail facilities

Mollie Hunt | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Sydney Metro v Expandamesh Pty Ltd* [2023] NSWCA 200 heard before Leeming JA, Griffiths AJA and Simpson AJA

September 2023

In brief

The case of *Sydney Metro v Expandamesh Pty Ltd* [2023] NSWCA 200 concerned an appeal by Sydney Metro to the New South Wales Court of Appeal (**Court of Appeal**) against the judgment of the Land and Environment Court of New South Wales (**Land and Environment Court**) in the case of *Expandamesh Pty Ltd v Sydney Metro (No. 3)* [2022] NSWLEC 137.

These cases related to the compulsory acquisition of land for underground rail facilities, specifically for the construction of two tunnels to serve the Sydney Metro City and Southwest Project in preparation for the construction of the new Waterloo railway station.

Compensation legislation

Compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) is not payable for subsurface acquisitions involving underground rail facilities under schedule 6B of the *Transport Administration Act 1988* (NSW), unless one of the exceptions in clause 2(1) of schedule 6B exists.

The rule, and the three exceptions, are set out in clause 2(1) of schedule 6B of the Transport Administration Act 1988 (NSW) as follows:

> ***No compensation for acquisition of land for underground rail facilities***
>
> *(1) If land under the surface is compulsorily acquired under the Land Acquisition (Just Terms Compensation) Act 1991 for the purpose of underground rail facilities, compensation is not payable under that Act unless—*
>
> *(a) the surface of the overlying soil is disturbed, or*
>
> *(b) the support of that surface is destroyed or injuriously affected by the construction of those facilities, or*
>
> *(c) any mines or underground working in or adjacent to the land are thereby rendered unworkable or are injuriously affected.*

Both of these cases related to exception (a), being whether "*the surface of the overlying soil [was] disturbed*".

Findings of the Courts

At first instance, the Land and Environment Court held that 1.5mm of soil settlement enlivened exception (a).

However, the Court of Appeal in the joint judgment of Leeming JA and Griffiths AJA has now held that the disturbance needs to be "*… in a way which has practical significance or is not trivial …*" (see [53] and [62]) and is not "*trifling*" (at [54]).

Whilst Simpson AJA agreed with the majority, Her Honour's judgment noted at [96] the oxymoron of "imperceptible disturbance" as follows (emphasis added):

> *In other respects I agree with the joint judgment and add only this. I have difficulty with the notion that 'disturbance' may be 'imperceptible'. The very concept of a 'disturbance' ordinarily, and, indeed, inherently, connotes something that is perceived; certainly something that is 'perceptible'.* ***'Imperceptible disturbance' is an unfamiliar, and somewhat jarring, collocation of words****.*

There still remains some ambiguity as to what level of soil settlement would constitute "disturbance" to satisfy exception (a), due to contextual factors the decision mentions. In this regard, at [64] (extracted below), the Court of Appeal indicates that it depends on what is occurring above the surface of the soil as to whether the disturbance would be "non-trivial" (emphasis added):

> ***Whether or not a particular effect is non-trivial*** *for the purposes of cl 2(1)(a) will depend upon the particular factual context. As was pointed out during the hearing, a subsidence of 1.5mm might appropriately be described as trivial if a tunnel is constructed under* ***land which has sheep grazing on it****. This could be* ***contrasted*** *with the situation where subsidence of that degree is caused by tunnelling under land on which is located a* ***semiconductor factory or a chemical laboratory with sensitive equipment which is very susceptible to any form of disturbance or destabilisation****. To put it another way, how land is currently being used or might be used in the future may be relevant to an assessment of the triviality or otherwise of disturbance to the surface of overlying soil. The circumstances relating to Expandamesh's land are far removed from the example concerning the chemical laboratory.*

Conclusion

Those who are affected by the compulsory acquisition of substratum land for the purposes of underground rail facilities should continue to bear in mind that there are three available exceptions to the general rule that compensation under the Just Terms Act is not available.

This Court of Appeal decision narrows the circumstances in which the exception in clause 2(1)(a) might exist. There needs to be a level of practical significance to the disturbance that has occurred. Even if there is evidence of disturbance, one needs to consider the significance of that disturbance to the actual use of the property above the surface of the soil in determining whether exception (a) is enlivened.

Colin Biggers & Paisley

Exempt development – but is it exempt from the Design and Building Practitioners Act 2020 (NSW)?

Katherine Pickerd | Todd Neal

This article discusses whether remedial building work is 'exempt development' under the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (NSW) and the *Design and Building Practitioners Act 2020* (NSW)

September 2023

In brief

The *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (NSW) and the *Design and Building Practitioners Act 2020* (NSW) assist in determining whether remedial building works constitute 'exempt development'.

Background

In July 2023, the New South Wales Department of Planning and Environment issued a fact sheet entitled *Remedial building work - State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*.

While the fact sheet is not legal advice, it seeks to provide guidance to understand how the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (NSW) (**Codes SEPP**) applies to remedial building work in the context of the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**). That is, it provides guidance on what constitutes 'exempt development' under the Codes SEPP and is also exempt from the requirement to prepare a regulated design under the DBP Act.

This is important because previously, when work was considered to be 'exempt development' under the Codes SEPP, that was the end of the line of enquiry. Those in the industry now need to be aware that if particular work is 'exempt development' under the Codes SEPP, consideration must also be given as to whether the DBP Act applies so as to cause the need for a regulated design to be prepared.

With the spotlight continually being shone on defects within the building industry together with the increased costs of designing, building and fixing class 2 buildings, the fact sheet will no doubt be used by those in the industry as well as owners corporations to try to work out if they need to comply with the DBP Act and prepare a regulated design before undertaking remedial building work. This is because there can be significant cost and time implications if a regulated design needs to be prepared.

'Remedial building work'

While there is no definition of 'remedial building work' in the Codes SEPP, the DBP Act or the *Design and Building Practitioners Regulation 2021* (NSW) (**DBP Regulation**), the fact sheet says that remedial building work is work involving:

- "*rectification or corrective actions or upgrades for deteriorating building elements in aging buildings*
- *rectification of defects in relatively new buildings.*"

What needs to be considered

Those carrying out remedial building work need to consider two questions:

- firstly, whether the remedial building work is 'exempt development' under the Codes SEPP; and
- secondly, whether the remedial building work is exempt from the requirements of the DBP Act and the DBP Regulation.

When considering whether proposed remedial building work is 'exempt development', the first step is to go to the Codes SEPP and identify a relevant code that may apply. If a code is available and the applicable development standards and other requirements of the Codes SEPP are met, then the development may be exempt from the requirement to obtain a development consent or complying development certificate.

The fact sheet helpfully provides a list of examples of work considered to be 'exempt development' under the Codes SEPP provided the development standards and other requirements of the Codes SEPP are met. It is also worth noting that some of the codes (such as clause 2.53 of the Codes SEPP) are not exhaustive. This means that other works not specifically mentioned could also be considered to be 'exempt development'. Legal or other advice may be needed to determine whether or not the work fits within the code.

If the remedial building work is 'exempt development' under the Codes SEPP, consideration must then be given to whether the provisions of the DBP Act apply. One can no longer stop after forming the conclusion that particular work is 'exempt development' under the Codes SEPP.

Rather, building practitioners, design practitioners, owners corporations and strata managers need to consider whether clause 13 of the DBP Regulation which identifies work that is excluded from being "building work" under the DBP Act applies. If work is excluded from being "building work" under the DBP Act, then that Act does not apply so as to require a regulated design to be prepared.

Clause 13 of the DBP Regulation contains a list of 14 circumstances where work is excluded from being "building work". For example, with the exception of certain types of waterproofing work, 'exempt development' under the Codes SEPP is not "building work". Only certain types of waterproofing work is excluded from being "building work" because waterproofing is a building element under the DBP Act.

Take away messages

When determining whether remedial building work is 'exempt development' under the Codes SEPP for a class 2 building, consideration should also be given to whether the work is exempt from the requirements of the DBP Act. Just because work is 'exempt development', this does not mean that the requirements under the DBP Act are avoided.

The exemptions from the DBP Act set out in clause 13 of the DBP Regulation do not only apply to some 'exempt development' under the Codes SEPP. There are other types of "building work" as defined under the DBP Act and Regulation that are also exempt such as in circumstances where orders are issued under the *Local Government Act 1993* (NSW) or the *Environmental Planning and Assessment Act 1979* (NSW). The entirety of clause 13 of the DBP Regulation should be considered to make sure there is an available provision before carrying out any work without a regulated design.

Ultimately, there are at least two layers of regulation to consider when dealing with remedial building works. The first involves relevant planning instruments, in particular the Codes SEPP, and the second is the DBP Act. If work is 'exempt development', this does not mean that the requirements under the DBP Act are avoided.

Colin Biggers & Paisley

NSW Supreme Court has allowed damages against Transport for NSW for small businesses affected by the Sydney Light Rail construction

Joanne Queiros | Bethany Burke | Anthony Landro | Todd Neal

This article discusses the decision of the Supreme Court of New South Wales in the matter of *Hunt Leather Pty Ltd v Transport for NSW* [2023] NSWSC 840 heard before Cavanagh J

September 2023

In brief

In the recent decision handed down on 19 July 2023 in *Hunt Leather Pty Ltd v Transport for NSW* [2023] NSWSC 840, the NSW Supreme Court has upheld a claim for private nuisance brought in relation to the interference caused by the NSW Government's Sydney Light Rail (**SLR**) project from Circular Quay to Kingsford/Randwick. The proceedings were commenced as a class action against Transport for NSW (**TfNSW**) on behalf of all persons who suffered loss or damage by reason of the interference with their enjoyment of their interest in the land. The two lead plaintiffs were a luxury handbag store, and a restaurant. The outcome means that TfNSW has been found liable for the financial damage suffered by the two businesses during the construction of the SLR. The decision will have wide implications for infrastructure planning throughout the State.

Background

The proceedings

The proceedings were commenced against TfNSW on behalf of all persons who held an interest in land in the vicinity of the SLR, and suffered loss or damage by reason of the interference with their enjoyment of that interest. TfNSW conducted the planning of the SLR between 2011 and 2014. The Project Deed was then entered into with ALTRAC in December 2014.

There were four lead plaintiffs, being a luxury retail leather goods business with stores in the QVB and the Strand Arcade (Hunt Leather), its CEO (Ms Sophie Hunt), a trustee of a unit trust that operated a restaurant business on Anzac Parade in Kensington (Ancio), and its sole director (Mr Nicholas Zisti).

The SLR project

The SLR project was due to be completed in March 2019, but due to extensive delays, it was not completed until March 2020. It was supposed to be completed in stages according to "fee zones", whereby the occupation periods for each fee zone were established under the Project Deed. The intention of this strategy was to minimise disruption to businesses along the route. However, every time there was an encounter with an unidentified utility (referred to as a 'Utility Works Event'), the contractor could make a claim to extend the relevant occupation period in each zone. Ultimately, the fee zone strategy failed and businesses were subject to extensive construction activities in excess of what was anticipated under the strategy. His Honour commented that "[the staging of the construction activities] could only be described as a complete failure" (at [758]).

The claim

Hunt Leather and Ancio pursued a **private** nuisance claim, whilst Ms Hunt and Mr Zisti pursued a **public** nuisance claim.

The private nuisance claim

There are three types of private nuisances that can be established per *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152 at [54]:

- "*Causing encroachment on the neighbour's land, short of trespass*
- *Causing physical damage to the neighbour's land; and*
- *Unduly interfering with a neighbour in the comfortable and convenient enjoyment of his or her land*".

The Hunt Leather case was concerned with the third type of interference.

The plaintiffs alleged that during the construction of the SLR, members of the class were subject to a nuisance arising from the SLR construction activities, which was an interference with their rights, and the enjoyment and occupation of their properties. The plaintiffs submitted that the nuisance was constituted by:

- the nature of the SLR construction activities (involving heavy machinery, vibrations, noise and dust);
- the presence of hoardings and general restriction of pedestrian and vehicular movement; and
- the length of time that the SLR construction work was being conducted outside of their premises.

The plaintiffs claimed that TfNSW was responsible for the nuisance because it was the statutory authority that developed, procured, planned, and organised the SLR Project, and that the nuisance arose because of TfNSW's failures in the planning, design and contracting phase.

The public nuisance claim

Ms Hunt and Mr Zisti claimed that the public nuisance (the substantial and unreasonable disruption or inconvenience to the public in the exercise of public rights) occurred by the damage and obstruction of roadways and footpaths through road closures and the erection of hoardings, and that they suffered loss and damage, and non-economic loss (see [947] - [949]).

Nuisances denied by TfNSW

TfNSW denied there had been any nuisance in both the private and public claims. It argued amongst other things that the interference was not substantial and unreasonable, and it could not be liable in nuisance because the interference was an inevitable consequence of the SLR construction.

Issues

Summary

The issues before the Court were principally:

- Whether it was necessary for the plaintiffs to establish that the defendant failed to take reasonable care in order to succeed in an action for nuisance.
- Whether the interference to the lead plaintiffs' properties constituted an actionable nuisance that TfNSW should be liable for (ie was the interference substantial and unreasonable?).
- Whether the defendant could rely on the defence of statutory authority.

The above is a simplification. The case involved complex legal and factual issues, evidence from experts in 8 separate disciplines, and 25 days of hearing in November - December 2022. The full written judgment by Justice Cavanagh handed down on 19 July 2023 comprised 1140 paragraphs.

Was it necessary to prove negligence?

The lead plaintiffs in Hunt Leather did not plead any negligence claim. TfNSW argued that in order to succeed in the nuisance claim, it was necessary to succeed in establishing negligence against TfNSW.

The Court confirmed at [646] that the interference may be unreasonable even though the defendant took reasonable care. Whilst the Court observed that there are many cases where the same facts give rise to both an action in nuisance and negligence, the Court found at [674] that there was no need for a plaintiff to establish negligence to succeed in an action in nuisance, even if it may do so.

The Court affirmed that nuisance is concerned with interference with a person's enjoyment of the land, and noted at [582] that the High Court of Australia has not yet held that a claimant must establish that the tortfeasor (in this case, TfNSW) acted negligently to succeed in nuisance.

Despite these findings, the Court found that "it was not evident" that TfNSW had properly considered the interests of business owners along the SLR route (at [820]), and his Honour was unable to be satisfied that TfNSW exercised reasonable care to protect the interest of business owners along the SLR route.

Was the interference substantial and unreasonable?

The Court confirmed at [646] that the plaintiffs must each establish that there had been an interference with their use of the land which was "substantial and unreasonable", and that what is unreasonable must be considered objectively by the parties having regard to a range of factors.

Regarding whether the interferences were "substantial", the Court found that the interference to Hunt Leather's Strand Arcade store was substantial and unreasonable between November 2015 and December 2017 (coinciding with when the barricades and hoardings were removed). The Court identified the point at which the nuisance became unreasonable as November 2016, one year after the commencement of the interference (see [937]). For the Hunt Leather QVB store however, the Court was not satisfied that the interference was substantial, finding that dusty windows alone were not sufficient for the interference to be "substantial" [at [887]).

For the Ancio restaurant, the Court found that there was a substantial interference between May 2016 and February 2019 due to the hoardings and barricades erected outside of the restaurant. The Court identified the point at which the nuisance became unreasonable as September 2017, one year and four months after the commencement of the interference (see [938]).

The Court found at [656] that the use of the roads along the SLR route was not a common and ordinary use, and was "exceptional". This finding went towards the Court's consideration of the reasonableness of the interference.

The Court helpfully provided a list of factors at [915] regarding whether an interference was unreasonable. These factors included:

- the nature and purpose of the activities;
- the relationship between the parties, including the obligations of the landowner from which the nuisance emanates;
- the period during which the interference was substantial;
- the benefit of the activities to the public;
- whether the landowner took care to avoid unnecessary interference;
- whether there were self-help measures available to the claimants; and
- the extent to which the defendant might have known or anticipated that the interference would impact on the financial interests of the adjoining landowners.

The Court noted the law of nuisance is based on the principle of "give and take" between neighbours. It seeks to strike a balance between the conflicting rights and interests of neighbours, one of whom may be seeking quiet use of their land whilst the other may be developing their land. (at [589]).

Could TfNSW rely on a defence?

One submission raised by TfNSW was that the construction was for the public benefit, and therefore this should operate as a defence. The Court found at [809] - [811] that even though there was a public benefit associated with the construction of the SLR, the fact that there was a public benefit does not operate as a defence. Rather, it is an important factor to consider in assessing the issue of reasonableness. Otherwise "it would allow the State to override the rights and interests of ordinary members of the community" [at [811]).

Another defence raised by TfNSW was that it was exercising its statutory functions at the time of which the plaintiff's complained about the actions taken during the construction of the SLR and this interference with the plaintiffs' land was inevitable (see section 43A of the *Civil Liability Act 2002*) (see [823]). The Court rejected this submission and found that TfNSW had not established its defence. The Court found that the existence of the fee zone strategy detracted from this defence (see [834]).

Outcome

Lead plaintiffs

The Court ultimately held that Hunt Leather and Ancio were successful in their claim for private nuisance. The Court found at [940] that TfNSW was responsible for the nuisance for four reasons:

- The prolongation of construction activities outside businesses along the SLR route was plainly foreseeable by TfNSW.
- The risk was so high that the other party to the PPP arrangement was not prepared to accept it, other than to a limited extent.
- Despite assurance to business owners along the SLR route that the work would be performed in stages, TfNSW contracted on terms that provided no real deterrence for any departure from the staging plan.
- TfNSW took the risk in respect of the requirements of the utility providers.

As a result, the Court found that TfNSW was liable to Hunt Leather and Ancio in respect of the losses that they sustained.

The public nuisance claim brought by Ms Hunt and Mr Zisti was unsuccessful. The Court observed at [953] that a private action for public nuisance is only available when a claimant can demonstrate they have suffered damage beyond the common injury to the members of the public affected by the nuisance. At [954] - [963], the Court provided a number of reasons why the public nuisance claim was not made out. The Court also found at [980] that section 141 of the *Roads Act 1993* provided a defence. That section sets out that where an approval or consent existed, action in accordance with that is taken not to be a public nuisance.

Class action members

It remains to be seen how the litigation will affect the class action members, however many of the threshold questions are dealt with by the written judgment. The Court has listed the matter for further directions to determine a process going forward.

The Court noted that the proceedings were not a "particularly apt vehicle for a class action" (see [1136]), as the loss suffered by each business was proportionally different depending on the degree of interference. The Court at [1133] has warned that mere proximity to the construction works does not establish substantial interference, despite some diminution in profitability flowing from the construction of the SLR.

Significance

Class action members

The judgment should encourage class members to pursue their respective claims against TfNSW, provided they can establish they were impacted by the SLR in a way similar to the Hunt Leather Strand Arcade store, as opposed to the QVB store. Broadly speaking, the outlook is more optimistic for customer facing small businesses within the class.

Broader impacts

The Hunt Leather decision is a significant case for its broader implications for individuals and businesses affected by large infrastructure projects. Often businesses in the position of the Plaintiffs are unable to claim compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**), as no interest in land is acquired from them.

Even if an interest in land is acquired, compensation for the impacts of these types of projects is constrained by the heads of compensation in the Just Terms Act, in particular by disturbance and injurious affection. There have been a number of cases in recent years that have constrained the scope of disturbance such that it can no longer be called a "catch all" provision. At the same time, the special value head of compensation has also not been litigated in the manner alluded to by Basten JA at [36] in *Roads and Maritime Services v Allandale Blue Metal Pty Ltd* [2016] NSWCA 7.

The Court's decision in Hunt Leather highlights to those whose land has been partially acquired or those whose land has not been acquired in proximity to an intrusive infrastructure project that the tort of nuisance may apply. If an infrastructure project will diminish profitability because of a substantial and unreasonable interference with a business, then the tort of nuisance should be considered. Infrastructure authorities will need to focus firmly on the project planning phase and engage with stakeholders to minimise disruption and mitigate risk, particularly where the disruptions might be substantial and unreasonable.

Colin Biggers & Paisley

Victorian Civil and Administrative Tribunal's review rights in the case of Myers v Southern Grampians Shire Council (Red Dot) [2022] VCAT 695 (24 June 2022)

Bailiejean Hohnberg | David Passarella

This article discusses the decision of the Victorian Civil and Administrative Tribunal in the matter of *Myers v Southern Grampians Shire Council (Red Dot)* [2022] VCAT 695 (24 June 2022) heard before Joel Templar, Member (merits) and Picha Djohan, Member (legal opinion)

September 2023

In brief

The case of *Myers v Southern Grampians Shire Council (Red Dot)* [2022] VCAT 695 (24 June 2022) concerned an application for review in the Victorian Civil and Administrative Tribunal (**VCAT**) in respect of the approval of a permit application lodged with the Southern Grampians Shire Council (**Council**) for the proposed development of land located at the southern end of the Grampians National Park for a group accommodation comprising four cabins accommodating up to ten people, a pool, and a sauna.

Three objections were received in respect of the permit application. These objections were on the grounds that the proposed development, if approved, would have an unacceptable visual impact on the scenic natural features of the Grampians that attract many visitors to the region each year. Despite the three objections, the Council still granted the permit. Consequentially, the objectors made an application for review to VCAT.

VCAT relevantly held that it did not have jurisdiction under section 82 of the *Planning and Environment Act 1987* (Vic) (**Planning and Environment Act**) to consider the part of the review application challenging the Council's decision to grant a permit to construct a building or carry out works on land affected by the Design and Development Overlay Schedule 6 (**DD06**) of the *Southern Grampians Planning Scheme* (**Planning Scheme**).

In respect of the other aspects of the review, VCAT was satisfied that the permit application should be granted under the Rural Living Zone Schedule 2 and Environmental Significance Overlay Schedules 2 and 3 of the Planning Scheme and varied the decision of the Council to include conditions requiring that a tree be retained and that grass be replanted using an indigenous seed mix.

VCAT's jurisdiction

The primary issue considered by VCAT was whether VCAT has jurisdiction to consider the application for review under DD06 having regard to section 82 of the Planning and Environment Act.

Section 82(1) of the Planning and Environment Act grants an objector to a planning permit the right to apply to VCAT for a review of a decision of the responsible authority to grant a permit. However, if the relevant planning scheme exempts a decision of an application for a permit from review under section 82(1), then under section 82(3) of the Planning and Environment Act "*… an application for review cannot be made under [section 82(1)] in respect of that decision*".

The objectors submitted that VCAT did not have jurisdiction under section 82 of the Planning and Environment Act as there is no trigger for review under DD06. The respondent submitted that the review application was not able to be brought in respect of the Council's decision to grant the permit and that VCAT does not have jurisdiction to consider the review application.

In reaching its decision, VCAT noted that it only has original and review jurisdiction. VCAT held that its review jurisdiction could not be invoked in this instance because the Planning Scheme exempted the Council's decision from review under section 82 of the Planning and Environment Act. VCAT would have had jurisdiction to hear the appeal if the Planning Scheme did not exempt the decision from review.

VCAT also relevantly noted that in a review application under section 82(1) of the Planning and Environment Act, the review is confined to matters raised under section 82(1) and VCAT does not have jurisdiction to consider the whole of the permit application that led to the decision under review.

VCAT finds no unacceptable visual impact and varies the Council's decision to include conditions

VCAT was satisfied that the permit application should be granted under the Rural Living Zone Schedule 2 and Environmental Significance Overlay Schedules 2 and 3 of the Planning Scheme because the design of the proposed development would have a minimal visual impact that would not be an "*unacceptable intrusion on the landscape*" and the proposed vegetation would soften the built form to an acceptable degree.

VCAT relevantly varied the decision of the Council to include conditions requiring that the plans of development be amended to retain a Carob Tree originally proposed to be removed and that grass be replanted using an indigenous seed mix.

Significance of this Red Dot decision

This Red Dot decision is of significance to the practice of planning and environment law as it reiterates the jurisdiction of VCAT and highlights the limitations on VCAT's jurisdiction to hear specific matters. This case demonstrates that provisions in a planning scheme can dictate the rights of review in respect of a permit application.

Colin Biggers & Paisley

Taking the politics out of planning: Victorian government's 'planning takeover' proposes to bypass local councils and third party appeals to fast-track housing supply in Melbourne

Evie Atkinson-Willes | David Passarella

This article discusses the response to the ongoing housing crisis by Federal and State governments by fast-tracking developments in an attempt to meet housing supply targets

September 2023

In brief

In response to the ongoing housing crisis, Federal and State governments have committed to fast-track developments in an attempt to meet ambitious housing supply targets. Reported plans of the Victorian government's 'planning takeover' due to be announced next month offer several solutions, such as bypassing third party appeals, removing council approval rights and implementing affordable housing quotas, to streamline the planning system in Victoria and accelerate medium density developments in established suburbs.

Earlier this month, the Australian government allocated $3.5 billion for the construction of 1.2 million additional homes across Australia over the next five years in a bid to address the housing supply issue. Similarly, the Victorian government is due to announce a plan next month to implement a major overhaul of the Victorian planning system to reach their goal of constructing 1 million homes in established suburbs by 2050. In anticipation of next month's announcement, Premier Daniel Andrews has suggested that the government will impose significant policy changes to bypass local democracy and streamline the planning process for medium and high density developments at the expense of local councillors and resident objectors. While this presents promising opportunities for developers looking to construct multi-storey developments in prime locations around Melbourne, it is unclear what the increased centralisation of planning powers will look like in practice.

Under the current planning system in Victoria, the growing sentiment of 'not-in-my-backyard' or 'nimbyism' presents a significant roadblock to the government's ability to accommodate the surging populace. Local councils have been criticised for responding to the concerns of current residents, ignoring the recommendations of their planning officers and forfeiting a prospective approach to accommodate future residents of Melbourne. Accordingly, planning processes are frequently delayed, resulting in lengthy and costly court proceedings at the Victorian Civil and Administrative Tribunal. This has, and will continue to, significantly contribute to the housing supply issue in Victoria.

To tackle the housing crisis, the Victorian government has made several proposals to reform the planning system. These include removing third party appeal rights for medium density developments that incorporate affordable housing, and reducing the planning approval powers of local councils to streamline the planning process in established suburbs across Greater Melbourne.

However, determining the efficacy of these high level policy changes in creating practical outcomes will depend on the detail. At this preliminary stage, it remains to be seen how the government will administer the proposed policy changes. If the state government gains planning powers, the following points will need to be considered when delivering the finalised strategy:

- What areas of Melbourne will the changes apply to?
- What will constitute a 'medium density development' for the scheme?
- Whether a permit applicant will have an appeal right against the Minister's decisions?
- Whether the Minister will be bound by the timeframes ordinarily required for a responsible authority to make a decision?
- What proportion of affordable housing will developers be required to deliver?
- If local councils do not have approval powers, to what extent, if at all, will they remain involved in the planning permit application process?

In short, the projected divestment of planning powers and appeal rights in Victoria presents an opportunity for developers to propose projects where they would ordinarily be struck down by local council or objectors. Further, the Victorian Government's interventionist approach will provide more protection for developers against expensive legal proceedings, provided they are willing and able to integrate affordable housing into their plans, and remove the inefficiencies associated with the current permit application process. Ultimately, the planning system must adapt to appease the growing demand for housing stock and private developers will undoubtedly continue to play an essential role in achieving this goal.

Planning and Environment Court of Queensland dismisses appeal against an infrastructure charges notice finding the levied charge was correctly calculated by reference to the demand generated by all types of development facilitating the end use of the premise

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Douglas Construction & Engineering Pty Ptd v Logan City Council* [2023] QPEC 28 heard before Kefford DCJ

October 2023

In brief

The case of *Douglas Construction & Engineering Pty Ptd v Logan City Council* [2023] QPEC 28 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against an infrastructure charges notice (**ICN**) issued by the Logan City Council (**Council**) in respect of a development permit for building work on land in Loganholme (**Subject Land**).

The Council gave to the Appellant an ICN on 2 February 2022 pursuant to section 119(2) of the *Planning Act 2016* (Qld) (**Planning Act**). The Appellant commenced its appeal on 23 May 2022 pursuant to section 229(1) of the Planning Act, seeking an order that the ICN be set aside and replaced with, or changed to, a decision that the levied charge be nil for the reason that that the ICN involved an error relating to the working out of extra demand for section 120 of the Planning Act.

The Appellant alleged that Council failed to properly apply section 120(2)(c) of the Planning Act in calculating the levied charge the subject of the ICN by failing to not include the demand generated by the use of the Subject Land as a warehouse and ancillary office, being "*other development*" on the Subject Land that may be lawfully carried out without the need for a "*further development permit*" (at [14]).

The Council argued that for the purpose of section 120 of the Planning Act and sections 3.6, 6.1 and 6.2(a) of the *Logan Charges Resolution (No. 9) 2021* (**Logan Charges Resolution**) (at [16]):

> *(a) the warehouse and ancillary office are not 'other development on the premises' but is the same development for which the charge was levied;*
>
> *(b) even if the material change of use is 'other development', the start of the new warehouse and ancillary office may not be lawfully carried out without the need for a further development permit for building work and operational work; and*
>
> *(c) the infrastructure charges notice does not involve an error relating to the working out of extra demand for s 120 of the Planning Act 2016.*

Accordingly, the Court determined the following questions (at [18]):

> *1. Is the making of a material change of use of the subject land for a warehouse and ancillary office 'other development' on the subject land?*
>
> *2. Can the warehouse and ancillary office use lawfully start without the need for a 'further development permit'?*
>
> *3. Should the ICN be set aside and replaced with, or changed to, a decision that the levied charge be nil?*

The Appellant bore the onus of establishing that the appeal should be upheld by demonstrating that each question is answered in the affirmative.

The Court held that the Appellant failed to discharge its onus and accordingly dismissed the appeal.

Court finds the making of a material change of use of the Subject Land for a warehouse and ancillary office is not "other development"

The Appellant submitted that "*other development*" for section 120 of the Planning Act constitutes any type of development other than that which triggered the giving of the ICN, having regard to the language used in section 119(1)(a), section 119(1)(b), section 120(1), section 120(2)(a), and section 120(2)(b), and the operation of section 122(2)(b), of the Planning Act (see [59] to [67]).

The Appellant submitted that this construction of "*other development*" for section 120(1)(c) of the Planning Act is sufficiently broad to encompass development in the form of making a material change of use.

The Council submitted that the material change of use of the Subject Land for warehouse and ancillary office cannot be "*other development*" for the purpose of section 120(2)(c) of the Planning Act for the following reasons (see [68] to [72]):

- Reference to "*the development*" in section 120(1) of the Planning Act is to all aspects of the development and the use sought to be facilitated by it, thus encompassing all its constituent types that will generate demand on trunk infrastructure. This construction is consistent with the legislative scheme and the meaning confirmed by the explanatory note to section 119 of the Planning Act.
- The fact that a development permit is not required to make a material change of use of the Subject Land for a warehouse and ancillary office does not mean that "*development*" has occurred. "*Development*", under schedule 2 of the Planning Act, includes "*making a material change of use of premises*". Since no material change of use of the Subject Land had been made at the time of the building work approval, there is no "*development*" or "*other development*" that could be considered as creating extra demand for section 120(2)(c) of the Planning Act.

The Court considered the legislative regime in respect of infrastructure charges from [23] to [34], particularly the limitations for levied charges imposed by section 120 of the Planning Act which formed the subject of the dispute.

The Court made the following observations about the legislative regime in respect of infrastructure charges (see [36] and [37]):

- The purpose of the chapter within which the relevant provisions are found is to authorise a local government to levy charges in relation to the demand placed on trunk infrastructure generated by "*the development*".
- A reference to "*the development*" encompasses all types of development that, in combination, facilitate the end use of the premises, this being what places demand on trunk infrastructure, rather than a single type of development in isolation.

The Court found that this interpretation of "*the development*" is assisted by a reading of chapter 4 in the context of the whole of the Planning Act, which "*… reveals that a development permit for each type of development will not always be required to use premises for a purpose identified in sch 16 of the Planning Regulation 2017*" (at [38]).

Accordingly, the Court concluded that "*the development*" encompasses all types of development regardless of whether the type of development requires a development approval, as it is the combined undertaking of all types of development that generates the demand on trunk infrastructure (at [44]).

Court finds it unnecessary to determine whether the warehouse and ancillary office use can lawfully commence without the need for a "further development permit"

Having found that the making of a material change of use of the Subject Land is not "*other development*", the Court deemed it unnecessary to answer the second question (at [75]). Yet, the Court made several observations regarding the Appellant's submissions regarding this issue from [76] to [81]. The Court concluded that it was not persuaded that, even if other "*other development*" is properly construed as including the making of a material change of use in the building the subject of the levied charge, the term "*further development permit*" should be attributed to the meaning contended by the Appellant (at [82]).

Notably, in this regard, the Court did not accept the Appellant's submission that the ordinary meaning of the word "*further*" attaches a future connotation and thus contemplates additional development permits beyond those currently in existence (see [77] to [78]).

Court finds that the calculation of the levied charge should not be replaced with, or changed to, a decision that the levied charge be nil

The Court stated that "*… even if the Appellant had persuaded me of its construction of s 120 of the Planning Act 2016 … it has not persuaded me that there is an error in working out extra demand for s 120 of the Planning Act 2016 such that the levied charge should be nil.*" (at [83]).

The Court recognised that it was not in dispute that the ability to make a material change of use for a warehouse and ancillary office is "*accepted development subject to requirements*" (at [87]). Rather, the dispute concerned whether a further development permit for building work and operational work is required to lawfully carry out a material change of use and, if so, whether the development permit for operational work is for a specific purpose or use such that it satisfies that requirement (at [87]).

The Court stated that it was not persuaded of the following (at [90]):

> *(a) the making of a material change of use for a warehouse with the same gross floor area and the same extent of area impervious to stormwater as that which is the subject of the building work approval could occur as accepted development; and*
>
> *(b) even if the Appellant is correct about the proper construction of s 120 of the Planning Act 2016, the extra demand calculated in* accordance *with the Logan Charges Resolution No. 9 2021 equals the adopted charge for the development the subject of the building work approval such that the levied charge should be nil.*

Conclusion

The Court held that the extra demand calculated in accordance with the Logan Charges Resolution was correct, such that the levied charge should not be replaced with, or changed to, a decision that it be nil.

Having found that the Appellant did not discharge its onus, the Court dismissed the appeal.

The Appellant filed on 28 July 2023 an application for leave to appeal to the Queensland Court of Appeal against the Court's decision. The application is yet to be decided by the Queensland Court of Appeal.

Colin Biggers & Paisley

Planning and Environment Court of Queensland allows the modernisation of a place of worship despite submitter concerns about character and built form and amenity

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Edie & Ors v Brisbane City Council & Anor* [2023] QPEC 9 heard before McDonnell DCJ

October 2023

In brief

The case of *Edie & Ors v Brisbane City Council & Anor* [2023] QPEC 9 concerned a submitter appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Brisbane City Council (**Council**) to approve a development application for a development permit for a material change of use for a place of worship, church hall, and townhouses (parish residences) (**Proposed Development**) on land situated at 33 Bunya Street, 34 Peach Street, and 68 to 80 Dunellan Street, Greenslopes (**Land**).

More specifically, the Proposed Development involved the removal of the existing church and parish residence buildings on the Land that were constructed after 1946, the retention of the four pre-1947 dwelling houses which were to be reused as parish residences, and the construction of a new church building and church hall.

The issues in dispute were as follows (at [28]):

- Whether the built form and scale of the Proposed Development are compatible with the planning intent.
- Whether the Proposed Development will result in unreasonable amenity impacts.
- Whether the Proposed Development can be conditioned to achieve compliance with the assessment benchmarks to the extent that there is any non-compliance with the assessment benchmarks.

The Court held that the Proposed Development can be conditioned to achieve compliance with the relevant assessment benchmarks and listed the appeal for review to enable the parties to agree on appropriate conditions.

Planning matrix

The Proposed Development is to be assessed against the relevant assessment benchmarks in the *Brisbane City Plan 2014* (version 18) (**City Plan**) and the Land is included within the following designation of zones and subject to the corresponding codes in the City Plan:

- Character Residential (Infill Housing) Zone and subject to the Character Residential (Infill Housing) Zone Code (**Infill Housing Zone Code**).
- Coorparoo and District Neighbourhood Plan and subject to the Coorparoo and District Neighbourhood Plan Code (**Coorparoo Neighbourhood Plan Code**).
- Traditional Building Character Overlay and subject to the Traditional Building Character Overlay.

The Community Facilities Code and Transport, Access and Parking and Servicing Code (**TAPS Code**) were also applicable to the assessment of the Proposed Development.

Court finds that the character and built form of the Proposed Development are acceptable

This issues in dispute in respect of character and built form were as follows (at [28]):

> 1. *Whether the proposed development is compatible with the planning intent for the area, including the character and built form requirements of the planning scheme, having regard to both the following assessment benchmarks and whether the proposed development is of a height, bulk and scale that: -*

(a) *is appropriate, in relation to:-*

(i) *the prevailing built form and streetscape of the subject land and its surrounds; and*

(ii) *the use proposed;*

(b) *is consistent with:-*

(i) *the existing and desired building height for the area; and*

(ii) *community expectations for development in the area; …*

Relevant assessment benchmarks were identified in the Strategic Framework, Infill Housing Zone Code, Coorparoo Neighbourhood Plan Code, and Community Facilities Code.

Court finds that the character of the locality is mixed and that the use of the Proposed Development reflects and complements such character

The Court held that the Proposed Development satisfies the relevant assessment benchmarks in respect of character for the following reasons:

- The Court agreed with the Applicant's and Council's visual amenity experts in that the character of the Proposed Development is sub-tropical and the character of the locality mixed. In particular, the Court stated as follows:
  - That it accepted that "*… the proposed landscaping and deep planting was generous and well-located, and would assist to integrate the built form [and] reinforce the sub-tropical character …*" (at [49]).
  - "*… the character of the immediate locality, informed by a mix of land uses, building forms and materials, is mixed*" because of the combination of the nature of the built forms and materials used in both pre-war and post-war buildings that deliver traditional building and sub-tropical elements (see [49] to [55]).
- The Court held "*[t]hat a new building must reflect and complement the city's traditional building character suggests that it is not intended that the proposal mimic that character*" (at [68]). The Court preferred the evidence of the Applicant's and Council's visual amenity experts in this respect, who opined that "*… it is not a good design outcome for a church to mimic traditional building character; that a tin and timber church would be a highly compromised outcome*" (at [69]).
- The Court considered the visual amenity experts' description of the attributes of the Proposed Development and preferred that of the Applicant's and Council's (see [62] to [65]). The Court therefore held that the Proposed Development reinforces the sub-tropical character required by Overall Outcome 5(d) of the Infill Housing Zone Code.

Court finds that the built form of the Proposed Development satisfies the planning intent of the Infill Housing Zone Code

The Court held that the Proposed Development satisfies the relevant assessment benchmarks in respect of height, bulk, and scale for the following reasons:

- The Proposed Development is less than 9.5 metres above ground, but for the ridge of the church and the belltower, and is compatible with most other built form in the locality. The Court agreed with the Council's visual amenity expert that the area exceeding 9.5 metres would not have any material impact on the character of the area (at [70]). Further, the Court held that the Proposed Development has sufficient setbacks such that "*… the height of the church is compatible with other built form in the area*" (at [70]).
- The Land is "*… appropriately sized and configured, enabling the built form to be dispersed across the Site as six buildings …*" (at [66]).
- The Council's and Applicant's visual amenity experts and the Applicant's architectural expert opined that the Proposed Development "*… contributes to a high quality streetscape through its form, scale and landscaping outcomes*" (at [73]). The Court agreed and held that "*… the built form and landscaping of the proposal will contribute to a high quality streetscape*" (at [73]).

The Court in summary held that "*… the landscaping and the design elements including the articulation, setbacks and the stepped roof form all contribute to a softening of the built form. These features, in combination with the use of materials, colour and detailing including traditional design motifs, ensure that the proposal is compatible with and integrates with the built form intent of the [Infill Housing Zone Code]*" (at [71]).

The Court further held that the community expectations are a relevant consideration in that "*… it is reasonable that the community expect that the proposal has a scale and form consistent with the amenity and character intended for the Site and complements the traditional building character*" (at [39]). However, the Court held that the Appellants' submissions in respect of community expectations as to the built form are not reasonable for the following reasons:

- The Appellants' adverse submissions are not reasonable as "*… they give insufficient weight to the current use which can continue with limited restrictions, and misconstrue the City Plan as requiring that the proposal be of tin and timber construction*" (at [37]) and because the Proposed Development is "*… compatible with the built form intent of the zone, reflects and complements the character and is of a bulk, scale and form consistent with and reflective of that character …*" (at [40]).
- "*Reasonable expectations with respect to built form, site layout and landscape design should be informed by an objective reading of the applicable provisions of City Plan. I am satisfied the proposal meets those provisions*" (at [75]).

Amenity impacts

The Appellants argued that the "*… hours of operation and levels of patronage would result in unacceptable amenity impacts, in terms of traffic, lighting, noise and general amenity*" (at [79]). The Appellants relied on several assessment benchmarks from the Infill Housing Zone Code, Coorparoo Neighbourhood Plan Code, Community Facilities Code, and the TAPS Code which demonstrate non-compliance. Each individual amenity issue was considered by the Court in turn.

Traffic impacts

The traffic expert opined that "*… the number, location and design of the driveways are consistent with the requirements of the TAPS Planning Scheme Policy and will ensure adequate levels of vehicular and pedestrian safety on Dunellan and Bunyan Streets*" (at [100]). The Court agreed and held that any minor non-compliance in respect of traffic impacts does not warrant refusal since the Proposed Development "*… will result in an imperceptible increase in traffic volumes on the local street network and minimises the introduction of non-local traffic into minor residential streets*" (at [105]).

The Court accepted the traffic expert's unopposed evidence that "*… the additional onsite car parking will improve the existing traffic and parking situation and local amenity and there will be no unacceptable traffic operations impact and traffic safety risk on the local street network as the result of approval of the proposed development*" (at [114]).

Hours of operation, lighting, and noise

The Court considered the amenity issues relating to hours of operation, lighting, and noise in conjunction for the reason that the existing use is largely uncontrolled in that "*… it is necessary to examine the impact of the hours of operation on amenity. In the present circumstances this requires a consideration of the impacts of lighting and noise*" (at [119]).

Lighting

The Applicant's acoustic engineering expert opined that "*[l]ighting can be readily designed, installed and operated to meet amenity spill and glare requirements of AS4282 which protects the amenity of surrounding areas*" (at [120]). The expert further opined that "*… an approval of the proposed development with conditions would deliver a better amenity outcome for the neighbourhood than the existing facility, from a noise and lighting perspective*" (at [121]). The Court agreed and held that conditions can achieve an appropriate amenity outcome, and that "*… there are no lighting issues which warrant refusal of the proposed development*" (at [123]).

Acoustic

The Appellants' and Applicant's acoustic engineering experts both opined that noise mitigation measures could be implemented to satisfy the technical requirements with respect to noise emissions (at [124]). However, the Appellants argued that "*… while the expert evidence should be respected and given due weight, the Court must have regard to the reasonable and genuine concerns about impacts on amenity notwithstanding those expert opinions*" (at [125]).

The Appellants' acoustic engineering expert expressed concern about the risk of noise generated by patrons leaving the Land and that the mitigation of the risk relies upon the implementation of conditions (at [126]). The Appellants' town planning expert agreed and submitted that the church may not have the ability to enforce compliance with the conditions or to monitor the number of people on the Land.

The Court rejected the Appellants' argument for the reason that "*[i]t must, of course, be assumed that persons will act lawfully and comply with conditions of approval*" and that patrons would comply with a noise management plan (at [131]). The Court held that "*… amenity impacts arising from noise generated by people on site could be satisfactorily addressed by conditions such that noise from the proposed development would not be inconsistent with the character and amenity of the area*" (at [137]).

Hours of operation

As the Court did not find that lighting or acoustic impacts would cause unacceptable amenity impacts, the Court held that "*… the proposed hours of operation will not result in unacceptable amenity impacts and are consistent with reasonable expectations for the use as informed by the historic and current use of the Site*" and that the imposition of appropriate conditions can achieve compliance with the relevant assessment benchmarks (see [138] and [139]).

Court finds that relevant matters support the Proposed Development and exercises its discretion in favour of approval

The Court heard from all parties as to relevant matters and held that the exercise of the Court's discretion favours approval of the Proposed Development for the following reasons (see [142] to [143]):

- "*The present use of the Site can continue with limited restrictions upon its operation and use.*" However, "*[t]he existing approved church facility is no longer fit for purpose*" because of its unacceptable amenity impacts on the community.
- The Proposed Development will benefit the local community by way of improving accessibility and regulations on its hours of use.
- The refusal of the Proposed Development is not warranted in the face of any non-compliance with the relevant assessment benchmarks.

Conclusion

The Court adjourned the appeal to a date to be fixed for review to enable the parties to consider appropriate conditions of approval.

Colin Biggers & Paisley

Planning and Environment Court of Queensland refuses an advertising sign because of concerns over motorists' safety

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bishopp Outdoor Advertising Pty Ltd v Moreton Bay Regional Council* [2023] QPEC 19 heard before Rackemann DCJ

October 2023

In brief

The case of *Bishopp Outdoor Advertising Pty Ltd v Moreton Bay Regional Council* [2023] QPEC 19 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Moreton Bay Regional Council (**Council**) to refuse a development application for a development permit for operational work for an advertising device on the traditional main street of Caboolture, being 44 King Street (**Land**).

The proposed advertising device comprises two sign faces that are 10.26 metres high and 4.6 metres wide, and will project to the northbound and southbound traffic along Morayfield Road (**Proposed Development**). Morayfield Road is a multi-lane divided arterial road with a 60-kilometre per hour signed speed limit with a four-way intersection that relevantly includes the following features:

- A northbound long-shared left-turn cycle lane into the perpendicular Elliot Street (**Cycle Lane**).
- A left-hand through lane that continues northbound through Morayfield Road.
- Parallel footpaths adjacent to each side of Morayfield Road.

The Land is generally included within the Centre Zone under the *Moreton Bay Regional Council Planning Scheme 2016* (version 6) (**Planning Scheme**), and the Proposed Development is to be assessed against the assessment benchmarks in the Advertising Devices Code (**Code**). It was agreed between the parties that the Proposed Development does not comply with the Requirements for Accepted Development RAD 2, 3, and 8 of the Code, and is therefore code assessable pursuant to section 5.3.3(1)(a)(ii) of the Planning Scheme (at [6]).

The agreed list of issues were as follows (at [10]):

1. *Whether the present scale, size, location, height, design and placement of the proposed advertising device will adversely impact upon the character, amenity and streetscape of the immediate and wider locality, contrary to Advertising devices code:*
    - *(a) Overall outcomes 2(a), (b) and (c); and*
    - *(b) Performance outcome PO1(a), (b), (c) and (d).*
2. *Whether the proposed advertising device will result in unacceptable traffic safety risk or diminish efficiency of a State controlled road contrary to Advertising devices code:*
    - *(a) overall outcome 2(e)(ii) and*
    - *(b) performance outcome PO6.*
3. *Whether the proposed advertising device will result in no adverse impacts upon adjoining premises, consistent with the Advertising devices code Overall outcome 2(a) and (e) and performance outcome PO1(e).*
4. *Whether any non-compliance:*
    - *(a) can be addressed through the imposition of conditions; or*
    - *(b) calls for refusal of the proposed development, in the exercise of the Court's discretion.*

The Court held that the Proposed Development complies with the assessment benchmarks relevant to amenity and streetscape, but was not satisfied that there would be no unacceptable traffic safety risks in respect of overall outcome 2(e)(ii) and performance outcome PO6 of the Code.

Court finds that the Proposed Development will not adversely affect the surrounding amenity, streetscape, or adjoining premises

The Council argued that the Proposed Development will have unacceptable impacts on character and amenity for the reason that it will (at [15]):

> 1. *be overbearing and visually dominant;*
> 2. *contribute to visual clutter;*
> 3. *not complement the existing and future planned character and amenity of the area in which it is proposed to be located; and*
> 4. *by reason of its visual dominance and disparate scale be incompatible with the surrounding streetscape and the landscape.*

The Court rejected the Council's arguments in respect of character and amenity and held that the Proposed Development complies with all relevant assessment benchmarks for the following reasons:

1. The Proposed Development is not overbearing or visually dominant for the following reasons:
   (a) It is "*… set back both from Elliott Street and from the existing building on the site*" (at [19]).
   (b) As conceded by the Council's town planning expert in cross-examination, it "*… at its highest point, does not significantly protrude above the rooftops of buildings of adjoining sites …*" and "*… would not be overly dominant in terms of scale when seen in the context of the other buildings*" (see [19] to [20]).
   (c) It "*… would not be any more overbearing to pedestrians than the existing buildings*" (at [21]).
2. The Proposed Development does not contribute to visual clutter for the reason that "*… the existing signage is not such that the addition of the subject sign would result in any material or adverse clutter of any significance*" (at [25]). The Court preferred the evidence of the Applicant's town planning expert who "*… helpfully illustrate[d] the difference between a cluttered environment and what pertains in the subject site, in his individual report*" (at [26]).
3. The Court rejected the approach of the Council's experts in their assessment of character and amenity for the reason that the experts premised their evidence from an "*adverse starting point*" to reach an "*adverse conclusion*" (see [27] to [30]). The Court held that "*… if one starts from the premise that there is nothing inherently incongruous in a pylon advertising sign being erected in centre zoned land, then there is nothing about this sign which would have an undue impact upon the character, amenity or street character of the area*" (at [31]).
4. For the same reasons above, the Court held that there is "*… nothing about the streetscapes or landscapes surrounding the subject site, which would render the subject sign incompatible*" (at [32]).

Court finds that the Proposed Development will interfere with traffic lights and cause unacceptable traffic safety risks

The Council argued that the effect of the Proposed Development on the northbound traffic will result in an unacceptable traffic safety risk and diminish the efficiency of a State controlled road in contravention of the Code (at [10]).

Firstly, it was opined by the Applicant's psychology expert with expertise in traffic safety that drivers merging into the Cycle Lane may be distracted by the Proposed Development (at [38]). The Court agreed with the expert's opinion that this risk could be mitigated by a condition that would limit advertisement transitions (at [39]).

The Council argued that the Proposed Development will interfere with a driver's detection of pedestrians who travel across the Cyle Lane at a designated pedestrian crossing (at [40]). The Court rejected this argument and preferred the opinion of the Applicant's traffic expert that a driver will be aware of the crossing and any pedestrians since they are required to wait seven seconds before deciding whether to proceed over the pedestrian crossing (at [41]).

The final argument submitted by the Council was that the Proposed Development "*… will be backgrounding one of the primary traffic signals at a time when the driver of the vehicle is making a critical decision in the approach to that intersection*" (at [42]). The Court agreed and held that the Proposed Development would cause backgrounding to a primary signal and create a traffic safety issue in contravention of overall outcome 2(e)(ii) of the Code which requires that an advertising device does not confuse or distract motorists, particularly in proximity to intersections or other complex traffic environments, and performance outcome PO6 of the Code which requires that advertising devices do not adversely impact on the safety and efficiency of the State controlled road. The Court's reasons were as follows:

- The Court rejected the Applicant's argument that northbound motorists can rely on other non-primary traffic signals or the behaviour of other vehicles for critical decision making for the reason that "*[i]t does not seem … to be an appropriate or adequate response to a concern about the safety issues …*" (see [43] to [44]).

- The Court preferred the methodology of the Council's traffic expert who accounted for varying speeds of vehicles as opposed to exclusively the speed limit (see [52] to [53]). This methodology evidenced that slower motorists will be more likely to be making critical decisions closer to the intersection, and therefore with a reduced reaction time, in a position affected by backgrounding from the Proposed Development (see [51] and [52]).
- The Applicant argued that the Proposed Development could be conditioned to comply with overall outcome 2(e)(ii) and performance outcome PO6 of the Code by restricting colours of advertisements to not be similar to those used in traffic signals, citing the case of *Ogna Group Pty Ltd v Logan City Council* [2021] QPEC 41 (see [46] to [47]). The Court distinguished the case on the basis that it was not related to backgrounding issues and rejected the condition. The Court relevantly stated that "*… [i]t seems … that reliance upon the proper compliance with and enforcement of, such a condition is fraught with some difficulty and I would be loath to rely upon it*" (at [48]).
- The Applicant's traffic expert "*… made it abundantly clear that he was not in favour of the sign if, indeed, critical decisions were being made whilst it backgrounded the relevant primary traffic signal*" (at [49]). The Court rejected the Applicant's argument that it should then instead take the "*management-focused*" position of the psychology expert and held that "*… when it comes to matters of safety, an appropriately conservative approach should be taken*" (at [50]).

Conclusion

The Applicant conceded that if the Court held that the Proposed Development did not comply with relevant traffic safety assessment benchmarks, then there are no discretionary reasons to allow the appeal (at [54]). The Court therefore dismissed the appeal.

Planning and Environment Court of Queensland allows an application to add land the subject of a development application

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Kenfrost (1987) Pty Ltd (ACN 082 384 325) Trustee Under Instrument 716471770 v Cairns Regional Council & Ors* [2022] QPEC 48 heard before Fantin DCJ

October 2023

In brief

The case of *Kenfrost (1987) Pty Ltd (ACN 082 384 325) Trustee Under Instrument 716471770 v Cairns Regional Council & Ors* [2022] QPEC 48 concerned an application in pending proceeding to the Planning and Environment Court of Queensland (**Court**) to change a development application (**Change Application**) to include new land to act as a buffer to adjoining agricultural uses (**Proposed Change**), and to seek orders permitting the hearing of the appeal against the refusal of that development application on the basis of the Change Application.

The Court allowed the Change Application, finding that it would not result in substantially different development.

Background

The Applicant originally applied for the following (**Original Application**) (at [1]):

> *(a) a development permit for reconfiguration of a lot (three lots into 65 lots, new road, and balance); and*
>
> *(b) a preliminary approval for a material change of use, including a variation approval to override the Cairns planning scheme to establish use rights associated with the Low-Density Residential Zone.*

The Original Application was refused by the Cairns Regional Council (**Council**). A substantive appeal by the Applicant against the Council's refusal of the Original Application was listed for hearing in the week commencing 31 October 2022 (**Appeal**) (at [3]). The Council was joined by two co-respondents by election.

The Council did not dispute the Change Application, but maintained its opposition to the proposed development in the Appeal. The First Co-Respondent by Election opposed the Change Application on the basis that the Proposed Change was not a minor change since it would result in "*substantially different development*" (at [7]).

Section 46(3) of the *Planning and Environment Court Act 2016* (Qld) (**PECA**) states that the Court cannot consider a change to a development application unless the change is only a "*minor change*" to the development application (at [10]).

The Court thus had to determine whether the Proposed Change was a "*minor change*" for the purpose of section 46(3) of the PECA.

Court finds that the Proposed Change is a "minor change" for the purpose of section 46(3) of the PECA

The Court considered schedule 2 of the *Planning Act 2016* (Qld) (**Planning Act**), which defines a "*minor change*" as a change that meets the following two limbs (at [11]):

> *(a) for a development application—*
>
> *(i) does not result in substantially different development; and*
>
> *(ii) if the application, including the change, were made when the change is made—would not cause—*
>
> *(A) the inclusion of prohibited development in the application; or*
>
> *(B) referral to a referral agency if there were no referral agencies for the development application; or*
>
> *(C) referral to extra referral agencies; 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 …*

The Court relevantly affirmed that a change to a development application that is characterised as "*essential, material, or important*" does not necessarily transcend the definition of "*minor change*" in schedule 2 of the Planning Act, citing the case of *Cleanaway Solid Waste Pty Ltd v Ipswich City Council & Ors* [2020] QPEC 47; (2021) QPELR 809 (at [13]).

Court finds that the Proposed Change will not result in "substantially different development"

In respect of the first limb in subparagraph (i) of the definition of "*minor change*", being the requirement that the change does not result in substantially different development, the Court recognised that although "*substantially different development*" is not defined in the Planning Act, the relevant principles are "*well established*" (at [12]).

The Court considered schedule 1 of the Development Assessment Rules which states a non-exhaustive list of circumstances in which a change may be deemed to result in "*substantially different development*" (at [15]). The Court observed that the list concentrates on changes that would involve "*new, additional, or increased impacts*" as opposed to "*changes which tend to ameliorate impacts*" (at [16]).

The Court found that even though the Proposed Change "*results in the application applying to a new parcel of land*", which is one of the circumstances listed in schedule 1 of the Development Assessment Rules, it does not trigger any of the other listed circumstances (at [18]).

The Applicant submitted that the Proposed Change will result in an improvement to the development in that "*… the result of the proposed change is to ameliorate the potential for impacts on adjoining rural land further south by incorporating a buffer which will operate to reduce the impacts of the proposed development on surrounding agricultural uses*" (at [21]).

The First Co-Respondent by Election argued that the Proposed Change is not a "*minor change*" for the following reasons (at [25]):

- The Change Application and material filed in support of the Change Application do not sufficiently establish that it is a "*minor change*".
- Alternatively, it includes new rural land which would be effectively "*urbanised*". The new land may facilitate the proposed scale and intensity of urban development which would not be possible but for the inclusion of the new land and thus "*… manifests in a 'substantially different development'*".

The Court disregarded the first argument, finding that the material is sufficient to establish that the Proposed Change is a "*minor change*" and that it identifies the Proposed Change in sufficient detail (at [26]).

In respect of the second argument, the Court found that the argument "*… appears to be concerned with possible future applications to change the development application or, perhaps, the consequences of approval of the development application*" (at [28]). The future use of the relevant land, the Court found, was a matter to be explored in the Appeal and not one that renders the Proposed Change "*substantially different development*" (see [28] and [29]).

The Court observed that, in respect of the substantive issue of whether the Proposed Change is or is not a "*minor change*", the development still seeks to facilitate a residential subdivision, despite the application applying to a new parcel of land (at [31]).

The Court made several other observations in relation to the Proposed Change, including the following (at [31]):

- It will not change the number of lots or the lot layout.
- It will not change the built form of the development or introduce a new use.
- It will not remove a component integral to the operation of the development.
- It will not impact the traffic flow or the transport network.
- It does not require removal of an incentive or an offset component.
- It will have no impact on the provision of infrastructure provision.
- It will not increase the severity of known impacts.

The Court reiterated that whether the Proposed Change "*… may introduce new impacts because of the uncertainty of what use will be made of the small sliver of land between the vegetated buffer and the southern boundary of the residential lots …*" is a matter to be determined at the Appeal (at [32]).

The Court was satisfied that the Proposed Change will not result in "*substantially different development*".

Court finds that the Proposed Change is consistent with subparagraph (ii) of the definition of "minor change"

In respect of the second limb in subparagraph (ii) of the definition of "*minor change*", the Court was satisfied that sub-subparagraphs (A) to (E) do not apply to the Proposed Change. In particular, the Court found that the Proposed Change would not result in the following (at [17]):

- The inclusion of prohibited development in the development application.
- The need for referral to any referral agency.
- A change to the level of assessment of the development application.

Conclusion

The Court held that, considered "*broadly and fairly*" (at [12]), the Proposed Change will not result in "*substantially different development*" and was a "*minor change*" for the purpose of section 46(3) of the PECA despite it resulting in the application applying to a new parcel of land (at [33]).

Accordingly, the Court allowed the Change Application and made an order permitting the hearing of the Appeal on the basis of the Change Application.

The Court also clarified that this finding was not "*… in any way, an endorsement of the change or the proposed development*", which would be subject of the Appeal (at [34]).

Colin Biggers & Paisley

Planning and Environment Court of Queensland refuses approval given for a development to take full advantage of the "uplift provision" under the Gold Coast City Plan Strategic Framework

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Dajen Investments Pty Ltd & Anor v Council of the City of Gold Coast & Anor; Ruffin & others v City of Gold Coast & Anor* [2023] QPEC 32 heard before Rackemann DCJ

October 2023

In brief

The case of *Dajen Investments Pty Ltd & Anor v Council of the City of Gold Coast & Anor; Ruffin & others v City of Gold Coast & Anor* [2023] QPEC 32 concerned two appeals commenced by two submitters (**Submitters**) to the Planning and Environment Court of Queensland (**Court**) against a development approval given by the Council of the City of Gold Coast (**Council**) to Perspective Point Break Pty Ltd (**Co-Respondent**) for a material change of use for a 14 storey, 43.5 metre multiple dwelling development comprising 34 apartments (**Proposed Development**) on premises at 953 Gold Coast Highway, Palm Beach (**Land**).

The Land is located in the medium density residential zone of the *Gold Coast City Plan 2016* (version 10) (**City Plan**) in which buildings are not to exceed the maximum height of 29 metres for the Land indicated on the Building Height Overlay Map (**BHOM**).

In limited circumstances, the Strategic Framework in part 3.3.2.1 of the City Plan allows an increase in building height up to a maximum of fifty percent above the maximum height, but the development must strictly comply with the relevant provisions (**Uplift Provision**). Fifty percent above 29 metres is 43.5 metres, being the height of the Proposed Development.

The issues in dispute as agreed between the parties were as follows (at [11]):

1. *whether the design, bulk, height and scale of the proposed development will have unacceptable impacts upon the character and amenity of the area;*
2. *whether the proposed development satisfies the Strategic Framework building height uplift provisions …;*
3. *whether the proposed [development] supports housing diversity within the city, and housing affordability outcomes that meet housing needs for the locality; and*
4. *relevant matters …*

The Submitters' position was that if the Court decided that the Uplift Provision is satisfied, the first and third issues would not in themselves justify refusal of the development application. The Court at [12] stated that it would be "*… unnecessary for [the Court] to separately consider the asserted non-compliance with those other provisions*".

The Court's focus was on the second issue, being whether the Proposed Development complies with the Uplift Provision.

The Court held that the Proposed Development did not satisfy all of the mandatory conditions of the Uplift Provision. Accordingly, the Court allowed the appeal and refused the development application.

Court finds that the Proposed Development does not satisfy five out of the nine mandatory conditions stated in the Uplift Provision

The Uplift Provision has nine outcomes, which must all be satisfied for the application of the height increase. They are as follows:

(a) *a reinforced local identity and sense of place;*

(b) *a well managed interface with, relationship to and impact on nearby development, including the reasonable amenity expectations of nearby residents;*

(c) *a varied, ordered and interesting local skyline;*

(d) *an excellent standard of appearance of the built form and street edge;*

(e) *housing choice and affordability;*

(f) *protection for important elements of local character or scenic amenity, including views from popular public outlooks to the city's significant natural features;*

(g) *deliberate and distinct built form contract in locations where building heights change abruptly on the [BHOM]; and*

(h) *the safe, secure and efficient functioning of the Gold Coast Airport or other aeronautical facilities.*

The Submitters contended that the Proposed Development did not satisfy the outcomes stated in subparagraphs (a), (b), (c), (d), (e), and (f).

Reinforced local identity and sense of place

The Court found that "*… the bulk, scale and height of the proposal would consolidate and reinforce the appearance of the large built forms and create a strong visual relationship with the two taller buildings (the Palm buildings) when viewed from surrounding locations*" (at [44]). The Court went on to find that the "*… massing of the proposal with the Palm buildings is undesirable and unwarranted*" (at [44]) and that the Proposed Development would reinforce "*… the incongruous Palm buildings*" and "*… would not result in a reinforced local identity and sense of place*".

The Court therefore held that the Proposed Development did not satisfy the outcome in subparagraph (a).

Well managed interface with, relationship to and impact on nearby development

In considering the outcome in subparagraph (b), the Court broke this outcome down into the following elements: "*interfaced with*", "*relationship to*", and "*impact on*" (at [52]).

With respect to "*interfaced with*", the Court found this requires a consideration of the cohesion with the adjacent development which comprises multiple four storey apartment blocks. The Court held that the Proposed Development is "*overbearing*" and "*fails to significantly or sufficiently address the great difference in scale between the two developments*" (at [59]).

With respect to "*relationship to*", the Court accepted that the term "*relationship*" is broad enough to include the visual relationship of the Proposed Development to nearby development (at [60]). The Court found that the Proposed Development does not visually relate to the nearby development for the reasons given in respect of the Court's consideration of the outcome in subparagraph (a).

With respect to "*impact on*", the Court accepted that the Proposed Development would not unnecessarily affect the outlook of neighbouring properties, nor would it cause undue shadowing impacts. The Court found that whilst the additional height of the Proposed Development would cast some additional shadow, it was a significant impact as it would only occur in the afternoon for a short period of time (at [53]).

In conclusion, the Court found that the Proposed Development does "*… not represent a well-managed relationship to 'nearby' development …*" (at [61]).

The Court therefore held that the Proposed Development does not satisfy the outcome in subparagraph (b).

Varied, ordered and interesting local skyline

The Court found that the skyline of Palm Beach currently has little order and the Proposed Development would relate more closely to two high rise buildings located approximately 85 and 120 metres north. The Court found that this would "*… represent the intrusion of a third inconsistent and incongruous element to the Palm Beach skyline …*" (at [66]).

The Court therefore held that the Proposed Development does not satisfy the outcome in subparagraph (c).

Excellent standard of appearance of the built form and street edge

As to the meaning of an "*excellent standard*", the Court referred to its decision in *McLucas & Ors, Gri & Ors & Vidjon & Ors v Council of the City of Gold Coast & Marquee Flora Pty Ltd* [2022] QPEC 56 at [107] in which it stated that "*[s]omething is excellent if it has superior merit or is remarkably good*" (at [64]).

The Court then went on to consider the standard of appearance of the built form and street edge.

With respect to the standard of appearance, the Court found that the Submitters' town planning expert's description of the Proposed Development as "*a big lump of a building*" and "*overwhelming*" were not unfair descriptions (at [74]).

With respect to the standard of appearance of the street edge, the Submitters took issue with the centralised driveway, lack of planting, lowered street entrance, and plant and equipment being visible from the street edge. The Co-Respondent amended its development application to shift the driveway to the side of the Land which allowed for centralised planting and it also raised the street entrance to be at street level. Whilst the Court held that "*… this is an issue upon which reasonable minds could legitimately differ*", the Court was satisfied that the Proposed Development could be conditioned to meet this part of the outcome (see [80] and [81]).

The Court therefore held that, although conditions could be imposed to meet the requirement for an excellent standard of appearance at the street edge, the Proposed Development does not satisfy the outcome in subparagraph (d) because it fails the requirement for an excellent standard of appearance of the built form.

Housing choice and affordability

The Court found that affordability includes both the cost of housing and availability of choice (at [82]).The economist for the Co-Respondent explained that the Proposed Development would add to diversity of housing choice due to the scarce 3 and 4 bedroom apartment availability and "*… the apartments are at a more affordable price point than single dwellings at the subject site would be*" (at [88]).

The Court agreed and therefore held that the Proposed Development does satisfy the outcome in subparagraph (e).

Protection for important elements of local character or scenic amenity

The Court held that the Proposed Development does not satisfy the outcome in subparagraph (f) for the reasons given in respect of the outcomes in subparagraphs (a) and (b).

Other relevant matters

In respect of other relevant matters which may support the Proposed Development, the Court found as follows:

The Proposed Development is not consistent with community expectations with respect to bulk, height and scale (at [95]).

There is a need for the Proposed Development including for the reason that it would provide an increased choice of housing, but this is not a matter of overriding weight (at [96]).

Approving the Proposed Development would not create a precedent to approve other height uplifts elsewhere, but would "*… cut across the planning strategy of limiting the circumstances in which additional height, above that shown on the BHOM, is permitted*" (at [97]).

The Court acknowledged that conditions could be imposed to address some of the issues in respect of the Uplift Provision, but complete compliance cannot be achieved (at [98]).

Conclusion

The appeals were therefore allowed and the development application was refused.

Green light, red light: Queensland Court of Appeal upholds finding of the Supreme Court of Queensland that the Brisbane City Council was required to afford procedural fairness to the owner of a neighbouring property regarding approval of the exhibition of an advertising structure

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Brisbane City Council v Leahy & Ors* [2023] QCA 133 heard before Flanagan and Boddice JJA and Ryan J

November 2023

In brief

The case of *Brisbane City Council v Leahy & Ors* [2023] QCA 133 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) by Brisbane City Council (**Council**) against an order made by the Supreme Court of Queensland (**Supreme Court**) to set aside the decision of the Council to approve the exhibition of an electronic advertising structure (**Sign**) on land adjacent to the boundary of the First Respondent's property in Red Hill, Brisbane.

The Court of Appeal had to determine whether the Supreme Court erred by finding that the Council was required to afford procedural fairness to the First Respondent, with respect to whether the relevant legislation evinces a clear intendment that the principles of natural justice are excluded.

The Court of Appeal held that the Supreme Court's orders were "*properly founded*" on the failure of the Council to afford procedural fairness to the First Respondent (at [12]).

The Court of Appeal dismissed the appeal and ordered that the Council pay the First Respondent's costs of, and incidental to, the appeal (at [60]).

Background

On 18 December 2018, a delegate of the Council approved an application, pursuant to the *Advertisements Local Law 2013* (**Local Law**) and the *Advertisements Subordinate Local Law 2005* (**Subordinate Local Law**), for the exhibition of an electronic advertising structure on land adjacent to the boundary of the First Respondent's property.

In deciding whether to approve the exhibition of an advertisement, the Council must have regard to the criteria in section 10 of the Local Law. This includes the criteria and conditions prescribed by the Subordinate Local Law pursuant to section 10(1)(d) (see [14] and [57]). The Council's approval must also be consistent with the Subordinate Local Law pursuant to section 10(2)(e).

Schedule 5, item 1(2) of the Subordinate Local Law provides that "*[a]dvertisements should respect the amenity of other property owners and not obscure, dominate or overcrowd the views of existing or prospective development on neighbouring properties*".

The First Respondent had no notice of the application for approval of the exhibition of the Sign nor the decision by the Council to approve the application. The First Respondent was not given the opportunity to object to, or make submissions in relation to, the relevant application prior to the Council's approval (see [6] and [7]).

In the case of *Leahy v Brisbane City Council & Ors* [2022] QSC 200 (**First Leahy Decision**), the decision the subject of the appeal, the First Respondent made an application for statutory order of review to the Supreme Court, which sought an order to have the decision set aside and remitted back to the Council for further consideration.

The primary issue to be determined by the Supreme Court in the First Leahy Decision was whether the Local Law and Subordinate Local Law, "*… by plain words of necessary intendment, excluded the obligation to afford procedural fairness*" (at [22]).

The Supreme Court "*… determined that the Council was required to afford Mr Leahy procedural fairness and had failed to do so, and that in making the decision it had failed to take into account a relevant consideration, namely whether the views of neighbouring properties might be obscured, dominated or overcrowded by the sign*" (at [9]).

The Supreme Court found that it was unnecessary to consider the First Respondent's other grounds of review, namely, that the Council took into account irrelevant considerations, there was a lack of evidence or other material to justify the making of the decision, unreasonableness, and the decision being otherwise contrary to law (see [117] to [120] of the First Leahy Decision).

On 20 September 2022, the Supreme Court made an order setting aside the Council's decision and ordered the Council to further consider the application to approve the exhibition of the Sign (at [9]).

On appeal, the Court of Appeal had to determine whether the Supreme Court erred in finding that the Council was required to afford procedural fairness to the First Respondent (see [10] to [12]).

Court of Appeal finds that the Supreme Court did not err in finding that the Council was required to afford procedural fairness to the First Respondent

The Council challenged the Supreme Court's finding that it was required to afford procedural fairness to the First Respondent. The Council alleged, by its appeal grounds 1 to 3, that the Supreme Court erred for the following reasons (at [10]):

> (a) *in finding that a subclass of those affected by the decision - namely the owners of neighbouring properties whose views might be obscured, dominated or overcrowded - were entitled to procedural fairness when other classes of persons whose views might be affected were not so entitled; and*
>
> (b) *in finding that the identified subclass was limited and identifiable.*

The Council further submitted that the Supreme Court erred in considering that the class of persons affected in item 1(2) of schedule 5 of the Subordinate Local Law, namely "*neighbouring properties*", was "*very limited*" in the sense that such a class could be identified reasonably and practically (at [27]).

The Court of Appeal made the following general observations (see [31] to [33]):

- The Local Law and Subordinate Local Law confer a power on the Council to approve the exhibition of an advertisement.
- Given the exercise of this power may prejudice the interests of persons, including the owners of neighbouring properties, it is regulated by the principles of natural justice.
- The Local Law and the Subordinate Local Law are silent as to the exclusion or content of the principles of natural justice and any obligation to afford procedural fairness.
- The principles of natural justice may only be excluded by plain words of necessary intendment and "*with irresistible clearness*" (quoting *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [15]).
- Where the relevant decision is one for which provision is made by statute, the application and content of the doctrine of natural justice or obligation of procedural fairness will depend substantially on the construction of the statute.

Court of Appeal finds that the relevant legislation does not evince a clear intendment to exclude the principles of natural justice

The Court of Appeal stated that "*… the fact that a decision to approve the exhibition of a sign may affect the interests of various classes of persons in different ways does not, of itself, evince an intention to exclude the principles of natural justice*" (at [33]).

The Court of Appeal recognised that the Supreme Court correctly held that, "*[i]n circumstances where the legislative framework recognises that different classes of persons may be affected in different ways, and at least one of those classes is identifiable … the proper consideration is not whether the Local Law and Subordinate Law, by necessary implication, excludes the principles of natural justice, but rather,* ***what the content of the duty to afford procedural fairness ought to be***" (at [35]) [our emphasis].

The Court of Appeal pertinently identified that the Local Law and Subordinate Local Law, by virtue of item 1 of schedule 5 of the Subordinate Local Law, "*… expressly recognises that the interests of distinct classes of persons will be affected differently*" and that "*[t]he members of at least one of those distinct classes can be identified*" (at [40]). Accordingly, the Court of Appeal stated that it was "*… not required to determine whether an obligation to afford procedural fairness can arise only in respect of some identifiable members of a predominantly unidentifiable class*" (at [40]).

The Court of Appeal found that, rather, "*… the relevant inquiry is what the content of that obligation ought to be as it applies to the particular identifiable class of which Mr Leahy is a member …*", that is, the "*neighbouring properties*" whose views might be obscured, dominated or overcrowded according to item 1(2) of schedule 5 of the Subordinate Local Law (at [40]).

Court of Appeal considers the content of the obligation to afford procedural fairness

The Court of Appeal stated that the preferable approach "*… is to have regard to the nature of the interests which may be affected, viewed in light of the relevant legislative framework, in order to determine the content - that is, the nature and extent - of the obligation to afford procedural fairness*" (at [47]).

The Court of Appeal determined that section 10(1) of the Local Law mandates the matters to which the Council must have regard in deciding whether to approve the exhibition of an advertisement. The Court of Appeal reiterated that item 1(2) of schedule 5 of the Subordinate Local Law provides that advertisements should not obscure, dominate or overcrowd the views of existing or prospective development on neighbouring property, thus identifying two classes, namely, "*other property owners*" and "*neighbouring properties*" (at [58]).

The Court of Appeal observed that "*[t]his is not a case where the [latter] class is constituted by such a great number of persons that affording procedural fairness would render the approval process unworkable*" (at [59]). The Court of Appeal addressed that the Council is, pursuant to the Local Law and Subordinate Local Law, in its decision to approve the exhibition of an advertisement, required to have regard to whether the relevant advertisement obscures, dominates or overcrowds the views of existing or prospective development on neighbouring properties. The Court of Appeal noted that "*[t]he Council is uniquely placed by reference to relevant planning instruments to identify the existing or prospective development on neighbouring properties*" (at [59]).

The Court of Appeal highlighted that a report was provided to the Council as part of the application for approval which specifically identified the First Respondent's property as a "*neighbouring property*" and the fact that the Sign may obstruct views from the premises (at [59]). Relevantly, the Court of Appeal recognised that, under section 10(1)(a) of the Local Law, the Council must have regard to any relevant advice it sees fit to obtain from suitable qualified experts in deciding to approve the exhibition of an advertisement.

The Court of Appeal concluded that "*[i]n these circumstances, any difficulty associated with identifying the class of 'neighbouring properties' informs only the content of the obligation to afford procedural fairness*", and does not evince any clear intendment to exclude the principles of natural justice (at [59]).

Conclusion

The Court of Appeal found that the Local Law and the Subordinate Local Law do not evidence any clear intendment that the principles of natural justice are excluded and so the Supreme Court correctly held that the Council was required to afford procedural fairness to the First Respondent.

Accordingly, the Court of Appeal dismissed the appeal and ordered that the Council pay the First Respondent's costs of, and incidental to the appeal (at [60]).

Subsequently, the Council applied for special leave to appeal to the High Court of Australia against the Court of Appeal's decision. The Council later discontinued its application for special leave.

Colin Biggers & Paisley

What's err matter: Planning and Environment Court of Queensland dismisses appeal against a Development Tribunal decision about an enforcement notice

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Brisbane City Council v Tina and Tony Pty Ltd* [2022] QPEC 36 heard before Kefford DCJ

November 2023

In brief

The case of *Brisbane City Council v Tina and Tony Pty Ltd* [2022] QPEC 36 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by the Brisbane City Council (**Council**) against the decision of the Development Tribunal (**Tribunal**) to allow an appeal brought by a landowner (**Respondent**) to replace an enforcement notice issued by the Council.

The Respondent is the owner of land at 60 Lancelot Street, Tennyson (**Subject Land**). On 1 December 2020 the Council issued to the Respondent an enforcement notice under section 168 of the *Planning Act 2016* (Qld) (**Planning Act**) alleging an offence under section 165 for unlawful use of the Subject Land for a multiple dwelling (**Enforcement Notice**). On 16 December 2020 the Respondent appealed the Enforcement Notice to the Tribunal which subsequently allowed the appeal on 10 January 2022 and replaced the Enforcement Notice with a decision to not give the Enforcement Notice.

For the Court to allow the appeal against the decision of the Tribunal, the Council had to show that there was either a mistake in law on the part of the Tribunal or a jurisdictional error (see section 229 and schedule 1, table 2, item 1 of the Planning Act).

The Court determined that the Council did not discharge the onus to establish that the appeal should be upheld and the Court dismissed the appeal.

Schedule 1, section 1 of the Planning Act

To help understand the Court's decision, it is necessary to have regard to schedule 1, section 1(2)(a) to (h) of the Planning Act, which states that for the purpose of section 229 of the Planning Act the Tribunal may hear an appeal if the matter involves the following:

> *(a) the refusal, or deemed refusal of a development application, for—*
>
> *(i) a material change of use for a classified building; or*
>
> *(ii) operational work associated with building work, a retaining wall, or a tennis court; or*
>
> *(b) a provision of a development approval for—*
>
> *(i) a material change of use for a classified building; or*
>
> *(ii) operational work associated with building work, a retaining wall, or a tennis court; or*
>
> *(c) if a development permit was applied for—the decision to give a preliminary approval for—*
>
> *(i) a material change of use for a classified building; or*
>
> *(ii) operational work associated with building work, a retaining wall, or a tennis court; or*
>
> *(d) a development condition if—*
>
> *(i) the development approval is only for a material change of use that involves the use of a building classified under the Building Code as a class 2 building; and*
>
> *(ii) the building is, or is proposed to be, not more than 3 storeys; and*
>
> *(iii) the proposed development is for not more than 60 sole-occupancy units; or*
>
> *(e) a decision for, or a deemed refusal of, an extension application for a development approval that is only for a material change of use of a classified building; or*
>
> *(f) a decision for, or a deemed refusal of, a change application for a development approval that is only for a material change of use of a classified building; or*

(g) *a matter under this Act, to the extent the matter relates to the Building Act, other than a matter under that Act that may or must be decided by the Queensland Building and Construction Commission;*

(h) *a decision to give an enforcement notice—*

(i) *in relation to a matter under paragraphs (a) to (g); or*

(ii) *under the Plumbing and Drainage Act 2018; or*

…

Council argued four appeal grounds at the hearing

The Tribunal provided on 10 January 2022 its Notice of Decision with reasons, as required under section 255 of the Planning Act (**Decision Notice**). The Tribunal allowed the appeal and replaced the decision to give with Enforcement Notice with a decision to not give the Enforcement Notice (at [11]).

The Decision Notice relevantly stated as follows under the heading "*Jurisdiction*" (at [12]):

13. *The Tribunal has jurisdiction for an appeal against a decision to give an enforcement notice in relation to a matter under paragraphs (a) to (g) of section 1(2) of Schedule 1 of the Planning Act 2016.*

14. *The Tribunal is of the view it has jurisdiction to decide this appeal. In short, the Tribunal is of the view that:*

    (a) *'a material change of use of a classified building' is one of the matters under paragraphs (a) to (g); and*

    (b) *the decision to give the enforcement notice in this appeal concerns an unlawful use of a class 1 building which is 'in relation to a material change of use of a classified building.'.*

15. *The detailed reasons for this view are set out in the Appendix to this decision.*

In respect of the Tribunal's decision as to jurisdiction, the Court stated that it was apparent that the decision was informed by its determination about the following (at [14]):

(a) *the meaning to be ascribed to 'matter' in sch 1, s 1(2)(h) of the Planning Act 2016; and*

(b) *whether the decision to give an enforcement notice was 'in relation to the identified matter', i.e. whether there was the necessary relationship between the enforcement notice and the 'matter'.*

The Council argued the following errors in respect of the Decision Notice:

- The Tribunal erred in its construction of "*a material change of use for a classified building*" under schedule 1, sections 1(2)(a), (b) and (c) of the Planning Act.
- The Tribunal erred in respect of the meaning it ascribed to "*matter*" in schedule 1, section 1(2)(h) of the Planning Act.
- There is not the necessary relationship between the Enforcement Notice and the "*matter*" the subject of schedule 1, section 1(2)(h) of the Planning Act.
- The proper construction of schedule 1, section 1(2)(h) of the Planning Act is that the Tribunal's jurisdiction is excluded under schedule 1, section 1(3)(a)(i) of the Planning Act.

Court finds that the Council's arguments were not succinctly stated in the Notice of Appeal

The Respondent argued that two of the four allegations of error raised by the Council were not raised in the Notice of Appeal, and argued that "*… the [Council] should not now be permitted to rely on them*" (at [20]). In considering whether the Council could raise issues beyond the ambit of the Notice of Appeal, the Court considered the context of the situation and section 230 of the Planning Act which requires that an appeal be "*… in the approved form and succinctly states the grounds of the appeal*" (at [22]). The Court relied upon the decision in *Trinity Park Investments Pty Ltd v Fabcot & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd* [2021] QCA 276 where Bond JA stated that "*… it is not up to this Court to wade through the documents to see if a question of law can somehow be found by the examination of written and oral arguments …. If there is legal error it must be specifically identified. As Posner J famously observed in US v Dunkel 927 F. 2d (7th Cir 1991), 'Judges are not like pigs, hunting for truffles in buried briefs'*" (at [23]).

Although the appeal was in the approved form, the Court found that the Notice of Appeal did not succinctly state the grounds of the appeal. This alone was enough to satisfy the Court that the appeal ought to be dismissed, but for completeness the Court went on to consider each of the Council's allegations made at the hearing.

Court finds that the Tribunal did not err in its construction of "a material change of use for a classified building"

The Council argued that section 109 of the *Building Act 1975* (Qld) (**Building Act**) ought to be construed as making the change of a classification of a building assessable development as a material change of use for the purpose of the Planning Act, with the consequence that because the Enforcement Notice did not relate to a change of building classification the Tribunal did not have the requisite jurisdiction under schedule 1, sections 1(2)(a), (b) and (c) of the Planning Act. Although the Council abandoned this argument at the hearing, the Court still considered it.

The Council's argument relied upon an interpretation of the words "*use change*" and "*a change to the use*" in section 109(1) of the Building Act as being the same as "*a material change of use*" under the Planning Act. The Court found that the Council's argument construed section 109 of the Building Act out of context, and also overlooked the purpose and scheme of the Building Act. In particular, the Court focused on section 3 of the Building Act which states a simplified outline of the Building Act. The Court observed that Chapters 2, 3 and 4 of the Building Act relate to the assessment of building work for the purposes of the Planning Act whereas Chapter 5, which contains the provisions relied upon by the Council, does not relate to the assessment of building work for the purposes of the Planning Act (see [37] to (40]). The Court did not however determine the Council's argument because the Council had abandoned it during the hearing (at [41]).

Court finds that the Tribunal did not err in respect of the meaning to be ascribed to "matter" in schedule 1, section 1(2)(h) of the Planning Act

The Council argued that the word "*matter*" in schedule 1, section 1(2)(h) of the Planning Act is to be construed as including all of the words that appear in each of the referenced subsections and that the Tribunal's approach gave no work to the leading words in each subsection (see [42] to [43]).

The Court disagreed and found "*no fault*" with the Tribunal's reasoning (at [44]).

Court finds that the Tribunal did not err in finding that the Enforcement Notice was "in relation to" a matter under schedule 1, section 1(2)(a) of the Planning Act

The Council argued that the Enforcement Notice is not a matter "*in relation to*" schedule 1, sections 1(2)(a) to (g) of the Planning Act.

The Respondent argued that the Tribunal correctly relied upon the High Court leading authority in *O'Grady v Northern Queensland Co Ltd* [1990] HCA 16, which relevantly states that "*in relation to*" ought to be construed "*as requiring a broad relationship between two subject matters, as limited by the context of the legislation*" (at [46]). The Council had acknowledged that the alleged unlawful use of premises does "*raise a question of a material change of use of that classified building*" (at [46]). The Respondent argued that the Tribunal correctly found that there was a sufficient relationship "*because a material change of use is "at the heart" of an allegation of unlawful use*". The Court agreed and found "*no fault*" with the Tribunal's reasoning (at [47]).

Court finds that the Tribunal's jurisdiction was not excluded under schedule 1, section 1(3)(a)(i) of the Planning Act

Schedule 1, section 1(3)(a)(i) of the Planning Act provides that there is no right of appeal to the Tribunal if the matter involves:

> *(a) for a matter in subsection (2)(a) to (d)—*
>
> *(i) a development approval for which the development application required impact assessment; and*
>
> *(ii) a development approval in relation to which the assessment manager received a properly made submission for the development application; or*
>
> *(b) a provision of a development approval about the identification or inclusion, under a variation approval, of a matter for the development.*

At the hearing, the Respondent argued that the first time the Council raised the allegation was at the hearing and it was based upon facts that were not before the Tribunal. In response, the Council abandoned the argument and the Court therefore did not deal with it.

Conclusion

The appeal was dismissed.

Size of habitat area matters to koalas: Planning and Environment Court of Queensland finds that a proposed minor change to a development application does not require referral for interfering with koala habitat in an area that is koala habitat area but not koala priority area

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stephen Family Pastoral Pty Ltd v Logan City Council* [2023] QPEC 30 heard before Rackemann DCJ

November 2023

In brief

The case of *Stephen Family Pastoral Pty Ltd v Logan City Council* [2023] QPEC 30 concerned an application to the Planning and Environment Court of Queensland (**Court**) by the Co-Respondent seeking a change to a development application (**Change Application**) the subject of the principal proceeding, being a submitter appeal against the decision of the Logan City Council to approve a combined development application for a development permit for a material change of use (childcare centre, service station and shopping centre), reconfiguring a lot (2 lots into 8 lots, and access easements) and operational works (**earthworks**) with respect to land located at 2-30, 1-23 and 565-577 Noffke Court, Logan Reserve (**Proposed Development**).

The Court considered whether the changes proposed by the Change Application (**Changes**) constituted a minor change as defined in Schedule 2 of the *Planning Act 2016* (Qld) (**Planning Act**) including whether:

- Section 73 of the *Planning Regulation 2017* (Qld) (**Regulation**) precluded certain amendments made to the Regulation applying to the Change Application (Section 73).
- The Changes involve exempted development for the purpose of Schedule 10, Part 10, section 16B of the Regulation (Section 16B).
- The Changes themselves trigger a referral under Section 16B.

Background and legislative context

Section 46(3) of the *Planning and Environment Court Act 2016* (Qld) provides that the Court cannot consider a change to a development application unless the change is a minor change.

Minor change is relevantly defined as follows in Schedule 2 of the Planning Act (**Minor Change Test**):

> ***minor change*** *means a change that –*
>
> *(a) for a development application –*
>
> *(i) does not result in substantially different development; and*
>
> *(ii) if the application, including the change, were made when the change is made – would not cause –*
>
> *…*
>
> *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;*
>
> *…*

The parties agreed, and the Court accepted, that the Changes would not result in substantially different development (at [3]).

The Appellant argued that the Changes were not a minor change as they did not satisfy section (a)(ii)(D) of the Minor Change Test (**Referral Trigger**), for the reason that the referral agency would have to assess the development application including the Changes having regard to the Proposed Development's "*… interference with koala habitat in a koala habitat area outside koala priority areas*" (at [4]).

The development application was properly made in 2018. Subsequently, the Regulation was amended by the *Nature Conservation and Other Legislation (Koala Protection) Amendment Regulation 2020* (Qld) (**Koala Amendment**).

Relevantly, the Koala Amendment inserted Section 16B which, in subsection 1, provides that development is assessable development to the extent that it involves interfering with koala habitat in an area that is a koala habitat area and not a koala priority area (at [5]). However, Section 16B(2)(a) provides that Section 16B(1) does not apply to the extent that development is exempted development.

The definitions for "*koala priority area*" and "*koala habitat area*" in Schedule 24 of the Regulation refer to sections 7A(1) and 7B(1) of the *Nature Conservation (Koala) Conservation Plan 2017* (Qld) (**Koala Plan**) respectively. Sections 7A(1) and 7B(1) of the Koala Plan provide that the Chief Executive may determine that an area in a koala district is a koala priority area or a koala habitat area.

Paragraph (k) of the definition of "*exempted development*" in Schedule 24 of the Regulation includes "*development … that results in a total area on the premises of 500m^2 or less of 1 or more koala habitat areas being cleared of native vegetation since 7 February 2020 …*" (**Exempted Development Definition**).

At the time the Change Application was made, a small area of approximately 195m^2 along the northern boundary of the land the subject of the Proposed Development was mapped by the Chief Executive as a koala habitat area (**Mapped KHA**). Relevantly, the Changes included an increase in the northern setback of the Proposed Development to further mitigate potential impacts on the Mapped KHA.

The Appellant argued that the Referral Trigger was engaged for the Proposed Development because the development application was not assessed having regard to Section 16B when it was made in 2018, but would require assessment having regard to Section 16B if the development application including the Changes was made when the Change Application was made due to the Mapped KHA (at [6]).

Court finds that Section 73 does not affect the Minor Change Test

Section 73 provides that the Regulation as in force from time to time before the commencement of the Koala Amendment continued to apply in relation to a development application that was properly made, but not decided, before the commencement of the Koala Amendment.

As such, the Co-Respondent argued that Section 73 made the development application, and by extension the Change Application, immune to the Referral Trigger with respect to the Koala Amendment as it meant that a version of the Regulation which did not include Section 16B applied to the development application (at [7]).

The Court did not agree with this application of Section 73 and found that Section 73 does not limit, curtail or alter the hypothetical scenario which is postulated by the Minor Change Test, that is, "*what would be the case if the development application were made at the time the change was made*" (at [8]).

Therefore, the Court considered that the Change Application was subject to the Regulation including the Koala Amendment.

Court finds that the Proposed Development constitutes exempted development for the purpose of Section 16B

The Co-Respondent relied on Section 16B(2) and argued that the Change Application did not engage the Referral Trigger with respect to Section 16B(1) as the Proposed Development, including the Changes, constituted exempted development for the reason that it involved the clearing of less than 500m^2 of koala habitat area in accordance with the Exempted Development Definition (at [9]).

Whilst the subject land contained only 195m^2 of Mapped KHA, the Appellant argued that the Exempted Development Definition did not apply on the basis that its expert ecologist had conducted a "*ground-truthing*" exercise and determined that the land contains approximately 2,600m^2 of koala habitat and that over 500m^2 of this koala habitat would be cleared by the Proposed Development (see [14] to [16]).

However, having regard to the legislative context outlined above, the Court found as follows (see [16] to [17]):

- The reference to "*koala habitat area*" is a reference to the area which is determined to be "*koala habitat area*" and mapped as such on the map published by the Chief Executive.
- The Chief Executive's determination and mapping cannot be overridden by "*ground-truthing*".
- The Proposed Development would be exempted development for the purpose of Section 16B.

Court finds that the Changes themselves do not engage the Referral Trigger

Whilst the Court was satisfied that the Changes were a minor change because it involved exempted development for the purpose of Section 16B, it also dealt with a third argument regarding the Referral Trigger.

The Court noted that the Minor Change Test begins with the words "*means a change that*", and found that this means that the test must focus on the change itself and what the change results in rather than a consideration of "*whether the law has changed in the meantime such that the assessment of unaltered parts of a development application would now attract a greater degree of scrutiny*" (at [19]).

As the Changes did not seek to increase the clearing of the Mapped KHA, the Court found that the Changes could not themselves engage the Referral Trigger with respect to Section 16B and the Appellant's argument that referral would be required relied solely on a change to the position of law, contrary to the exercise requested by the Minor Change Test (see [19] to [22]).

Conclusion

The Court was satisfied that the Changes were a minor change and ordered that the appeal, as well as another submitter appeal concerned with the Proposed Development, proceed on the basis of the changed proposed development.

Colin Biggers & Paisley

All brakes, no gas: Planning and Environment Court of Queensland upholds decision to refuse a development application for Captain Cook Highway service station, finding unacceptable impacts on rural character and scenic amenity and no demonstrated need

Marnie Robbins | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Northern Sands Pty Ltd v Cairns Regional Council* [2023] QPEC 31 heard before Morzone KC DCJ

November 2023

In brief

The case of *Northern Sands Pty Ltd v Cairns Regional Council* [2023] QPEC 31 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) by Northern Sands Pty Ltd (**Appellant**) against the decision of the Cairns Regional Council (**Council**) to refuse a development application for a development permit for a material change of use for a service station and truck stop (**Proposed Development**) on the Captain Cook Highway on the outskirts of Cairns, Far North Queensland (**Site**).

The impact assessable development application was assessed in accordance with the repealed *Sustainable Planning Act 2009* (Qld) (**SPA**), which was in force at the time the development application was made in December 2015, against the *Far North Queensland Regional Plan 2009-2031* (**Regional Plan**) and *CairnsPlan 2009*. The Court also decided that substantial weight ought to be given to the *CairnsPlan 2016* which came into affect after the development application was made.

The Appellant submitted that the Proposed Development would improve the current use of the highway and provide a unique contribution to the area by accommodating a variety of highway-traveller needs. The Council however argued that there is nothing about the Proposed Development which would trump the significant conflicts with the relevant planning instruments that are aimed at protecting the rural character and scenic amenity of the inter-urban break (at [5]).

The Court considered the following critical issues (at [6]):

(a) *Does the scope of the development application include decoupled truck parking facilities?*

(b) *Does the proposal conflict with the planning instruments, in relation to:*

  (i) *The proposed land use and location?*

  (ii) *The rural character and scenic amenity?*

(c) *Is the proposal inconsistent with existing approvals over the land? and*

(d) *If the proposal conflicts with the planning instruments, are there sufficient grounds to approve the application, including whether there is a need for the proposal?*

The Court upheld the Council's decision to refuse the development application and dismissed the appeal. The Court concluded that there are significant conflicts with the relevant planning instruments and that there is no need for the Proposed Development which would support its approval.

Court finds the decoupled truck parking facilities fall outside the scope of the development application

A preliminary question for the Court was whether the decoupled truck parking facilities adjacent to the service station formed part of the "*Service Station*" use under the *CairnsPlan 2009* as well as the narrower definition under the *CairnsPlan 2016*.

The Court found that the decoupled truck parking facilities use does not fall within the definition of "*Service Station*" under either version of the relevant planning scheme, even if that definition is construed broadly. The Court went on to find that the decoupled truck parking facilities use is "*… more aptly caught by the definition of 'Transport depot'*" (at [34]).

Court finds the Proposed Development conflicts with the relevant planning instruments

The Court went on to assess the Proposed Development against a number of overlapping provisions under the Regional Plan, *CairnsPlan 2009* and *CairnsPlan 2016* with respect to "*… the proposed land use and location, and the surrounding rural character and scenic amenity …*" (at [36]).

Regional Plan

The relevant provisions of the Regional Plan were Part C (Strategic directions) and Part E (Regional policies); section 2.1 (Regional landscape values), and section 2.3 (Scenic amenity, outdoor recreation and inter-urban breaks).

Part C of the Regional Plan relevantly requires that "*planning and development must be responsive to these strategic directions to ensure long-term ecological sustainability of the region*" (at [37]). The Court was particularly concerned with the Strategic Direction - Protecting regional landscape and rural production values, which "*… seeks to maintain regional landscape and rural production values and features by protecting them from 'inappropriate urban development, urban sprawl and fragmentation' …*" (at [38]).

Part E of the Regional Plan, in particular policy 2 - Regional landscape and natural resources includes the desired regional outcomes that "*the environmental, cultural, social and economic features that comprise the region's unique tropical and rural landscapes are identified, maintained and managed sustainably*", and (relevant to this case) that "*the forested hills, regional landscapes and abundant tropical greenery make the region's scenery special and distinct from other parts of Australia. … [The region's landscape] … provides a backdrop for tourism, outdoor recreation and spiritual and cultural pursuits.*" (at [41]).

Section 2.1 of the Regional Plan describes the regional landscape values, and includes references to "*areas that form inter-urban breaks*". The Court referenced that "*Inter-urban breaks*" means "*non-urban land areas that separate or surround urban villages, towns and metropolitan areas*" (at [43]).

The Court stated that the "*[Site] itself is well outside the world heritage area, and it is not itself an area of high ecological significance or of high scenic amenity or of landscape heritage value*" (at 71]). The Court noted the total area of the Proposed Development, being 6,863m^2, and that in comparison to the existing use "*… will be exposed with less screening in the inter-urban break*" (at [74]). The Court therefore found that the Proposed Development would present "*… an incursion into the preservation of the inter-urban break promoted by the [Regional Plan]*" (at [74]) and that there is a conflict with the Regional Plan (at 75]).

CairnsPlan 2009

The relevant provisions of *CairnsPlan 2009* were the relevant 'Desired Environmental Outcomes', the relevant 'Planning for Districts' provisions, the 'Rural 1 Planning Area Code', the 'Service Station Code', and the 'Development Near Major Transport Corridors and Facilities Code'.

Most notably:

- The Court considered Desired Environmental Outcomes 2.2.5 and 2.3.2 in the *CairnsPlan 2009*. Desired Environmental Outcome 2.2.5 emphasises the high scenic value of the region, and the performance indicator "*rhetorically asks that 'where development has occurred, has it adversely affected the scenic landscape of the city or any of the essential elements of the scenic landscape?'*" (at [45]). Desired Environmental Outcome 2.3.2, which is in respect of Economic Activity and Employment Centres, relevantly states that "*[t]own centres, subregional, district and local centres are intended to be developed to contribute to a sense of community life and belonging for the people they serve*". The corresponding performance indicator asks "*[w]here significant new business, community and industrial development has occurred, has it been located within the Town Centres, Sub-Regional and District Centres and the major industrial and employment areas?*'" (at [45]).
- The relevant district for the Site is the 'Barron-Smithfield District', which in accordance with section 3.7.1 of the *CairnsPlan 2009* has dominant features including the Barron Delta floodplain, forested hillslopes of the Kuranda Range and extensive cane field and wetlands (see [46]). Applying section 3.7.1, the Court recognised that the Site is intended to be "*… utilised as productive agricultural land because of the susceptibility to flooding; the value of the good quality agricultural land; and the contribution the area makes to the scenic amenity of the City with views of cane fields, wetlands and hillslopes*" (at [46]).
- The Site is within the Rural 1 Planning Area and is therefore subject to the Rural 1 Planning Area Code under the *CairnsPlan 2009*, which facilities the retention of the natural scenic landscape character of land in the planning area, and its protection from urban uses (at [47]).

With respect to the strategic provisions in the Desired Environmental Outcomes, the Court observed that they are predominantly concerned with an assessment of the impacts on the rural character and scenic amenity of the area. The Court had the benefit of photomontages of day and night photos to assist with its consideration of the impacts. The Court found that the illuminated signage, removal of vegetation, and limited landscaping contributed to the visual impact of the Proposed Development, and such impacts would extend into the night (at [88]).

With respect to the other *CairnsPlan 2009* provisions, the Court referred to the Appellant's town planning expert's summary of such provisions as requiring a consideration of the following (at 78]):

> *(a) whether rural activities are protected from the intrusion of incompatible uses;*
>
> *(b) whether the site is important to the scenic landscape value of the City; and*
>
> *(c) whether the Proposed Development can be protected from the identified flooding issues.*

The Court accepted evidence from the Appellant that the Site had "*… limited agricultural potential in the mid to long term*" and that "*[t]he land itself is not identified as being important to the scenic landscape value …*" (at [79]). However this could not be separated from the "*… wider impact considerations of whether it is an inappropriate urban development that impacts the rural character and scenic amenity …*" (at [80]).

On balance, the Court found that the impacts of the Proposed Development would result in an inappropriate urban intrusion into the Barron Delta area (at [80]).

CairnsPlan 2016

The relevant provisions of the *CairnsPlan 2016* were the relevant strategic intent and strategic outcomes statements in the 'Strategic Framework', the 'Rural Zone Code', the 'Service Station and Car Wash Code', and the 'Flood Inundation Hazards Overlay Code'.

Most notably:

- The Court considered section 3.2 of *CairnsPlan 2016* which sets out the strategic intent representing the vision for the Cairns region in 2031. "*… including that: 'Growth has occurred in an efficient manner and urban development is consolidated within the identified urban area'; 'The expected population growth for the region is accommodated through the redevelopment of existing urban area …; 'Rural land has been protected and is used for rural purposes'; 'The hillslopes, waterways and natural areas and rural surrounds sit alongside the urban environment. They are protected and enjoyed by the community for their character and identity, landscape value and contribution to the local economy*" (at [51]).
- The Court also considered section 3.4 of *CairnsPlan 2016* which contains a number of strategic outcomes for the Natural Areas and Feature Theme, which provide that development projects should "*protect, maintain and enhance the region's landscape values*" (see section 3.4.4.1(1)); "*rural and inter-urban breaks are to be protected from visual intrusion*" (see section 3.4.4.1(2)); and, specific to the element of Natural Hazards, "*development, other than agricultural activities, is not to occur within the Barron River Delta flood plain*" (see section 3.4.6.1(7)).
- Section 6.2.19.2(4)(b) of the *CairnsPlan 2016*, being the "*Rural zone code*" (**Rural Zone Code**), supported by Performance Outcome PO3 to PO6 in Table 6.2.19.3.a, provides that the purpose of the zone is to, among other things, "*provide for uses and activities that are compatible with - (i) existing and future rural uses and activities; and (ii) the character and environmental features of the zone …*".

The Court considered the objectives of protecting and enhancing the visual amenity of the scenic landscape, as emphasised in the strategic provisions of both the *CairnsPlan 2009* and the *CairnsPlan 2016*. The Court found that because the Proposed Development would require the removal of vegetation and the visibility of the use would be increased when compared to the existing use, the development would have a negative impact on the scenic value of the area and is therefore in conflict with the relevant strategic provisions (see [98] to [101]).

The Court also agreed with the Council that the Proposed Development "*… will have an intrusive effect on the rural and scenic values of the land, and the development fails to respond to the land's characteristics and surroundings*" in conflict with the Rural Zone Code (at [103]).

The Court concluded that the Proposed Development "*… will have an unacceptable impact on the rural character and scenic amenity being central to [CityPlan 2009 and CityPlan 2016] planning instruments"*, and, as such, there is a significant and fundamental conflict (at [104]).

Court finds the Proposed Development is inconsistent with existing approvals for the Site

The Court also had regard to the existing approvals for the Site in accordance with section 314(3)(b) of the SPA.

The existing approvals for the Site are subject to landscaping conditions requiring the dedication of a strip along the frontage, vegetation buffers and other measures aimed at safeguarding the future use of the Site and retaining its aesthetic quality (see [106] to [109]).

The Proposed Development would require the removal of existing vegetation along approximately 135 metres of the front of the Site and in the road reserve. The Court concluded that the Proposed Development involved a clear contravention of the conditions of the existing approvals for the Site and thus approval of the Proposed Development would be inconsistent with the conditions of those approvals (at [110]).

Court finds that there are no sufficient grounds to approve the Proposed Development notwithstanding conflicts with the relevant planning instruments

The Court finally had to determine whether there were grounds to approve the Proposed Development despite the substantial conflicts with the planning instruments, as required by section 326(1)(b) of the SPA.

The Appellant argued, among other things, that there is a clear need for the Proposed Development and the site has specific "*locational and spatial characteristics*" suited to the Proposed Development (at [112]).

The Council argued that there is no reason the Proposed Development should be located on the Site given the substantial conflicts with the relevant planning instruments, and particularly in light of the expert evidence as to the rural character of the area.

The Court considered a range of factors with respect to whether there is a need for a service station in the area. Such consideration included the fuel market, the number of vehicles passing through the area, the residential population, existing service stations within the area, and other competitor developments.

The Court concluded that the demand for a service station is "*… likely to be lower than the typical demand for highway service centres*" (at [151]).

Accordingly, the Court decided that there is no demonstrated economic, town planning or community need for the Proposed Development despite the conflicts with the planning instruments.

Conclusion

The Court concluded that the Proposed Development is in substantial conflict with the relevant planning instruments and there are no sufficient grounds to justify the approval of the Proposed Development. The Court therefore upheld the refusal of the development application and the appeal was dismissed.

Colin Biggers & Paisley

A win and a loss: Planning and Environment Court of Queensland denies costs to landowner

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Heather & Anor v Sunshine Coast Regional Council & Ors (No. 2)* [2023] QPEC 4 heard before Cash DCJ

November 2023

In brief

The case of *Heather & Anor v Sunshine Coast Regional Council & Ors (No. 2)* [2023] QPEC 4 concerned an application for costs to the Planning and Environment Court of Queensland (**Court**) by the respondent landowners (**Respondents**) in respect of an unsuccessful application by adjacent landowners (**Applicants**) to challenge the decision by the Sunshine Coast Regional Council (**Council**) to give to the Respondents a development permit for tidal works approval for a gangway, deck and pontoon (**Development**).

In the initial case of *Heather & Anor v Sunshine Coast Regional Council & Ors* [2022] QPEC 37 the Applicants made an application challenging the Development on the basis of jurisdictional error (**Initial Application**). The Initial Application was dismissed on 7 October 2022 and the parties finalised their submissions for the costs application on 24 February 2023. The Council did not make an application as to costs (see [1]).

The Court recognised that the power to award costs is conferred in legislation, and in particular by, section 59 and section 60 the *Planning and Environment Court Act 2016* (Qld) (**PECA**) (see [3]).

Section 59 provides that subject to sections 60 and 61 of the PECA each party must bear their own costs in court proceedings. Section 60 provides certain circumstances where it is appropriate for costs to be awarded. The Court found that section 61 is not relevant to this application as it relates to enforcement proceedings (see [4]).

The Respondents contended that sections 60(1)(a), (b) and (i) of the PECA are engaged (see [5] and [11]). More particularly, the Respondents argued that section 60(1)(a) requires evidence that the Applicants started or conducted the Initial Application primarily for an "*improper purpose*" (at [5]), and that section 60(1)(b) requires evidence that the Initial Application was "*frivolous or vexatious*" (at [5]).

Late in the written submissions, the Respondents submitted that section 60(1)(i) applied on the basis that the Applicants failed to properly discharge their responsibilities in the proceeding (see [11]).

The Court considered each contention separately.

Lack of success does not mean the proceeding was frivolous and vexatious under section 60(1)(b) of the PECA

First, the Court considered section 60(1)(b). The Court cited the recent decision in *Sincere International Group Pty Ltd v Council of the City of Gold Coast (No. 2)* [2019] QPEC 9, which recognised at [27] "*… 'frivolous or vexatious' as it appears in s.60(1)(b) of PECA is not defined. It is, as a consequence, to be given its ordinary meaning … in Mudie v Gainriver Pty Ltd (No. 2) (2003) 2 Qd R 271 … [Williams JA] held that frivolous meant 'of little or no value or importance, paltry'; 'having no reasonable grounds'; and 'lacking seriousness or sense, silly'. McMurdo P and Atkinson J … held that the ordinary meaning of 'frivolous' was 'of little or no weight, worth or importance' and 'not worthy of serious notice'*" (at [5]).

The Court also cited *Robertson & Ors v Brisbane City Council & Ors* [2021] QPEC 54, in which the Court stated at [29] "*… even when a party's case is unsuccessful and could properly be described as weak does not mean, without more, that costs ought necessarily be awarded to the successful party*" (at [7]).

The Court considered four issues in the Initial Application in relation to the application of acceptable outcome 10.1 and performance outcome 10.1 in Schedule 3 of the *Coastal Protection and Management Regulation 2017* (Qld) (**Code**). Each of the three parties to the Initial Proceeding proposed a different construction of the Code, which was enough to demonstrate to the Court that there was not a single clear answer (see [15] and [16]).

Ultimately the Court was persuaded that the proceeding was not frivolous or vexatious, and found that "*… lack of success [by the Applicants] does not translate into a conclusion that points were raised frivolously or to vex the respondents*" (at [17]).

Initial Application was not conducted for an improper purpose under section 60(1)(a) of the PECA

In order to determine that the proceeding was conducted for an improper purpose, the Court needed to be satisfied "*that the predominant purpose was to use legal process for some outcome outside the scope of the proceeding*" (at [9]).

The Respondents submitted that the Applicants started the proceedings to prevent the Respondents from being able to use or to remove their pontoon as permitted in accordance with the Development to enable the Applicants to moor a larger vessel in their pontoon, amounting to an improper purpose (see [19]). The Court found this to not be an improper purpose as this purpose closely aligned with the legal proceeding (see [19]).

No failure to discharge responsibilities found in relation to section 60(1)(b) of the PECA

The Court found that the Respondents reliance on section 60(1)(i) to be "*misconceived*" as the proceeding was not conducted in a way that was inconsistent with the lawyers' ethical responsibilities and statutory principles (at [20]).

Conclusion

The application was dismissed.

Colin Biggers & Paisley

Stay right there, enforcement notice: Planning and Environment Court of Queensland allows an application to stay the operation of an enforcement notice relating to the clearing of native vegetation in a koala habitat area

Matt Richards | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Glesk v Chief Executive of the Department of Environment and Science* [2023] QPEC 43 heard before Williamson KC

December 2023

In brief

The case of *Glesk v Chief Executive of the Department of Environment and Science* [2023] QPEC 43 concerned an application in pending proceedings by Tibor Glesk (**Appellant**) to the Planning and Environment Court of Queensland (**Court**) to stay the operation of an enforcement notice (**Enforcement Notice**) given by the Chief Executive of the Department of Environment and Science (**Respondent**) for land situated at Tallowood Close, Little Mountain (**Land**), until the conclusion of the proceedings (**Appeal**).

The Court concluded that, in the circumstances, it was appropriate for a stay of the Enforcement Notice to be granted (at [22]).

Background

The Appeal is against the Enforcement Notice, which states that the Respondent held a reasonable belief that the Appellant committed a development offence in breach of section 163(1)(b) of the *Planning Act 2016* (Qld) (**Planning Act**) being "*… the clearing of native vegetation on the land within an area mapped as a koala habitat outside a koala priority area … between 21 January 2021 and 3 February 2021*" (at [1]).

The Enforcement Notice required the Appellant to rehabilitate part of the Land by reinstating the vegetation and, in order to demonstrate compliance, to have completed the first of the steps required for rehabilitation by 10 November 2023 (at [2]).

Given the pending deadline for compliance with the first of the steps required for rehabilitation, the Appellant sought an order that the operation of the Enforcement Notice be stayed until the Appeal is decided, or otherwise ends (at [3]). The Respondent did not oppose the application (at [3]).

In considering the Appellant's reasons for seeking a stay of the Enforcement Notice, the Court observed that "*… there is a genuine prospect of non-compliance with the enforcement notice …*" and that it was "*unrealistic*" that the Appeal could be determined before 10 November 2023 (at [6]).

The Court had to consider the following issues:

- Whether rule 658 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) confers upon the Court a power to grant a stay of the Enforcement Notice.
- If so, whether section 171 of the Planning Act operates to limit the Court's power to stay the Enforcement Notice under rule 658 of the UCPR.
- Whether, in the circumstances, it would be appropriate to make an order to stay the Enforcement Notice under rule 658 of the UCPR.

Court finds that the UCPR confers upon the Court a power to grant a stay of the Enforcement Notice

The Court held that, pursuant to sections 171(2) and 167(5)(a) of the Planning Act, the commencement of the Appeal did not automatically stay the operation of the Enforcement Notice. The Court also held that the Planning Act does not confer upon it express power to grant a stay of an enforcement notice pending the determination of an appeal (at [7]).

However, the Appellant submitted "*… that the power conferred by r 658 of the [UCPR] is sufficiently broad to confer such a power*" (at [7]).

Rule 658 of the UCPR states as follows (at [8]):

> *(1) The Court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.*
>
> *(2) The Court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document.*

The Court agreed that "*[t]he power conferred by r 658 of the UCPR is expressed in broad terms*" and therefore "*[t]he broad expression of this rule extends … to granting a stay such as that sought here*" (at [9]). In making this finding, the Court had regard to the "*… words of the rule itself*" and the "*well established*" matter of statutory construction that "*… a power granted to a court is not to be construed subject to a limitation not contained in the grant itself*" (at [9]).

Court finds that section 171 of the Planning Act does not exclude the Court's power to stay the Enforcement Notice under the UCPR

The Court had to determine whether section 171 of the Planning Act "*… operates to limit the Court's power to stay the enforcement notice under r 658 [of the UCPR]*" (at [10]).

Section 171 of the Planning Act states as follows (at [11]):

> *(1) An appeal against an enforcement notice stays the operation of the notice until —*
>
> *(a) the tribunal or court hearing the appeal decides otherwise; or*
>
> *(b) the appeal ends.*
>
> *(2) However, the notice is not stayed to the extent the notice is about a matter stated in section 167(5)(a).*

The Court held that section 171(2) is engaged because the Enforcement Notice concerns a matter stated in section 167(5)(a) of the Planning Act, namely, the clearing of vegetation (at [12]).

The Court held, however, that section 171(2) of the Planning Act "*… does not, in terms, express a prohibition upon the grant of a stay by order of the Court*" given that such a limitation is not implied by the "*plain words of the section*", "*[n]or is it supported by surrounding context in the [Planning Act]*" (at [13]).

The Court accepted the Appellant's submissions that "*… subsections (1) and (2) of s 171, when read together, have the effect of identifying a subset of enforcement notice appeals having the benefit of a stay …*" and that "*… s 171(2) of the [Planning Act] identifies a subset of enforcement notice appeals that do not have the benefit of an 'automatic' stay*" (at [14]).

The Court held that section 171 of the Planning Act "*… leaves room for a stay to be granted if the nature of the case requires it*" (at [14]). The Court went on to hold that "*[a] construction that precludes the Court from granting a stay of an enforcement notice about one of the matters in s 167(5)(a) of the [Planning Act] may have the effect of rendering an appeal nugatory and deprive, in a practical sense, an appellant of the appeal rights granted under the [Planning Act]*" (at [16]).

As a result, the Court held that section 171 of the Planning Act does not operate to preclude the Court's power to stay the Enforcement Notice under rule 658 of the UCPR.

Court finds it appropriate to make an order to stay the Enforcement Notice in the circumstances

The Court had to consider whether it would be appropriate in the circumstances to make an order for the grant of stay of the Enforcement Notice (see [17] to [21]). The Court found that it was appropriate to make such an order having regard to the Enforcement Notice, the notice of appeal, and the following matters:

- It is possible that, if the stay were not granted, the Appellant "*… could be prejudiced by having to carry out actions under an enforcement notice that is ultimately found not to have been validly imposed*" (at [18]).
- There is no "*pressing need*" for the rehabilitation required by the Enforcement Notice given that the alleged offence occurred almost three years ago (at [19]).
- The Appeal was not "*frivolous or unarguable*" (at [20]).
- The Respondent did not oppose the stay nor suggest it would suffer any prejudice if it was granted (at [21]).

Conclusion

The Court ordered a stay of the Enforcement Notice in accordance with the draft provided by the Appellant (at [22]).

Colin Biggers & Paisley

U-turn prohibited, unless minor change: Planning and Environment Court of Queensland considers whether the addition of a U-turn to an existing development application constitutes a minor change

Erin Schipp | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Coles Group Property Developments Limited v Sunshine Coast Regional Council & Ors* [2023] QPEC 35 heard before Kent KC DCJ

December 2023

In brief

The case of *Coles Group Property Developments Limited v Sunshine Coast Regional Council & Ors* [2023] QPEC 35 concerned an application to change the development application the subject of the appeal to the Planning and Environment Court of Queensland (**Court**) by Coles Group Property Developments Limited (**Appellant**) for a proposed 'homemaker' style development, including a supermarket (**Proposed Development**) at land in Beerwah, Queensland (**Subject Site**).

Background

The Appellant had previously submitted three applications for stages of the Proposed Development (**Development Applications**), which were all refused by the Sunshine Coast Regional Council (**Council**) and were the subject of three separate appeals by the Appellant. Prior to those appeals being heard, the Appellant sought various changes to the Development Applications (at [1]).

The proposed changes included changes to the proposed land dedication for new roadworks, supermarket loading dock design, driveway rearrangements, parking bays, raised traffic islands and a U-turn facility (**U-turn Facility**) (see [2] and [3]). The U-turn Facility was proposed to be a new roadway at the north-eastern corner of the four adjoining lots of the Subject Site which leads to a large roundabout sufficient to allow U-turns by large vehicles, including articulated vehicles (at [13]).

The Council's position and the second co-respondent by election's position was that the changes were minor (at [3]). Village Fair Investments Pty Ltd, being the first co-respondent by election (**First Co-Respondent**) agreed all proposed changes were minor, except for the U-turn Facility.

The First Co-Respondent argued that the addition of the U-turn Facility was not a minor change under section 46(3) of the *Planning and Environment Court Act 2016* (Qld) and Schedule 2 of the *Planning Act 2016* (Qld) (**Planning Act**) as it would result in a "*substantially different development*" as it would give rise to the following:

- A new access point to the Subject Site (at [15]).
- Operational aspects as a consequence of "*new adverse impacts*" (at [17]).
- An addition of a new parcel of land the subject of the Development Applications (at [21]).
- The stifling of third party rights (at [23]).

The First Co-Respondent, referring to schedule 1, rule 4 of the *Development Assessment Rules* (**DA Rules**), argued that the relevant impacts of the U-turn Facility that may result in a "*substantially different development*" were as follows (at [5]):

> *(f) significantly impacts on traffic flow and the transport network, such as increasing traffic to the site; or*
>
> *(g) introduces new impacts or increase the severity of known impacts; or …*
>
> *(i) impacts on infrastructure provisions.*

The Court referred to comments in the earlier decision of *Heilbronn & Partners v Gold Coast City Council* (2005) QPELR 386 at 392, in which the Court stated that "*… the power [to change a development application] is beneficial and the flexibility to modify proposals is an important feature of the process*" (at [7]).

The Court described its approach to determining whether the proposed change is a minor change as broad rather than pedantic, noting that it was "*exercising a beneficial power with flexibility*" (at [25]). The Court concluded that the Appellant discharged the onus of proving the U-turn Facility resulted in a minor change (at [25]).

New access proposed by previous plan

The First Co-Respondent argued that the U-Turn Facility would add a new access point as it would allow future internal roadways to connect to the U-Turn Facility for general access purposes (at [15]). However, access was already contemplated on the masterplan where the U-turn Facility would allow traffic, albeit not as a result of the U-turn Facility (at [15]). The second co-respondent by election agreed the U-turn Facility did not represent a new access at the time of the appeals (at [16]).

In its conclusion, the Court was satisfied that the U-turn facility would not result in a substantially new access point as access was already contemplated at that point (at [25]).

U-turn Facility as a solution to an existing operational issue

The traffic expert for the First Co-Respondent argued that that the U-turn Facility would facilitate "*new adverse impacts … [including] time and distance penalties for traffic*" (at [17]). In reply, the Appellant's traffic expert stated that "*any time imposition is minimal and an acceptable trade-off in the context of the (significant) existing problem*" (at [19]); the "*existing problem*" being the current right hand turn by heavy vehicles in particular, which the First Co-Respondent conceded is "*less than ideal*" (at [19]).

The Court was satisfied that the U-turn Facility will not result in a substantially different development, and provided a solution to the difficulty of the existing right hand turn (at [26]).

Same Subject Site and not new land

The First Co-Respondent argued that under Schedule 1, rule 4(b) of the DA Rules, the U-turn Facility will result in the addition of a "*new parcel of land*" to the land the subject of the Development Application as new impacts may be realised where there were previously no impacts (at [21]). The Appellant rejected this idea and argued that the U-turn Facility is entirely within the four lots of the Subject Site, with site coverage being only slightly varied (at [22]).

The Court was satisfied that the area taken up by the U-turn Facility was entirely within the Subject Site, and did not involve "*new*" land (at 27]).

Third party rights no more

The First Co-Respondent argued that the U-turn Facility would "*stifle third party rights*" in the context that "*… a potential submitter may be concerned about the [U-turn Facility], particularly where it may be used for access*" (at [23]). The Appellant argued that the "*minor change*" test from Schedule 10 of the repealed *Integrated Planning Act 1997* (Qld) is irrelevant as it is based on superseded legislation (see [23] and [24]). Further, the Appellant submitted that in the absence of the Proposed Development, an industrial development on the Subject Site would involve more heavy vehicle movements (at [24]).

The Court held that the current Planning Act (and previously the *Sustainable Planning Act 2009* (Qld) [repealed]) does not require a consideration of third party rights (at [28]). Further, it was not clear to the Court that there would be a particular group of "*potential submitters whose rights would be stifled*" because of the location of the Subject Site, and because neighbouring uses would have an interest in the traffic solution provided by the U-turn Facility (at [28]).

Conclusion

The Court was satisfied that the Appellant discharged the onus of proving the change was minor and concluded that the addition of the U-turn Facility is a minor change.

Colin Biggers & Paisley

No overdevelopment of Main Beach – Planning and Environment Court of Queensland approves a high-rise multiple dwelling on the Gold Coast

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *74 The Esplanade Pty Ltd v Council of the City of Gold Coast* [2023] QPEC 36 heard before Everson DCJ

December 2023

In brief

The case of *74 The Esplanade Pty Ltd v Council of the City of Gold Coast* [2023] QPEC 36 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Council of the City of Gold Coast (**Council**) to refuse a development application for a development permit for a material change of use for a multiple dwelling (15 units) and food and drink outlet, and a preliminary approval for operational works (public landscaping) (**Proposed Development**) on land situated at 3640 Main Beach Parade, Main Beach (**Land**).

The Land is critically within the vicinity of multiple dwellings exhibiting a similar intensity to the Proposed Development that have been recently approved by the Council. The Land is subject to the following provisions under the *Gold Coast City Plan 2016* (version 8) (**Planning Scheme**):

- High density residential zone code (**Zone Code**).
- Light Rail Urban Renewal area overlay code (**Overlay Code**).
- High-rise accommodation design code (**Design Code**).
- Landscape work code.

The Council refused the development application on the grounds that the Proposed Development "*… will result in an overdevelopment of the site which is only 410m² in size*" (at [2]). The agreed list of issues in the appeal were as follows (at [21]):

1. *Whether the setbacks and site cover of the proposed development will result in unacceptable character and amenity impacts and will result in overdevelopment;*
2. *Whether the built form, height and density of the proposed development will result in unacceptable amenity and character impacts and will result in overdevelopment;*
3. *Whether the proposed landscaping and ultimate streetscape will result in unacceptable character and amenity impacts.*

Court finds that the setbacks and site cover of the Proposed Development do not result in unacceptable character and amenity impacts

The Council argued that "*… it is simply not possible to locate a building of this size on a lot this small and comply with the requirements of the planning scheme in respect of setbacks*" (at [22]). The Applicant argued that the Proposed Development complies with the relevant provisions of the Overlay Code, being overall outcomes 3(a)(i) and (iii), which state as follows:

> *(3) The purpose of the code will be achieved through the following overall outcomes:*
>
> *…*
>
> *(a) Place making helps development contribute to strengthening communities' local character through:*
>
> *(i) neighbourhood analysis that evaluates the distinct local character patterns, opportunities, and challenges and how the proposed development enhances them;*
>
> *…*

(iii) locating and designing development to respect and complement the scale, character, form and setting of on-site and adjacent properties;

…

The Court rejected the Council's argument and held that although the Proposed Development does not comply with some performance outcomes, the setbacks and site cover do not result in unacceptable character and amenity impacts for the following reasons:

- The Proposed Development complies with overall outcomes 3(a)(i) and (iii) for the following reasons:
  - The relevant photomontage demonstrated that "*… the design promotes public to private realm transition and surveillance …*" (at [27]).
  - The local character and the scale, character, form and setting of the properties adjacent to the Proposed Development include more intense development which had been recently approved (at [23]).
- The Court agreed with the following joint opinions of the visual amenity experts of the Applicant and Council (at [24]):
  - The podium of the Proposed Development "*… is unlikely to cause significant impacts on the character or amenity of the area and any overbearing impacts of the tower of the proposed development would only be apparent from nearby viewpoints.*"
  - The Proposed Development "*… will not be a particularly large building when compared to other high-rise buildings in the area and that the tower will be slender.*"
  - "*… [T]he proposed development would achieve reasonable separation from existing towers nearby …*" and "*… would not unreasonably obstruct any important view corridors through the local area.*"
- The Court agreed with the evidence from the Applicant's visual amenity expert, who concluded as follows (at [25]):
  - The properties adjacent to the Proposed Development "*… have similar side setbacks … interfacing with large recreation spaces.*"
  - "*… [T]he built to boundary setbacks for the podium of the [Proposed Development] will interface with the neighbouring driveway on the southern side, an accessway on the western side (where adjoining residents are unlikely to spend large amounts of time), and that their primary living areas are typically orientated away from the site*" and "*… they will retain ample access to open sky views.*"
  - "*… [T]he landscaping treatment of the built to boundary elements and the podium would reduce the dominance of the proposed development.*"
- The Proposed Development's non-compliance with the provisions relevant to amenity in the Design Code and the Zone Code do not warrant refusal (see [26] to [27]).

Court finds that the built form, height and density of the Proposed Development will not result in either unacceptable amenity and character impacts or overdevelopment

The Council argued that the language of overall outcome 3(e)(viii) of the Overlay Code, which states "*[n]ot all light rail urban renewal areas will accommodate high-rise buildings*", expressly discourages the Proposed Development for the reason that it is a high-rise development (at [29]).

The Court rejected the Council's argument and held that "*… this statement appears to be more of a reflection of the fact that the [Overlay Code] also covers low-to-medium rise areas as well as Frame areas being high density neighbourhoods where the site is located*" (at [29]).

The Court held that the built form, height and density of the Proposed Development will not result in either unacceptable amenity and character impacts or overdevelopment for the following reasons:

- The Applicant's architectural expert opined that the buildings adjacent to the Proposed Development "*… will continue to dominate the character of the local area.*" (at [30]). The Court agreed and noted that these buildings are almost twice the height of the Proposed Development.
- The Court stated that "*… compliance will be achieved in circumstances where the [Proposed Development] will be an attractive, high-quality and visually appealing building which will not have adverse amenity impacts on neighbouring premises*" (at [32]).

Court finds that the proposed landscaping and ultimate streetscape will not result in unacceptable character and amenity impacts

The Court held that there are no reasons for refusal of the Proposed Development in respect of landscaping or streetscape for the following reasons:

- "*… [T]he landscaping cleverly softens the built form in a way that is both innovative and adequate having regard to the photomontages*" (at [33]). The Court agreed with the Applicant's architectural expert that "*… this approach is similar to that exhibited in the recently approved developments in the vicinity of the site …*" (at [33]).
- In respect of overall outcome (2)(i) of the Landscape work code, the Court accepted the evidence of the Applicant's architectural expert that "*… the proposed landscaping can be appropriately maintained and that this can be achieved through the imposition of lawful conditions*" (at [35]).

Conclusion

The Court allowed the appeal subject to the imposition of appropriate lawful conditions.

Pride and Irreparable Prejudice: Land Court of Queensland stays a decision under appeal to prevent prejudice to the Applicant

Ashleigh Foster | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Land Court in the matter of *MacMines Austasia Pty Ltd v Chief Executive, Department of Environment and Science* [2023] QLC 4 heard before FY Kingham

December 2023

In brief

The case of *MacMines Austasia Pty Ltd v Chief Executive, Department of Environment and Science* [2023] QLC 4 concerned an application by MacMines Austasia Pty Ltd (**Applicant**) to the Land Court of Queensland (**Court**) to stay the decision of the Chief Executive, Department of Environment and Science (**DES**) to find that an application made by the Applicant under the *Environmental Protection Act 1994* (Qld) (**EP Act**) for an environmental authority for an open-cut and underground thermal coal mine in the Galilee Basin (**EA Application**) was not properly made (**Decision**), pending the outcome of the Applicant's appeal against the Decision (**Appeal**).

In deciding to stay the Decision, the Court considered the following:

- whether a stay of the decision is required to secure the effectiveness of the Appeal;
- whether the Appeal is based on arguable grounds; and
- whether the Applicant will be prejudiced if the Decision is not stayed.

Court finds that the stay may be required to secure the effectiveness of the Appeal

The notice of the Decision included certain steps that the Applicant had to undertake by a fixed date in order to remedy the "*deficiencies*" in its EA Application (at [1]).

The Applicant submitted that, in accordance with section 129 of the EP Act, its EA Application would lapse if it did not complete the steps set out in the notice of the Decision and that any orders made by the Court in the Appeal would not be effective if the Decision lapsed (see [8] to [9]).

The Court commented that, if the decision of the Court in the Appeal is to find that the Decision was invalid, the EA Application will not lapse as there cannot be any "*statutory consequence for non-compliance with an invalid notice*" (at [11]). However, the Court declined to decide this point as the DES had not challenged the Applicant's submissions or offered an alternative interpretation of section 129 of the EP Act (see [11] to [12]).

Court finds that the Appeal is based on arguable grounds

The Decision was based on the DES's finding that the EA Application (at [16]):

- did not include an assessment of the likely impact of the project's activities on environmental values in accordance with section 125(1)(l) of the EP Act; and
- was not accompanied by a Progressive Rehabilitation and Closure Plan in accordance with section 125(1)(n) of the EP Act.

The Applicant argued that a report prepared by the Co-Ordinator General assessing the project under the *State Development and Public Works Organisation Act 1971* (Qld) (**Public Works Act**) exempted the EA Application from the requirements of section 125(1)(l) and (n) of the EP Act (see [15] to [16]).

The Court found that the Applicant's grounds of appeal are not frivolous or vexatious as they involve the following matters of substance (see [17] to [18]):

- Questions of statutory interpretation with respect to the Public Works Act and the EP Act.
- Whether an evaluation report prepared by the Co-Ordinator General under the Public Works Act affected the statutory requirements under the EP Act.
- A challenge to the DES's assessment of the material provided in support of the EA Application.

Court finds that the Applicant would be prejudiced if the Decision is not stayed

Whilst the Court did not make a decision with respect to whether the EA Application could lapse if the Applicant is successful in the Appeal, the Court noted that it would nevertheless be prudent for the Applicant to take the steps required by the notice of the Decision to avoid the EA Application lapsing and that the time and expense involved in taking these steps could distract the Applicant from the Appeal (at [19]).

Therefore, the Court found that the Applicant would be "*irreparably prejudiced*" if it is the case that the EA Application lapsed despite being successful in the Appeal and noted that the DES had not suggested that it would be prejudiced by a stay of the Decision (at [19]).

Conclusion

The Court stayed the Decision, extended the time for service of the application and reserved the costs of the application.

No error here: Queensland Court of Appeal finds no error or mistake of law in respect of the Planning and Environment Court's decision not to amend a development condition to make it a necessary infrastructure condition

Marnie Robbins | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Traspunt No. 7 Pty Ltd v Moreton Bay Regional Council* [2021] QCA 275 heard before Morrison and McMurdo JJA and Boddice J

December 2023

In brief

The case of *Traspunt No. 7 Pty Ltd v Moreton Bay Regional Council* [2021] QCA 275 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) by Traspunt No. 7 Pty Ltd (**Applicant**) against the decision of the Planning and Environment Court of Queensland (**Planning and Environment Court**) to dismiss an appeal in respect of a development condition requiring the dedication of land (**Dedicated Land**) to the Moreton Bay Regional Council (**Council**) at no cost to the Council in respect of a proposed 2 into 46 lot subdivision at Burbury Road, Morayfield (**Premises**).

We have previously published a case note about the decision of the Planning and Environment Court, which can be found here. In short, the Planning and Environment Court did not accept the Applicant's arguments that the relevant Local Government Infrastructure Plan (**LGIP**) is inadequate in its identification of trunk infrastructure, and found that the Dedicated Land was not necessary to service the Premises. The Applicant's argument that the development condition ought to be amended to state that it was imposed under section 128 of the *Planning Act 2016* (Qld) (**Planning Act**), with the consequence that the Applicant is entitled to an offset or refund under section 129 of the Planning Act, therefore failed.

On application to the Court of Appeal for leave to appeal, the Applicant argued that the Planning and Environment Court's decision was affected by an error or mistake in law.

The Court of Appeal did not agree and found that none of the proposed grounds of appeal had merit, and therefore refused the application for leave to appeal with costs.

Background

The Court of Appeal outlined the reasoning of the Planning and Environment Court in the following terms before dealing with each ground of appeal:

- The proper construction of section 128(2) of the Planning Act is that it is only engaged where the relevant LGIP does not identify trunk infrastructure necessary to service the subject premises within the period of the LGIP (at [23]).
- The Council's LGIP had a base date of 2016 and contained projections as to infrastructure demand through to mid-2031 (at [24]). The Council's LGIP also contained two relevant drawings. First, the "*plan for trunk infrastructure - active transport*" which shows the relevant section of road adjoining the Dedicated Land as being in the category "*corridors required beyond 2031*" (at [26]). Second, the "*Plan for Trunk Infrastructure - Transport Network*" which shows the existing trunk transport network and future trunk transport network (at [27]). The relevant section of road is not identified in either category. The necessary implication is that the relevant section of road is trunk infrastructure which will not be necessary within a period of time which expires in 2031 (at [27]).
- There was no material point of difference between the opinions of the traffic engineers retained by the parties. In particular, the Council's traffic engineer opined that a development condition could have been imposed requiring a western extension of the existing eastern Clark Road to service the Premises, however it was unnecessary to do so because an adjacent subdivision included a requirement for road connections which would service the Premises (at [32]). The Planning and Environment Court noted that the Applicant's traffic engineer endorsed the opinions of the Council's traffic engineer (at [33]).

- The Planning and Environment Court accepted the evidence of the Council's traffic engineer that "*… the traffic planning benefit of the proposed dedication relates to future development beyond the planning horizon applied in the Council's LGIP*", and thus the Planning and Environment Court found that the Dedicated Land is not required during the life of the Council's LGIP to mid-2031 as necessary to service the Premises (at [34]).
- The Planning and Environment Court therefore held that based on the evidence and on the proper construction of section 128(2), that section was not the source of the power to impose the condition; because the trunk infrastructure identified as such in the LGIP was adequate to service the subject premises and the provision of the Dedicated Land was not necessary to do so (at [35]).

Court of Appeal finds none of the Applicant's proposed grounds of appeal have merit

The Applicant's first ground of its proposed appeal was that the Planning and Environment Court incorrectly concluded it was irrelevant for the purpose of section 128(2) of the Planning Act to consider "*… whether the development infrastructure, when constructed, serves a trunk infrastructure function*" (at [41]). The Court of Appeal stated that this ground seemed to challenge the Planning and Environment Court's finding that for the purpose of section 128(2) of the Planning Act the development infrastructure must be necessary to service the subject premises and that the Council cannot impose a condition requiring dedication for any possible future trunk infrastructure (see [37] and [43]). The Court of Appeal accepted the reasoning of the Planning and Environment Court. In doing so, the Court of Appeal made the following two observations (at [43]):

- Firstly, that "*trunk infrastructure*" is constrained by how the term is defined in the Planning Act and, by implication, the Court of Appeal observed it does not include any possible future trunk infrastructure not identified in the subject LGIP.
- Secondly, there is other identified trunk infrastructure in the Council's LGIP which services the Premises which cuts across the Applicant's argument that the Dedicated Land ought to be categorised as trunk infrastructure because the Council's LGIP does not identify other adequate trunk infrastructure to service the Premises.

The Court of Appeal dealt with grounds two and three together. The Court of Appeal described ground two in terms of the Planning and Environment Court having "*erred in construing s 128(2) as referring to development infrastructure 'presently required' to service the subject premises, instead of development infrastructure that is needed, either now or in the future, to do so*" (at 44]). The Court of Appeal described ground three in terms of the Planning and Environment Court having "*erred in the same way when addressing the criterion of necessity*" (at [44]). The Court of Appeal found that was not the reasoning of the Planning and Environment Court, and therefore both grounds three and four lacked merit (at [44]).

Grounds four and five were also considered together. The fourth ground was that the Planning and Environment Court had erred as a matter of law in holding that the evidence failed to show "*… the dedicated land 'was not development infrastructure that was needed, either now or in the future, to service the premises' and in finding, instead, that this section of Clark Road was no more than a potential future road*" (at [45]). Ground five was that unchallenged evidence including records relating to a future extension of the relevant road and evidence of traffic engineers was overlooked. The Court of Appeal found no merit in either ground five or ground six.

Conclusion

The Court of Appeal found no error or mistake in law that warranted a grant of leave to appeal against the judgment of the Planning and Environment Court, and the application was refused with costs.

Development setbacks: Victorian Civil and Administrative Tribunal provides contrasting decisions regarding the application and impact of recently codified Standard B17 on proposals for two or more dwellings on one lot

Evie Atkinson-Willes | David Passarella

This article discusses the decisions of the Victorian Civil and Administrative Tribunal in the matters of *D'Andrea v Boroondara CC* [2023] VCAT 1148 heard before Michael Deidun, Member and *Costa v Banyule CC* [2023] VCAT 1273 heard before Rachel Naylor, Senior Member

December 2023

In brief

The cases of *D'Andrea v Boroondara CC* [2023] VCAT 1148 (***D'Andrea***) and *Costa v Banyule CC* [2023] VCAT 1273 (***Costa***) concerned appeal proceedings in the Victorian Civil and Administrative Tribunal (**Tribunal**). In *D'Andrea*, two objector appeals were raised against Boroondara City Council's decision to grant a permit for the construction of a three-storey apartment building at 570 Riverdale Road, Camberwell. In *Costa*, the Permit Applicants proposing to construct two double-storey dwellings at 18 Boyce Avenue, Briar Hill, sought a review of the decision by Banyule City Council to refuse to grant a permit for the development.

Notably, these cases mark some of the first decisions by the Tribunal since the gazettal of Planning Provisions Amendment VC243 (**Amendment**) on 22 September 2023. The Amendment is one of several amendments made to Victorian planning schemes as a result of recent governmental planning reforms. In particular, the Amendment codified 14 of the residential development provisions at clauses 54 and 55 (**ResCode standards**). Accordingly, where a proposed development meets a codified ResCode standard, it is deemed to comply with the corresponding objective.

Relevantly, in assessing the implications of the Amendment as they relate to the proceedings, the Tribunal considered whether a proposal that has setbacks and heights on a boundary which complies with Standard B17 of the ResCode standards automatically achieves acceptable neighbourhood character and amenity outcomes (*D'Andrea* at [26] and *Costa* at [28]). These two decisions diverged in opinion as to how the Amendment may affect a decision-maker's discretion when conducting an assessment of neighbourhood character pursuant to clause 55 of the ResCode standards.

Tribunal in D'Andrea had particular regard to the wording of the objectives and standards at clause 55.04-1

In *D'Andrea*, Member Deidun took the view that any development proposing side and rear setbacks that comply with Standard B17 is deemed to comply with the objective at clause 55.04-1 (*D'Andrea* at [52]). In this instance, the Permit Applicant undertook to meet Standard B17 via permit condition. Accordingly, it was the Tribunal's view that promising to satisfy Standard B17 intrinsically resolves all assessments of neighbourhood character in relation to height and setbacks from a rear and side boundary.

In turn, this ultimately negated the ability to argue that the proposal fails to achieve appropriate neighbourhood character outcomes insofar as it relates to height and setback of a building from the side and rear boundaries (*D'Andrea* at [49]).

However, the Tribunal determined that while Standard B17 seeks to deal with the height and setback of walls from a side and rear boundary, it does not exclude the consideration of other matters that may influence the visual bulk of a building and any amenity impacts, including building length, articulation, design or materiality, and found that the proposal ultimately satisfied these other requirements for built form (*D'Andrea* at [28]).

Tribunal in Costa departed from D'Andrea on the grounds that there were other objectives under a Planning Scheme that required consideration of neighbourhood character

By contrast, the Tribunal in *Costa* was of the opinion that the setbacks and height of a proposal do not meet the objective for the purposes of neighbourhood character simply by virtue of meeting Standard B17. Member Naylor departed from Member Deidun's view on the basis that there are other objectives which demand the consideration of neighbourhood character, thus meeting Standard B17 cannot remove the discretion in a clause 55 assessment to consider rear and side setbacks and building height where it relates to neighbourhood character (at [32]).

Compulsory acquisition cases in the Class 3 jurisdiction of the Land and Environment Court of New South Wales for 2023 and implications for 2024

Annie Dong | Joseph Johnson | Bethany Burke | Anthony Landro | Todd Neal

This article discusses the legal implications surrounding compulsory acquisitions in New South Wales and considers some relevant cases from the Land and Environment Court of New South Wales

December 2023

In brief

Many of the infrastructure projects undertaken in New South Wales (**NSW**) have continued to give rise to legal issues surrounding compulsory acquisitions. This article considers a few select cases from the Land and Environment Court of New South Wales (**NSWLEC**) in 2023, which illustrate novel and emerging issues in the Class 3 jurisdiction: *G&J Drivas Pty Ltd v Sydney Metro* [2023] NSWLEC 20 (**G&J Drivas**); *Perry Properties Pty Ltd v Georges River Council* [2023] NSWLEC 51 (**Perry Properties**); *Sydney Metro v Expandamesh Pty Ltd* [2023] NSWCA 200 (**Sydney Metro**); *David Fox v Planning Ministerial Corporation* [2023] NSWLEC 109 (**David Fox**); and *Keller and Keller v Blacktown City Council* [2023] NSWLEC 133 (**Keller and Keller**).

We conclude with a set of observations about the year ahead.

G&J Drivas Pty Ltd v Sydney Metro [2023] NSWLEC 20 provides guidance on how the Court applies the statutory disregard for the decrease in value caused by the public purpose

Duggan J's judgment in G&J Drivas helpfully demonstrates how the NSWLEC addresses compensation for land where the land would have had a higher value if the public purpose had not been proposed, due to abandonment of a development as a result of the public purpose.

The background to that case was that G&J Drivas Pty Ltd and Telado Pty Ltd (**Applicants**) were the owners of a substantial property in the Parramatta CBD (**Site**), which was acquired for the Sydney Metro West Project (**public purpose**).

At the time of acquisition, the Site was improved by a two-storey mixed retail and office complex. A development consent however had been granted for a 25-storey tower by the City of Parramatta Council in December 2018. Whilst the Applicants did not commence any physical works to erect any building under that consent, they did take non-physical steps to progress the development, including:

- preparing detailed drawings;
- entering into contracts for the marketing and leasing of the tower; and
- engaging Crone Partners for architectural services under a consultancy agreement.

However, the Applicants had to delay and ultimately abandon their development due to the public purpose. That is, 'but for' the proposal to carry out the public purpose, the Applicants would have progressed the development of the tower, such that the value of the land would have been higher at the date of acquisition.

The Class 3 NSWLEC proceedings dealt with section 56(1)(a) of the *Land Acquisition (Just Terms Compensation) Act 1991* (**Just Terms Act**). Section 56(1) provides the statutory mechanism for determining the market value of land, and the statutory disregard of the impact on value caused by the public purpose:

> *the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer, disregarding (for the purpose of determining the amount that would have been paid) —*
>
> *(a) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired …*

It was not in dispute that the Applicants would not have abandoned works 'but for' the proposal to carry out the public purpose, nor that the proposal caused a decrease in the value of the land at the date of acquisition.

The Applicants contended that the decrease in the value of land caused by the abandonment must be disregarded under section 56(1)(a), as the decisions to discontinue and stop works were caused by the proposal to carry out the public purpose. Therefore, the Site warranted a higher market value at the date of acquisition.

By contrast, Sydney Metro argued that section 56(1)(a) did not allow the impact of non-physical decisions on market value to be considered, and that the statutory disregard under that section only allowed the consideration of a decrease in land caused by *physical* work undertaken as of the date of acquisition.

Duggan J ultimately found in favour of the Applicants on this issue, holding that the provisions of the Just Terms Act did not preclude a claim for a decrease in market value where that decrease was a consequence of actions not undertaken by the Applicants due to the proposal to carry out the public purpose, and where those actions would have increased the value of the acquired land as at the date of acquisition. At paragraph [92], her Honour explicitly stated that such a claim "*may include actions not taken [by the Applicants] that are not (or would not have been) physically manifested on the Acquired Land*".

Whilst each resumption matter involves its unique facts, this provides some assurance to dispossessed owners of land that they do not have to vigorously pursue and carry on works to reach a higher market value of land when faced with a compulsory acquisition, assuming that decision arises because of the proposal to carry out the public purpose.

Negotiations under section 10A of the Just Terms Act: *Perry Properties Pty Ltd v Georges River Council* [2023] NSWLEC 51

Pritchard J's decision in Perry Properties further clarifies the requirements under section 10A of the Just Terms Act relating to the minimum negotiation period for acquisition by agreement, before the compulsory acquisition process begins. Unlike other section 10A cases, the case was heard in the NSWLEC due to it being a Council acquisition.

Section 10A mandates a 6-month period of negotiation by the acquiring authority before the compulsory acquisition process begins, and requires the acquiring authority to make a genuine attempt to acquire land by agreement during that time. Section 10A(2) states:

> *(2) The authority of the State is to make a genuine attempt to acquire the land by agreement for at least 6 months* before *giving a proposed acquisition notice.*

In Perry Properties, the land which Council sought to acquire was subject to a lease. Immediately before Council issued Proposed Acquisition Notices (**PANs**) to the owner and lessee, the owner entered into a call option deed with four grantees, whom together lodged a caveat on title. Despite also issuing PANs to the grantees, Council did not negotiate with them, and only negotiated with the owner and lessee.

The grantees then argued that the PANs issued to them were unlawful because Council did not abide by the 6-month negotiation period, and that the negotiation period was a jurisdictional pre-condition to issuing the PANs.

Pritchard J held that the reference to "land" in section 10A(2) of the Just Terms Act does not refer to "*every owner of every interest in land*". Instead, the person with whom agreement must be attempted to be reached before a PAN can be given is "*the person, corporate or individual, **who is in a position to sell the land, that is, the owner of the land***." (emphasis added)

Finally, the Court held that the statutory bar under section 10A(7) of the Just Terms Act precluded anything in that section from giving rise to, or being taken to account in, any civil cause of action.

The case provides some comfort to acquiring authorities faced with numerous potential interests in land. The requirement to genuinely attempt reaching an agreement applies to the person in a position to sell the land, rather than to the myriad of other interests that may exist.

NSW Court of appeal has narrowed the gateway to compensation for substratum acquisitions in *Sydney Metro v Expandamesh Pty Ltd* [2023] NSWCA 200

There has been a large number of substratum acquisitions resulting from the Sydney Metro Project. However, only a few substratum acquisitions have resulted in compensation being awarded, since compensation is limited to the three exceptions set out under clause 2(1) of Schedule 6B of the *Transport Administration Act 1988* (NSW). That clause provides as follows:

> *under the Land Acquisition (Just Terms Compensation) Act 1991 for the purpose of underground rail facilities, compensation is not payable under that Act unless —*
>
> *(a) the surface of the overlying soil is disturbed, or*
>
> *(b) the support of that surface is destroyed or injuriously affected by the construction of those facilities, or*
>
> *(c) any mines or underground working in or adjacent to the land are thereby rendered unworkable or are injuriously affected.*

The NSW Court of Appeal's decision in *Sydney Metro v Expandamesh Pty Ltd* [2023] NSWCA 200 narrowed the scope of the exception in clause 2(1)(a), such that any disturbance in the overlying soil needs to be "*in a way which has practical significance or is not trivial.*" Our detailed article on that decision is available here.

There are a number of matters that have been filed in the NSWLEC but are stayed at present pending construction work commencing beneath the parent parcel. Once that occurs, the extent of surface disturbance will need to be quantified and then evaluated in accordance with the Court of Appeal's decision. The decision indicates there is no uniform disturbance metric that will open the gateway to compensation. Rather, the level of surface disturbance that might open the gateway depends on the land use of the parent parcel.

NSW Land and Environment Court shows preference for narrower characterisations of public purpose

Two recent cases handed down in October and November 2023 have deepened the jurisprudence on how the 'public purpose' should be characterised. As indicated previously in this article, the construal of the public purpose is important when working out compensation since it needs to be disregarded. Both the negative and positive impacts must be ignored when quantifying compensation. Given the significant implications the construal of compensation can have on quantum, there appears to have been more careful scrutiny of the public purpose in the last year.

David Fox v Planning Ministerial Corporation [2023] NSWLEC 109

The case of David Fox concerned the Planning Ministerial Corporation's (**Ministerial Corporation**) compulsory acquisition of 1 Henry Lawson Avenue, McMahons Point (**Site**). The Site was the last remaining privately-owned property located in Blues Point Reserve, a waterfront reserve in Sydney's lower north shore overlooking Luna Park, the Harbour Bridge and CBD skyline.

In the proceedings, the parties held competing positions as to what should be regarded as the 'public purpose' of the acquisition.

The Applicant argued that the Site was acquired so that it could be included into the surrounding public parkland to create a greater regional park on the foreshore of McMahons Point, which the NSW Government had been pursuing for almost 75 years since 1948. Therefore, disregarding the 'public purpose' of the adjoining public reserve, the Site would have been zoned as either R3 Medium Density Residential or R4 High Density Residential, justifying a higher market valuation.

Moore J ultimately found in favour of the Ministerial Corporation, who contended for a narrower characterisation of the 'public purpose', which would result in the land being valued on the basis of a B1 Neighbourhood Centre or IN4 Working Waterfront zoning under the North Sydney Local Environmental Plan 2013 (**NSLEP**). His Honour found that the public purpose was not to *create* a regional park, but to include the Site in the existing reserves and *complete* the project by bringing the vicinity into public ownership. The resultant market value for the Site was lower based on this narrower characterisation.

In reaching this conclusion, Moore J emphasised that whilst 'public purpose' is defined under section 4(1) of the Just Terms Act, what might constitute that 'public purpose' must be derived from:

- the statutory power enabling the acquisition, and
- the terms of the documentation effecting the acquisition.

Regarding the first limb, the Ministerial Corporation's statutory power to acquire land derived from clause 31 of Schedule 2 of the *Environmental Planning and Assessment Act 1979* (NSW), which referred to the NSLEP and to the purpose of the Minister considering that the land should be made available in the public interest. Both these considerations supported the narrower purpose of incorporating the Site into the reserve. Regarding the second limb, the Court found that it is necessary to consider the terms to the acquisition documentation when determining 'public purpose'. Moore J held that the precise words "*public recreation and **inclusion** [of the Site] to Blues Point Reserve*" (emphasis added) in the PAN was an express and unequivocal expression of an intention that the acquisition was for the narrower public purpose, so much so that it was fatal to the Applicant's submissions. The word "inclusion" necessarily assumed that the Blues Point Reserve already existed, so it could not possibly be 'created', but only 'completed'.

The case also serves as a reminder for of the amount and complexity of expert evidence that sometimes is adduced in Class 3 proceedings. At paragraphs [52]-[53], Moore J cautioned that the detail of expert evidence went "*well beyond*" what would reasonably be expected to be sought by a hypothetical prudent purchaser of the land, which resulted in an almost 11-day hearing and 200-page judgment.

Keller and Keller v Blacktown City Council [2023] NSWLEC 133

The case of *Keller and Keller v Blacktown City Council* [2023] NSWLEC 133 indicates how a narrower characterisation can increase an Applicant's entitlement compensation.

In Keller and Keller, the Valuer-General initially determined $558,300 in compensation for the acquired land. The Applicants then brought Class 3 proceedings seeking total compensation of $950,000, on the basis that "*but for the acquisition for the public purpose, the land would have been zoned for residential development.*" The acquisition was for drainage infrastructure.

At paragraph [43], Robson J held that the:

> *correct approach to the statutory disregard required by s 56(1)(a) of the Just Terms Act is, having identified the zoning of the Acquired Land at the date of acquisition, to* ***determine whether the imposition of that zoning was part of the carrying out of the public purpose*** *(or the proposal thereto) for which the Acquired Land was acquired, and, if so,* ***notionally setting aside that zoning and the potential of the Acquired Land****.* (emphasis added)

The Applicants argued for a narrower characterisation of public purpose, which was limited to the provision of trunk drainage by Council in the location of the acquired land.

The Respondent Council argued for a broader characterisation where the public purpose included a trunk stormwater drainage system to accommodate increased stormwater discharge from new urban development, such that the urban residential zoning of the surrounding land since 2010 was also a part of the public purpose, and therefore had to be disregarded for valuation purposes.

The Council argued that there was "no prospect" the Minister would have rezoned the relevant land absent a precinct-wide scheme to deal with run-off and existing flood issues, and on that basis, the residential zoning should be disregarded, and the land should be valued on the basis of a lower value environmental zoning.

The Court however accepted the Applicants' narrower characterisation of the public purpose because:

- It was consistent with town planning evidence which concluded that the Acquired Land and the surrounding area would be rezoned from rural to more urban zonings, 'but for' the provision of a trunk drainage system at the location.
- The town planners agreed that the trunk drainage system could be located at a different location or delivered through a different means.
- If the 'public purpose' of the trunk drainage system was set aside, it would have been necessary to find another means of dealing with the increased stormwater infrastructure.
- Finally, even if the specific R2 zoning of the immediate surrounding was disregarded, there was compelling evidence that there would be movement towards residential zoning of the Acquired Land.

Ultimately, the Applicants were awarded $700,000 for market value.

Potential changes following the NSW Supreme Court allowing damages for small business affected by the Sydney Light Rail construction in *Hunt Leather Pty Ltd v Transport for NSW* [2023] NSWSC 840

On 19 July 2023, the NSW Supreme Court (**NSWSC**) upheld a claim for private nuisance for unreasonable interference to small businesses along the Sydney Light Rail (**SLR**) from Circular Quay to Kingsford/Randwick, brought by two lead plaintiffs: a luxury leather goods store, and a restaurant.

At paragraph [940], the NSWSC found that private nuisance was made out on four reasons:

- Transport for NSW (**TfNSW**) would have foreseen the risk of prolonging construction activities outside businesses along the SLR route.
- This risk was so high that the other party to the public-private partnership arrangement was not prepared to accept it, other than to a limited extent.
- Even though TfNSW assured business owners along the SLR route that the work would be performed in stages, it contracted on terms that provided **no real deterrence** for any departure from the staging plan.
- TfNSW took the risk in respect of the requirements of the utility providers.

The Hunt Leather decision has broader implications for individuals and businesses affected by large infrastructure projects. It highlights private nuisance as a potential alternate means of compensation for those who are unable to claim under the Just Terms Act if they do not have an interest in the acquired land, so long as there is 'substantial and unreasonable interference' with a business. Our detailed article on this decision is available here.

What will 2024 bring for compulsory acquisitions?

The NSW Government's Property Acquisition Data website helpfully allows people to track the numbers of resumptions occurring across the different acquiring authorities. After a reduction in 2020, presumably due to the start of the pandemic, numbers have continued to sit just below 500 per annum for the 12 acquiring authorities recorded (including all local councils as a single entity).

In November 2023, the Albanese Government conducted an independent strategic review and found that the Commonwealth's Infrastructure Investment Program was undeliverable. Consequently, funding towards many projects that previously had Commonwealth commitment has changed, and in some cases, cancelled. Whether this leads to the abandonment of acquisitions (enlivening other statutory rights under Part 4 of the Just Terms Act) remains to be seen.

Infrastructure NSW also recently updated the *NSW Major Infrastructure Pipeline and the 2023 − 2024 State Infrastructure Plan*. It appears that Infrastructure NSW will focus on projects delivering on schools, hospitals, and public transport. It is likely that the latter will nevertheless see a steady level of compulsory acquisitions occurring.

From the range of matters we have seen throughout the past year, 2024 will bring challenges for both acquiring authorities in navigating these changes to funding arrangements, and for affected landowners dealing with the shadow of an acquisition amongst project uncertainty. Issues with the administration of the Just Term Act continue to remain, as observed in the 2021 inquiry for the Acquisition of land in relation to major transport projects, though we are yet to see the recommendations being actioned or implemented. With the appointment of a new Valuer-General, but only for a period of 12 months from 1 June 2023, we expect a continuation of the existing policies located here, although we understand that there will be an increase in the number of valuations conducted by the Valuer-General's office itself as opposed to contract valuers, which may impact on statutory timeframes depending on the number of acquisitions occurring.

Finally, we anticipate new legal commentary arising from the large numbers of rural acquisitions occurring for the new linear infrastructure and renewable energy zones involved in the transition to renewables, as well as for the inland rail project run by the Australian Rail Track Corporation. We expect decisions like *Kater v Electricity Transmission Authority (NSW)* [1996] NSWLEC 19 and *Arrow v Electricity Commission of NSW* (1994) 87 LGERA 363 to be revisited and built upon as the impacts from these acquisitions are felt by sophisticated agricultural operations with complex farm ownership arrangements. Given the electricity infrastructure in some cases is almost double the size of existing transmission line infrastructure, the extent to which a blanket rate per sqm and set formulas for injurious affection can be adopted will no doubt be tested in some of the many partial acquisitions required to build the new infrastructure.

Colin Biggers & Paisley

The year in review – A look at New South Wales planning and environment law 2023

Audrey Wu | Bethany Burke | Rebecca Pellizzon | Mollie Hunt | Katherine Pickerd | Todd Neal

This article is a review of New South Wales planning and environment law in 2023 and also a summary of expectations for 2024

December 2023

In brief

This end of year article focuses on several cases from 2023, that have given added definition to the types of jurisdictional issues that will go to the validity of development decisions and those which will not. These court decisions have brought nuance to the types of jurisdictional issues that exist. This is important given the long list of jurisdictional issues parties to disputes involving development have been required to address in proceedings before the New South Wales Land and Environment Court (**NSW LEC**).

In this article we also provide a summary of the successful challenges to Registrar's decisions in the NSW LEC and the New South Wales Environment Protection Authority's (**NSW EPA**) Climate Change Policy and Climate Change Action Plan 2023-2026 released this year.

To conclude, we comment on the outlook for 2024 in the current climate where there are daily newspaper articles about the need for housing in NSW and what impact that will have on NSW planning and environment law into next year.

'Jurisdictional facts'

Since the decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (**Huajun**) and *HP Subsidiary Pty Ltd v City of Parramatta Council* [2020] NSWLEC 135, there has been greater scrutiny in development appeals to ensure the satisfaction of each provision that requires something to occur before a consent authority has the power to grant development consent. These provisions are often expressed as: "*Development consent must not be granted unless ...*", or "*The consent authority must consider ... before granting development consent*".

Preston CJ's comments at [217] of Huajun in the NSW Court of Appeal, differentiating between conditions on the exercise of power, and conditions to the exercise of power, are insightful to proceedings in the NSW LEC:

> *The requirement to **consider** relevant matters is a **condition on the exercise of the power** to determine a development application, but it is **not a condition to the exercise of the power in the first place**. The check on jurisdiction required by s 34(3) [of the Land and Environment Court Act 1979] is that the decision could have been made in the proper exercise of the relevant power, that is to say, that there is power to make the decision, not on how the power, if it can be exercised, should be exercised.* (emphasis added)

Since these cases, parties have been actively providing jurisdictional statements to the NSW LEC along with section 34 agreements so that the Court can be sure that the grant of development consent following a successful section 34 conciliation conference is "*a decision that the Court could have made in the proper exercise of its functions*": section 34(3) *Land and Environment Court Act 1979* (NSW) (**LEC Act**).

In our 2022 Year in Review article, we considered the Court of Appeal's judgment in *Ross v Lane* [2022] NSWCA 235 (**Ross**). The Court of Appeal in that case held that where the application of a provision in an environmental planning instrument depends on the formation of an opinion, it is the consent authority, not the Court, which conclusively determines whether the provision is engaged. The particular provision in that case was the clause within *State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development* (**SEPP 65**) which set out when SEPP 65 was to apply, including that SEPP 65 applies to development involving "*the substantial redevelopment ... of an existing building*". The Court of Appeal found that the question of whether the development involved the "substantial redevelopment" of the building was not a jurisdictional fact.

Since that judgment, we have seen several judgments relating to whether certain provisions involve jurisdictional facts including *El Khouri v Gemaveld Pty Ltd* [2023] NSWCA 78 (**El Khouri**), and *Lahoud v Willoughby City Council* [2023] NSWLEC 117 (**Lahoud**).

El Khouri v Gemaveld Pty Ltd [2023] NSWCA 78

In El Khouri, the Court of Appeal dismissed an application for judicial review of a NSW LEC decision where development consent was granted following a successful section 34 conciliation conference for a proposed residential development in Blakehurst.

A significant contention in the proceedings had been compliance with the nine metre height control imposed by the *Kogarah Local Environmental Plan 2012* (**LEP**) (now repealed).

The applicants in the Court of Appeal, who were objectors in the NSW LEC proceedings, appealed on the basis that the height control was later discovered to have been breached, and there had been no request to vary the development standard under clause 4.6 of the *Kogarah Local Environmental Plan 2012*.

Clause 4.6 requests seek to dispense with the requirement to comply with a standard and have been regularly described as a "gateway" to further merit assessment preventing the progression of the proposed development if the gateway is not opened. Therefore, the applicants argued that the NSW LEC could not have decided to grant development consent in the proper exercise of its functions under section 34(3) of the LEC Act.

Critically, although the applicant's fresh evidence showed that the proposed development exceeded the height control, that was not evident in the documents before the Commissioner in the NSW LEC.

The Court of Appeal dismissed the amended summons with costs stating at [75]:

> *It is plain that the Commissioner had regard to cl 4.3 of the Kogarah LEP. He expressly formed the* ***only view that was open to him on the evidence which was available to him****, namely, that there was compliance with the height requirement. That decision is not vitiated merely because the applicants can establish, by evidence not made available to the Commissioner, that there was not compliance with that clause.* (emphasis added)

Lahoud v Willoughby City Council [2023] NSWLEC 117

Lahoud involved class 4 judicial review proceedings in the NSW LEC relating to a challenge to the grant of development consent by Willougby Local Planning Panel to a development application made by Helm Pty Ltd. The applicant, who was a neighbour to the land the subject of the development consent, alleged that the development consent was invalid on six grounds involving jurisdictional error.

Before the NSW LEC handed down its decision, the NSW LEC invited the parties to make submissions as to whether or not (and, if so, how) Ross and El Khouri, potentially impacted on the approach the NSW LEC was required to adopt to all or any of the grounds pressed by the Applicant. The parties' submissions relating to how Ross and El Khouri apply or do not apply are extensively set out in the judgment from [80].

Ground 1 asserted that the Panel's clause 4.6 decision relating to contravention of the height control was invalid. The ground failed because while it was clear that the Planning Panel was not satisfied with the clause 4.6 request as it applied to the entire development proposed, section 4.16 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) allows a consent authority to grant approval to only part of the development that had been sought, and that was the power that the Planning Panel exercised in requiring the removal of a portion of the northern end of the development. In doing so, the Planning Panel properly considered the clause 4.6 request and concluded that it was appropriate to grant the dispensation if the northern portion of the development was removed. Interestingly, the NSW LEC reminded that the reasons written by decision making bodies such as planning panels "*are not to be examined with an eye attuned to error or with a fine-toothed comb*" (at [146]).

Ground 2 related to a challenge involving the active street frontage requirement in clause 6.7 of the LEP. The ground was successful with the NSW LEC concluding that there was "*no proper basis in fact on any rational construction of the wording of the clause that could have led the Planning Panel to have concluded that it was satisfied*" (at [186]). However, the NSW LEC declined to grant relief for merit related reasons.

Ground 3 asserted that the development was prohibited because it was not for shop top housing. However, the ground failed because the Court found that there was "*no necessity for any vertical linear relationship between any apartment falling within the concept of shop top housing to be directly above any of the ground floor commercial or business premises that provide the anchoring foundation for the permissibility of such a development*" (at [218]).

Ground 4 related to a challenge that clause 4.4 of the LEP (which was the FSR development standard) was not achieved and there was no clause 4.6 request. This ground relied on post-determination surveying evidence. The NSW LEC followed El Khouri saying at [251] that to "*the extent that the Applicant now seeks to rely on the surveying evidence – evidence which is 'fresh' in the sense that it was not available to the Planning Panel – this approach is inconsistent with what the Court of Appeal has held in El Khouri*".

Grounds 5 and 6 related to an alleged failure to consider contamination under SEPP 65. The Respondent argued that the grounds should be dismissed as they arise from fresh evidence setting out matter not available to the Planning Panel in an El Khouri sense, but that could have been made available to the Planning Panel from the Applicant. However, the NSW LEC rejected the argument because the grounds were advanced on a different basis, being that there was a material error in the Council's assessment report. That error was the assertion that there would be no excavation on the site arising from the development. While the NSW LEC found that the grounds were made out, the NSW LEC declined to exercise its discretion because, amongst other reasons, there were conditions that dealt with what was to occur if contamination was discovered and there was no credible explanation as to why the Applicant had not raised matters of potential contamination known to him at the time he examined the development application.

Finally, with respect to El Khouri, the Applicant "*respectfully submit[ted] that the decision in El Khouri was plainly wrong in concluding that planning instruments had no force in themselves because nothing in the EPA Act gave them force, as it overlooked the provisions of the Act that lend force to planning instruments otherwise than as s 4.15 factors for consideration, and the binding authority of Hillpalm Pty Ltd v Heavens Door Pty Ltd (2004) 220 CLR 472.*" Despite this, the NSW LEC noted that it was bound by the decision "*to the extent that I consider it applicable to the matters I am required to address and determine arising from each of the ground advance on behalf of the Applicant in these proceedings*" (at [90]). Based on the above comments, there may be some more nuanced commentary or findings from the Court of Appeal to come so as to clarify El Khouri.

Review of Registrar decisions

In this section of this article, we analyse some of the reviews of Registrar decisions that have occurred in 2023. Each of the review decisions below have resulted in the decision of the Registrar being either set aside or amended in some way.

The power to review a Registrar's decision is found under rule 49.19 of the *Uniform Civil Procedure Rules 2005*. These reviews are carried out by a Judge in the NSW LEC.

We have summarised the key decisions below:

- In *CWO Pty Ltd v Muswellbrook Shire Council and Commonwealth of Australia* [2023] NSWLEC 37, the Applicant sought to set aside the Registrar's decision joining the Commonwealth of Australia in class 1 proceedings. While Robson J found that the Commonwealth of Australia should be joined to the proceedings, the joinder was limited to discrete contentions relating to the impact of the proposed development on the Myambat Explosive Ordnance Depot and vice versa.
- In *Bennett v Ku-ring-gai Council* [2023] NSWLEC 6, Robson J heard an application made by the respondent council seeking a review of part of a Registrar's decision to refuse an application for leave to adduce town planning evidence – an area of expert evidence most cases focus on. Robson J found that the order made by the Registrar should be amended to provide for a single party town planning expert. One of the reasons for the decision was that there was a change in circumstances which the NSW LEC found was sufficient to warrant reconsideration. But balancing the interests of justice between the parties, the Robson J allowed only a single party expert given the applicant's opposition to an additional expert when there were already two heritage and two landscape architect experts engaged to deal with the question of whether a single tree should be removed.
- In *Caruana v Central Coast Council* [2023] NSWLEC 108, the Applicants were successful in setting aside a Registrar's decision to refuse leave to amend a class 1 application which involved an amendment to a standard development application to rely on the concept development application provision in section 4.22 of the EPA Act. The review application was neither consented to nor opposed by the respondent council, but the application before the Registrar was consented to by the council. Pain J found that the amendment did not alter the development application in substance, and it was not a "new one".

NSW EPA Climate Change Policy and Action Plan

In our 2022 Year in Review, we examined the NSW EPA's *Draft Climate Change Policy and Action Plan*.

This year, the NSW EPA released the Climate Change Policy (**Policy**) and *Climate Change Action Plan 2023-2026* (**Action Plan**). We conclude this article with a summary of the Policy and Action Plan.

The Policy outlines the causes and consequences of climate change in NSW. The policy identifies three key objectives:

- To maximise the economic, social and environmental wellbeing of NSW in the context of a changing climate and current and emerging international and national policy settings and actions to address climate change.
- To reduce greenhouse gas emissions in line with the NSW Government's net zero targets, which are:
  - a 50% reduction in emissions by 2030, compared to 2005 levels;
  - a 70% reduction in emissions by 2035, compared to 2005 levels; and
  - net zero emissions by 2050.
- To make NSW more resilient and adapted to a changing climate.

The Action Plan accompanies the Policy and sets out the specific actions the NSW EPA will take to meet the above objectives, as well as the regulatory actions it will consider over the medium to long term to support the NSW Government's climate change commitments and policies, including achieving net zero emissions by 2050.

Both the Policy and Action Plan are supported by three pillars:

1. *Inform and plan: continually improving as we listen, provide support and report*
2. *Mitigate: reducing greenhouse gas emissions*
3. *Adapt: adapting and building resilience to a changing climate*

The NSW EPA has identified 25 actions that it will both continue and develop, categorised under the three pillars.

Under the first pillar, '*Inform and plan*', the NSW EPA identifies three actions it will continue and strengthen, being to monitor and report on the impacts of climate change, to engage and collaborate with climate change experts, and to monitor emerging trends, risks and opportunities surrounding the issue of climate change. The NSW EPA also offers an additional six actions that it will undertake over the next three years. Of note, the Action Plan proposes a partnership between the NSW EPA and the Department of Planning and Environment to ensure climate change is adequately addressed in appropriate conditions in planning approvals, and to require licensees to update their pollution incident response management plans.

The second pillar, '*Mitigate*', identifies five actions that the NSW EPA will continue and strengthen. These actions focus on the implementation of programs to reduce emissions, support renewables, minimise emissions from NSW EPA-licensed onshore gas operators, and regulate climate pollutants. Additionally, the NSW EPA will aim to take new actions including the development of greenhouse gas emission targets, the adoption of climate change mitigation guidance for key sectors, and the progressive implementation of greenhouse gas emission limits on licences for key sectors. The NSW EPA has identified management of non-road diesel emissions at coal mines through the imposition of US EPA Tier 4 emission standards as an early step to achieve its mitigation goals.

The final pillar, '*Adapt*', identifies the NSW EPA's continued commitment to protect the environment through emergency response and recovery, and ensuring that native forestry climate risks are addressed via the Forest Monitoring and Improvement Program. Beyond these initiatives, the NSW EPA will develop an adaptation and resilience delivery plan, develop and implement environmental resilience programs and initiatives, prepare performance outcomes for key industry sectors, and develop a climate change citizen-science strategy and community education program.

These actions indicate an increased focus on sector-specific industry regulations. The industries that are specifically addressed in the Policy and Action Plan include building and construction, waste, transport, mining, forestry, metallurgy, agriculture and aviation. As the NSW EPA begins to implement the three pillars, those industries should begin planning now for new conditions relating to monitoring, reporting and performance management focusing on emissions and pollution.

Where to for 2024?

The NSW Government's drive to engender more housing supply which has been the subject of many media releases in 2023 will lead to new levers in policy and law encouraging that objective. The legal system will need to respond to these pressures for new development as more decisions are made concerning development issues that are underpinned by the administrative law that planning law sits on, such as those jurisdictional issues mentioned early in this article.

While the NSW Government is encouraging development to meet housing supply, it is too early to tell whether there will be more applications that are brought before the NSW LEC for determination. However, if the resources of consent authorities such as councils and planning panels and referral and concurrence authorities such as Transport for NSW are inadequate to meet the demand, applicants may pursue determinations through the NSW LEC.

Recently, the Sydney Morning Herald commented "*As Minns remarked yesterday (7 December 2023), there was a decade of housing with no infrastructure, and major new infrastructure with little new housing.*" The NSW Government's major transport and housing package will need to balance the need for infrastructure and housing in various areas throughout the state. We have already seen decisions to cut well-progressed projects such as the M7/M12 interchange ("spaghetti junction") and to stimulate development in specific areas around public transport.

Developers will need to have their ears to the ground in 2024 to capitalise on the incentives that are and may become available, and to time and design their development applications so that they are approved swiftly. With that said, the lack of infrastructure in some areas that are ripe for development means that first movers may face more obstacles and need to spend more time and money on development applications to progress development.

Declaration of interest: Colin Biggers & Paisley acted for the applicants in Caruana v Central Coast Council [2023] NSWLEC 108. The views expressed in this article are solely those of the authors.

Colin Biggers & Paisley

The year in review: Court decisions relating to the New South Wales waste industry in 2023

Bethany Burke | Katherine Pickerd | Todd Neal

This article discusses a number of decisions from the NSW Land and Environment Court (LEC) relevant to operators within the New South Wales (NSW) waste industry. The NSW Environment Protection Authority (NSW EPA) has announced its priorities for the 2023/2024 financial year which provides some guidance as to what can be expected from the regulator in early 2024

December 2023

In brief

In this article, we have briefly reviewed some of the key cases involving the NSW EPA relating to:

- The provision of false or misleading information where the LEC has imposed significant fines following successful prosecutions.
- Applications for environment protection licences including providing guidance around who is a "fit and proper person" to hold an environment protection licence.
- An appeal to the LEC because the NSW EPA considered fines imposed by the local court were manifestly inadequate. This case was the first time the LEC considered breaches of the *Waste Avoidance and Resource Recovery (Container Deposit Scheme) Regulation 2017* (NSW).
- The first criminal prosecution in the LEC for failure to comply with a clean-up notice.

Successful prosecutions relating to the provision of false or misleading information

Th NSW EPA has successfully prosecuted several cases concerning the provision of false or misleading information relating to waste which is an offence under section 144AA of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

In *Environment Protection Authority v ACE Demolition & Excavation Pty (No. 2)* [2023] NSWLEC 3, ACE Demolition & Excavation Pty Ltd was charged with four offences relating to the supply of false or misleading information for the provision of 603 weighbridge dockets for the disposal of waste as well as other documents. The company pleaded guilty to all four charges and was ordered by the Court to pay $943,650 plus the legal costs of the NSW EPA.

In *Environment Protection Authority v O'Brien* [2023] NSWLEC 118, the defendant was charged with four offences relating to the supply of false and misleading information concerning the receipt, transfer, and disposal of asbestos waste. The key question in the case related to whether the defendant was the person responsible for the supply of the false and misleading material beyond reasonable doubt as the defendant raised arguments about who had control of an email address. The NSW EPA was successful in prosecuting three of the four charges. The sentencing proceedings have not yet occurred.

In *Environment Protection Authority v Geagea* [2023] NSWLEC 125, the defendant was charged with one offence for conspiring with others to supply information about waste, being 49 waste delivery dockets, that he knew were false or misleading in a material respect. The tipping dockets revealed that waste was deposited at a licenced facility when it was actually deposited at a residential property in Luddenham. The defendant pleaded guilty and was ordered to pay $54,000 plus the NSW EPA's costs of the proceedings.

Environment protection licence cases

There have been two decisions this year relating to the issue of environment protection licences by the NSW EPA which we have previously written about. These decisions confirm the NSW EPA has an independent role in assessing applications for environment protection licences and provides guidance to applicants as to who is a "fit and proper person" to hold an environment protection licence.

In *Crush and Haul Pty Limited v Environment Protection Authority* [2023] NSWLEC 60, the LEC determined in class 4 proceedings that the NSW EPA was not required to issue an environment protection licence subject to conditions that are not inconsistent with a development consent. This decision confirmed that the grant of an integrated development consent does not automatically lead to the issue of an environment protection licence. A separate application needs to be made to and assessed by the NSW EPA. Our detailed article is available here.

In *Crush and Haul Pty Ltd v Environment Protection Authority* [2023] NSWLEC 1367, the LEC considered whether the applicant was a "fit and proper person" under section 45(f) of the POEO Act in class 1 proceedings. This was the first case to extensively consider the application of the "fit and proper person" test in granting of an environment protection licence. Applicants should be mindful of this test when preparing applications for environment protection licences. Our detailed article is available here.

First container deposit scheme case heard in the NSW Land and Environment Court

In 2022, Coffs Harbour Local Court ordered Clarence Valley Metal Recyclers Pty Ltd to pay three fines totalling $15,000 each for three breaches of the *Waste Avoidance and Resource Recovery (Container Deposit Scheme) Regulation 2017* (NSW). The defendant pleaded guilty to three offences relating to unlawfully presenting containers and double counting them to take advantage of the return and earn recycling scheme.

Being unsatisfied with the adequacy of the fines imposed, the NSW EPA commenced class 6 proceedings in the LEC to appeal against "the manifest inadequacy" of the three fines. This was the first time the LEC has considered breaches under the *Waste Avoidance and Resource Recovery (Container Deposit Scheme) Regulation 2017* (NSW).

In *Environment Protection Authority v Clarence Valley Metal Recyclers Pty Ltd* [2023] NSWLEC 96, the LEC found that the original sentences were inadequate and fined the defendant $149,000 in total (being $54,000, $50,000 and $45,000). The maximum penalty for each of the offences in the LEC was $440,000 for a company.

Operators involved with the container deposit scheme (as well as those dealing with other types of waste) should be aware of this decision. The NSW EPA's decision to appeal the findings of the Local Court demonstrates a willingness to appeal penalties which it considers inadequate.

First criminal prosecution for the failure to comply with a clean-up notice

Those within the industry would be well aware of the regulatory tools that are available to the NSW EPA to enforce compliance. These tools include issuing clean-up notices, prevention notices and prohibition notices. Operators usually comply with these types of notices to avoid further action being taken. However, the NSW EPA has for the first time successfully prosecuted a company and its director under section 91B of the POEO Act for not complying with a clean-up notice without a reasonable excuse.

In *Environment Protection Authority v Carbon MF Pty Ltd; Environment Protection Authority v Fair* [2023] NSWLEC 120, the company and director were charged with offences for not complying with a clean-up notice requiring the removal of waste tyres and for polluting land by unlawfully storing over 28,000 waste tyres. Guilty pleas were entered for the four offences. The LEC ordered that the defendants were together fined $582,375 and required to pay the NSW EPA's legal and investigation costs.

What will 2024 bring for the NSW waste industry?

We can take some guidance as to what is expected in 2024 from the NSW EPA's seven priorities for the 2023/2024 financial year which reveal it will focus on specific target areas. Three are relevant to the NSW waste industry and operators may wish to take note of in preparing for the new year:

- **Air pollution from dust:** the NSW EPA has indicated it will take a place-based approach to reduce air pollution from high dust emitting activities. We have seen an example of this in 2023 with the actions taken by the NSW EPA with respect to Cadia Holdings which has pleaded guilty to dust emission offences. While dust emissions have historically been a focus of the NSW EPA, waste operators can expect that there may be tougher enforcement action in this area.
- **End of life batteries:** the NSW EPA will focus more attention on the safe management of battery waste and encourage the recycling and repurposing of batteries, to avoid them ending up in landfills.
- **End of life tyres:** There is an apparent growing trend of stockpiling waste tyres which causes safety and environmental concerns. As mentioned above, the NSW EPA prosecuted the first dealing with a failure to comply with a clean-up notice this year, and it related to the unlawful storage of waste tyres. Waste operators can expect that closer attention will be paid to the number of waste tyres being stored on site. If the threshold of "more than 5 tonnes of waste tyres or 500 waste tyres" is exceeded, the need for an environment protection licence is triggered.

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