COLIN BIGGERS & PAISLEY LAWYERS

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PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

Trusted Partners, Strategic Thinkers, Legal and Policy Designers and Tacticians

COLIN BIGGERS & PAISLEY LAWYERS

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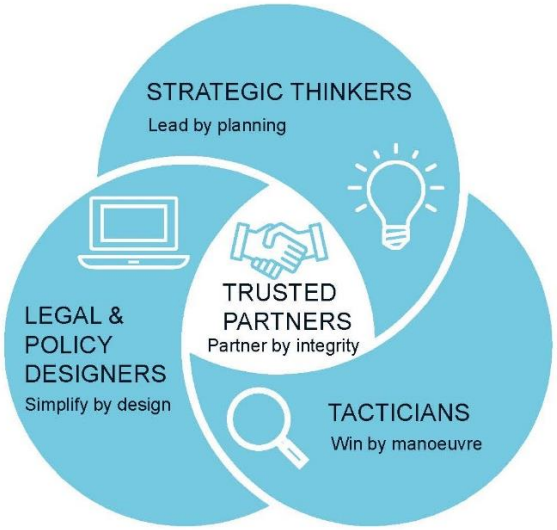

Lead, Simplify and Win with Integrity

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Determining the scope for protection of native vegetation

Samantha Hall | Katelin Kennedy

This article discusses the decision of the Queensland Court of Appeal in the matter of *Witheyman v Simpson* [2009] QCA 388 heard before Muir JA, Cullinane and Fryberg JJ

January 2010

Case

This was an application by Peter Witheyman (**applicant**) for leave to appeal against a decision of the District Court regarding the dismissal of a previous appeal from the Magistrates Court. The originating decision of the Magistrates Court was for the acquittal of Harvey Simpson (**respondent**) of three offences, which included starting assessable development without an effective development permit for the development in breach of section 4.3.1(1) (Carrying out assessable development without a permit) of the *Integrated Planning Act 1997* (**IPA**).

Facts

Although three charges were originally brought against the respondent, during the course of the appeal to the District Court counts 2 and 3 were abandoned. The remaining count (**offence**) specifically involved operational work that was the clearing of native vegetation on freehold land. The application for leave to appeal alleged that the District Court judge erred:

- in his construction of the relevant legislation (the IPA and the *Vegetation Management Act 1999* (**VMA**));
- in failing to conclude that the respondent had cleared 129.9 hectares of remnant endangered regional ecosystem; and
- in holding that, based on the findings of fact made by the magistrate, the conclusion to dismiss the charge was correct.

In the event that leave to appeal was granted, two issues were presented for determination including whether the actions of the respondent constituted "assessable development" that required the consent of the chief executive under the IPA, and whether the applicant had proved beyond reasonable doubt that the clearing on the respondent's land was clearing of native vegetation constituting assessable development requiring a development permit.

The applicant's contentions

The applicant submitted that, prima facie, the elements of the offence were made out as the respondent had started assessable development without a development permit for the development. Additionally, the assessable development was alleged to be the clearing of native vegetation to which the relevant provision of the IPA, being section 3A of part 1 of schedule 8, did not apply. This provision stated that assessable development includes carrying out operational work that is the clearing of native vegetation on freehold land, unless the clearing is necessary for routine management in an area that is outside a remnant endangered regional ecosystem shown on a regional ecosystem map. It was also submitted that the magistrate had erred in failing to find the elements of the offence proven beyond reasonable doubt based on the available evidence. The alleged error of the District Court was the finding, with reference to extrinsic evidence, that s 4.3.1(1) (Carrying out assessable development without a permit) of the IPA and section 3A of part 1 of schedule 8 of the IPA should not be given a literal construction and that at the time that the offence was alleged to have occurred, regional ecosystems other than remnant endangered regional ecosystems were not intended to be protected by the IPA and the VMA.

The respondent's contentions

The respondent successfully contended during the appeal to the District Court that the VMA influenced the construction of the IPA resulting in a lack of obligation to obtain a development permit at the relevant times. This argument was based on an amendment made to the VMA that altered section 3 (Purposes of Act) of the VMA to remove section 3(1)(a)(ii), which stated that an aspect of the purpose of the VMA was to preserve remnant of concern regional ecosystems.

Purposes of Act

3.(1) The purposes of this Act are to regulate the clearing of vegetation on freehold land to—

(a) preserve the following—

(i) remnant endangered regional ecosystems;

(ii) remnant of concern regional ecosystems;

(iii) vegetation in areas of high nature conservation value and areas vulnerable to land degradation; and

(b) ensure that the cleaning does not cause land degradation; and

(c) maintain or increase biodiversity; and

(d) maintain ecological processes; and

(e) allow for ecologically sustainable land use.

This amendment was accompanied by a policy statement from the Queensland government which explained that due to a lack of Commonwealth funding, the Queensland government would protect 'endangered' regional ecosystems, but would rely upon the regional vegetation planning process and committees to voluntarily extend protection to other levels of regional ecosystems. On this basis, the respondent argued that as the purpose of the VMA was expressly stated in section 3 (Purposes of Act), the removal of one of the categories of that section meant that no provision of the VMA could apply to land within the deleted category.

The magistrate's reasons

The reasons of the magistrate in her decision to acquit the respondent were also considered. The magistrate found that the question in the first instance was whether the applicant had proved beyond a reasonable doubt that "the clearing had taken place in areas where it was unlawful to clear at a time when it was unlawful to do so". In this case, the magistrate found that in order for the clearing to be unlawful, the area cleared was required to have been within an area of land properly mapped as remnant endangered regional ecosystem in a regional ecosystem map of the VMA. Additionally, the magistrate failed to accept that a certificate under s 66B (Evidentiary Aids) of the VMA demonstrated that any of the vegetation cleared by the respondent was remnant. On this basis, it was found that the applicant had failed to discharge the burden of proof, and the respondent was found not guilty.

Decision

Consideration of the respondent's contentions

Muir JA, with Cullinane J agreeing, found that it was not the intention of the legislature in removing section 3(1)(a)(ii) (Purposes of Act) from the purposes of the VMA to additionally remove from the VMA's purposes the regulation of clearing on such land to meet the other objectives set out in section 3 (Purposes of Act). Muir JA contended that even after the removal of s 3(1)(a)(ii) from the purposes of the VMA, scope remained for the legislation to "remnant of concern regional ecosystems". Additionally, Muir JA made reference to McHugh J in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, Brennan CJ in *IW v City of Perth* (1997) 146 ALR 696 and Speigelman CJ in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, among others, in his decision that both the judge of the District Court and the respondent had erred in their construction of the IPA to mean that the requirement to apply for a development approval before clearing "native vegetation on freehold land" ceased to exist. Muir JA found that the premise that it was permissible to construe a statute by applying a legislative policy arising from extrinsic materials was erroneous, resulting in a decision that the District Court judge had erred in law.

Consideration of the magistrate's reasons

Muir JA found that the magistrate had gone unnecessarily far in requiring that the applicant prove that the clearing was inside a remnant engendered regional ecosystem shown on a regional ecosystem map. His Honour found that in order for the clearing to fall under the exemption in section 3A(c) of part 1 of schedule 8 of the IPA, it had to be shown to be "necessary for routine management", where "routine management" meant "clearing native vegetation ... that is not remnant vegetation". The exemption could not apply unless these criteria were first fulfilled.

Fryberg J generally agreed with the reasoning of Muir JA, with the additional comment that with the evidence presented by the applicant, the only real issue remaining for determination was whether the clearing done by the respondent fell within the exception in section 3A(c)(iii) of part 1 of schedule 8 of the IPA.

Held

Leave to appeal was granted and the appeal was allowed. The orders of the District and Magistrates Court were set aside, with the proceedings remitted to the Magistrates Court for a rehearing and determination of the offence.

Application to remove statutory stay

Samantha Hall | Diane Coffin

This article discusses the matter of *Chermond Mushroom Farm Pty Ltd v Bundaberg Regional Council* (Appeal No. 61 of 2009) and *Bundaberg Regional Council v Chermond Mushroom Farm Pty Ltd* (Application No. 3319 of 2009) heard before Robin QC DCJ

January 2010

Case

This case involved both an appeal and an application. The appeal was against an enforcement notice issued by the Bundaberg Regional Council (**council**) to cease certain activities on the subject site that the council contended was a 'rural industry' within the meaning of the planning scheme definition, being composting operations conducted on land owned by Chermond Mushroom Farm Pty Ltd (**Chermond**). The effect of the appeal was that it stayed the council's enforcement notice. In the appeal, the council sought to rely on section 4.1.33(2)(g) (Stay of operation of enforcement notice) of the *Integrated Planning Act 1997* (**IPA**) and applied to the court to end the operation of the statutory stay on the basis of environmental nuisance. The council also, by separate application, sought interim enforcement orders to restrain the composting operations until Chermond obtained a development permit authorising the activities to be carried out.

Facts

The composting operation involved the wetting of hay upon a purpose-build concrete pad on the subject site. When it had composted sufficiently, it was mixed with other items brought to the site, principally poultry manure and urea. Heavy equipment was used to mix the ingredients and move them around for loading. The finished product, known as mushroom substrate, was used by Chermond at another property it had locally where it grew mushrooms.

Whether the use of the subject site for composting operations could occur as of right, depended on the activity being 'general agriculture' under the council's planning scheme, as general agriculture constituted exempt development. The definition of "general agriculture" provided that was "the use of premises for the growing of crops, pastures, turf, flowers, fruit, vegetables, plants, trees and the like and the growing and keeping of animals".

Decision

The parties settled the appeal on the basis of a consent order that dismissed the council's application to end the statutory stay and the appeal was adjourned.

With respect to the council's application for enforcement orders, on the basis of a review of the filed material, the court was satisfied that there had been environmental nuisance in the past. However, the question for the court was whether the court's discretion arose and if so, whether it should make an enforcement order under section 4.3.22 (Proceeding for orders) of the IPA. The basis of the jurisdiction for the court to exercise its discretion and to make an enforcement order was whether a development offence had been committed.

The court found that it was clear that a 'rural industry' had been conducted and that use was code assessable development. Any belief that the use of the subject site could occur as of right depended on the activity being "general agriculture".

The court found that it was at the heart of the definition of general agriculture that something must be grown on the premises. All the components relevant to Chermond's activity were imported to the site and, as such, the court found the activity was plainly not general agriculture.

On this basis, the court found that a development offence had been established for the purposes of section 4.3.25(1)(a) (Making enforcement order) of the IPA and that the likelihood was that, unless there was some restraint, the offending conduct would continue. Therefore, pursuant to section 4.3.25(2) (Making enforcement order) of the IPA, the court became entitled to make an order in those circumstances.

Held

In the appeal, by agreement, the parties provided to the court a consent order which the court made that dismissed the council's application to end the statutory stay and adjourned the appeal until 21 January 2010.

In the application, the court made an enforcement order restraining Chermond from carrying out composting operations unless and until such time as Chermond obtained an effective development permit for the material change of use. This order was suspended until 17 December 2010, to allow Chermond to complete processing activities that were already underway.

Whether conditions imposed on a development application are relevant or reasonable

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Smith & Anor v Brisbane City Council* [2009] QPEC 135 heard before Robin QC DCJ

January 2010

Case

This case concerned a developer's appeal by David Smith and Sean Smith (**appellants**) against conditions imposed on a development permit granted by the Brisbane City Council (**council**) for the subdivision of two lots of land into three and a material change of use for three single unit dwellings. The appellants contended that the conditions could not be justified under section 3.5.30 (Conditions must be relevant or reasonable) of the *Integrated Planning Act 1997* (**IPA**).

Facts

The appellants sought development approval to subdivide two lots of land into three and a material change of use to construct three single unit dwellings (including the original house) at Cunningham Street, Taringa. The development application was approved by the council subject to a condition to provide a 2.5m verge along the frontage of the property. This condition had the effect of widening the street footpath by 0.7 of a metre.

The decision by the council to impose this condition was based on widespread concern for the narrowness of Cunningham Street. This was reflected in the submissions from local residents who raised concerns about the safety of pedestrians using the footpaths, parking pressure, increased density and obstruction of footpaths by increased numbers of wheelie bins placed out for collection.

The council relied extensively upon various provisions of the *Brisbane City Plan 2000* (**City Plan**) and other polices and guidelines to highlight the importance attached by council as planning authority to achieve adequate footpath width for pedestrians and cyclists. Particular attention was focused on the subdivision code in chapter 5 of the City Plan, specifically section 5.1.3 (Code Performance Criteria for pedestrian and cyclist facilities) and section 5.1.6 (Minor Road Design). The council also relied upon the Transport and Facilities Planning Scheme Policy, pointing to section 5.6 (Local access), and also section 5.4.3 (Verges) in the Subdivision and Development Guidelines.

The appellants contended that the conditions imposed upon the development permit could not be justified under section 3.5.30 (Conditions must be relevant or reasonable) of the IPA. Section 3.5.30(1) of the IPA provides that (a) a condition must be relevant to, but not an unreasonable imposition on the development and (b) must be reasonably required in respect of the development.

The appellants argued firstly that the proposed conditions were not reasonably required in the sense that they were not a reasonable response to the changes which occurred as a consequence of the development, secondly that the conditions were not relevant as they were not necessary to maintain proper standards in local development, and thirdly that the conditions were unreasonable because the proposed development only threatened a negligible increase in pedestrian traffic.

Decision

His Honour Robin QC DCJ dismissed the appellants' appeal agreeing with the council that for the purposes of section 3.5.30 (Conditions must be relevant or reasonable) of the IPA the conditions were relevant to the proposed development and were not an unreasonable imposition on it.

His Honour accepted the views of the council's traffic expert that the existing verge was inadequate and a 2.5m width for a pedestrian pathway was an appropriate absolute minimum. It was also further accepted that the desirability to increase the verge width was not solely related to the impact of the proposed development but also to the current problems of Cunningham Street coupled with the expected increase in density.

On the issue of the relevance, his Honour rejected the appellants' argument that the streetscape of Cunningham Street was characterised by narrow pavement width and narrow verges and that the impugned conditions were not consistent with other properties in the street. Rather, he agreed with the council's traffic expert that any improved length of footpath improved the overall amenity of the area.

His Honour concluded that the relevant footpath was inadequate and substandard, having become so because of the proliferation of vehicles over time, and crucially, more recently, the use of footpaths for placement of wheelie bins for rubbish collection. It was noted that the development could be expected to increase the number of bins placed out for collection. A widening of the footpath to 2.5m would attenuate those new impacts in a useful way and was not an unreasonable imposition on the development.

Held

The appellants' appeal was dismissed.

It's not "made" unless it's "properly made"

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Court of Appeal in the matter of *Metricon Innisfail Pty Ltd v Cassowary Coast Regional Council & Anor* [2009] QCA 400 heard before McMurdo P, Fraser JA and Atkinson J

January 2010

Case

This was an application brought by Metricon Innisfail Pty Ltd (**Metricon**) to the Court of Appeal for leave to appeal against the decision of the Planning and Environment Court (**P&E Court**) that Metricon's development application was not "made" prior to the commencement of the Draft State Planning Regulatory Provisions (Regional Plans) (**SPRP**) which took effect on 9 May 2008.

Facts

On 1 April 2008, Metricon delivered to the Cassowary Coast Regional Council (**council**) a purported development application for a development approval under the *Integrated Planning Act 1997* (**IPA**) in relation to a residential and marina development near the Johnstone River at Innisfail.

The relevant land was, according to section 3.2.1(5) (Applying for development approval) of the IPA, a "State resource prescribed under a regulation". The regulation required that a development application for a development approval which involved taking or interfering with a State resource be supported by evidence that the chief executive of the department was satisfied that the development was consistent with all allocations of, or entitlements to, the resource.

When Metricon delivered the purported development application to the council, it did not include the resource entitlement evidence. Accordingly, the council could not accept the development application as being "properly made" under the IPA. Metricon subsequently obtained the resource entitlement evidence and delivered it to the council in October 2008.

In the meantime, the SPRP took effect on 9 May 2008. The question before the court was whether the SPRP applied to Metricon's development application.

Section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP relevantly provided that the draft regulatory provisions did not apply to development carried out under a development approval for a development application that was made before the day the SPRP took effect.

Metricon subsequently commenced proceedings in the P&E Court in which it unsuccessfully sought to establish that the SPRP did not apply to the development application because the development application was "made" before the SPRP took effect.

Decision

In his judgment, to which McMurdo P and Atkinson J agreed, Fraser JA considered issues of construction of section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP and the status of Metricon's development application.

His Honour observed that in applying for a development approval, section 3.2.1 (Applying for development approval) of the IPA provided that Metricon's development application required State resource entitlement evidence. The result of Metricon's failure to provide this evidence meant that the development application was not a "properly made application". Therefore, Metricon's development application could never have led to a "development approval", as specifically referred to in section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP.

In its arguments to the court, Metricon accepted that when the SPRP took effect its development application was not properly made but argued that the IPA definition of "properly made" should not be imported into section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP given that the legislature could have easily inserted the term if that was its intention. Metricon also argued that the IPA made a clear distinction between the term "made" and "properly made" and that even though its development application was not "properly made" it was still "made" for the purposes of section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP.

The council and the Minister for Infrastructure and Planning (**second respondent**) endorsed and elaborated upon the reasons given by the P&E Court in the initial application.

His Honour rejected Metricon's arguments, holding that the P&E Court judge did not make an error by importing the definition of "properly made" into section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP and that the P&E Court judge correctly had regard to the IPA for the purpose of deciding whether Metricon had "made" a development application within the meaning of section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP.

His Honour held that the P&E Court judge was right to regard it as significant that the development application at the time the SPRP took effect was incapable of being the subject of any approval under the IPA.

Further, his Honour held that the use of the term "made" in the IPA does not reveal any distinction between a "properly made application" and an application that is "made". In considering the term "made", his Honour observed that when read in the context of the purpose of section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP, the term is consistent with something more than mere delivery of the development application to the council. This reading supports a conclusion that for the purposes of section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP, a development application is not "made" by delivering something which purports to be a development application but which under the IPA is incapable of progressing towards a development approval.

His Honour acknowledged that a development application that is not properly made can be changed to form a properly made application, however held that the fact that such a change is permissible does not imply that the changed application should necessarily be treated as having been "made" before it was changed.

His Honour concluded that the proper construction of section 1.4(1)(a) (When these draft regulatory provisions do not apply) of the SPRP was that an application for a development approval delivered to the assessment manager under the IPA which was not supported by evidence as required under section 3.2.1(5) (Applying for development approval) of the IPA before the day the SPRP took effect did not constitute a "development application that was made" before the SPRP took effect. Therefore the SPRP would apply to the development application.

Held

It was held that the application for leave to appeal be granted with the appeal to be dismissed and an order made that Metricon pay the council's and the Minister's costs of the application and the appeal.

Partial approval of application

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Court of Appeal in the matter of *SLS Property Group Pty Ltd v Townsville City Council & Anor; Catchlove & Ors v Townsville City Council* [2009] QCA 380 heard before Keane JJA, Holmes JJA and Daubney J

January 2010

Case

This was an application for leave to appeal by SLS Property Group Pty Ltd (**SLS**) and Centro Properties Group (**Centro**) to the Court of Appeal in relation to a decision of the Planning and Environment Court (**P&E Court**) concerning the operation of section 3.5.11(1)(b) (Decisions generally) of the *Integrated Planning Act 1997* (**IPA**).

Facts

In 2008 the Townsville City Council (**council**) resolved to approve part of an application made by Consolidated Properties Group Pty Ltd (**Consolidated**) to develop vacant land on the Bruce Highway at Deeragun north of Townsville for a supermarket, specialty shop and a community centre.

P&E Court

SLS and Centro appealed to the P&E Court against the council's decision, seeking a declaration that the approval was invalid on a number of grounds.

One of the grounds argued by SLS and Centro was that the council had no power to approve only the first stage of the development application under section 3.5.11(1)(b) (Decisions generally) of the IPA.

Wilson SC DCJ held that the council's decision to approve the development application "in part" under section 3.5.11(1)(b) (Decisions generally) of the IPA was valid. Wilson SC DCJ stated that whilst the power to approve in part could not extend to the approval of something which was materially different from what was sought in the development application that was not the case here as what had been approved was part of the whole application.

Decision

The Court of Appeal agreed with the decision of the P&E Court at first instance, finding that SLS and Centro did not demonstrate a sufficiently arguable case of error of law on the part of the P&E Court to warrant the grant of leave to appeal.

Legislative context

The court, referring to the statutory context of section 3.5.11(1)(b) (Decisions generally) of the IPA as distinct from section 3.5.24 (Request to change development approval (other than a change of a condition)) and section 4.1.52 (Appeal by way of hearing anew) of the IPA which address minor changes to applications, stated it was impossible to infer that the decision of the legislature not to use similar language in section 3.5.11(1)(b) (Decisions generally) of the IPA to confine the power of an assessment manager to approve part of an application where that reflects a minor change to the application, was not deliberate.

The court rejected the argument by SLS that section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA indicated that the power conferred by section 3.5.11(1)(b) (Decisions generally) of the IPA was limited to cases involving only a minor change in the approval granted from that which was sought in the application. The court stated that section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA did not assist in interpreting section 3.5.11(1)(b) (Decisions generally) of the IPA but rather was concerned with ensuring that an applicant did not have to restart earlier stages of an application as a result of a late change to an application.

Partial approval of an application

The court accepted Wilson SC DCJ's proposition that the power conferred by section 3.5.11(1)(b) (Decisions generally) of the IPA could not extend to something which was materially different from what was sought in the development application.

The court held that an approval of part of the application being stage 1 of a two part application was not for a materially different application because it was always possible that on that application only stage 1 would be approved.

The court went on to state that what was approved was not a changed application but one of the parts of the application that Consolidated had applied for.

Further, interested members of the public had been informed that the application involved two stages, one or both of which might be approved. The court stated that members of the public could not have been led to believe that the application was made on an "all or nothing" basis.

The court distinguished the decision of Rackemann DCJ in *Metroplex v Brisbane City Council & Ors* [2009] QPEC 110 which related to a component of an "integrated development". The court stated that Wilson SC DCJ was not asked to make a finding that stage 1 and stage 2 were integrated elements of the application.

Held

The application for leave to appeal was dismissed, with SLS and Centro to pay the respondents' costs.

Stepping up koala conservation in South East Queensland at the expense of property holders

Samantha Hall | Matthew Soden-Taylor

This article provides a brief analysis of the new strategies the Queensland government is implementing in an attempt to ensure koala conservation in SEQ. Particular emphasis will be on the draft South East Queensland Koala Conservation State Planning Policy (draft SPP) and the draft South East Queensland Koala Conservation State Planning Regulatory Provisions (draft Koala Conservation SPRP) and their somewhat controversial effect on property owners in SEQ

February 2010

Background

Last year, the South East Queensland Regional Plan 2009-2031 (**SEQRP**), painted a very bleak picture for the mortality of the koala population in South East Queensland (**SEQ**). Studies underpinning the SEQRP show an alarming decline in population rates over the past 10 years. This is due largely to habitat loss and fragmentation and high rates of deaths from cars, domestic dogs and disease, near urban areas.

As a result, the Queensland government has moved quickly to create a koala response strategy in order to conserve and recover koala populations in SEQ. This strategy aims to increase the current extent of mature and actively regenerating koala habitat by 2020. Additionally, the goals of the koala strategy will also be to:

- ensure adequate connectivity between major populations to allow for genetic exchange;
- apply measures that address the different circumstances of each habitat strata and the role they can play in ensuring long-term koala viability;
- focus priority actions in the first 5 years of the SEQRP to address the decline of the most at-risk populations.

Koala conservation in South East Queensland

There have been a significant number of State planning instruments regarding the preservation of koalas in SEQ in the past decade or so.

The first was State Planning Policy 1/97 Conservation of Koalas in the Koala Coast 1.0 (**SPP 1/97**). SPP 1/97 ceased to have effect on 31 January 2005, when it was repealed and replaced by State Planning Policy 1/05: Conservation of Koalas in SEQ (**SPP 1/05**) on 1 February 2005. SPP 1/05 was repealed on 8 July 2005 and was superseded by the provisions in the South East Queensland Regional Plan 2005-2026 (**2005 SEQRP**). The 2005 SEQRP was supported by the Nature Conservation (Koala) Conservation Plan 2006 and Management Program 2006-2016 (**Koala Conservation Plan**). The Koala Conservation Plan remains in force and is accompanied by the draft South East Queensland Koala State Planning Regulatory Provisions and regulatory maps (**draft SEQ Koala SPRP**), which came into effect on 12 December 2008. The draft SEQ Koala SPRP applies to development within the Urban Footprint in SEQ.

On 1 July 2009, the Queensland government finalised the draft SEQ Koala SPRP (**SEQ Koala SPRP**). The SEQ Koala SPRP was subsequently amended on 2 November 2009 (meaning it is now again referred to as the draft SEQ Koala SPRP) in order to introduce new bushland protection provisions to stop bushland being cleared. The amendments aim to ensure that the draft Koala Conservation SPRP is not undermined by pre-emptive clearing before it takes effect.

Draft SEQ Koala SPRP

The draft SEQ Koala SPRP is currently in effect until it is replaced by the commencement of the State government's latest koala planning instruments, being the draft SPP and the draft Koala Conservation SPRP.

The draft SEQ Koala SPRP provides assessment criteria for development in a protected koala bushland habitat area and development in an interim koala habitat protection area as identified on the draft SEQ Koala SPRP mapping.

Schedule 7, table 2, item 38 of the *Sustainable Planning Regulation 2009* also has the effect of making the Environmental Protection Agency a concurrence agency for development in an interim koala habitat protection area to which the draft SEQ Koala SPRP apply.

This obviously has a significant effect on development in these areas; however, the identification of protected koala bushland habitat areas and interim koala habitat protection areas is not as extensive as the new designations and consequential assessment criteria under the new draft SPP and draft Koala Conservation SPRP.

New koala planning Instruments

South East Queensland Regional Plan 2009-2031

The SEQRP identifies a serious State government commitment to koala conservation. Section 2.2 of the SEQRP requires that a State Planning Policy for koala conservation be prepared and framed to minimise the impact of development on koala habitat. The SEQRP provides that the State Planning Policy will contain the following:

- a statutory map that identifies different categories of koala habitat areas across the region;
- policies to inform local government planning schemes and other planning documents;
- codes for development assessment purposes.

The SEQRP also provides that the State Planning Policy will require the provision of an offset where new development in a koala habitat area will have unavoidable impacts on koalas. Offset contributions will be used to:

- acquire additional koala bushland;
- rehabilitate potential koala bushland habitat areas outside the urban footprint;
- implement measures that will reduce koala deaths in urbanised areas and along transport corridors.

The draft SPP has been drafted in accordance with section 2.2 of the SEQRP and was released by the Department of Environment and Resource Management and the Department of Infrastructure and Planning in late December 2009.

Draft SPP

Background

The draft SPP is the first step in the Queensland government's aggressive new approach to koala conservation in SEQ. Together with the draft Koala Conservation SPRP, the instruments aim to provide an integrated landscape strategy to maintain vital koala habitat and provide for more compatible development where it proceeds within koala population areas. The instruments provide a comprehensive planning and assessment framework under Queensland planning legislation and will regulate new development at the development assessment stage.

The draft SPP is currently not in force but has been released for public consultation until 28 February 2010. If adopted, it will come into force after 28 February 2010. The draft SPP will replace all previous State government instruments that relate to the State's interest in koala conservation and it will drive the land-use planning direction in the South East Queensland Koala Protection Area (**SEQKPA**). The SEQKPA is an area within the boundaries of an identified local government. The local government areas that have been identified in the draft SPP as being within the SEQKPA are as follows:

- Sunshine Coast Regional Council;
- Moreton Bay Regional Council;
- Brisbane City Council;
- Redland City Council;
- Logan City Council;
- Ipswich City Council;
- Gold Coast City Council.

The draft SPP largely reflects the principle and the interim policies in section 2.2 of the SEQ Regional Plan and it is supported by the draft South East Queensland Koala Conservation State Planning Policy Guideline, which was released in mid February 2010. When adopted, the draft SPP will become a statutory instrument under the *Sustainable Planning Act 2009* (**SPA**).

Desired outcome

The draft SPP seeks to ensure viable populations of koalas continue in the SEQ region, in particular within the urban footprint area. This outcome will be sought by requiring development to:

- contribute to an increase in mature and actively regenerating habitat across SEQ by 2020; and
- protect identified koala habitat from habitat destruction and overall net loss as a result of development; and
- protect and conserve koala habitat, including areas suitable for rehabilitation, at the earliest stage in planning processes; and

- minimise the impact of new development on koala populations and koala habitat.

Implementing the draft SPP

The policy intent of the draft SPP will be reflected in local government planning schemes and other relevant local planning instruments.

Development to which the draft SPP applies

The draft SPP applies to the SEQKPA and requires that the development assessment provisions for koala conservation within the SEQKPA (which are provided in the draft Koala Conservation SPRP) are to be incorporated into local government planning instruments.

The draft SPP also identifies areas of land in the SEQKPA as being in a Koala PIanned Area (**KPA**) and also a Priority Koala Management Area (**PKMA**). The draft SPP also provides specifically for the maintenance or enhancement of Koala Habitat Values.

Koala Planning Areas

A KPA is an area of land mapped by the Queensland government as a KPA. There are three KPAs; KPA 1, KPA 2 and KPA 3. The intents for the KPAs in the draft SPP are as follows :

Koala Planning Area 1 (KPA 1)

Extensive areas of koala habitat in South East Queensland are protected and retained for koala conservation and koala habitat protection outcomes, whilst recognising land use purposes that are compatible with these outcomes. Land use purposes that are generally compatible with koala conservation outcomes are those with a conservation intent, open space intent, rural intent or rural residential intent.

The priorities for this area are:

- the protection of bushland habitat and high value and medium value rehabilitation habitats from urban development;
- the restoration and rehabilitation of high value and medium value rehabilitation habitats to bushland status; and
- contribute to an increase in koala habitat in the SEQKPA.

Koala Planning Area 2 (KPA 2)

To the greatest possible extent, of areas of important koala habitat (that do not meet the requirements of KPA1) within the urban footprint of South East Queensland are conserved whilst recognising the necessity of development.

The priorities for this area are:

- to minimise development pressure on areas of high value, medium value and low value bushland habitats and high value and medium value rehabilitation habitats from development; and
- the protection of existing koala habitat connectivity within the urban matrix.

Koala Planning Area 3 (KPA 3)

Provide for safe koala movement through areas that are either:

- significantly fragmented habitat; or
- subject to existing development at high urban densities.

The priorities for this area are:

- the protection of existing koala habitat connectivity within urban areas.

Priority Koala Management Area

A PKMA is an area that is identified as such in the KPA maps and is an area known to have koala populations under immediate threat of extinction and as such, stronger planning controls for development are required. There are two PKMAs identified in the mapping; Koala Coast, encompassing portions of Brisbane City, Logan City and Redland City; and Pine Rivers.

These designations attract significant development requirements under the draft Koala Conservation SPRP which will be considered below.

Koala habitat value mapping

Additionally, in December 2009, the Queensland government released mapping for the designation of koala habitat values. These maps identify certain areas of land within three different categories, being Bushland Habitat, Suitable for Rehabilitation and Other Areas of Value. In a number of SEQ local government areas, where the State identified koalas to be under a serious threat of extinction, such as the Sunshine Coast Regional Council, Moreton Bay Regional Council, Brisbane City Council, Redland City Council, Logan City Council, Ipswich City

Council and Gold Coast City Council, the State has further ranked the habitat in each category as High, Medium and Low value. This koala habitat mapping has been used to inform the mapping underpinning the draft SPP and the draft Koala Conservation SPRP. Generally, areas that have been mapped by the koala habitat mapping as being Bushland Habitat or of high or medium value, will be subject to higher levels of habitat protection by the draft SPP and the draft Koala Conservation SPRP.

Draft Koala Conservation SPRP

Background

The draft Koala Conservation SPRP works in combination with the draft SPP to provide a comprehensive planning and assessment framework for new development. Like the draft SPP, the draft Koala Conservation SPRP is not yet in force and is currently released for public consultation until 28 February 2010. It is anticipated that the draft Koala Conservation SPRP will be adopted and come into force as a final instrument in mid 2010. The draft Koala Conservation SPRP is supported by the draft South East Queensland Koala Conservation State Planning Regulatory Provisions Guideline which was released in mid February 2010.

The draft Koala Conservation SPRP provides assessment criteria for the assessment of development to which the draft Koala Conservation SPRP applies. However, the draft Koala Conservation SPRP only applies to development that is already assessable development under the SPA. The draft Koala Conservation SPRP does not declare development to be assessable development.

Assessment criteria

Division 2 of the draft Koala Conservation SPRP provides assessment triggers for development. Where development does not meet the requirements of development in column 1 of table 1 of the draft Koala Conservation SPRP, the development is subject to the assessment criteria in column 2 of table 1 of the draft Koala Conservation SPRP.

As an example of the impact the draft Koala Conservation SPRP will have on property owners, the assessment criteria for development provides that development must not occur in a KPA1, subject to certain limited exceptions.

Obviously, such a provision has the potential to have huge consequences on land value and can have the effect of sterilising the land from development.

For development not in a KPA1, the assessment criteria in column 2 of table 1 of the draft Koala Conservation SPRP requires compliance with schedule 3. Schedule 3 of the draft Koala Conservation SPRP provides that a development complies with schedule 3 when it includes the mandatory information in annexe 1 and meets the requirements of the code in annexe 2 of the draft Koala Conservation SPRP.

Annexe 1 of the draft Koala Conservation SPRP provides that a development application must contain:

- a site design in the form of a layout plan and a development plan which contains specific koala information such as the koala presence on the land, the type of koala habitat on the land and a map showing likely koala movements; and
- information on how the development application meets each of the relevant code requirements of the code in Annexe 2 of the draft Koala Conservation SPRP.

Annexe 2 of the draft Koala Conservation SPRP provides multiple assessment tables that identify specific outcomes and probable solutions for particular types of development.

Biodiversity Development Offset Areas

The other aspect of the draft Koala Conservation SPRP is that it contains provisions relating to Biodiversity Development Offset Areas (**BDOA**). This process aims to preserve areas where high koala conservation values are under development threat by directing development pressure to more suitable areas, predominantly outside the urban footprint, that have been identified as having relatively low or no koala conservation value.

Prior to the Minister agreeing to approve a BDOA, an applicant must satisfy the Minister that a proposed BDOA:

- meets the criteria for a send site (land proposed for conservation); and
- meets the criteria for a receive site (land proposed for development).

Section 3.2.1 of the draft Koala Conservation SPRP provides the criteria for a send site and for a receive site. The provisions with respect to BDOAs are interesting because they enable the transfer of development potential from one parcel to another, in the interest of habitat conservation. However, this may be cold comfort to those developers that have already spent much time, money and effort in planning for the development of a particular site.

Effect on property owners

The effect of the draft SPP and the draft Koala Conservation SPRP on property owners in SEQ cannot be underestimated. As already mentioned, the assessment requirements in the draft Koala Conservation SPRP have the effect of prohibiting development (subject to certain exceptions) on land within a KPA1, without compensation to the property owner.

The Property Council of Australia (**PCA**) has made a detailed submission to the Minister for Infrastructure and Planning on the draft SPP and the draft Koala Conservation SPRP. The submission by the PCA is highly critical of the new koala instruments, raising a number of concerns on behalf of the development industry including:

- the instruments remove the basic rights of land holders without compensation;
- the instruments will affect some 52,000 hectares, with a large amount of land being effectively removed from the urban footprint;
- the effect of the instruments should be described as a "moratorium on development" in protected koala habitat areas;
- the effect of the instruments will have far reaching implications for the Queensland building and development industry, putting additional strain on the issue of housing affordability, and seriously impeding Queensland's growth and development prospects.

Conclusion

The Queensland government has recently taken an aggressive approach to koala conservation and recovery in SEQ. The draft SPP and draft Koala Conservation SPRP are the first steps in this approach.

The draft SPP and draft Koala Conservation SPRP will replace previous koala planning instruments and if adopted, will come into force after 28 February 2010.

These koala planning instruments create an extensive and strict framework for the planning and assessment of development within koala habitat areas in SEQ. The effect of these instruments on property owners is substantial. The instruments have the potential to strip land of its development potential without compensation to the property owner for any consequential loss of value.

The draft SPP and draft Koala Conservation SPRP have been released for public consultation until 28 February 2010. Therefore, there is only a brief amount of time left to make submissions to the Department of Environment and Resource Management. We recommend that if these instruments affect you for whatever reason, you make a submission to the Department and send a copy to the PCA, so that your interests can be heard before the final instrument is released and comes into force.

Additionally, it is unclear when the final instruments will come into force. However, neither instrument should have retrospective operation and the draft Koala Conservation SPRP specifically excludes development carried out under a development approval for a development application that was made before the commencement of the draft Koala Conservation SPRP. Accordingly, we suggest that it may be prudent to lodge development applications in respect of land affected by the draft SPP and draft Koala Conservation SPRP, particularly for land that is within a KPA1, prior to 28 February 2010.

Injurious affection: Effect of a new planning scheme on market values of land

Samantha Hall | Tom Buckley | Katelin Kennedy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Barns and Barns v Maroochy Shire Council* [2010] QPEC 2 heard before Searles DCJ

March 2010

Case

This case was an appeal by James Thomas Barns and Lynette Joy Barns (**appellants**) concerning a decision of the Maroochy Shire Council (**respondent**) to reject a claim for compensation for the reduction in the value of their land (**land**) as a result of the introduction of a new planning scheme. The basis of the appellants claim was that as a consequence of the introduction of a new strategic plan in May 1996 (**relevant date**) their interest in the land was 'injuriously affected' within the meaning of section 3.5 (Compensation) of the *Local Government (Planning and Environment) Act 1990* (**PEA**).

Facts

In 1975, the appellants purchased the land, some 155ha in area, situated at Monak Road, Webya Downs as an investment for potential future subdivision. The land was heavily vegetated with a mixture of both dryland and wetland vegetation, it was traversed by a number of gully lines and since its acquisition, it was predominately used for forestry activities. Under the 1985 Shire of Maroochy Strategic Plan, the land was zoned Rural A, with approximately 103.6 ha designated as Urban Areas Preferred Dominant Land Uses (**PDLU**) and 51.4 ha designated as Rural Areas PDLU.

In 1996, the respondent introduced a new strategic plan which had the effect of changing the PDLU designation of the appellants' land. There were three main consequences; the majority of the Land was redesignated as Rural or Valued Habitat PDLU, areas in the northern portions of the Land were redesignated as Conservation PDLU and pockets in the eastern end of the Land were redesignated as Agricultural Protection PDLU. This effectively meant that the majority of the land could not be developed or subdivided for urban uses and, as the appellants claimed, significantly affected the market value of the land.

In 2008, an Urban Development Plan (**Covey Plan**) was created based on the highest and best use of the land immediately before the introduction of the 1996 strategic plan. The Covey Plan valued the land at $4.740 million. After the commencement of the 1996 strategic plan, it was agreed the land was only valued at $750,000.

Pursuant to section 3.4 (Effect of new planning scheme on pre-existing applications and approvals) and section 3.5(1) (Compensation) of the PEA, the appellants applied to the respondent for compensation for the reduction in the value of the land. Specifically, they contended that the prohibitions and restrictions imposed by the 1996 Shire of Maroochy Planning Scheme 'injuriously affected' the value of the land. The respondent rejected the appellants' claim for compensation which the appellants appealed to the Queensland Planning and Environment Court (**court**).

The respondent's argument was twofold, firstly that there was a statutory exclusion to the appellants' claim for compensation under sections 3.5(4)(d), 3.5(5) (Compensation) and 4.4(5A) (Assessment of proposed planning scheme amendment) of the PEA and secondly, even if the exclusion did not operate to defeat the claim, the value of the land was not injuriously affected because both the 1985 and 1996 strategic plans, properly construed, were of the same effect in restricting the appellants' ability to rezone the land for urban purposes.

Decision

His Honour, Searles DCJ, rejected the respondent's argument that section 3.5(4)(d) and section 3.5(5) (Compensation) of the PEA operated to defeat the claim, stating that the 1996 strategic plan was not one which, by its operation, prohibited or restricted the use of the land in the relevant sense (urban purposes with supporting uses).

Rather, his Honour stated that the principal issue for determination was ascertaining what a hypothetical prudent purchaser, properly advised, would have paid for the land at the relevant date (the introduction of the 1996 strategic plan), reflecting his assessment of the prospects of obtaining approval for rezoning the land for urban development.

In coming to this conclusion it was accepted by both parties that when considering the market value of the land, a prudent purchaser would take account of the following issues: the relevant provisions of the PEA with respect to rezoning; the advice of qualified experts in the fields of town planning, good quality agricultural land, flora, fauna, traffic, civil engineering and valuation; the attitude of the respondent and the State government departments to the Norfolk Estates rezoning application; and events surrounding and decisions associated with, the approvals obtained for the residential estates of Peregian Springs and Coolum Ridges. Each of these issues were addressed by the court in turn.

Environmental issues

It was argued by the respondent that the Covey Plan failed to acknowledge the significance of the vegetation and habitat existing on the land and additionally, the need to protect those values that was outlined in the 1985 strategic plan. The respondent relied on particular Urban Area PDLU Objectives, including objective 1(d), which provided for the protection and retention of areas with particular physical characteristics. Objective 4, which aimed to ensure that environmentally sensitive and/or conservation areas were not compromised by new urban growth, was also relied on by the respondent. The effect of these objectives was to require the respondent to take into account any impacts upon the environment when it was considering rezoning and development applications.

On this issue, the court found that the evidence presented by the experts for the respondent would be preferable to a prudent purchaser. This evidence demonstrated that at the relevant time, sufficient information existed regarding the values of the land to make it clear that the land was highly constrained with regard to development and that it would have been impossible for the habitat values to be protected to any acceptable level, had the development been implemented as per the Covey Plan. The court considered these issues to be a serious risk to the grant of a development approval for the proposed development.

Peregian Springs and Coolum Ridges approval

It was suggested by the appellants that the existence of the approvals of the Peregian Springs and Coolum Ridges developments would have been relevant to a prudent purchaser as an example of the respondent's approach to urban development applications at the time. The appellants relied on similar aspects of both approvals in their argument, including the high priority of the Peregian Springs and Coolum Ridges land in terms of conservation value, that the Peregian Springs and Coolum Ridges land had a higher biodiversity value than the land, that the development of the Peregian Springs and Coolum Ridges land would have resulted in many of the impacts identified by the experts for the respondent in relation to the land and finally, the lack of dispute among the experts that the Peregian Springs and Coolum Ridges approvals were adequate responses to the environmental constraints of the relevant land.

The respondent stated that although the appellants' reliance on the aspects of the approvals as discussed would have had to be considered and assessed at an appropriate time during the approvals process, the prior approvals would not have had a strong influence on the decision in question. Both approvals occurred prior to 1992, the year which marked a turning point in terms of the importance that was attached to environmental issues.

The court favoured the arguments of the respondent in this issue, finding that the prior approvals would not have offered significant support for an approval over the land at the relevant date, as the approvals predated that date by a significant margin. His Honour concluded that it was clear that environmental considerations were given more weight at the relevant date than at the time of the prior approvals, and therefore the existence of the prior approvals could not be used to mitigate the evidence of the experts regarding the impacts of the development in question on environmental values and considerations.

Norfolk Estates application

The issues which arose from a previous development application over the land (and an additional adjoining area) and the appeal which followed the deemed refusal by the council of that previous development application, was found by the court to be influential in terms of allowing a potential purchaser to determine the likelihood of a development approval being granted over the land. The issues that arose during the Norfolk Estates application demonstrated the growing importance of environmental considerations during the time leading up to the relevant date. Many of the respondents to that appeal and advice agencies cited environmental concerns, and specifically it was found that the Norfolk Estates proposal was contrary to the provisions of the then draft 1996 strategic plan and would have created unacceptable adverse impacts on the environment.

The court held that the circumstances of the Norfolk Estates application and subsequent appeal would have raised concerns in the mind of a prudent purchaser as to whether a development approval over the land would be granted.

Good quality agricultural land

It was argued by the respondent that the Covey Plan development would result in the loss of good quality agricultural land without fulfilling a significant need in the local community. This would have hindered any decision to grant a rezoning over the land due to a 1992 amendment to the PEA. The amendment required the respondent to observe State Planning Policy 1/92 regarding the development and conservation of agricultural land and the subsequent 1993 Planning Guidelines on the identification of good quality agricultural land when deciding a rezoning application.

It was found by the court that a significant amount of good quality agricultural land did exist within the boundaries of the land and that it would be a relevant concern for a prudent purchaser in terms of obtaining development approval, given the requirement of the respondent to have regard to State Planning Policy 1/92 and the 1993 Planning Guidelines.

Planning need

On this issue, the court concluded that any properly advised purchaser would have been advised that 'planning need' was an issue that was required to be taken into account in relation to any rezoning application. The court tended to agree with the respondent's position that there was little evidence of town planning or community need for an amendment to the 1996 strategic plan, to include the appellant's land in the zones contemplated by the proposed development.

This decision of the court was based on expert evidence that suggested that any future residential needs in the area could be met by other considerable lands, such as land around Nambour and Sippy Downs. This was further supported by evidence of the respondent's valuer highlighting a significant reduction in the demand for residential land between 1994 to 1996 in the Maroochy and Noosa Shire areas.

Costs of development

It was suggested that the associated costs of development that would be considered by a prudent purchaser would be the provision and cost of reticulated water supply and sewer and engineering infrastructure. Both the appellants and the respondent submitted experts with differing views on the likely cost of development.

The court favoured the higher cost estimation of the respondent's expert and concluded that a properly advised purchaser would anticipate this higher cost of development so as to account for any contingencies that might occur, despite the possibility of contribution from others and the possibility of headwork credits.

Prematurity / leap frogging

It was argued by the respondent that even though the land could be have been properly serviced with the appropriate infrastructure at the introduction of the 1996 strategic plan, there still remained a real question as to whether those services were needed. Specifically, it argued that the proposed development would have been 'premature' and represented an inefficient extension of infrastructure services.

Some crucial factors raised by the respondent to justify this included the great distance of the land from the then existing urban development in the area, the position of the land at the very edge of the Maroochy Shire and beyond the planned headworks area and the capability of Peregian Springs and Coolum Ridges to meet any reasonably foreseeable need for residential allotments in the future.

Accordingly, the court concluded that a prudent purchaser, properly advised, would consider these factors as seriously mitigating against a successful development approval for the land.

Flooding and drainage and acid sulphate soils

It was acknowledged by the respondent that these would not be significant issues that would preclude development of the land for urban purposes. Accordingly, his Honour concluded that these would not be issues considered by a prudent purchaser that would impede a development approval.

Traffic engineering issues

Both parties accepted that any traffic engineering issues would not have, in themselves, precluded development of the land. Thus it was not considered by the court as a factor that a prudent purchaser would consider in pursuing a development approval for the appellants' land.

Town planning considerations

It was accepted by both parties that a hypothetical prudent purchaser in an assessment of the prospects of obtaining approval for rezoning of the land for urban development, would have regard to all relevant town planning considerations.

The respondent made three primary contentions; the Urban Areas PDLU did not confer any relevant expectation that the land would necessarily be approved for urban or rural development, the proposal to develop the land conflicted with a multitude of Urban Areas Objectives, such as objectives 3(1)d and 4(a), and finally that the development would not represent an orderly development, given the absence of any existing urban development nearby.

This was supported by the respondent's expert witness who was of the view that by having regard to the designation of the land as rural, its environmental qualities, its remote location in respect of other urban designations in the Maroochy Shire, its distance from any appropriate service infrastructure and the absence of any planning need for the land to be developed, a prudent purchaser, properly informed, would have serious concerns about the prospect of development approval being granted for the land.

The court agreed with the respondent's expert witness, favouring the arguments of environmental impact, orderly and proper development, the lack of a planning need and the consolidation of existing urban areas. His Honour went on to conclude that a prudent purchaser would be more likely to accept the opinions of the respondent's expert witness.

Market value of land

The first contentious point on this issue was the method of valuation used to determine the value of the land. The appellants' valuer adopted a 'hypothetical development method of valuation' which they argued was the appropriate method to be used where there was an absence of comparable sales evidence and the land was not developed.

The respondent disagreed with this point, suggesting that the appellants' valuation failed to reflect any of the potential 'risks' associated with the prospect of obtaining rezoning approval. It argued that the 'hypothetical development method of valuation' was completely inappropriate in this case because of the timeframe for development (13 years). It was argued by the respondent's valuer that because there so many subjective judgments made in regard to the value of the land, the further out in time the potential start of that development, the less reliable those subjective assumptions would be.

The respondent's valuer went on to suggest that the demand for lots in the development would be insufficient to achieve a financially viable development and concluded that the land had a value of below zero on a hypothetical development method approach.

The court agreed with the respondent, suggesting that a properly advised prudent purchaser having regard to the appropriateness of the 'hypothetical development method of valuation' and the opinion of the respondent's valuer, would have serious concerns as to the market value of the land. His Honour went on to suggest that the differences in opinion between the appellants' and respondent's valuers would further raise doubt in the mind of a prudent purchaser as to the true value of the land.

Conclusion

In consideration of all of these issues, it was determined by the court that a prudent purchaser, properly advised and faced with the same circumstances as the appellants, would conclude that approval for development of the land for urban residential development immediately before the introduction of the 1996 strategic plan, would not be granted.

Held

The appeal was dismissed.

Building and Other Legislation Amendment Act 2009

Samantha Hall | Anne Hinton | Katelin Kennedy

This article discusses the introduction of the *Building and Other Legislation Amendment Act 2009* and how the provisions of the Act place additional responsibilities on members of the building industry including disclosing more information to buyers to achieve an increased level sustainable development in Queensland

March 2010

New sustainability and transport noise corridor requirements for Queensland

On 1 January 2010, the *Building and Other Legislation Amendment Act 2009* (**Act**) commenced. The provisions of the Act, once in effect, will place new responsibilities on various members of the building industry, including developers and government, to disclose more information to buyers and ensure covenants and body corporate by-laws are valid in order to achieve a greater level of sustainability for housing in Queensland.

Purpose

The purpose of the Act is to promote awareness and encourage the implementation of actions that support sustainable housing.

This purpose is achieved through amending a number of existing Acts. Such amendments will prevent bodies corporate and developers from restricting the use of sustainable building elements and features, and will aim to ensure developments mitigate the impacts of noise in identified transport noise corridors.

"Ban the banners"

The "ban the banners" policy, as it is referred to in the explanatory notes to the *Building and Other Legislation Amendment Bill 2009*, aims to remove restrictions placed on the use of sustainable building elements and features by bodies corporate and developments, thus increasing the sustainable and affordable building options available to a lot or building owner. The policy is given effect through new provisions in chapter 8A, division 2 of the *Building Act 1975* and in the *Body Corporate and Community Management Act 1997*. The result is that new covenants and body corporate by-laws may not restrict owners from using sustainable and affordable features including:

- light roof colours;
- energy efficient windows or window treatments;
- smaller minimum floor areas;
- fewer bedrooms and bathrooms;
- specific finishes and materials for the roof or external walls;
- single car garages;
- appropriately located solar hot water systems; and
- photovoltaic cells on the roof or other external surface.

A covenant or body corporate by-law entered into from 1 January 2010 that proposes to restrict these aspects will be rendered invalid by the new provisions. In addition, all covenants or body corporate by-laws which restrict the installation of solar hot water systems and photovoltaic cells will be invalid, including those made before 1 January 2010.

The amendments still allow bodies corporate some control over the use of sustainable and affordable features, to the extent that the control reduces any adverse impacts on affected neighbours. For example, in the case of roof finishes, a body corporate is able to require low reflectivity finishes where neighbours may be affected by glare.

The practical effect of the introduction of the new provisions is that developers and bodies corporate will need to consider and revise existing terms, covenants and by-laws to ensure that compliance with the new provisions is achieved. However, developers and bodies corporate should be aware that the existing covenants and by-laws may require further review in the not too distant future. Following consistent and continued lobbying of the Queensland Government by the property industry, the Minister for Infrastructure and Planning has recently announced that the Queensland government intends to revise the "Ban the Banners" legislation as it relates to building covenants. The Minister has acknowledged that the scope and impact of the legislation was greater than was originally intended, and that the implementation of all of the requirements detailed in the legislation may have a detrimental effect on the property sector, and consequently hamper the resurgence of confidence in the property sector. The Property Council of Australia has submitted that the only restrictions on covenants and body corporate by-laws that should be included in the amended legislation should relate to sensible sustainable housing features (including light coloured roofs (non-reflective), solar hot water and solar panels).

Transport noise corridors

The Act also aims to mitigate the impacts of noise in identified transport noise corridors and streamline the time and cost involved in gaining approval for building work over a lot located close to either a local government road or a State-controlled road. These provisions are to commence upon proclamation and are not yet in effect.

The introduction of chapter 8B into the *Building Act 1975* supports the implementation of a new part of the Queensland development code to improve the process of mitigating the impacts of noise in transport corridors, resulting in a process which is less resource intensive than the previous system of statutory covenants between the Department of Transport, the Department of Main Roads and the relevant property owner.

The amendments will enable the clear identification of those areas of land that are transport noise corridors, to which the relevant building assessment provisions apply. Generally, land within 100 metres in any horizontal direction from the edge of either a local government road, a State-controlled road or railway land, will be designated as a transport noise corridor. Additional variables, such as vehicle speed, pavement type, topography or a higher proportion of heavy vehicles, may increase the area designated as a transport noise corridor. The *Building Act 1975* will require the relevant local government to include a reference to the transport noise corridor in its planning scheme and to notify the chief executive of the designation. Similar notification provisions exist with regard to State-controlled roads or railway lines, including notification being given to the relevant local government in whose area the transport noise corridor is situated.

Conclusions

The provisions of the Act facilitate the achievement of a greater level of sustainability for development in Queensland, which many in the development sector consider to have some significant detrimental impacts upon the property industry. We will have to await the government's net steps in respect of its announced review of these provisions, to see to what extent the sustainability principles are retained in the Act. Less controversially, the provisions of the Act also ensure that buyers are more informed about the impacts of surrounding infrastructure on their land. Given the many infrastructure projects that are being undertaken across the State, these provisions will certainly be welcomed by buyers, however, their effects upon property values of land affected by the transport noise corridors will remain to be seen.

Misdescription not fatal to development application

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Crossan v Central Highlands Regional Council & Ors* [2010] QPEC 10 heard before Rackemann DCJ

March 2010

Case

This was an application for determination of preliminary points in relation to an appeal by Crossan (**appellant**) against a decision of the Central Highlands Regional Council (**council**) to refuse a development application for a preliminary approval to override the planning scheme and for a development permit for reconfiguring a lot.

Facts

The appellant lodged a development application with the council for a preliminary approval to override the planning scheme under section 3.1.6 (Preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997* (**IPA**) and for a development permit for reconfiguring a lot.

The council asserted that the development application for a preliminary approval to override the planning scheme (**development application**) was not of a kind which could be made under the IPA and that the council was wrong to accept and decide it for the following reasons:

- the development application did not identify any development for which a preliminary approval was sought; and
- the development application sought a variation to the scheme of a kind not recognised by the IPA.

The council also submitted that given the development application was of a kind which could not be made under the IPA, the development application for a development permit for reconfiguring a lot consequently fell, as it relied upon the granting of the preliminary approval.

Decision

The development application

In the IDAS forms submitted to the council, the applicant described the development application as a "Change of land use and subdivision". The master plan submitted with the development application showed an indicative road and subdivision layout and described the proposed uses for various precincts within the development.

The proposed uses applied for were further described in the consultant's planning report and a plan of development which accompanied the development application.

The consultant's report also set out amended tables of assessable development for the commercial precinct and the residential accommodation precinct against which future applications for development permits for those uses could be assessed.

Nature of section 3.1.6 preliminary approval

His Honour Judge Rackemann referred to the introduction of provisions under the IPA for an application for preliminary approval to override the local planning instrument which replaced applications for rezoning that were made prior to the IPA.

His Honour referred to the explanatory notes to section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA, as it was initially enacted, which contemplated the use of that provision to obtain approval for a development which indicated broad land use intentions.

His Honour went on to state that the explanatory note to section 3.1.5 (Approvals under this Act) of the IPA, as it was amended by the *Integrated Planning and Other Legislation Amendment Act 2003*, referred to approval of development as a concept, rather than nominating a particular form of development specifically defined under the planning scheme as assessable development.

The explanatory notes to section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA, as amended by the *Integrated Planning and Other Legislation Amendment Act 2003*, also referred to the preliminary approval process as it related to larger 'conceptual' approvals. The explanatory notes relevantly stated as follows:

For example, a preliminary approval for a material change of use for 'master plan community' may vary assessment requirements that will include codes for building work associated with the material change of use (e.g. for building height, bulk or density), or associated reconfiguration (e.g. through lot size or other characteristics).

His Honour Judge Rackemann held that a development application for a preliminary approval does not have to describe the material change of use for which preliminary approval is sought, by reference to terms defined in the planning scheme.

His Honour held that the development application was a competent application for a preliminary approval under section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA, as it ascribed intents to precincts and went on to give descriptions of the use proposed for each precinct.

Description of the development application

The development application was described in the application material as an application to rezone the land, rather than as being for a preliminary approval for the uses described in the master plan, together with a request to vary the effect of a planning scheme.

His Honour held that whilst the rezoning description in the application material was wrong, the application documents were to be construed as a whole and objectively.

His Honour distinguished the case of *Lagoon Gardens Pty Ltd v Whitsunday Regional Council & Ors* [2009] QPEC 66, which concerned an application for a development permit which was held to be too uncertain or ambiguous to qualify as an application for development.

His Honour noted that an application for preliminary approval to override the planning scheme is distinguishable from a development permit, as it is not limited to assessable development and does not authorise assessable development to occur.

Further, his Honour concluded that it was evident from the material that what was being sought was a preliminary approval under section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA.

To the extent that the misdescription of the development application in the application documents caused any non-compliance with the requirements of section 3.2.1 (Applying for development approval) of the IPA, and to the extent that those defects were not otherwise cured by the council's acceptance of the development application, his Honour was prepared to exercise the court's discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA, to excuse any non-compliance.

His Honour reached the same conclusion in relation to the public notification of the development application. His Honour held that whilst the description of the development application was literally wrong, it was unlikely to have materially misled anyone viewing the development application as to the nature of the application.

Held

To the extent that the requirements of section 3.2.1 (Applying for development approval) of the IPA were not complied with, the court exercised its discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA to excuse any non-compliance. On that basis, the court held that the development application was an application under section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA.

Application to remove statutory stay

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Coles Group Property Development Limited v Sunshine Coast Regional Council and Chief Executive, Department of Transport and Main Roads* [2010] QPEC 9 heard before Robin QC DCJ

March 2010

Case

This case involved an originating application made pursuant to division 2 (Changing approvals – request for change after applicant's appeal period ends) of part 8 (Dealing with decision notices and approvals) of chapter 6 (Integrated development assessment system (**IDAS**)) of the *Sustainable Planning Act 2009* (**SPA**).

The originating application was to change a development approval in the court order for *The Heilbronn Group v Maroochy Shire Council* (P&E Appeal No. BD1675 of 2004) in relation to a local shopping centre at Coolum. The court's order approved a supermarket of up to 2,500m^2. IGA, the original supermarket operator located for the development, was only interested in a much smaller store, so was to vacate the centre and Coles Group Property Development Limited (**applicant**) was interested in moving in on the basis of a supermarket of the size envisaged in the court's order. In association with the establishment of a larger supermarket, some changes to the development application and the conditions in the court's order were desired by the applicant.

Facts

Robin QC DCJ described the requested changes as minor from any point of view and certainly "permissible" within section 367 (Whit is a permissible change for a development approval) of the SPA in that they could not possibly be seen as resulting in a substantially different development. However, section 374(1)(c) (Responsible entity to assess request) of the SPA required the court, 'to the extent relevant', to assess the request to change the existing approval and conditions, having regard to submissions that were made about the development application. Unfortunately, of the six folders or boxes constituting the Sunshine Coast Regional Council's (**respondent**) file on the development application, two folders or boxes were missing and the submissions that were made about the development application were contained in those two missing folders or boxes.

His Honour Judge Rackemann had adjourned a previous hearing of the originating application because of the unavailability of the submissions which were made during the public notification process in 2002.

The court did, however, have the advantage of access to the respondent's internal planning report which contained not only a summary of the submissions but also a detailed list of the grounds of the submissions and the planning officer's response to each ground, with the overall response being that the grounds of submission did not stand in the way of the development application being supported. Robin QC DCJ noted that considerable experience over the years had shown that such planning reports are comprehensive and reliable.

Decision

Robin QC DCJ stated that a commonsense practical approach had to be taken to situations such as the present, that the SPA called on the court to advance the SPA's purpose which included ensuring that decision-making processes are accountable, coordinated, effective and efficient and that further adjournment would best be avoided.

Robin QC DCJ referred to *Gaven Developments Pty Ltd v Scenic Rim Regional Council* [2009] QPEC 119 in which the court faced a similar task as with this case and noted that the court was prepared to proceed on the basis of a large representative selection of submissions.

Robin QC DCJ was satisfied that he was in a position to consider the submissions by reference to the respondent's internal planning report (which there was no reason to doubt) and stated, to the extent relevant, that such consideration did not dissuade him from granting the relief sought. In Robin's QC DCJ opinion, proceeding in that way did not offend the letter or spirit of section 374(1)(c) (Responsible entity to assess request) of the SPA nor did the process referred to offend the corresponding provisions in the now repealed *Integrated Planning Act 1997*. In Robin's QC DCJ opinion a practical, commonsense approach may on appropriate occasions be taken by the court, rather than a full and exhaustive approach.

Held

The court made an order in the terms of the initialled draft granting the originating application to change the development approval and conditions in the court's order in P&E Appeal No. BD1675 of 2004.

Requirements in serving a notice of appeal

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Northeast Business Park Pty Ltd v Moreton Bay Regional Council & Anor* [2010] QPEC 15 heard before Rackemann DCJ

March 2010

Case

This was a preliminary points hearing in two appeals regarding the requirement to give notice of the appeals to the principal submitters in accordance with the provisions of the *Integrated Planning Act 1997* (**IPA**).

Facts

Northeast Business Park Pty Ltd (**appellant**) filed appeals against the decisions of the Moreton Bay Regional Council (**council**) in respect of two development applications at Caboolture.

In the course of serving a copy of the notices of appeal on the principal submitters, letters were sent to the principal submitters attaching the notices of appeal and stating:

> *We enclose, by way of service, a copy of two (2) Notices of Appeal filed in the Planning and Environment Court today.*

The respondents raised as an issue whether the appellant had complied with section 4.1.41(3)(b) (Notice of appeal to other parties) of the IPA in giving notice of the appeals to the principal submitters, in that notice was not given to the principal submitters stating that they had 10 business days to elect to become a co-respondent by filing a notice of election in the approved form.

Section 4.1.41(3) (Notice of appeal to other parties) of the IPA provides that in giving notice of the appeal to other parties:

> *"(3) The notice must state—*
>
> *(a) the grounds of the appeal; and*
>
> *(b) if the person given the notice is not the respondent or a co-respondent under section 4.1.43—that the person may, within 10 business days after the notice is given, elect to become a co-respondent to the appeal by filing in the court a notice of election in the approved form."*

Decision

His Honour Judge Rackemann stated that the form prescribed for a notice of appeal includes a note at the end of the notice of appeal which informs a person who might be entitled to elect to join the appeal as to what they must do to elect to join as a party to the appeal.

His Honour though stated that the note at the end of a notice of appeal is not intended to inform a person as to whether they have the entitlement to elect to become a party to the appeal. This notification is intended to be given by the Appellant pursuant to section 4.1.41 (Notice of appeal to other parties) of the IPA.

Held

The court held that service of the notice of the appeal to the principal submitters was not sufficient and ordered the appellant to give to each person who was entitled to receive such a notice, save for the co-respondent written notice stating:

- the grounds of the appeal; and
- in that notice, state the entitlement to elect to become a respondent to the appeal.

Court exercises discretion to return development application to public notification

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Walker v Logan City Council* [2010] QPEC 8 heard before Robin QC DCJ

March 2010

Case

This was an application to the Planning and Environment Court in Brisbane to exercise its discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the *Integrated Planning Act 1997* (**IPA**) to return a development application back to the public notification stage of the IDAS process due to the fact that public notification of the development application had been completely overlooked.

Facts

The development application in this case required public notification in accordance with section 3.4.4 (Public notice of applications to be given) of the IPA.

Due to significant changes in the personnel of the applicant's agent, who had carriage of the development application, public notification was overlooked completely and was not carried out.

Accordingly, the Logan City Council (**council**) advised the applicant that the development application had lapsed pursuant to section 3.2.12(1) (Applications lapse in certain circumstances) of the IPA, in that 20 business days had elapsed since the applicant was entitled to commence public notification of the development application. However, the council was supportive of the relief sought in this case.

The effect of these circumstances meant that the applicant would have to lodge a new development application if relief was not granted by the court.

Decision

His Honour held that to send the development application back to the public notification stage of the IDAS process would be in accordance with "every commonsense and practical consideration" in the circumstances.

His Honour considered the case of *Coolum Properties Pty Ltd v Maroochy Shire Council* [2006] QPEC 31, in which public notification was commenced late. In that case, Judge Dodds found it difficult to see "that what has occurred has in any way restricted the opportunity for a person to exercise the rights conferred on the person by IPA or any other Act". His Honour found this case to be distinguishable given that the public were not given any opportunity to make submissions.

In his finding that the court had jurisdiction under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA to return the development application to the public notification stage, his Honour stated "I don't think it's unduly straining things to say that the condition of the court having jurisdiction to grant leave under section 4.1.5A quoted by Judge Dodds is met".

His Honour also provided that it was of assistance to the application that the council was supportive of the relief sought.

Held

Relief pursuant to section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA was granted to the applicant and it was ordered that the development application be returned to the public notification stage of the IDAS process.

Fibre deployment for new developments

Samantha Hall | Matthew Soden-Taylor

This article discusses *Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010* in accordance with the Commonwealth Government's decision to establish a National Broadband Network

March 2010

Background

On 7 April 2009, the Commonwealth government announced its decision to establish a new National Broadband Network (**NBN**) with the objective of connecting up to 90 percent of all homes, schools and workplaces with fibre based broadband services within Australia.

On 18 March 2010, the Commonwealth government took another step in achieving the NBN by introducing the *Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010*. The Bill amends the *Telecommunications Act 1997* to provide a legislative framework for installing superfast fibre based infrastructure in new developments across Australia.

Facts

The Bill provides a legislative framework to allow the Minister to put in place, through subordinate legislation, detailed arrangements for optical fibre and fibre ready facilities to be installed in new developments.

In the Bill's second reading speech, it was identified that the implementation of the fibre deployment will have two limbs. The first is that where the immediate installation of optic fibre is not mandated, there will be an obligation to install fibre ready infrastructure. The second is that the obligations in the Bill will be triggered, only if the planning process has reached a prescribed stage. This will be identified in subordinate legislation. The subordinate legislation will also identify whether fibre or fibre ready requirements apply to a particular development.

Failure to meet the requirements in the Bill relating to fibre and fibre ready installation, will attract civil penalties under the *Telecommunications Act 1997*.

Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, highlighted the importance of the Bill by saying that "high speed broadband is becoming a critical utility service like water, electricity and gas".

The effect of the Bill can be summed up in the following paragraph which is contained in the Bill's second reading speech:

> *The Bill will help residents and businesses in new development access the most up to date telecommunications services. It is a key complement to the Government's historic National Broadband Network. As such the Bill will play an important role in helping us prepare Australian homes, workplaces, schools and other premises for the high-speed online digital world of today and the future.*

Can the currency period of a lapsed development approval be extended?

Samantha Hall | Anne Hinton

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Zenmak Pty Ltd and Christopher Zenonos v Moreton Bay Regional Council* [2010] QPEC 013 heard before Robin QC DCJ

April 2010

Case

This was an appeal by Zenmak Pty Ltd and Christopher Zenonos (**appellant**) against the Moreton Bay Regional Council's (**council**) refusal of its request for an extension of the currency period of a development approval for a period of 12 months (**request**). The request was made after the development approval had lapsed. The appellant sought, among others, the following orders from the court with respect to the conduct of the appeal:

- an order pursuant to section 4.1.55 (Court may allow longer period to take an action) of the *Integrated Planning Act 1997* (**IPA**) that the time for lodging the notice of appeal be extended;
- an order pursuant to section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA that the period for the lodgement of the request be extended.

Facts

The appellant purchased land (**land**), the subject of a development approval. The currency period of the development approval subsequently lapsed on 11 May 2009, and at this time no substantial steps had been taken by the appellant to commence the approved development. At the time the appeal was heard, the appellant was in negotiations with a potential purchaser for the sale of the land.

On 7 September 2009, the appellant made the request to the council. By letter of 23 September 2009, the council advised the appellant that there was no provision within the IPA to allow the council to reinstate the approval once it had lapsed, and therefore the request was unable to be processed.

Through its solicitors, the appellant subsequently requested that the council formally provide notice refusing the request, so that the appellant could proceed to appeal the decision of the council under section 4.1.30(1)(a) (Appeals for matters arising after approval given (co-respondents)) of the IPA, and apply to the court to act under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA to excuse the failure of the appellant to comply with the IPA requirement to lodge the request during the currency of the relevant development approval. Such relief had been granted by the court in similar circumstances in the decision of *Brisbane Land Pty Ltd v Pine Rivers Shire Council* [2007] QPEC 126. The council advised that its letter dated 23 September 2009 should be sufficient for the appellant to commence proceedings to seek relief from the court under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA. However, by this stage it was too late for the Appellant to file a timely appeal against the council's decision.

Decision

Section 4.1.55

Judge Robin QC, DCJ took the view that the circumstances of the appellant in this case were sufficient to justify the court's acting under section 4.1.55 (Court may allow longer period to take an action) of the IPA. The matters taken into consideration by Judge Robin QC, DCJ, aside from the arguable inadequacy of the "written notice" required from the council, included the following:

- the development proposal was an impact assessable one which went through public notification attracting no submissions. If the appellant had to start over again with the development application process, this would likely be prejudicial to the appellant's negotiations with the potential purchaser;
- material before the court confirmed that the council regarded the development as a suitable one for the area and the council would raise no objection should the appellant seek a declaration to grant a further extension of time.

Section 4.1.5A

Judge Robin QC, DCJ held that the section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA relief should be granted on the same basis as it was in the Brisbane land case (in which case the council was supportive of the development and where the court held that a step that must be taken to prevent the lapsing of an application or approval may properly be seen as a "requirement" of the Act and sufficient for the purposes of section 4.1.5A (How court may deal with matters involving substantial compliance)), and given that public notification of the "suitable" proposal had occurred, and no "opportunity" referred to in section 4.1.5A(1)(b) (How court may deal with matters involving substantial compliance) of the IPA had been restricted.

Held

The court held that given the council's approach to this matter, the appeal was to be allowed.

Where renovations affect traditional pre-1946 building character

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hearne v Brisbane City Council* [2010] QPEC 16 heard before Searles DCJ

April 2010

Case

This was an appeal against the deemed refusal by the Brisbane City Council (**council**) of a development application to demolish a pre-1946 house.

Facts

Brian Wayne Hearne (**appellant**) filed an appeal against the deemed refusal by the council of a development application for a material change of use, namely to demolish a pre-1946 house constructed at Norman Park. The house was situated within the Demolition Control Precinct and allocated to the Character Residential Area within the *Brisbane City Plan 2000* (**City Plan**).

Issues raised by the council, were that the development application:

- did not achieve the performance criteria and did not comply with the acceptable solutions of the demolition code of the City Plan;
- was contrary to the purpose of the demolition code.

Decision

In determining the appeal, the relevant question for the court was:

> *Does the property currently represent traditional building character within P1 of the Performance Criteria?*

The court considered the evidence of the appellant's expert that although the house had pre-1946 origins, the extent of the 19 alterations to the property were such that the property was no longer representative of a traditional character house with a central core and attached verandahs. Furthermore, the alterations had deprived it of its classification as a traditional character house under the City Plan.

The council's expert's view was that the building clearly represented the "timber and tin" traditional building character that was sought to be protected by the City Plan and that the building was a representative example of the bungalow class of traditional house styles and could be identified as such from the combination of architectural characteristics.

Also relevant in the appeal was that that council's urban planner and team architect, in assessing the appellant's development application, formed the view that the property had been substantially altered and no longer had the appearance of being constructed in or prior to 1946.

Judge Searles found that the building did not represent traditional building character as a result of the substantial alterations it had been subjected to over the years. In his view, the house no longer enjoyed the appearance of a pre-1946 house.

Held

The appeal was allowed.

Minor change – substantially different development

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Heritage Properties Pty Ltd & Ausbuild Pty Ltd v Redland City Council & Ors* [2010] QPEC 19 heard before Rackemann DCJ

April 2010

Case

This was an application for determination of a preliminary point in relation to an appeal against the Redland City Council's (**council**) deemed refusal of a development application which sought a preliminary approval for a material change of use for residential development and development permits for stages 1a and 1b of a proposed six stage residential development.

Facts

The matter for determination by the court was whether an amended plan represented a minor change. The changes which were the focus of the appeal were in relation to the internal road connections, being:

- a future road connection across adjoining land between stages 1a and 1b of the proposed development owned by Mr and Mrs Doek (**Doek property**); and
- internal driveways giving access to the rear of the lots owned by the fourth and fifth co-respondents by election.

The appeal was made under the repealed *Integrated Planning Act 1997* (**IPA**). Section 4.1.52(2) (Appeal by way of hearing anew) of the IPA provides that the court must not consider a change to a development application the subject of an appeal, unless the change is only a minor change.

Section 821 (Application of repealed IPA, s 4.1.52) of the *Sustainable Planning Act 2009* (**SPA**) provides that a reference to "minor change" in repealed IPA section 4.1.52(2) (Appeal by way of hearing anew) is a reference to minor change as defined under section 350 (Meaning of minor change) of the SPA.

For the purpose of the appeal, the debate was whether the change to the development application resulted in a substantially different development under section 350(1)(d)(i) (Meaning of minor change) of the SPA.

Decision

His Honour referred to Statutory Guideline 6/09 Substantially different development when changing applications and approvals which provides a list of changes which may result in a substantially different development. The list is not intended to be exhaustive and is only a list of changes which "may" result in a substantially different development.

His Honour accepted that the proposed connection across the Doek property made the achievement of a future internal connection less certain. However, as the internal connection road was to be provided in stage 6, whether the connection could be achieved was a matter relevant to the granting of development permits for future stages of the development and did not bear upon the change to the development application relating to stages 1a and 1b.

His Honour stated that the changed proposal did not introduce any new or additional impact upon the fourth or fifth co-respondents by election by providing access to the rear of their lots. Whilst the change could result in the Department of Main Roads denying access to Cleveland-Redland Bay Road, the change itself did not propose any closure of the main road access.

Held

It was held that the change to the development application did not involve any of the matters listed in Statutory Guideline 06/09 and, as a matter of fact and degree, it did not represent a substantially different form of development.

Owner's consent not required with benefit of easement

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Eames v Brisbane City Council* [2010] QPEC 14 heard before Rackemann DCJ

April 2010

Case

This case related to the determination of a jurisdictional point at a preliminary stage in a submitter appeal to the Planning and Environment Court in Brisbane against the Brisbane City Council's approval of a multi-unit development at Coronation Drive, Toowong.

The issue before the court was whether owner's consent was required for the development application, where the development had the benefit of an easement. The question was whether there was any inconsistency with the terms of the easement.

Facts

The proposed development was to obtain sole access to the development land from a neighbouring lot. The development land had the benefit of an easement from the neighbouring lot for the purpose of gaining access to and from the development land.

It was argued by the appellant that the development application was not a properly made application because owner's consent of the relevant neighbouring lot was not obtained. The respondent and co-respondent argued that pursuant to section 3.2.1(12) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**), where the development land had the benefit of an easement, and the proposed development was not inconsistent with the terms of the easement, the consent of the owner of the servient tenement was not required.

It was argued by the appellant that the material change of use the subject of the proposed development included waste disposal and the method of collection of waste was inconsistent with the terms of the easement which was for access only.

Decision

In determining whether the collection of refuse was part of the use of the proposed development, his Honour found that the activity of rubbish vehicles entering on the land, stopping and collecting the rubbish was an activity that already happened and was not a function of the material change in the scale or intensity of the use the subject of the development application.

Therefore, his Honour held that the point of inconsistency with the easement was not something generated by the material change of use. The development was therefore consistent with the easement in respect of access.

His Honour noted that the court did not in any way lend itself to an entrenchment of an illegality (inconsistency with the terms of the easement) and noted that the parties were free to enforce the rights and obligations under the easement.

Held

It was held that there was no inconsistency between the proposed development and the terms of the easement. Therefore, owner's consent was not required and the jurisdictional point was determined in favour of the co-respondent.

Protecting land for public recreation. The introduction of the draft Queensland Greenspace Strategy

Samantha Hall | Matthew Soden-Taylor

This article discusses the release of the Queensland Government's draft Greenspace Strategy which aims to successfully deliver the Greenspace Strategy and the green ambition identified in *Toward Q2: Tomorrow's Queensland*

April 2010

State government's vision to protect greenspace land

In September 2008, the Queensland government released its vision in *Toward Q2: Tomorrow's Queensland* which provided a green ambition to achieve a State-wide target to protect 50 percent more land for nature conservation and public recreation by 2020 (**green ambition**).

In March 2010, the Queensland government released its draft Queensland Greenspace Strategy for public comment (**draft Greenspace Strategy**). The draft Greenspace Strategy aims to support the delivery of the green ambition to protect land for nature conservation and public recreation.

The draft Greenspace Strategy focuses on expanding land used for public recreation and aims to deliver a strategy that will achieve the green ambition by the following measures:

- introducing better planning processes;
- investigating the potential to use surplus State-owned land as green space;
- designating additional green space in urban areas;
- removing arbitrary barriers that limit public access to State-owned land; and
- encouraging recreation opportunities on private land.[1]

The draft Greenspace Strategy indicates that the Greenspace Strategy will provide a framework for the establishment of an integrated high quality green space network to meet community needs in growth areas.

According to the draft Greenspace Strategy, the Greenspace Strategy will deliver a green space network which includes:

- parks for outdoor/public recreation activities needing large areas;
- expansion of the existing regional trails program;
- corridors which link parcels of existing green space; and
- parks to serve the needs of local neighbourhoods.[2]

Mandatory greenspace in new developments

As part of the Greenspace Strategy, the State government will mandate parklands in all new developments. This will affect developers given that such a requirement on development will limit the portion of land that can be privately used. In practice, this will affect the lot yield for land that is being reconfigured.

The draft Greenspace Strategy addresses this issue by providing that it will be vital that future urban developments are planned to provide for adequate green space especially in areas of increased population and density. Development will need to also ensure that appropriate infill measures are put in place to support green development.[3]

Greenspace Network Plans

In implementing the requirement of mandatory green space in all new developments, the Queensland government will produce Greenspace Network Plans. The Greenspace Network Plans will be formed on the basis of the State government's research and determination as to the appropriate levels of green space for future urban development which will be based on housing density and land use types.

1 Draft Queensland Greenspace Strategy, p 3.
2 Draft Queensland Greenspace Strategy, p 4.
3 Draft Queensland Greenspace Strategy, p 4-5.

These plans will eventually become planning instruments under the *Sustainable Planning Act 2009* (**SPA**) and will be considered in planning and development assessment for major new urban areas. The Greenspace Strategy is expected to deliver the Greenspace Network Plan for South East Queensland by 2011 (**SEQ Greenspace Network Plan**).[4]

New initiatives

The State government is keen to identify opportunities that will assist it in delivering the Greenspace Strategy. One initiative to be taken by the State government will be the introduction of a program to assess after hours access to school playing fields by community organisations. The State government has also identified the potential for public recreation on suitable privately-owned land.

Additionally, the draft Greenspace Strategy indicates that the State government will investigate the potential of assessing surplus State-owned land in high growth urban areas for its potential to contribute to a parks network.[5] Each of these new initiatives seeks to remove any existing arbitrary barriers that limit public access to State-owned land.

Conclusion

The draft Greenspace Strategy sets draft actions that the Queensland government will aim to undertake in delivering the Greenspace Strategy and the green ambition identified in *Toward Q2: Tomorrow's Queensland*.

The State government will aim to complete most of these activities by 2012, with the SEQ Greenspace Network Plan to be completed by 2011.

The draft Greenspace Strategy is currently open for public comment. Submissions can be made to the Department of Infrastructure and Planning before 5pm on Friday, 7 May 2010.

The achievement of the green ambition through the Greenspace Strategy will provide valuable green spaces for public recreation and native wildlife conservation in Queensland into the future. The Strategy also has the potential to affect many land owners in Queensland, particularly developers, given the impact of mandatory green space upon the potential lot yields in future urban developments. Given the competing interests that the State government is balancing with the draft Greenspace Strategy, it is expected that the progress of this strategy is sure to be followed with great interest.

4 Draft Queensland Greenspace Strategy, p 5.
5 Draft Queensland Greenspace Strategy, p 5.

British Election: Are there any lessons for Australia?

Ian Wright

This article discusses the 2010 British Elections and highlights that the planning system delivered by the Labour Party has sensible planning suggestions that deserve consideration by Commonwealth and State policy makers

April 2010

Relevance to Australia

Britons will go to the polls on 6 May 2010. The ruling Labour Party as well as the Conservative Party and Liberal Democrats have released their election manifestos.

The election manifestos of the respective parties are of general interest given the British parliamentary system is the basis for the government in Australia. They are of particular interest in the planning and development field given that Australian planning systems have their origins in the British planning system.

The election manifestos are also of more than a passing interest given the Federal election in 2010 and the Rudd Labour Government's stated intention to enter the urban planning policy space of State and local governments.

Finally the manifestos are of particular interest given that issues of population growth and growth management are occupying a central stage in the policy debate in State and local government elections, with Queensland elections scheduled for 2011.

Labour manifesto

The ruling Labour Party Manifesto 2010 (http://www2.labour.org.uk/uploads/ TheLabourPartyManifesto-2010.pdf) not surprisingly calls for the retention of the policy and governmental arrangements it has put in place in relation to planning and development. However the manifesto does make the following relevant statements:

- The Infrastructure Planning Commission (a body created by the Labour Party to assess major projects) will help streamline and speed up decision making on major projects.
- Councils are to ensure that the importance of local services to the community is taken into account before granting planning permission to change a use.

Conservative manifesto

The Conservative Manifesto 2010 (http://www.conservatives.com/Policy/Manifesto.aspx) proposes as a central tenant of its platform to change politics in Britain through significant reform to the planning and governmental systems. Significant reform proposals include the following:

- Create a presumption in favour of sustainable development in the planning system.
- Abolish the unelected Infrastructure Planning Commission (a body created to assess and determine development applications for major projects) and replace it with an efficient and democratically accountable system that provides a fast track process for major infrastructure projects.
- Use private or hybrid Acts of Parliament to promote major projects.
- Ensure that all other major projects are considered at planning enquiries which have binding timetables and which focus on planning issues with final permission given by a Minister.
- An open source planning system is to be created where neighbourhood plans prepared by people in each neighbourhood are to be consolidated into a local plan.
- The undemocratic tier of regional planning including regional spatial strategies (equivalent to the regional plans in Queensland and regional environmental plans in NSW) and building targets are to be abolished.
- Developers will have to pay a tariff to a local authority to compensate the community for loss of amenity and costs of additional infrastructure.
- A portion of the tariff is to be kept by the neighbourhoods in which a given development takes place providing clear incentives for communities which go for growth.
- Significant local projects like new housing estates are to be designed through a collaborative process that has involved the neighbourhood.
- A faster approvals process for planning applications where neighbourhoods raise no objection is to be introduced.

- A simple and consolidated national planning framework which sets out national economic and environmental priorities is to be presented to the parliament.
- The power of planning inspectors (the equivalent of which in Queensland and NSW are courts) to rewrite local plans is to be abolished.
- Limit applicant appeals against local planning decisions to courts to cases that involve abuse of process or failure to apply the local plans.
- Encourage local authorities to compile infrastructure plans.
- Give local planning authorities and other public authorities a duty to co-operate with one another.

Liberal Democrat manifesto

The Liberal Democrat Manifesto 2010 (http://www.libdems.org.uk/our_manifesto.aspx) puts forward the following policies:

- Close loopholes that allow playing fields to be sold or built upon without going through the normal planning procedures.
- Require a local competition test for all planning applications for new retail developments and establish a local competition office within the Office of Fair Trading to investigate anti-competitive practices at local and regional level.
- Abolish the Infrastructure Planning Commission and return decision making including housing targets to local people.
- Create a third party right of appeal in cases where planning decisions go against locally agreed plans.
- Create a new designation to protect green areas of particular importance or value to the community and stop the practice of defining gardens as greenfield sites in planning law so that they cannot so easily be built over.
- Introduce landscape-scale policies with a specific remit to restore water channels, rivers and wetlands and reduce flood risk by properly utilising the natural capacity of the landscape to retain water.
- Give local authorities the power to set high local tax rates for second homes and the option to require specific planning permission for new second homes in areas where the number of such homes is threatening the viability of a community.

Conclusions

In Britain, the planning system delivered by the ruling Labour Party has many of the same policy settings that we would recognise in the Australian context. These include the following:

- A weakening of the planning powers of democratically elected planning authorities such as local authorities.
- The transfer of planning powers at regional and national levels to planning authorities that are not democratically elected to prevent the development delays caused by NIMBYism that are often associated with democratically elected planning authorities such as local authorities.
- The prevalence of regional planning and regional government to administer regional planning.
- The focus on infrastructure planning and infrastructure contribution charges to fund infrastructure in times of declining tax revenues and high public sector debt.

The policy environment developed by the Labour Party in response to broader economic, social and environmental agendas have often been at the expense of the interests of individuals and neighbourhoods.

The Conservatives and Liberal Democrats are clearly seeking to tap into the disenchantment of local communities with their proposed policy initiatives.

The Conservative's policy agenda is in some respects revolutionary in terms of the repositioning of power in the planning system from central government and regional planning authorities and larger national development entities to local authorities and more localised development entities.

However the less contentious elements of the Conservative's policies do provide some interesting policy options for Australian policy makers. For example:

- The proposal for a simple and consolidated national planning framework which sets out national economic and environmental priorities.
- The proposal for local planning authorities and other public authorities to be subject to a duty to co-operate with one another.
- The proposal for a faster approvals process for planning applications where neighbourhoods raise no objection to a planning application.
- The proposal to encourage local authorities to compile infrastructure plans.

These are sensible policy suggestions that deserve consideration by Commonwealth and State policy makers some of which may arise as a result of the Commonwealth's stated intention to re-enter the public policy debate over population growth and urban and regional development.

Proposed subordinate legislation to give effect to fibre deployment

Samantha Hall | Matthew Soden-Taylor

This article discusses the position paper released by the Minister of Broadband, Communications, and the Digital Economy. The purpose of this position paper is to provide information on the proposed subordinate legislation

April 2010

Background

On 7 April 2009, the Commonwealth government announced its decision to establish a new National Broadband Network (**NBN**) with the objective of connecting up to 90 percent of all homes, schools and workplaces with fibre based broadband services within Australia.

Taking a step towards achieving the NBN, the Commonwealth government, on 18 March 2010, introduced the *Telecommunications Legislation Amendment (Fibre Deployment) Bill 2010* (**Fibre Deployment Bill**). The Fibre Deployment Bill amends the *Telecommunications Act 1997* to provide a legislative framework for installing superfast fibre based infrastructure in new developments across Australia.

The Fibre Deployment Bill provides a legislative framework to allow the Minister to put in place, through subordinate legislation, detailed arrangements for optical fibre and fibre-ready facilities to be installed in new developments.

On 16 April 2010, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, released a position paper on the proposed subordinate legislation that will give operational effect to the Fibre Deployment Bill.

Position paper

Purpose

The purpose of the position paper is to provide information on the proposed subordinate legislation that will give operation to the requirements for fibre deployment in new developments across Australia and to seek comment from stakeholders.

Summary

The proposed subordinate legislation will:

- apply in all areas of Australia wherever urban utilities are installed, with appropriate exemptions to this rule;
- define what is meant by "fibre-ready facilities" for the purposes of the fibre-ready infrastructure requirement under the Fibre Deployment Bill;
- specify that all fixed line facilities installed in the geographical area of coverage need to be fibre-ready facilities;
- identify further the subset of new developments in which fixed lines to be installed would need to be optical fibre by establishing criteria which require fibre (as well as fibre-ready facilities) to be installed in a new development;
- identify the limited circumstances where fixed lines may be exempted from the requirement that they be fibre;
- determine trigger events which will cause the requirements to have practical effect via the definition of "planning approval";
- set out the conditions, including technical specifications, to be met by optical fibre lines or fibre-ready facilities where they need to be installed.

Fibre-ready requirement

The intention of the Fibre Deployment Bill and the proposed subordinate legislation is that they will apply to all new developments across Australia. However, the subordinate legislation proposes to target those parts of Australia where services are expected to be provided over a fibre access network.

Accordingly, development that is located in an area where urban utility infrastructure such as reticulated water, sewerage or mains electricity is installed, will be required to be fibre-ready. Certain exemptions will apply in this regard.

Installation of fibre requirement

Where developments are caught by the fibre-ready requirement, the developments will also be required to install optical fibre if the development over its life would be equal to or greater than 200 building lots or units (size threshold) and fibre could be installed at a price of $3,000 (including GST) or less per lot or unit (price threshold). If the price exceeds the price threshold, the installation of fibre would be optional and fibre-ready facilities would be the default requirement.

Importantly for developers and assessment managers for development applications, where a developer believes a proposed development would not meet the price threshold, it is envisaged that the relevant development application would be referred if necessary to the communications industry regulator, the Australian Communications and Media Authority, to deal with this part of the development application.

Practical date of effect

It is the Commonwealth government's intention to have the legislative framework that is the Telecommunications Legislation Amendment (Fibre Deployment) Act and subordinate legislation in place from 1 July 2010. However, the practical date of effect will depend on the triggers for the fibre and fibre-ready requirements.

The position paper identifies that it is proposed that fibre and fibre-ready requirements would apply to developments for which a development application is lodged which provides for the negotiation of infrastructure levies and detailed structure planning, on or after 1 July 2010.

In Queensland, conditions relating to infrastructure contributions can be set as part of a development approval. Therefore, the practical effect of the legislation will be that all new developments in Queensland for which a development application is lodged after 1 July 2010, will be subject to the fibre and fibre-ready requirements.

Comments

The Commonwealth government has welcomed comments in response to the position paper. Written comments can be made to the Manager, Fibre in New Developments, Networks Policy and Regulation Division, Department of Broadband, Communications and the Digital Economy, prior to 5:00pm on Monday, 3 May 2010, by:

- email to greenfields@dbcde.gov.au (preferred method);
- facsimile to (02) 6271 1377; or
- post to GPO Box 2154, CANBERRA ACT 2601.

Building and Other Legislation Amendment Bill 2010

Samantha Hall | Anne Hinton

This article discusses the revision of the recently enacted "Ban the Banners" provisions under the *Building Act 1975*

On 15 April 2010, the *Building and Other Legislation Amendment Bill 2010* (Bill) was introduced into parliament by the Honourable Minister Stirling Hinchliffe. The Bill amends the recently enacted "ban the banners" provisions of the *Building Act 1975* (BA), by repealing provisions relating to amenity issues while retaining provisions relating to environmental issues. The Bill also introduces tough new pool safety legislation. The focus of this article will be on the amendments to the "ban the banners" provisions of the BA under the Bill

May 2010

Background

On 1 January 2010, the *Building and Other Legislation Amendment Act 2009* commenced. This Act introduced new provisions into the BA, (the "ban the banners" provisions), which were aimed to remove restrictions placed on the use of sustainable building elements and features by bodies corporate and developments. Our Planning Government Infrastructure and Environment update sent on 12 March 2010 provided an overview of the implications of these new provisions. Following the commencement of the new provisions, concerns were raised by the property sector as to the implications the new provisions would have on the performance of the property industry in the current financial climate.

As a result of such concerns, the Minister consulted with key stakeholders and the community, and earlier this year announced that the Queensland government intended to revise the "ban the banners" legislation as it related to building covenants. The Minister acknowledged that the scope and impact of the "ban the banners" legislation was greater than was originally intended, and that the implementation of all of the requirements detailed in the legislation may have a detrimental effect on the property sector, and consequently hamper the resurgence of confidence in the property sector.

Purpose

The objective of the Bill as it relates to the "ban the banners" provisions under the BA, is to amend provisions of the BA to remove or modify certain prohibitions relating to covenants and body corporate by-laws which impose certain building restrictions. In particular, the purpose of clause 11 of the Bill (Amendment of s 246O (Prohibitions or requirements that no force or effect)) is "to repeal aspects of the Government's "ban the banners" policy that relate to amenity issues while retaining those provisions that relate to environmental issues".

Amendments to the BA

The Minister announced that the amendments to the "ban the banners" provisions under the Bill would have no effect on the existing provisions in the BA which provide that covenants and body corporate by–laws may not restrict owners in relation to the following environmental features:

- solar hot water systems;
- photovoltaic cells;
- dark coloured roofs;
- energy efficient windows;
- minimum number of bathrooms and bedrooms.

The Bill does not remove the prohibition in the BA relating to a requirement in a covenant of a minimum floor area. However, it will be possible for the covenant to prescribe a minimum frontage, except if this requirement has the effect of the construction of a less energy efficient building. In addition, a covenant will only be able to validly contain restrictions relating to house orientation in circumstances where it is required for the construction of an energy efficient building.

The Bill amends the "ban the banners" provisions by repealing the provisions of the BA which deal with the following amenity related prohibitions on covenants:

- the number of car parking spaces;
- minimum roof pitch;
- external surface finishes;
- materials and completion timeframes for building, landscaping, fencing, and driveways.

The Minister announced that the "ban the banners" provisions will start at the commencement of the Act, in order to help the property industry provide certainty to the residential property sector.

Conclusions

The amendments to the "ban the banners" provisions of the BA, as provided for in the Bill, have been welcomed by developers, however comments have been made by some members of the community which indicate that they do not necessarily agree with the Queensland government's proposed amendments to repeal the prohibitions relating to amenity covenants. Such comments appear to be based on a fundamental objection to the fact that developers may dictate what a land owner can do on its land. However, that is not the issue here.

The original purpose of the "ban the banners" policy was to encourage the implementation of actions that support sustainable housing, including to remove restrictions placed on the use of sustainable building elements and features by developers. The Bill clearly maintains the implementation of actions that support sustainable housing which are "environmentally" related, by maintaining the prohibitions on covenants relating to environmentally sustainable housing features in the BA, however, sustainable housing encompasses many issues broader than those that are environmental in nature. Therefore, the amendments do seem to now fulfill only part of the original purpose of the policy, which may result in the government carrying out further amendments in the future. If that is the case, it is to be hoped that those amendments incite less controversy and strike a balance between the objectives of developers and the community.

Queensland government's growth management agenda

Samantha Hall | Susan Cleary

This article discusses growth management and changes to infrastructure planning as 'population crisis' places increased pressure on existing infrastructure and services in South-East Queensland

May 2010

Background

In light of the mounting "population crisis" placing pressure on local infrastructure and services in South-East Queensland, the Queensland government has announced this morning at the Urban Local Government Association of Queensland's annual conference at Mackay the following strategies directed towards managing the predicted population growth for the region.

New Growth Management Queensland agency

A new agency, Growth Management Queensland, has been established to deliver a focused and coordinated approach to growth management in Queensland.

Growth Management Queensland will be responsible for delivering better linkages between land use planning, infrastructure delivery, economic development, protection of environmental assets, expansion of greenspace areas and availability of affordable housing.

The immediate priorities of the agency include:

- improvement of development approval processes in Queensland;
- creation of delivery timetables for land supply, including greenfield sites;
- acceleration of development of infill sites and delivery of priority transit oriented development precincts;
- protection and improvement of liveability in communities.

Changes to infrastructure planning

A new Infrastructure Charges Taskforce has been established to examine the delivery of local infrastructure for new development in Queensland.

The taskforce will review the infrastructure charging regime for local infrastructure with a view to streamlining processes and simplifying charges where possible.

The State government will also introduce a new Queensland Infrastructure Plan (**QIP**), similar to the SEQ Infrastructure Plan and Program. The QIP will include:

- a plan of State-wide requirements for road, public transport, health and education infrastructure to match forecast population growth;
- targets for delivery of infrastructure, with an aim to attract federal funding;
- a prioritisation, sequencing and maturity assessment of infrastructure projects State-wide;
- an assessment of significant economic development activities (such as the new Liquefied Natural Gas industry) and associated infrastructure requirements.

In preparing the QIP, the State government will consult with local governments to ensure existing dwelling targets for each region align with infrastructure investment and delivery.

Model cities for South-East Queensland

Three new South-East Queensland cities will become Queensland's first model communities, to be master planned by the Urban Land Development Authority (**ULDA**).

The three new cities are to be developed in major greenfield areas in the south and western growth corridors of South-East Queensland, being Ripley Valley, Greater Flagstone and Yarrabilba. Development within these areas has the capacity to deliver in excess of 100,000 new homes.

The government will commence the process to declare these sites as Urban Development Areas. The ULDA will then have 12 months to complete a development scheme for each new city.

Green wedges to avoid urban sprawl

A new 10 year strategy is being developed to protect rural land in order to prevent urban sprawl in South-East Queensland.

The government plans to protect areas of farmland and forests currently forming inter-urban breaks at places like Woongoolba, Norwell and Beerburrum. Parts of these "green wedges" are to be transformed into new parks, nature reserves and outdoor recreation areas.

The new initiative supports the government's recently released draft Queensland Greenspace Strategy.

Excusal of non-compliance with mandatory parts and determining "minor changes"

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Jack's Property Development Pty Ltd v Ipswich City Council* [2010] QPEC 25 heard before Robin QC

May 2010

Case

This was an application to the Planning and Environment Court in Brisbane in respect of two matters. The first was an issue with the developer's non-compliance with the mandatory parts for the original development application. The second was whether changes to the proposed development were "minor changes".

Facts

The original development application the subject of an appeal to which this application relates, omitted a small portion of land which technically should have been included in the development application. The small portion of land was an access strip owned by the appellant comprising an area of 4 square metres.

The second issue for determination by the court was whether the changes made to the proposed development were "minor changes". The changes related to reduced density, alteration of the layout, changed vehicular access, reduced car parks and other changes relating to stormwater, bio retention basins and swales.

Decision

By reference to section 3.2.1 (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**), his Honour observed that by omitting the access strip from the description of the land in the development application, the appellant had clearly failed to comply with the requirements in section 3.2.1 (Applying for development approval) of the IPA.

However, his Honour ultimately held that given that nothing turned upon the failure to identify the small access strip in the development application, the circumstances were such in which the court could exercise the discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA.

In respect of the "minor change" issue, his Honour firstly observed that the transitional provisions of the *Sustainable Planning Act 2009* (**SPA**) had the effect of allowing the IPA to continue. However, his Honour identified the exception in section 821(2) (Application of repealed IPA, s 4.1.52) of the SPA which provides that issues of "minor change" in an appeal to the court under the IPA would be determined by reference to the definition in section 350 (Meaning of minor change) of the SPA.

His Honour also provided that when considering the meaning of "minor change" under the SPA, some guidance can be obtained from the principles established under the IPA.

Held

The appellant's non-compliance with section 3.2.1 (Applying for development approval) of the IPA was excused by exercise of the court's discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA.

The changes to the proposed development were determined to be "minor changes".

Serving 888 principal submitters

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Rainbow Shores Pty Ltd v Gympie Regional Council & Ors* [2010] QPEC 24 heard before Rackemann DCJ

May 2010

Case

This was a directions hearing in an appeal against the refusal of a development application at Inskip Peninsula.

Facts

Rainbow Shores Pty Ltd (**appellant**) filed an appeal against the refusal by the Gympie Regional Council (**council**) of a development application for a preliminary approval for a material change of use of premises for an integrated resort/commercial village within a broader residential community offering a range of housing styles and densities supported by retail business services and community infrastructure set within a vegetated community open space area at Inskip Point.

In the course of preparing the matter for directions, the solicitors for the appellant were required to serve a copy of the notice of appeal on any principal submitter whose submission had not been withdrawn. The council's decision notice advised that there were 888 properly made submissions in respect of the development application.

The solicitors for the appellant sent a copy of the notice of appeal to each of the 888 addresses given by the council's decision notice, however 131 envelopes were returned with messages that the people were no longer residing at the address.

The appellant sought to rely upon the provisions of section 4.1.5A (How court may deal with matters involving substantial compliance) of the *Integrated Planning Act 1997* (**IPA**).

Decision

In determining whether there had been substantial compliance with section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA, the judge stated that the section required him to be satisfied that non-compliance or partial compliance had not substantially restricted the opportunity for a person to exercise the rights conferred.

Material was put before the court that demonstrated that the appeal had attracted quite a bit of media interest. The appellant exhibited to an affidavit, newspapers which were circulating generally throughout the area, which not only had front page articles regarding the appeal but also informed the public of their rights to elect to join the appeal and the timeframe which they had in which to exercise those rights.

In consideration of these circumstances, his Honour Judge Rackemann was satisfied there was substantial compliance under section 4.1.41 (Notice of appeal to other parties (div 8)) of the IPA with regard to public notice and also was satisfied of the matters contained in section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA. Accordingly his Honour was prepared to exercise his discretion to permit the appeal to continue notwithstanding the partial non-compliance.

Held

The appeal to proceed notwithstanding the partial non-compliance.

Costs arising from a failure to comply with court procedure

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Moon & Littleford v Gold Coast City Council* [2010] QPEC 26 heard before CF Wall QC

May 2010

Case

This was an application made by the Gold Coast City Council (**respondent**) and the National Trust of Queensland (**first co-respondent**) for orders that the appellants pay all or some of their costs of resisting four appeals which were ultimately discontinued.

Facts

The appellants were submitters who appealed against decisions of the respondent to approve development applications. The appeals were determined together as each notice of appeal contained the same orders sought and the same grounds of appeal.

The application for a costs order arose as a result of the following:

- the late filing of the appellants' outline of argument and review on 8 September 2008;
- the appellants' outline of argument which went beyond their further and better particulars and failed to properly particularise the issues raised for the hearing on 21 November 2008;
- the review on 30 September 2008 necessitated by the alleged invalidity of the respondent's planning scheme, being new material which required the respondents to incur costs in dealing with it;
- the adjournment of the hearing on 21 November 2008 because of the appellants' lengthy additional outline of submissions delivered the day before the hearing, which failed to confine the submissions to the issues previously particularised;
- the appellants' service of additional material on 22 January 2009 which raised for the first time new facts and allegations as to the respondent's compliance with the statutory requirements for the making of a planning scheme, being new material which required the respondents to incur costs in dealing with it;
- the application filed by the appellants on 25 February 2009 to reinstate an abandoned issue, for which the respondent incurred costs in preparing for and appearing at the hearing of the application;
- the costs incurred by the respondent in complying with its obligations to disclose documents as a result of the appellants' allegation regarding a flooding issue.

Decision

His Honour stated that the appellants would have known that as a result of their failure to comply with procedural requirements, the respondents would be likely to be inconvenienced, hindered, and put to unnecessary and unjustified costs and expense.

It was not accepted that the appellants only had limited knowledge of court procedures in relation to time limits. Further, the fact that the appellants could suffer a financial burden as a result of a costs order did not warrant such orders not being made.

His Honour stated that he was unable to conclude that the appellants behaved in a frivolous or vexatious manner in the way in which they instituted and pursued the appeals such that they should have to pay all costs incurred by the respondents but held that the respondents were entitled to part of the costs sought.

Held

The appellants were ordered to pay the costs of the respondent and the first respondent of and incidental to the hearings on 8 September 2008, 30 September 2008, 21 November 2008 (but not the costs thrown away on that occasion as it would have been a doubling up) and of preparing for and appearing on the application to reinstate the abandoned issue.

The appellants were also ordered to pay the respondents' costs of responding to the new material introduced by the appellants on 21 January 2009 and of undertaking disclosure and preparing for hearing in relation to the flooding issue.

Was the development permit valid and sufficient?

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Krajniw v Brisbane City Council & Anor* [2010] QPEC 33 heard before Rackemann DCJ

May 2010

Case

This proceeding was initiated through originating applications for declarations and enforcement orders by Mr Krajniw who challenged the lawfulness of stage 2 of a bikeway/pedestrian path to be constructed on freehold and reserve land in Cannon Hill (**stage 2**).

Mr Krajniw relied on a number of Acts and statutory instruments in support of his contentions, however, the central issues were whether the development permit that had been issued approving operational work to authorise clearing of native vegetation on land held on trust for park and recreation purposes for stage 2 was sufficient, valid and effectual, whether stage 2 required further or other approvals, and whether the development would involve the commission of an offence.

Facts

In respect of the City Plan 2000, Mr Krajniw contended that stage 2 constituted a material change of use and as such required more than the development permit for operational work that had been issued. In respect of the *Integrated Planning Act 1997* (**IPA**), the *Sustainable Planning Act 2009* (**SPA**) and the *Vegetation Management Act 1999* (**VMA**), Mr Krajniw contended numerous allegations including the allegation that all of stage 2 was assessable development as it required operational work to clear native vegetation on freehold land and the exemption for development for 'urban purposes in an urban area' did not apply. In relation to the *Coastal Protection and Management Act 1995* (**CPMA**), Mr Krajniw contended that the proposed development was assessable development as it constituted 'interfering with quarry material on State coastal land above the high water mark'. In respect of the *Nature Conservation Act 1992* (**NCA**), Mr Krajniw raised a number of provisions which he alleged that stage 2 contravened.

Decision

His Honour Judge Rackemann found the majority of Mr Krajniw's contentions to be variously repetitive, irrelevant, not supported in the evidence and, at times, scandalous.

In respect of the City Plan 2000, Judge Rackemann held that the construction of a bicycle/pedestrian path was exempt development as it fell within the definition of a 'road' which when constructed, maintained or operated by or on behalf of the council was classified as exempt development.

In respect of the IPA, the SPA and the VMA, Judge Rackemann noted that under the IPA (which was superseded by the SPA), clearing of native vegetation on freehold land was assessable development unless it fell within certain exemptions and that one of those exemptions was where the clearing was of vegetation to which the VMA did not apply. His Honour found that, apart from one lot which was not freehold land but rather held by the council on trust for park and recreation purposes, the development of stage 2 was for 'urban purposes in an urban area' and as such fell within the exemption in the VMA. The development permit that had been issued was in respect of the remaining one lot held on trust by the council. Judge Rackemann found that the various other allegations raised by Mr Krajniw in respect of the development permit were not supported in the evidence.

In relation to the CPMA, Judge Rackemann found that the majority of the lots were not State coastal land because they were freehold land. In relation to the one lot that was not freehold land, Judge Rackemann found that that lot was also not State coastal land because it was not in a coastal management district. Therefore, the development was not assessable under the CPMA.

In respect of the NCA, Judge Rackemann found that most of the provisions Mr Krajniw alleged contravention of were not supported by evidence. However, in respect of section 89 (Restriction on taking etc particular protected plants) which create an offence for taking a protected plant that is in the wild, the council conceded that stage 2 would involve the taking of protected plants that were in the wild. Judge Rackemann further found that the potentially available exemption was not available to the council. The council then gave an undertaking that it would not conduct any clearing unless and until it had either met the terms of the exemption or had obtained the necessary licence, permit or authority.

The solicitors for the second and third respondents drew the court's attention to section 332 (Tampering with animal breeding place) of the *Nature Conservation (Wildlife Management) Regulation 2006* (**NCR**) which created an offence where a person, without reasonable excuse, tampered with an animal breeding place that was being used by a protected animal to incubate or rear the animal's offspring. Although Judge Rackemann found that the evidence did not establish that such an offence was inevitable, counsel for the council undertook that his client would not conduct any clearing until it had ascertained whether an offence against that provision would be involved and obtained any necessary approval.

Held

Ultimately, Judge Rackemann found that Mr Krajniw had been able to establish that the council needed more than the development permit it held if it wished to undertake clearing for the purposes of stage 2. In particular, the council needed to deal with the issues raised by section 89 (Restriction on taking etc particular protected plants) of the NCA and section 332 (Tampering with animal breeding place) of the NCR. Judge Rackemann also found that the other grounds raised by Mr Krajniw were not made out and, accordingly, Judge Rackemann otherwise dismissed the applications insofar as they related to those grounds.

Judge Rackemann finally held that it was unnecessary to make any interim enforcement orders and simply adjourned the further hearing of the proceedings to a later date to allow the council to attend to the outstanding issues with respect to section 89 (Restriction on taking etc particular protected plants) of the NCA and section 332 (Tampering with animal breeding place) of the NCR.

Relief for non-compliance with mandatory requirements

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *McDonald's Australia Limited v Brisbane City Council & Anor* [2010] QPEC 44 heard before Robin QC DCJ

June 2010

Case

This was an application to the Planning and Environment Court for a declaration that the appeal should proceed to a determination on the merits notwithstanding the applicant's non-compliance with the mandatory requirements of the IDAS process that there be "an accurate description of the land" pursuant to section 3.2.1(2)(a) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**).

Facts

The original development application proposed a McDonald's restaurant at a site at Richlands bounded by Archerfield Road, Government Road and Progress Road. The development application proposed a driveway which would provide sole access from the restaurant to Archerfield Road to be located on two lots which were not identified in the development application as relevant "land to which the application applies". Owner's consent was not obtained for the two lots.

The two lots were not private land, but council land which was compulsorily acquired by the Brisbane City Council (**council**) for the purposes of dedication as a road. The dedication had not occurred, however, registration of the lots by the council had.

Decision

His Honour Judge Robin QC observed that it was understandable for someone to have regarded the two lots as a road.

His Honour considered the cases of *Queensland Investment Corporation v Longhurst* [2001] QPELR 83, *Edwards v Douglas Shire Council* [2000] QPELR 375, *Woodrow v Miriam Vale Shire Council* [2006] QPEC 48 and *Gibway Pty Ltd v Caboolture Shire Council* [1987] 2 Qd R 65 in making his decision to grant the relief sought in the originating application.

By operation of section 440(3) (How court may deal with matters involving non-compliance) of the *Sustainable Planning Act 2009* (**SPA**), his Honour granted relief from non-compliance with the mandatory requirements in respect of the omission of the two lots in the development application and ordered the appeal to proceed to a determination on the merits.

Held

The appellant's non-compliance with section 3.2.1(2)(a) (Applying for development approval) of the IPA was excused by exercise of the court's discretion under section 440 (How court may deal with matters involving non-compliance) of the SPA.

The change to the development application to include the two lots was also determined to be a "minor change".

Exercise of relief to remedy a development application made under section 3.1.6 of IPA

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Moncrieff v Townsville City Council & Ors* [2010] QPEC 45 heard before Robin QC DCJ

June 2010

Case

This was an application for determination of a preliminary point in relation to an appeal by S and D Moncrieff (**appellant**) against a decision of the Townsville City Council (**council**) to refuse the appellant's development application for a preliminary approval for a material change of use of premises.

Facts

The appellant lodged a development application with the council for a preliminary approval to override the planning scheme (**development application**) under section 3.1.6 (Preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997* (**IPA**).

The site the subject of the development application was located in the Rural 400 sub-area identified in the council's planning scheme. The development application sought a preliminary approval to override the planning scheme to include the site within the Park Residential sub-area.

The council asserted that the development application was not of a kind which could lead to a preliminary approval overriding the planning scheme under the IPA.

Decision

Part D of the IDAS Form 1 Development Application submitted as part of the development application was incorrectly completed. The appellant failed to indicate that the development application triggered referral coordination as the application was for a preliminary approval mentioned in section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA.

In any event, the town planning report submitted with the development application stated that the development application proposed to alter the use rights associated with the subject land to that of the Park Residential sub-area, consistent with development to the north of the site and being an extension of the Rupertswood residential estate.

The town planning report went on to state that a number of variations to the provisions of the planning scheme had been sought. The report also stated how future development applications were to proceed.

His Honour Judge Robin stated that given that the proposed development was totally inconsistent with the planning scheme provisions for the Rural 400 sub-area, the appellant's need to override the ordinarily applicable planning scheme provisions was plain.

Additionally, his Honour pointed to the fact that nearly 200 submissions were made in respect of the development application, which indicated that the general public was aware of what was proposed in the development application and understood the change in character of the site from rural to more intensive residential development.

The appellant's failure to correctly complete the IDAS Form 1 Development Application had no effect on the opportunities available to State agencies or potential submitters to exercise their rights under the IPA or any other legislation.

His Honour concluded that the development application sufficiently stated the way in which the applicant sought approval to vary the effect of an applicable local planning instrument for the land for the purposes of section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA.

To the extent that the appellant failed to correctly complete the IDAS Form 1 Development Application, his Honour was prepared to exercise the court's discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA to excuse any defect in the development application.

Held

To the extent that the development application submitted to the council was incorrect, the court exercised its discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA to excuse any defect in the development application.

The court held that the development application was an application under section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA.

Declaration about what is permitted under development approval

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Tom Dooley Developments Pty Ltd v Brisbane City Council & Anor* [2010] QPEC 95 heard before Robin QC DCJ

June 2010

Case

In this proceeding Tom Dooley Developments Pty Ltd (**applicant**) sought declarations about what was permitted pursuant to condition 4 of the approval granted by the Planning and Environment Court (**development approval**). In particular, the applicant sought a declaration that the terms of condition 4 of the development approval, when properly constructed, allowed the applicant to remove, refurbish and reconstruct the walls required by that condition to be 'retained and incorporated into the proposed building'.

Facts

In September 2008, the applicant lodged a development application with the Brisbane City Council (**respondent**) for a development permit for a material change of use for a multi-unit dwelling and preliminary approvals for carrying out building work and operational work on the site of a heritage place and adjoining a heritage place.

In March 2009, the respondent granted a conditional approval which was the subject of a submitter appeal. In October of 2009, the Planning and Environment Court dismissed the submitter appeal and granted the development approval subject to conditions which included condition 4 that provided that "The two existing brick walls comprising the Heritage Place shall be retained and incorporated into the proposed building as shown on the approved drawings".

Subsequent to the development approval being granted, it became evident that retention of the two walls in situ while the approved development was under construction would have been unwise based upon engineering, safety and amenity factors, given that the two walls had no load-bearing capacity, some of the brickwork had deteriorated and there were clear safety risks to persons on the site.

Decision

Judge Robin QC was satisfied that the declarations power which the court had under section 456 (Court may make declarations and orders) of the *Sustainable Planning Act 2009* (**SPA**) was available to authorise the court to make a declaration about what represented a suitable way of complying with a condition of a development approval, particularly one constituted by a court order.

Judge Robin QC was far from being persuaded that there was any change in the circumstances and expressed the view that what was happening was of rather less moment than a 'permissible change' as defined in section 367 (what is a permissible change for a development approval) of the SPA.

Judge Robin also expressed the view that what was involved in 'retaining' some feature would likely vary depending upon the circumstances and that there would be many circumstances where a condition of retention required actual retention in situ of the feature to be preserved with no interference whatever. However, Judge Robin QC did not think that was the case in this instance.

Held

It was held that properly constructed, condition 4 of the development approval did not preclude the applicant from removing, refurbishing and reconstructing the walls referred to in that condition prior to the material change of use occurring.

It was also ordered that, upon the court being satisfied that to remove, refurbish and reconstruct the walls involved no more than a 'permissible change' to the development approval, condition 4 was amended to allow for the removal, refurbishment and reconstruction of the walls prior to the material change of use occurring as a means of retaining the walls.

Payment of council headworks

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Pacific Paradise Resort Pty Ltd v Sunshine Coast Regional Council* [2010] QPEC 37 heard before JM Robertson DCJ

June 2010

Case

Pacific Paradise Resort Pty Ltd (**appellant**) filed an application seeking relief from payment of any outstanding contributions for headworks by way of the court's power to make declarations under section 4.1.21(1) (Court may make declarations) of the *Integrated Planning Act 1997* (**IPA**) by attacking the validity of the conditions on grounds of unlawfulness or uncertainty and also attacking the validity of the Sunshine Coast Regional Council's (**council**) planning scheme policy which was taken up by the headworks conditions in the subdivision approval.

Facts

The appellant developed the land over 5 stages pursuant to a rezoning approval granted in 1993. The 1993 re-zoning approval contained conventional water and sewerage contribution conditions. Similar conditions in different terms were contained in a later 1998 subdivision approval.

When the appellant lodged plans for sealing in relation to stage 5, the council maintained that there were infrastructure contributions outstanding under the headworks conditions for earlier stages, however, the plans for those earlier stages had been sealed for some time (**sealing of plans**). The appellant argued that the council's decision to seal survey plans for those earlier stages suggested that the contributions had been paid. Accordingly, the appellant contended that the council was estopped from asserting that there were headworks contributions owing in relation to stages 3 and 4 on grounds that the council represented by its conduct that no such fees were payable (**estoppel argument**).

The appellant also argued that the council failed to comply with the relevant law in amending its 1985 planning scheme policy for sewerage and water supply (**1985 policy**) by increasing contribution rates such that the 1985 policy ceased to have effect when the *Local Government (Planning and Environment) Act 1990* (**PEA**) commenced. The appellant also relied upon the alleged invalidity of the 1985 policy to undermine the validity of the later 1998 planning scheme policy for sewerage and water supply (**1998 policy**).

Decision

In finding for the council, his Honour Judge Robertson commented:

- in respect of the philosophy behind the imposition of sewerage and headworks contribution conditions, his Honour stated:

  > *it is important to remember that the fundamental philosophy ... has always been to ensure that developers with the benefit of development permits, are required to make contributions on an equitable basis to allow developments to be connected to Council's water supply and sewerage headworks either immediately or in the future ...*
  >
  > *Such contributions recognise the Shire-wide cost of such infrastructure and the obvious associated benefits to developers. Both sets of impugned conditions provide that payment be made in accordance with the Policy then in force at the time of payment. As Mr Litster SC observed, this enables a developer to defer payment (for example until it is close to receiving a return on its development, for example with lodgement of the survey plan); however the developer then assumes the risk that the contributions may be higher than they would have been at the time of the imposition of the conditions.*

- in respect of the estoppel argument, his Honour stated as "*a general principle, a party cannot rely on an estoppel by conduct to prevent the performance of a statutory duty or the exercise of statutory discretion*";

- in considering the argument of the appellant that the sealing of the plans by the council without requiring payment amounted to a representation that the contribution had been paid, his Honour thought that to be drawing an extremely long bow;

- in respect of the argument of the appellant that the amendments to the 1985 policy were invalid, his Honour did not accept the submissions of the appellant and agreed that even if the council did not on the occasions it reviewed and changed the headworks contributions payable under the 1985 policy specifically have regard to the matters required under the *Local Government Act 1936*, this did not involve "fixing a policy" on each occasion. That is, the council was not "fixing" the policy anew each time it reviewed it and changed the levels of contributions. The PEA made a clear distinction between determining the amount of a contribution and the "fixing" of the policy itself. Furthermore, his Honour declared that it followed that there was no basis for holding that the adoption of the 1985 policy as a continuing policy under the PEA was invalid, allowing the 1985 policy to continue to have force and effect with the commencement of the PEA. His Honour made a similar finding in respect of the 1998 policy.

In conclusion, his Honour determined that even if he had found the council did not comply with the law in making changes to the rates in the 1985 policy and 1998 policy, he would have relied upon the declarations sought by the council. An extract of those declarations most relevant is as follows:

> *(c) it can be reasonably inferred that those who have developed land within the various headworks catchments have been required to contribute based on the impugned policies;*
>
> *(d) the Developer has benefited from the water supply and sewerage infrastructure to which the Development is connected;*
>
> *(e) it is in the public interest that contributions to defray the cost of providing water supply and sewerage infrastructure be secured from those who benefit from that infrastructure;*
>
> *(f) where a contribution is not secured, there is an obvious reduction in public funds available to defray the cost of providing water supply and sewerage infrastructure to a development.*

Furthermore, his Honour commented that:

> *the costs of providing sewerage and water headworks infrastructure is a significant impost on Council resources, and which, if not contributed to by developers who connect to such infrastructure, would have to come from Council's rate payer funded base*.

Held

- The application was dismissed.
- The application for reserved costs was refused.
- Liberty to apply within (21) days of delivery of judgment.

Submitter appeal dismissed

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wilhelm v Ipswich City Council & Anor* [2010] QPEC 46 heard before Newton DCJ

July 2010

Case

This was a submitter appeal to the Planning and Environment Court against the Ipswich City Council's (**council**) decision to approve an application for a development permit for a material change of use for a business use (service station) and shopping centre. The appeal was filed prior to the commencement of the *Sustainable Planning Act 2009*, so the appeal was heard under the *Integrated Planning Act 1997*.

Facts

The development application proposed a 7 Eleven service station with an associated convenience store, a shopping centre comprising a number of specialty stores and an environmentally relevant activity being ERA 8(1)(c), chemical storage, to facilitate the storage of fuel, at land situated at Raceview Street, Raceview.

The issues in the appeal which required determination were as follows:

- alleged conflict with the planning scheme;
- traffic engineering matters;
- need; and
- alleged adverse impacts on residential amenity; specifically noise, generation of non-local traffic on local streets, and visual amenity of the near to boundary wall between the street and the proposed 7 Eleven service station.

Decision

On the issue of need, his Honour heard evidence that asserted that "*a local resident living relatively near the subject land may find it more convenient to travel a slightly shorter distance to a service station on the subject site instead of one of the three existing 24 hour service stations which may involve a saving of travel distance of up to 1.5 kilometres by car*", (para 19). His Honour accepted this assertion.

After hearing expert evidence on all issues in the appeal his Honour dismissed the appeal giving the following reasons:

> *In my opinion there is no conflict with the Planning Scheme when read as a whole in the context of the appropriateness of land use. The proposed service station will not involve development that will adversely impact upon the amenity and character of the surrounding area. With the suggested road widening in Raceview Street and Greenham Street as outlined in this judgment the proposed service station development will not involve inappropriate and unsafe traffic arrangements. The evidence establishes an objectively perceived need for the development as described in paragraph 19 of this judgement. The appeal is dismissed. The matter is to be adjourned to allow the parties to formulate appropriate conditions.* (para 55)

Held

The appeal was dismissed.

Deficiencies in the public notice process

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sneesby & Ors v Brisbane City Council & Anor* [2010] QPEC 48 heard before Jones DCJ

July 2010

Case

This was a hearing of a preliminary point of law seeking excusal of non compliance under section 4.1.5A (How court may deal with matters involving substantial compliance) of the *Integrated Planning Act 1997* (**IPA**) in respect of deficiencies with the public notification requirements under section 3.4.4 (Public notice of applications to be given) and 3.4.5 (Notification period for applications) of the IPA.

Facts

The applicant lodged a development application with the Brisbane City Council (**council**) for land at the corner of Fraser Road and Mirrabooka Road, Ashgrove (**land**). The following issues with public notification arose:

- the initial notice was placed in a recessed doorway, such that it was not reasonably visible and in addition, by reasons of restaurant signage, tables, chairs and awnings, it was at times difficult for the public to see the notice;
- the notice described the property as "65 Mirrabooka Road", when it was clear that the main road frontage to the land was to Fraser Road;
- the notice stated the last date for making a submission was 12 May 2009, one day short;
- when the notice was moved to a new location on 4 May 2009, it was placed on the road frontage to the adjoining land and not on the land itself;
- on 4 May 2009, a second notice was erected on the street frontage to Mirrabooka Road, however it was located at the entrance to the car parking area;
- the two notices that were erected on 4 May 2009 were only in place for five or six days and incorrectly notified the date for submissions.

Decision

In considering whether to exercise discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA, Judge Jones stated that while some of the issues of non-compliance might have justified a decision in favour of the applicant, together the mistakes were an insurmountable obstacle to the applicant. Of note, was the issue of the notice being located in the recessed doorway and then later being located on the adjoining property rather than the subject land.

In finding against the applicant, his Honour referred to *Ramsgrove v Beaudesert Shire Council* [2005] 143 LGERA 43:

> *The purpose of the notification requirement in section 3.4.4 of the IPA is discernible from section 3.4.1 of IPA which provides that notification of an application serves the purpose of giving members of the community 'the opportunity to make submissions including objections that must be taken into account before an application is decided'.*

Also referred to was the decision in *Lewani Springs Resorts Pty Ltd v Gold Coast City Council & Anor* [2009] QPEC 114:

> *As section 4.1.5 stands, the Courts should not act to assist the co-respondent, unless it is satisfied that non-compliance, or partial non-compliance, has not substantially restricted the opportunity for a person to exercise the rights conferred by the IPA or some other Act. In this regard, the co-respondent bears the onus. ... Have those members of the public, those to whom IPA seeks to provide opportunities for involvement in decision making, had their opportunities substantially restricted.*

In dismissing the application, his Honour Judge Jones:

- found that the deficiencies in the public notice process could not be classified as merely technical or procedural; and
- was unable to be satisfied that a person's opportunity to exercise rights under the IPA were not restricted.

Held

- That the application be dismissed.
- That the appeal be allowed, on the limited ground of the failure to comply with the requirement to place a notice on the land in the way prescribed under the IPA.
- The development application be referred back to the council forthwith, to issue the appropriate acknowledgment notice.

Demolition of a house under Brisbane City Plan 2000

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Affram Pty Ltd v Brisbane City Council* [2010] QPEC 47 heard before Andrews SC DCJ

July 2010

Case

This was an appeal by Affram Pty Ltd (**appellant**) against a decision of the Brisbane City Council (**council**) to refuse the appellant's development application for the demolition of a house within a demolition control precinct.

Facts

The appellant lodged a development application with the council for the demolition of a house at 44 Palmer Street, Windsor (**development application**). The house was within the demolition control precinct identified in the council's *Brisbane City Plan 2000*.

The house was built before 1910, originally a large, timber single level dwelling on stumps. The house underwent several changes including demolition of the semi attached kitchen, relocation and reorientating of the core of the house within Palmer Street and conversion to four flats. As a consequence of the conversion to flats, the original external elements of the house including the timber walls within the verandahs, some eaves, sunhoods and lattice screens were covered by asbestos sheet walls. At the time of the appeal, the house was structurally unsound and uninhabitable.

The development application was code assessable against the Demolition Code in the *Brisbane City Plan 2000*.

Decision

Whether the appellant could succeed in demonstrating that the development application complied with the Demolition Code turned on the question of whether the house was built prior to 1900 or after 1900. If the house was built prior to 1900, the appellant had to prove that the house was not reasonably capable of being made structurally sound, in accordance with performance criteria P7 of the Demolition Code. It was the onus of the council to establish that the building was built prior to 1900.

The Planning and Environment Court (**P&E Court**) considered the expert evidence of historians and architects to establish when the house was built. The P&E Court was not convinced that the house was constructed prior to 1900. As a consequence, performance criteria P7 of the Demolition Code did not apply to the development application.

Given that performance criteria P7 did not apply, the appellant had to establish that the development application complied with acceptable solutions A1.1, A1.2 or A1.3 of the Demolition Code to be successful in the appeal. The P&E Court accepted that if the appellant failed to establish compliance with A1.3, the appellant had to demonstrate compliance with the third dot point of performance criterion P1 of the Demolition Code which stated, "*(The building) must not contribute positively to the visual character of the street.*"

Loss of traditional "timber and tin" building character

Acceptable solution A1.3 of the Demolition Code relevantly provided as follows, "*A1.3 The demolition of a building will not result in the loss of...Traditional 'timber and tin' building character within the Demolition Control Precinct...*".

The issue was whether the house had a traditional character and in particular, whether the character of the visible external parts of the house had "traditional 'timber and tin' building character". His Honour Judge Andrews SC stated that the existence of remnant characteristics of a former "traditional 'timber and tin' building character" did not necessarily mean that character remained. The external parts of the house that were visible to an outside observer were so changed from the original elements that the house no longer had a "traditional 'timber and tin' building character". The P&E Court accepted that the development application complied with acceptable solution A1.3 in that the demolition of the house would not result in the loss of "traditional 'timber and tin' building character" within the demolition control precinct.

Contribution to visual character of the street

In the event the conclusion in relation to acceptable solution A1.3 was incorrect, the P&E Court went on to consider whether the corresponding performance criteria in P1 had been met. His Honour Judge Andrews SC described the house as a "dilapidated, uninhabited and uninhabitable, fibro box" which was inconsistent with the character of the houses in the street, which appeared to be well maintained. His Honour found that the house did not contribute positively to the visual character of the street.

Given that the appellant successfully demonstrated that the development application complied with the Demolition Code, the appeal was successful.

Held

Appeal allowed.

Once again, the court if not the planning authority

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Court of Appeal in the matter of *Zanow v Ipswich City Council & Anor* [2010] QPEC 50 heard before Robin QC DCJ

July 2010

Case

This was an appeal by Darren Zanow and Bradley Zanow (**Zanow**) against Ipswich City Council's (**council**) refusal of their development application in respect of land situated at 217 Pine Mountain Road, Brassall (**subject land**) seeking:

- a preliminary approval to override the Ipswich Planning Scheme 2006 for a material change of use of land for local business and industry purposes; and
- a development permit for a material change of use for business and service/trade uses in respect of two of four buildings (each of 450m^2) proposed for the subject land.

The subject land had been used historically for industrial purposes, including industrial activities conducted by Telstra between 1990 and 1999. The existing use of (the western part of) the subject land was also for industrial purposes pursuant to a development approval granted in 2003 for a development permit for service industry use (assembly, storage, workshop and administrative activities) and a preliminary approval for light/service industry use (under section 3.1.6 (Preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997* (**IPA**)) (**2003 approval**).

Despite the 2003 approval, the subject land was included in the residential low density zone and the recreation zone in the Ipswich Planning Scheme 2006. Further, it had previously been included in the future urban zone and a residential low density precinct in the Ipswich Planning Scheme 1999. The Ipswich Northern and Inner Western Corridors Structure Plan 2001 also identified the subject land as being intended for residential and recreational purposes.

Facts

The council refused the development application and its reasoning is summarised as follows:

- the application was refused pursuant to section 3.5.14 (Decision if application requires impact assessment) and section 3.5.14A (Decision if application under s 3.1.6 requires assessment) of the IPA in that the development was in conflict with the provisions of the Ipswich Planning Scheme 2006 and there were not sufficient planning grounds to support the approval of the application;
- the application was refused by applying the precautionary principal in that the adverse traffic, noise and odour impact generated by the development on the amenity of the surrounding residences was unacceptable.

Given that the development application had two parts (namely, a development permit and a preliminary approval) to it, the Court of Appeal (**court**) was, at the outset, made aware of the injunction in section 3.5.14A(2)(a) (Decision if application under section 3.1.6 requires assessment) of the IPA, which stated that "*to the extent development applied for under other parts of the application is refused, any variation relating to the development must also be refused*".

Zanow's position

Zanow contended that the development was suitable for the subject land and there were sufficient grounds justifying approval despite conflict with the planning scheme, which included, amongst other things:

- the subject land had been historically used for industrial purposes;
- the development was consistent with the existing approved use pursuant to the 2003 approval and it was a limited expansion of the existing approved use. In fact, the existing approved use made the subject land unsuitable for residential use;
- the 2003 approval had overridden the provisions of the Ipswich Planning Scheme 2006 within the context of the approval, permitting light/service industry use;
- the development (if approved) would not prevent the subject land from being redeveloped in the future for residential purposes in the event that demand justified such redevelopment;

- the increase of traffic generated by the development was considered appropriate after taking into consideration the past and existing uses of the subject land, the absence of any alternative access to the subject land and the significant existing under-utilisation of the area of the subject land;
- whilst the local area might be predominately residential, the heavy traffic on the Warrego Highway, the existing approved industrial use of the subject land and non-residential traffic use of Pine Mountain Road would have impacted on its amenity and character;
- there was considerable support for the existing approved use and the proposed development from the local residents;
- there was no land available within Brassall appropriately zoned for the purpose proposed by the development (namely, local business and industry zone) and the development was too small to be located on any existing land so zoned elsewhere in the city. Further, there was no demand to support redevelopment of the subject land for residential purposes.

Council's position

The council argued that the zoning and designation of the subject land under the planning schemes and the structure plan had consistently reflected the intended and preferred use of the subject land (being residential use) and maintained its position that the proposed development was in conflict with the strategic and zoning intent for residential development.

Further, the council asserted that the proposed development:

- intensified non-residential uses on the subject land which was similar to a spot rezoning that conflicted with the planning scheme and jeopardised potential use of the land for the purposes intended; and
- effectively sought to entrench a non-conforming use.

The council disagreed with Zanow's assessment of the traffic impact and asserted that firstly, the existing access arrangement and driveway were inappropriate for the existing approved use on the subject land and secondly, the development (if approved) would significantly worsen the existing adverse impact (by the traffic generated) on the amenity of properties adjacent to and opposite the access driveway of the subject land.

The council also disagreed with Zanow's analysis of both the demand for residential land and for additional land available to be used for the purpose as proposed under the development. The council asserted that firstly, the uses proposed under the development were more consistent with the intended uses for the regional business and industry zone (as opposed to the local business and industry zone) and secondly, the absence of land zoned "local business and industry" did not of itself suggest a demand having regard to the key intended outcome for such zone and thirdly, the relevant demand which Zanow was required to demonstrate was the demand for the proposed development, not the demand for residential development.

Decision

Conflict with planning scheme

His Honour declared that the issue of "conflict" under section 3.5.14 (Decision if application requires impact assessment) of the IPA (as explained in *Woolworths Ltd v Maryborough City Council* (No 2) [2006] 1 Qd R 273 (at paragraph 23)) must be considered in accordance with the principles stated in *Grosser v Gold Coast City Council* [2001] QCA 423 (at paragraph 38), which re-affirmed the role of the court when considering town planning matters that neither "*the Court is a planning authority*" nor is it "*the Court's function to substitute planning strategies for those which a planning authority in a careful and proper has to adopt*".

His Honour observed that notwithstanding it was clear the development was in conflict with the Ipswich Planning Scheme 2006, relevant factors such as the subject land's suitability for the proposed development, its historical uses, its proximity to the Warrego Highway and its being at the outer edge of its residential zoning, should be considered and weighed up against the extent of the conflict.

His Honour examined the nature and operation of the 2003 approval closely and held that, despite its overriding effect, the Ipswich Planning Scheme 2006 remained the planning scheme which had the force of law, as the 2003 approval did not purport to change or have the effect of changing the Ipswich Planning Scheme 2006. His Honour observed that the 2003 approval did not give any special exemption to the development, as impact assessment was still required for the proposed development pursuant to the Ipswich Planning Scheme 2006 and the applicable planning scheme for such assessment was the Ipswich Planning Scheme 2006. His Honour declared that the 2003 approval on its own was insufficient to support the proposed development but he did recognise the importance of the 2003 approval in that it independently constituted a ground under section 3.5.14(2)(b) (Decision if application requires impact assessment) of the IPA, independently of its significance for section 3.5.5(2)(d) (Impact Assessment) of the IPA.

Future residential use

In considering whether the development (if approved) would prevent the subject land from being redeveloped in the future for residential purposes, his Honour noted the underlying decision lied upon the attitude taken by Zanow or their successors despite the existence of any pressing demand. His Honour however noted the proposed "Amended Plan of Development" required impact assessment of a residential development of the subject land and that such requirement would practically impede the planning intent for residential use on the subject land. His Honour confirmed that the court must not act to sterilise residential potential in such manner.

Traffic

On the issue of traffic, his Honour found that the development (if approved) would cause adverse traffic impact to the locality and the access of the subject land was inadequate and unsuitable for the existing approved use and also the proposed use.

Whilst his Honour acknowledged the impact of the heavy traffic on the Warrego Highway, the existing approved use on the subject land and the non-residential traffic use of Pine Mountain Road on the amenity and character of the local area, he indicated that the zoning of the subject land denied the court from acting on a contention that residential development on the subject land would have an adverse effect on amenity or character.

Community expectations

His Honour did not consider Telstra's former use of the subject land was of any particular significance to this appeal in light of the fact that its use (being "public utility" use) ceased when it left. In terms of the community expectations of the use of the subject land, his Honour noted that most people would have consulted the planning scheme provisions in the structure plan and the Ipswich Planning Scheme 2006 but the 2003 approval would have had some influence on such expectations.

Amenity

Referring to the decisions of his Honour Judge Row in *Tourism Investments Pty Ltd v Brisbane City Council* [1988] QPLR 197, *Edray Homes Pty Ltd Superannuation Fund v Ipswich City Council* [1990] QPLR 237 and *KC Drew Pty Ltd v Brisbane City Council* [1990] QPLR 232, his Honour held that the development was similar to a spot rezoning and the development effectively sought to entrench non-conforming uses, which were problematic.

To reinforce the significance and purpose of the planning intent and strategy adopted by planning authorities for local areas in their planning instruments, his Honour stated that "*the local government and not the Court is the planning authority has often been expressly recognised in decisions in this Court and on appeal from this Court*".

In his Honour's view, those decisions of his Honour Judge Row were "*instructive in demonstrating that an established and confirmed planning intent pursued by the planning authority is not lightly overridden, even where a proposal appears to have no adverse effects and may exhibit some positive grounds for assessing it as a good idea that might represent a better use of the subject site*". By following the approach taken by his Honour Judge Row, his Honour did not consider that either part of the development should be approved.

Need

His Honour acknowledged that "*the planning scheme may not represent a perfect or the best allocation of land to particular classes of uses*", referring to the Court of Appeal decision, *Clark v Cook Shire Council* [2007] QCA 139 (at paragraph 32). However, for this appeal, the question as identified by his Honour was:

> *Whether the planning scheme's effect ought to be overridden to a greater extent than has already happened*.

His Honour concluded that "*it is not shown that the city or Brassall in particular is being deprived by the restrictions in the planning scheme of any facilities that they ought or could reasonably expect to have*".

Held

The appeal was dismissed.

Articulating Weightman

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Court of Appeal in the matter of *MC Property Investments Pty Ltd v Sunshine Coast Regional Council* [2010] QCA 163 heard before Holmes JJA, Chesterman JJA and Atkinson J

August 2010

Case

This was an application before the Queensland Court of Appeal (**court**) by MC Property Investments Pty Ltd (**applicant**) for leave to appeal against a decision of the Planning and Environment Court to refuse an appeal against a decision of the Sunshine Coast Regional Council (**council**) to refuse an impact assessable material change of use application for 38 multiple dwelling units (**development application**).

Facts

The appeal was refused by the learned primary judge who considered the critical issue to be the proposed development's significant degree of conflict with the intent for the precinct. Also considered by his Honour, in accordance with section 3.5.14(2) (Decision if application requires impact assessment) of the *Integrated Planning Act 1997* (**IPA**), was the Weightman approach (*Weightman v Gold Coast City Council* [2003] 2 Qd R 441), being a determination of whether there were sufficient planning grounds to approve an application despite a conflict with the planning scheme.

In identifying the conflict and planning grounds, his Honour at first instance balanced the two interests by following the Weightman approach. The applicant alleged that despite his Honour's reference to the Weightman approach, his Honour's reasons did not disclose whether he did in fact follow that approach.

Decision

The applicant's submission raised 14 errors of law, many with subcategories, challenging almost every line in the relevant part of his Honour's judgment. The court described this as riddling "*his Honour's admirably clear and concise judgment*".[6]

Of note, was that whilst his Honour did not set out the steps articulated in Weightman, it was perfectly clear from his Honour's reasons that he identified the conflict with the planning scheme, did examine the planning grounds put forward by the applicant and did determine, on balance, that they were not sufficient to justify approving the application.[7]

Held

Application for leave refused with costs.

6 At paragraph 8.
7 At paragraph 17.

Exercising the court's discretion: A question of fact

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Court of Appeal in the matter of *Lewani Springs Resort Pty Ltd v Gold Coast City Council & Anor* [2010] QCA 145 heard before Chesterman JA and Atkinson and Ann Lyons JJ

August 2010

Case

This was an application for leave to appeal to the Court of Appeal against the Planning and Environment Court's (**P&E Court**) decision to exercise its discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the *Integrated Planning Act 1997* (**IPA**) to excuse the co-respondent's (**Aldi Stores**) noncompliance with the public notification requirements under the IPA.

Facts

The development application the subject of the appeal in the P&E Court to which the relevant public notification issues related was for a development permit for a material change of use to establish a shopping centre development and to clear native vegetation.

Essentially, there were two issues of noncompliance in respect of public notification. The first, which was ignored in this case as irrelevant, was the co-respondent's failure to erect a public notice sign on one particular road frontage. The second and critical issue was in respect of the notification period.

Public notification was undertaken for a period of 15 business days instead of the 30 business days which was required by the IPA on account of the development being located within 100m of a wetland. The effect of this was that the notice on the land was not erected for the required period and the newspaper advertisements and notice to adjoining owners gave a wrong, earlier, date for the receipt of submissions.

The P&E Court held that the noncompliance had not substantially restricted the opportunities for public involvement in the development application and accordingly exercised the discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA to excuse the noncompliance.

The issue before the Court of Appeal was whether the P&E Court judge had made an error of law in exercising the discretion under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA in this regard.

Decision

The application for leave to appeal was refused in this case by a majority of 2 to 1. Chesterman JA and Ann Lyons J, in refusing the application, observed that the authorities on this point established that the P&E Court "*judge's conclusion that there had not been a substantial restriction on the opportunity to exercise rights given by the IPA would be, if wrong, a mistake of fact and not of law, if there was evidence which was capable of supporting the finding, or which reasonably admitted of the finding. It is only if there was no such evidence that the primary judge's conclusion would be an error of law*." Chesterman JA and Ann Lyons J held that there was such evidence, being the prominence of public notification and general knowledge by residents that the site would be the subject of a development application at some point. Therefore, it was held that the P&E Court judge's decision was a question of fact and not law and given the finding of fact there was nothing unreasonable in the manner in which the P&E Court judge exercised the discretion.

In dissent, Atkinson J held that the authorities established that the making of findings and the drawing of inferences in the absence of evidence is an error of law.

Atkinson J observed that in this case the P&E Court judge's decision was based on the absence of identification by the appellant (**Lewani Springs**) of any particular person who would have made a submission or considered making one had the public notification deficiencies not occurred, however the onus was not on the appellant to prove this point but rather the co-respondent.

Therefore, a reversal of the onus of proof as occurred in this case was an error of law and the decision to exercise the discretion should be set aside and the application for leave to appeal be allowed.

Held

The application for leave to appeal was refused.

Conflict with planning scheme – No error of law

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Court of Appeal in the matter of *WBQH Developments Pty Ltd v Gold Coast City Council & Anor* [2010] QCA 126 heard before McMurdo P, Fryberg J and Atkinson J

August 2010

Case

This was an application for leave to appeal against the decision of the Planning and Environment Court (**P&E Court**) to refuse an appeal by WBQH Developments Pty Ltd (**applicant**) against the decision of the Gold Coast City Council (**council**) to refuse an application for a development permit for a 15 storey apartment building at Palm Beach (**proposed development**). The applicant submitted that the finding of the P&E Court resulted from the following errors of law:

- that on its proper construction the council's planning scheme intended to preserve the distinct low rise residential character for the suburb of Palm Beach;
- that on its proper construction the Overlay Map OM6 reinforced a planning intent to preserve the character of Palm Beach as a low rise residential development.

Facts

The site for the proposed development was in the tourist and residential domain identified in the council's planning scheme. The table of development for the tourist and residential domain stated that a material change of use involving building work that exceeded the maximum number of storeys indicated for the site identified on Overlay Map OM6, was impact assessable. Overlay Map OM6-7 identified that the maximum number of storeys for the site of the proposed development was seven storeys.

The Tourist and Residential Domain Place Code relevantly provided as follows:

Performance criteria	Acceptable solutions
Development that is self assessable, code assessable or impact assessable	
Building Height	
PC1	**AS1**
All buildings must be constructed to a height which complements the distinctive local character of the coastal parts of the City and either: (a) contributes to the clustering of high rise structures; or (b) introduces transitional building heights between these high rise clusters.	The building does not exceed the maximum height as identified on Overlay Map OM6 Maximum Building Height.

The proposed development failed to comply with acceptable solution 1, given that the proposed building height exceeded the maximum height prescribed on Overlay Map OM6-7.

Having regard to performance criteria 1, it was accepted that the proposed development would contribute to the clustering of high rise structures and did not introduce transitional building heights between clusters. The issue was whether the height of the proposed development would complement the distinctive local character of the coastal parts of the city.

The issue was one of mixed fact and law. The applicant contended that the decision of the P&E Court was affected by two errors of law, identifying the following errors in the judgment of the P&E Court:

> *[27]...In my view, the indications given by higher order elements of the scheme are that provisions of the scheme are intended to preserve a distinct low rise residential character for the suburb of Palm Beach as a whole.*

and

> *[28]...Overlay Map 6 reinforces a planning intent to preserve that character, low rise residential development.*

Decision

The first alleged error

The applicant's first submission was that the provisions of the council's planning scheme did not demonstrate an intention to preserve a distinct low rise residential character for Palm Beach as a whole because such an intention was inconsistent with Overlay Map OM6.

"Low rise building" is defined in the council's planning scheme as "*any building with a height not exceeding four storeys above mean ground level*". High rise buildings were defined as buildings with a height of five storeys or more above mean ground level. The applicant submitted that given Overlay Map OM6-7 indicated that buildings of seven storeys were acceptable, high rise buildings were an acceptable solution in this area and did not need impact assessment.

The Court of Appeal did not accept the applicant's submission that the P&E Court's reference to "low rise" had the same meaning of the words implied in the definition of "low rise building". Further, there was no inconsistency with permitting some bottom range high rise development in part of the suburb whilst intending to preserve the distinct low rise residential character in the precinct, given that the overlay maps show that most of the suburb is designated two or three storeys.

Second, the applicant submitted that the P&E Court's decision was contrary to Planning Strategy Map PS11. The applicant submitted that Map PS11 showed the eastern area of Palm Beach as part of a high rise spine extending from Coolangatta to Southport. The Court of Appeal stated that the conclusions of the P&E Court were not contrary to Map PS11. Map PS11 was diagrammatic and showed that the high rise spine was non-continuous, with Palm Beach being designated for a minor concentration of high rise buildings. Further, the map was to be read in the context of the City Image and Townscape Strategy which provided that "*the heights and concentrations of tall buildings to individual nodes and precincts, reflecting different levels of activity along the coastline, while maintaining a degree of variation in heights along the coastline itself.*"

Third, the applicant submitted that performance criteria 1 reflected an intention that high rise buildings be developed in the tourist and residential domain. The Court of Appeal rejected that submission on the basis that whilst performance criteria 1 implied that buildings of eight storeys or more may be erected on some sites in the tourist and residential domain, it did not reflect an intention that high rise buildings be developed anywhere in the domain.

Finally, the applicant submitted that the P&E Court failed to take into account the distinction between Palm Beach west of the highway and Palm Beach east of the highway, evident on Overlay Map PS6 and Planning Strategy Map PS11. The Court of Appeal stated that the distinction was only one factor to be taken into account and the weight to be assigned to the maps was a matter for the P&E Court.

The second alleged error

It was submitted by the applicant that the P&E Court misconstrued the council's planning scheme by treating the maximum building height in Overlay Map 6 as mandatory. The Court of Appeal stated that nothing in the judgment of the P&E Court suggested that the maximum building height be treated as mandatory or prescriptive.

Moreover, the Court of Appeal held that the P&E Court was correct in stating the function of the acceptable solutions as follows:

> *[7] Its failure to meet AS1 triggered impact assessment, instead of code assessment of the project. However, that does not establish a conflict with PC1. Compliance with acceptable solutions is not mandatory. If WBQH can demonstrate an alternative solution meets PC1 there is no conflict.*

The Court of Appeal stated that the content of an acceptable solution may indicate what the planning scheme desires or prefers as development in the particular area. Further, the "Planning Intent" of the council's planning scheme indicates that the overlay maps articulate the desired outcome.

The Court of Appeal went on to confirm that the existence of such an intent did not conclude the question of whether there was conflict between the proposal and the planning scheme. A proposed development may demonstrate compliance with performance criteria to satisfy the provisions of a code notwithstanding non-compliance with a corresponding acceptable solution.

Matter of fact and law

The Court of Appeal noted that the identification and characterisation of the relevant area for the purposes of performance criteria 1 was a matter involving issues of both fact and law. Even if the P&E Court erred in law, the conclusion of the characterisation of the relevant area was not necessarily invalidated.

The Court of Appeal considered the appropriate test to determine whether the applicant would be successful in an appeal in the event that it was successful in demonstrating that the primary judge's conclusion was affected by error of law. Whilst it was not necessary for the Court of Appeal to determine the point, Judge Fryberg, considering the decision in *ALDI Stores (A Limited Partnership) v Redland City Council* [2009] QCA 346, relevantly stated as follows:

> *It may be that where there has been a misconstruction of a scheme which is a factor in an evaluative exercise, it is sufficient for the appellant to show that the error might have affected the conclusion at first instance; or it may be that the appellant must show that there is a real or substantial possibility that the error did affect that conclusion; or it may be as the Chief Justice suggested, that the appellant must show that the judge at first instance was constrained by law to come to a different conclusion. There may be other possible tests. The correct one remains to be determined.*[8]

Held

The Court of Appeal dismissed the application for leave to appeal with costs.

[8] See paragraph [42].

Mineral or not: A question of its use

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Court of Appeal in the matter of *Unimin Australia Limited v State of Queensland* [2010] QCA 169 heard before Chesterman JA and Atkinson J

August 2010

Case

This was an appeal to the Queensland Court of Appeal by Unimin Australia Limited (**Unimin**) against the decision of the Supreme Court on the construction of section 6 (Meaning of mineral) of the *Mineral Resources Act 1989* (**Act**).

Facts

Unimin conducted sand mining operations on North Stradbroke Island under a mining lease 1108 granted under the Act for silica sand mining purpose.

Unimin's principal interest was to extract silica sand for use in manufacturing glass. Unimin did not require any additional permit for its extraction of such silica sand as it was a "mineral" within the meaning of section 6(1) (Meaning of mineral) of the Act.

However, Unimin's extraction of the mined sand also resulted in the extraction of a lower purity silica sand, which was unsuitable for the manufacture of glass. Unimin sold the lower grade sand for use in specialty white mortar and white renders because of its colour or lack of colour.

The principal issue before the Supreme Court was whether the lower grade sand was a "mineral" within the meaning of the Act.

The Supreme Court concluded that the lower grade sand was mined because its colour rendered it saleable and its colour was a physical property or characteristic, not one of its chemical properties. Accordingly, it was held that the lower grade sand was not a "mineral" within the meaning of the Act as it was not "*mined for use for its chemical properties*".

Unimin challenged the conclusion of the Supreme Court and brought the appeal on the grounds that the Supreme Court made an error of law by:

1) *ruling that not all of an undifferentiated mass of silica sand mined for glass manufacture is a 'mineral' as defined in section 6 of the Mineral Resources Act 1989, because ... at the time of mining, the Appellant knew that an unidentifiable portion of that the silica sand would be subsequently graded as unsuitable for the market for glass manufacture;*

2) *ruling that, because the Appellant knew at the time of mining that an unidentifiable portion of the silica sand unsuitable for the market for glass manufacture ... would probably be used in specialist mortars and specialist renders, the Appellant 'mined' the silica sand for use in specialist mortars and specialist renders;*

3) *ruling that a use of silica sand in specialist mortars and specialist renders is not a 'use for its chemical properties' as defined in section 6 of the Mineral Resources Act 1989, on the basis ...:*

   (a) *that the phrase 'chemical properties' in section 6(3)(b) of the Mineral Resources Act 1989 should not be defined in accordance with the wide ranging but specific technical meaning and that a narrow definition should instead be obtained from common usage ...;*

   (b) *that the words 'chemical properties' in section 6(3)(b) of the Mineral Resources Act 1989 did not include chemical composition, purity and transparency, and treating these attributes as if they were no more than white pigmentation;*

   (c) *notwithstanding that speciality glass ... can be made without chemical reaction, ... that '... the words "chemical properties" in section 6(3)(b) of the Mineral Resources Act 1989 should be understood as connoting properties associated with chemical reactivity or chemical change';*

4) *failing to interpret the relevant provisions of the Mineral Resources Act 1989 in favour of subjects in circumstances of ambiguity and long standing practice.*

Decision

The Chief Justice, with whom Chesterman JA and Atkinson J agreed, found that:

- With respect to the first ground, all of the sand for the purpose of section 6(3)(b) (Meaning of mineral) of the Act should not be treated the same way merely because the lower grade sand was subsequently separated out, particularly since Unimin knew, at the time of extraction or winning, that a portion of the sand won would be used in the production of mortar and renders, rather than in the manufacture of glass. The Chief Justice also noted the definition of "mine" under section 6A (Meaning of mine) of the Act extended to the "separation of the two grades of mineral". This ground was therefore not sustainable.
- With respect to the second ground, Unimin intended, at the time of extracting or winning, to use the portion of the sand which would be identified as the lower grade sand, in mortar and renders, having regard to its knowledge that a portion of the sand won would not be suitable for the manufacture of glass and its intention that, once it was separated out, it would be used in mortar and renders. This ground was therefore not established.
- With respect to the third ground, the Supreme Court's finding of the meaning of "chemical properties" under section 6(3) (Meaning of mineral) of the Act (being "*properties which contribute at least to the reactivity of the material within other materials, not extending to purely physical characteristics such as colour - albeit colour is a function of chemical composition*") was reasonable and reached by orthodox means. The Chief Justice also noted that the Supreme Court had used the experts' evidence in a reasonable manner to determine the meaning of "chemical property", particularly as the Chief Justice observed, there was no accepted technical meaning for it and the experts' evidence was irrelevant and inadmissible under the circumstances.

  The Chief Justice further reaffirmed the Supreme Court's reasoning that the relevant difference between the two grades of sand was their usability, rather than their purity, for the purpose of determining its qualification as a "mineral" within the meaning of the Act. The Chief Justice noted that the lower grade sand was used for its colour (hence, its physical property), as opposed to the higher grade sand, which was used in the production of glass (which ordinarily involved chemical reaction) for its chemical properties. This ground was therefore also not established.
- With respect to the fourth ground, the fact that it was difficult in construing the term "chemical properties" under the Act did not necessarily mean the term was ambiguous. The Chief Justice upheld the Supreme Court's finding of the meaning of "chemical properties" under section 6(3) (Meaning of mineral) of the Act.

  The Chief Justice also noted, if Unimin's submission that the term "chemical properties" was ambiguous, were to be accepted, that the intended beneficiaries of the Act were not confined to miners in light of section 2 (Objectives of Act) of the Act. This ground was therefore not sustainable.
- Other circumstantial evidence such as the conditions of the environmental authority issued to Unimin for the subject mining operation, the opinion expressed by the State of Queensland (**respondent**) in relation to Unimin's predecessor's mining operation, and the respondent's acceptance of royalty payments in respect of both grades of sand, was irrelevant to the proper construction of the term "mineral" under the Act.

Held

The appeal was dismissed, with costs including any reserved costs to be assessed.

Council has no say in the use of fee simple land – how absurd?

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fletch Pty Ltd v Gladstone Regional Council & Anor* [2010] QPEC 63 heard before Robin QC DCJ

August 2010

Case

This was an interlocutory application brought by Fletch Pty Ltd (**appellant**) to the Planning and Environment Court (**P&E Court**) seeking "*the court to grant full approval of development application MCU/07/0027 visitor accommodation and caretakers residence before the court under appeal no 325 of 2008 if not I ask the court to move these proceedings to the federal court under notice of constitutional matters 78b of the Judiciary Act 1903 and have these matters heard by a court of competent jurisdiction for such matters which is the federal court or high court.*"

Facts

The Gladstone Regional Council (**council**) refused the appellant's development application for reconfiguring a lot (boundary realignment) and a material change of use for visitor accommodation (including ancillary manager's office/residence and shop) and a caretaker's residence.

The appellant appealed to the P&E Court against the council's decision to refuse the development application.

The appellant's interlocutory application sought the P&E Court to grant a full approval of the development application; or alternatively, move the proceeding to a court of competent jurisdiction pursuant to the notice given under section 78B (Notice to Attorneys-General) of the *Judiciary Act 1903* (Cth).

Decision

Whilst the council requested his Honour to make directions requiring the appellant to provide particulars to clarify its contentions and adjourn the application to be heard at a later date, his Honour considered it appropriate to deal with the constitutional issues purportedly contended by the appellant then, to limit the parties' additional trouble and cost.

In his Honour's view, the appellant's principal contention was that the planning controls administered by the council were unconstitutional, as they were inconsistent with the appellant's rights as a fee simple owner. His Honour noted the contention was of a kind which would be regarded as one determined against "*the common law rights or interests of a land owner by Bone v Mothershaw [2003] 2 Qd R 600*" and in that regard, his Honour observed that the P&E Court had on a number of occasions dealt with arguments of a similar nature and had dismissed them. On that basis, his Honour consistently concluded that the appellant's contention was unsustainable.

Apart from the fee simple owner argument, his Honour believed the appellant also contended that "*the whole notion and panoply of local government*" was not supportable based on the rejection of a proposal of recognising local government in the Commonwealth Constitution at the Federal Referendum held on 3 September 1988. His Honour rejected such contention and indicated that the failure of the referendum about local government does not generate "*a matter arising under the Constitution as involving its interpretation for purposes of s 78B*" and "*what local governments such as the respondent Council do is done as the relevant emanation of State sovereignty*".

Accordingly, his Honour concluded that there was no constitutional issue for the purpose of section 78B (Notice to Attorneys-General) of the *Judiciary Act 1903* (Cth) and that no opportunity should be offered to the appellant to clarify or refine its points of contention.

His Honour noted that if in fact a local government had no say in land use matters, given that the P&E Court presumed the local government's role (as an assessment manager) in those matters, then there would be no point in the P&E Court to grant a development approval. In his Honour's opinion, it would be absurd to assert that a local government was bound to rubber stamp a development application without any enquiry. His Honour continued to state that it was also his opinion that the appeal ought to retain its place in the list to be determined on the merits.

His Honour dismissed the application accordingly. In the circumstances, the council sought costs against the appellant. Having regard to the fact that the council had previously notified the appellant the likelihood of it seeking costs against the appellant, his Honour considered that it was appropriate to order the appellant to pay the council's costs of the application.

Held

Orders were made that:

- the appellant's application be dismissed.
- the appellant pay the council's costs of and incidental to the application to be assessed.

Can Prince Charming awaken Sleeping Beauty?

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Zehnder Dezent JE Pty Ltd v Caloundra City Council* [2010] QPEC 68 heard before Robertson DCJ

August 2010

Case

This was an application by the:

- Caloundra City Council (**council**) for an order that the appeal by Zehnder Dezent JE Pty Ltd (**appellant**) be struck out for want of prosecution and for costs; and
- appellant for leave to take a further step pursuant to rule 389(2) (Continuation of proceeding after delay) of the *Uniform Civil Procedure Rules 1999* (**UCPR**).

Facts

An appeal was filed by the appellant against the council's decision on 20 December 2005. From that date, the appellant took no step to advance the appeal, apart from attending a without prejudice meeting with the council in January 2006.

On 15 March 2010, the solicitor for the council wrote to the solicitor for the appellant, requesting that the appellant file a notice of withdrawal or discontinuance. After receiving no response from the appellant, the solicitor for the council applied for an order to strike out the appeal for want of prosecution and for costs. In response, the appellant applied for leave to take a further step pursuant to rule 389(2) (Continuation of proceeding after delay) of the UCPR. Both applications were heard together by the Planning & Environment Court (**P&E Court**).

Decision

In determining the applications, the P&E Court referred to the decision of *Jimbelung Pty Ltd v Beaudesert Shire Council & Ors* [2005] QPEC 032 at [11] which provided:

> *[...] In proceedings in this court the usual case involves the evaluation of a development proposal against relevant town planning law and provisions and it is extremely rare to find that questions touching historical matters, and memory and recollection are an issue.*

In determining the applications, the P&E Court considered the following issues:

- reasons for delay;
- prospect for success;
- the length of delay;
- prejudice.

Reasons for delay

The appellant lead evidence that the reason for delay was simple commercial expediency, it had decided to put its efforts into another venture unrelated to the proposal. The P&E Court found this an entirely unsatisfactory explanation.

Prospect for success

In considering the limitations outlined in *Jimbelung*, material lead by the appellant convinced the P&E Court that the appellant had limited prospects of success.

Length of delay

The appellant relied heavily on the decision of *Jimbelung*, where following years of ongoing negotiations and further reports, the P&E Court gave leave to continue the proceedings. Evidence lead by the appellant had established that it was "*not a case in which the appeal has simply gone to sleep for many years*".

Conversely, the P&E Court likened the present appeal to "*Sleeping Beauty [who] now expects the court to act as Prince Charming and wake it up*" and found that *Jimbelung* was wholly distinguishable from the appeal.

Prejudice

The P&E Court determined that if the appeal were to be re-enlivened, some prejudice would be felt by the council, however striking out the appeal would not prevent the appellant from making another development application which may address the council's concerns.

In deciding against the appellant, the P&E Court noted:

> *This court is now very concerned about parties prosecuting appeals and applications expeditiously. Its appointment of an ADR Registrar and the significant rule changes [to the Planning and Environment Court Rules] to which earlier reference is made demonstrate this concern which is clearly in the public interest. The parties should not be permitted to lodge appeals or applications and then do nothing for many years unless there are satisfactory reasons for the delay.*

Held

- The applicant's application refused with costs.
- The respondent's application to strike out the appeal is granted.

When is a change permissible?

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hydrox Nominees Pty Ltd v Brisbane City Council* [2010] QPEC 64 heard before Robin QC DCJ

August 2010

Case

In July 2009, the Planning and Environment Court (**P&E Court**) decided an adverse submitter appeal (No. 583 of 2008) by approving in part a development application for a material change of use for a shop, restaurant and indoor sport and recreation and preliminary approval to carry out building work. Generally, the proposed development was for a 'Bunnings' type outlet by a commercial rival of Bunnings.

The applicant in this application, Hydrox Nominees Pty Ltd, which represented the intended operator, had significant involvement in the adverse submitter appeal in which the relevant party was Parmac Investments Pty Ltd. In the current application, Hydrox applied to the court to endorse some changes to the development application in the interests of the better operation of the proposed development.

Facts

Section 367 (What is a permissible change for a development approval) of the *Sustainable Planning Act 2009* (**SPA**) provides that, subject to a number of constraints, a development approval may be changed by the P&E Court provided the change is a 'permissible change'. The first constraint is found in section 367(1)(a) (What is a permissible change for a development approval) of the SPA in that the resulting development must not be 'substantially different' from the development that was approved. Evidence was presented to the P&E Court setting out in detail all of the changes proposed to be made to the approved development.

The second constraint, found in section 367(1)(b)(i) and (ii) (What is a permissible change for a development approval) of the SPA, is whether the changes proposed would require referral to additional concurrence agencies or require impact assessment where previously impact assessment was not required.

The third constraint, found in section 367(1)(c) (What is a permissible change for a development approval) of the SPA, is that the proposed change would not "*be likely to cause a person to make a properly made submission objecting to the proposed change if the circumstances allowed*". His Honour Judge Robin noted that he had read every submission and noted that they raised serious issues one of which concerned a connection along the southern boundary of the site. Judge Robin also noted that there were submissions based on the disappointment that an anticipated residential future for the site had been frustrated.

The final constraint is found in section 367(1)(d) (What is a permissible change for a development approval) of the SPA in that the change proposed must not cause the development to which the approval relates to include any prohibited development.

Decision

The P&E Court found that the changes proposed to be made to the approved development would not result in a substantially different development pursuant to section 367(1)(a) (What is a permissible change for a development approval) of the SPA.

The P&E Court found that neither paragraphs (i) nor (ii) of section 367(1)(b) (What is a permissible change for a development approval) of the SPA applied as there were no additional concurrence agencies and the proposal always required impact assessment.

Judge Robin found that the submissions must be taken to have received proper consideration in the process that led to the P&E Court's order of July 2009 and that there was nothing in the submissions which expressed any concern or relevant view bearing on the changes that were proposed. Finally the P&E Court found that the proposed change did not involve prohibited development.

Held

The development approval was ordered to be changed so that the approved drawings were the ones including the proposed changes and the matter was adjourned pending finalisation of a conditions package.

Dismissing appeal for breach of court orders

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Paul Dinning v Gold Coast City Council & Anor* [2010] QPEC 56 heard before Rackemann DCJ

August 2010

Case

This was an application by the respondent council (**council**) to dismiss, for breach of court orders, an appeal by the appellant, Mr Dinning, against the council's deemed refusal of a development application for a development permit for a material change of use for a reception room and wedding chapel in respect of land at 77 Holyrood Road, Maudsland.

Facts

The appeal was commenced in January 2008 and was substantially progressed towards trial. In the latter part of 2009 and the early part of 2010, the Planning and Environment Court (**P&E Court**) gave certain directions, including timeframes for the delivery of an acoustic joint expert report and participation in mediation.

The directions were not complied with due to the failure of the appellant's acoustic expert to participate until unpaid invoices were settled. The P&E Court subsequently made two new orders for revised timeframes in respect of the appellant providing particulars and also the preparation of the joint expert report.

After not complying with the new directions, the appellant sought a six week adjournment which was opposed by the council. The P&E Court made further orders requiring the appellant to give notice as to whether he would continue to prosecute the appeal. The appellant did not give notice within the required time.

On 21 June 2010, the council filed and served an application for dismissal of the appeal which was returnable on 24 June 2010. The council's application was adjourned for 3 weeks and it was ordered that the appellant file and serve affidavit material by 9 July 2010 evidencing why the appellant had not been able to prosecute the appeal in the preceding months, the personal circumstances that prevented him from prosecuting the appeal in the present and the steps the appellant proposed to take to be in a position to prosecute the appeal in the future. The appellant failed to file and serve any affidavit material.

Decision

His Honour Judge Rackemann dismissed the appeal and ordered that the appellant pay the council's costs of and incidental to the application for dismissal.

In his judgment his Honour provided as follows:

> *In this case, the concerning aspects are not only the delay that has occurred in the course of this year and non-compliance with the Court's order of 24 June, but also that it appears, from Mr Nelms' instructions, that there is no present intention to proceed expeditiously with the appeal from this point within any acceptable timeframe [at 18] ...*
>
> *The appellant's failure to provide any affidavit material must be seen in the context that that failure or refusal to comply with the Court's order of 24 June has occurred in circumstances where the appellant well knew that there was an application for dismissal of the proceedings on foot to be heard today [at 19] ...*
>
> *In my view, the non-compliance with the Court's order of 24 June is inexcusable and the circumstances of that non-compliance are such that, in my view, the appellant has not complied with its implied undertaking to the Court. It is appropriate, in the circumstances, not to require the respondent to continue to be a party to proceedings which are not being progressed appropriately and in respect of which the appellant has been in intentional and contumelious non-compliance with the Court's order [at 25].*
>
> *In respect of the respondent's request for costs of the application for dismissal, His Honour provided that "the costs associated with the application were incurred because of the procedural default of the appellant. The jurisdiction to award costs is therefore enlivened".*

Held

The application for dismissal was granted. The appeal was dismissed. The appellant was ordered to pay the council's costs of and incidental to the application for dismissal.

Relief from failure to provide plan for reconfiguration in time

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wallace & Anor v Logan City Council* [2010] QPEC 66 heard before Robin QC DCJ

August 2010

Case

This was an application by Wallace and another (**appellants**) to the Planning and Environment Court (**P&E Court**) to grant relief in relation to the appellants' failure to comply with section 3.7.2(2) (Plan for reconfiguring under development permit) of the *Integrated Planning Act 1997* (**IPA**).

Facts

The appellants overlooked section 3.7.2(2) (Plan for reconfiguring under development permit) of the IPA which provided that where a reconfiguration proposed to be effected by a plan is authorised by a development permit "*the plan must be given to the local government for its approval while the permit still has effect*".

The relevant development permit was for a reconfiguration of one lot into two and a preliminary approval for operational work that was granted by the Logan City Council (**council**) on 23 December 2005 (**development approval**).

The development approval continued to have effect in accordance with section 801 (Continuing effect of development approvals) of the *Sustainable Planning Act 2009* (**SPA**). Section 341(2)(b) (When approval lapses if development not started) of the SPA provides that to the extent a development approval is for reconfiguring a lot requiring operational work, the approval lapses if a plan for the reconfiguration is not given to the local government within 4 years starting the day the approval takes effect.

Further, section 815 (Continuing effect of repealed IPA, ch 3, pt 7) of the SPA provides that where a development permit given under the repealed IPA includes a condition requiring a plan for reconfiguring a lot to be submitted to a local government, the repealed IPA chapter 3, part 7 continues to apply in relation to the development permit. As a consequence, chapter 3, part 7 of the IPA continued to apply to the development approval.

The development approval failed after 23 December 2009, having regard to section 3.5.21(2)(b) (When approval lapses if development not started) of the IPA which provided that to the extent a development approval is for reconfiguring a lot, the approval lapses if a plan for the reconfiguration is not given to the local government under section 3.7.2(2) within 4 years starting the day the approval takes effect.

The approvals had been acted on by the appellants, having completed substantial works on the site the subject of the approvals.

The council was sympathetic to the appellants' situation and the appellants had expressions of support from nearby residents for the development.

Decision

The P&E Court referred to the decision of Judge Wilson SC in *Ferpro Pty Ltd as Trustee v Logan City Council* (unreported, 25 February 2009) where the applicant similarly overlooked section 3.7.2(2) (Plan for reconfiguring under development permit) of the IPA.

Judge Robin QC referred to the expanded equivalent of the old section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA in section 440 (How court may deal with matters involving noncompliance) of the SPA. Section 440(3) (How court may deal with matters involving noncompliance) of the SPA states that to remove any doubt, it is declared that the section applies in relation to a development application that has lapsed. However, the section does not refer to development approvals which have lapsed. His Honour stated that, in his opinion, section 440(3) (How court may deal with matters involving noncompliance) of the SPA did not have the effect that a lapsed approval may not be directly or indirectly revived by an appropriate court order.

Judge Robin QC, following the approach of other judges of the P&E Court, which is to be generous in permitting lapsed applications and the like to be revived, made an order providing that the time for the appellants to give a plan of reconfiguration to the council pursuant to section 3.7.2(2) (Plan for reconfiguring under development permit) of the IPA and section 341(2) (When approval lapses if development not started) of the SPA be extended to 28 October 2010.

Held

Order that the time for the appellants to give a plan of reconfiguration to the council pursuant to section 3.7.2(2) (Plan for reconfiguring under development permit) of the IPA and section 341(2) (When approval lapses if development not started) of the SPA be extended to 28 October 2010.

Expiry of local laws

Diane Coffin

State-wide reform of local government areas in 2008 saw the widespread amalgamation or transfer of various local government areas into larger integrated local government entities. As part of the amalgamation process local governments were required to apply the local laws of their predecessor councils in the predecessor council's local government area. At the time of the reforms the Queensland Parliament introduced regulations containing provisions which deal with the validity and application of local laws within new local government areas. These provisions have the potential to result in serious repercussions, particularly for the local laws of previous joint local governments, in terms of the continuing application of those local laws after 31 December 2010

August 2010

Local laws of joint local governments

Section 64 (Local laws for new local government areas) of the *Local Government Reform Implementation Regulation 2008* (**LGRI Reg**) states that local laws of a joint local government in force immediately before amalgamation will continue to operate in what was the joint local government's area until they are repealed by the new local government or the new local government applies the local laws to the whole of its local government area or 31 December 2010. This section only applies to the 11 joint local governments listed in schedule 1 (Joint local governments and new local government area) of the LGRI Reg but means that all the local laws of those joint local governments will expire on 31 December 2010 if action is not taken to either repeal the local laws or apply the local laws to the new local government area. It is therefore advisable all local governments with responsibility for the local laws of the previous joint local governments undertake an immediate review of those local laws.

Other local laws

By contrast, section 12 (Local laws for new local government areas) of the LGRI Reg which applies to all merging local governments in Queensland with the exception of Beaudesert, Ipswich, Taroom, Tiaro, and Torres Councils, states that local laws of a merging local government in force immediately before amalgamation will continue to operate in what was the merging local government's area until they are repealed by the new local government or the new local government applies the local laws to the whole of its local government area or 31 December 2011. This means if the new local government does not repeal the local laws or apply the local laws to the new local government area then the local laws will expire on 31 December 2011.

The local governments not included in section 12 (Local laws for new local government areas) of the LGRI Reg are dealt with under the *Local Government Reform Implementation (Transferring Areas) Regulation 2007*. Section 20 (Local laws for transferring areas) of this regulation provides for the same procedure imposed on local governments under section 12 (Local laws for new local government areas) of the LGRI Reg whereby the local laws applicable to a transferring local government area will expire on 31 December 2011 in the absence of action by the new local government to either repeal the local laws or apply the local laws to the whole of the local government's area.

Therefore, the local laws of a merging local government in force immediately before amalgamation and local laws applicable to a transferring local government area will expire on 31 December 2011 in the absence of action by local governments to either repeal the local laws or apply the local laws to the whole of the local government's area. Given the effect of these provisions it is advisable for local governments to begin undertaking a widespread review of all the local laws applicable to former local government areas prior to amalgamation.

Local law making process

Because of the introduction of the *Local Government Act 2009* (**LGA**), the first part of any review of local laws should be for each local government to establish their own local law making process.

Section 29 (Local law making process) of the LGA specifically provides that each local government may decide its own process for making local laws as long as that process is consistent with the State interest check provisions in section 29A (State interest check) of the LGA and the public notice provisions in section 29B (Notice of new local law) of the LGA. Section 29A (State interest check) of the LGA also provides that any proposed local laws should be drafted substantially in accordance with the relevant drafting standards.

At first instance, any local law making process would need to comply with section 4 (Local government principles underpin this Act) of the LGA which relevantly include principles such as "transparent and effective process, and decision-making in the public interest" and "democratic representation, social inclusion and meaningful community engagement".

A local government's power to make local laws is set out in section 28 (Power to make a local law) of the LGA which provides a local government may make and enforce any local law that is necessary or convenient for the good rule and local government of its local government area. However, this power is limited by a number of sections which specify subjects that a local government may not make a local law about including network connections, election advertising and development processes. Section 38 (Anti-competitive provisions) of the LGA also provides that a local government must not make a local law that contains an anti-competitive provision unless the local government has complied with the procedures prescribed under a regulation for the review of such provisions.

Therefore any local law making process should, at a minimum, include the following stages:

Stage 1: Development, drafting and full council resolution to propose to make a local law.

Stage 2: Undertake consultation with:

- relevant State government entities (State interest check);
- the community; and
- relevant stakeholders identified in any public interest test in relation to any anti-competitive provisions.

Stage 3: Proposed local law reviewed in light of results from Stage 2[9] and adoption by council resolution as the proposed local law.

Stage 4: Proposed local law and supporting documentation provided to Minister for approval.

Stage 5: Minister's approval.

Stage 6: Meet any conditions imposed by Minister, pass council resolution to adopt local law, publish notices of new local law and provide Minister with copy of local law, drafting certificate and published notices.

Given that some local governments have hundreds of local laws which they currently administer over various parts of their local government area, the task of synthesising all these local laws into one coherent set of local laws applicable to the whole of its local government area will be a substantial task. So whatever process is adopted by local governments, that process would be better started sooner rather than later.

[9] Further consultation may be required if further amendments are made to the proposed local law.

Development approvals confer ownership in the sense of the right to take advantage of a development approval on the owner of the land for the time being

Diane Coffin | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mofo Group Pty Ltd v Brisbane City Council & Ors* [2010] QPEC 79 heard before Robin QC DCJ

September 2010

Case

This was an application by Mofo Group Pty Ltd (**applicant**) to achieve recognition of intellectual property rights from work done and financial contributions made by it towards achieving a development approval which took the form of a negotiated decision notice.

Facts

The applicant made its development application with the consent of the owners of the property in 2008, seeking a development permit for a material change of use for multi-unit dwellings and reconfiguring a lot which was approved in 2008. Subsequent negotiations with the Brisbane City Council (**first respondent**) resulted in a negotiated decision notice (**approval**).

At a later date, Conics (Sunshine Coast) Pty Ltd (**second respondent**) on behalf of Vantage Holdings Pty Ltd (**third respondent**) made a request to the first respondent to change the approval.

The land is now owned by Kinabulu Holdings Pty Ltd (**fourth respondent**) who had advanced construction of dwellings on the site.

The applicant sought declarations that:

- a changed decision notice dated 1 December 2009, pursuant to the application made on behalf of the third respondent was null and void;
- the second respondent and the third respondent were neither entitled nor authorised to make the application of 20 October 2009;
- the first respondent was not entitled or empowered to consider the 1 December 2009 application.

The applicant also sought an injunction restraining the third and fourth respondents from proceeding to act in reliance on the approval issued on 1 December 2009.

From the outset of the application, the respondents challenged its validity. The respondents challenged the jurisdiction of the Planning and Environment Court (**P&E Court**) to hear the matter and the applicant's contentions as unsustainable. Furthermore, the respondents placed the appellant on notice that costs would be sought against it.

The appellant made submissions that the *Integrated Planning Act 1997* (**IPA**) does not confer ownership of approvals and furthermore the owner's consent cannot have the effect of conferring on an entity such as the Third Respondent any relevant right.

Decision

In determining the application, his Honour found that section 3.5.28 (Approval attaches to land) of the IPA conferred ownership in the sense of the right to take advantage of a development approval on the owner of the land for the time being.

In terms of the appellant's submission that an approval could not be implemented without the consent of the original applicant for the approval to the use of its intellectual property, his Honour determined that there are other courts or tribunals where relief by way of protection of rights that the appellant may have obtained even to the extent of preventing construction of the appellant's development.

Furthermore, his Honour stated that a development approval not only runs with the land, it forms part of the whole planning regime for the local government area conferring development rights which may well differ from those that the general planning arrangement confer.

In respect of costs sought by the respondents, the P&E Court found that the proceeding became frivolous and vexatious at different times for each respondent and the applicant was ordered to pay costs accordingly.

Held

The application was dismissed and the applicant was ordered to pay costs to each respondent.

No excusal for non–compliance with IPA

Diane Coffin | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mahaside Pty Ltd v Sunshine Coast Regional Council & Ors* [2010] QPEC 70 heard before Robertson DCJ

September 2010

Case

This was an application by Mahaside Pty Ltd (**Mahaside**) for a declaration that its development application was properly made and that the former Maroochy Shire Council, now the Sunshine Coast Regional Council's (**council**) decision notice for the development application was valid. In the alternative Mahaside sought an order excusing non–compliance, if any, with section 3.2.1(5) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**) and a declaration that the council's decision notice be treated as valid.

Facts

On 11 October 2004, Mahaside applied to the council for reconfiguration of land situated at Collins Road and Waterfall Road, Yandina. The development application was refused and an appeal was filed with the Planning and Environment Court against the refusal. The issue the subject of this application was whether the development application was "properly made".

From 4 October 2004, section 3.2.1(5) (Applying for development approval) of the IPA required an application, to the extent that the development proposal involved the taking or interfering with a State resource prescribed under a regulation, to be supported by evidence that the proposed development was consistent with an allocation of, or entitlement to the resource, or that the development application may proceed in the absence of an allocation or entitlement to the resource. Mahaside proposed that a road be constructed over part of unallocated State land to facilitate access to some of the northern lots in the proposed reconfiguration.

It was common ground that the unallocated State land was a State resource prescribed under a regulation. Therefore, the critical issue was whether the proposed road on part of the unallocated State land involved "the taking or interfering with" a State resource prescribed under a regulation.

Decision

His Honour considered that the proposed development, as it affected the unallocated State land, would fall within the concepts of both "taking" and "interference with a State resource". His Honour observed that "*the part that would be taken as a road will have the effect (by reference to the Land Act 1994) of alienating it from the stock of unallocated State land, and 'hampering (and/or) hindering (with) the State's stewardship of the resource'*".

Therefore, his Honour held that section 3.2.1(5) (Applying for development approval) of the IPA applied and the development application was not a "properly made" application as it failed to provide evidence that the proposed development was consistent with an allocation of, or entitlement to the resource, or that the development application may proceed in the absence of an allocation or entitlement to the resource.

In turning to the question of whether the non-compliance with section 3.2.1(5) (Applying for development approval) of the IPA should be excused under section 820(1) (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009*, his Honour observed that it was an important factor that the appellant incorrectly answered the question (on the development application form) about interference with a State resource, and that any interested person reading the application would have proceeded on the basis that the application did not involve the taking or interfering with a State resource. This was particularly so in light of the fact that there were 364 properly made submissions during the IDAS process.

His Honour concluded that the non-compliance should not be excused in the circumstances.

Held

The application was dismissed. It followed that the appeal should also be dismissed.

COLIN BIGGERS & PAISLEY LAWYERS

No jurisdiction means no application

Ronald Yuen | Diane Coffin

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Crowther v Brisbane City Council (No. 2)* [2010] QPEC 72 heard before Searles DCJ

September 2010

Case

This was an application brought by Claire Crowther (**applicant**) to the Planning and Environment Court (**P&E Court**) seeking the P&E Court to restrain the Brisbane City Council (**council**) from doing any work pursuant to an exemption certificate for development in respect of the Yeronga Memorial Park (**certificate**) granted under section 74 (Deciding application for exemption certificate) of the *Queensland Heritage Act 1992* (**QHA**).

Facts

The council proposed to carry out works in the Yeronga Memorial Park, which included, amongst other things, reinstating the original planting distances and alignments of the trees (**works**). The Yeronga Memorial Park is on the Queensland Heritage Register under the QHA. The applicant opposed the carrying out of the works by the council pursuant to the certificate and contended that the carrying out of the works would adversely affect the environmental values of the Yeronga Memorial Park and be in breach of a number of legislation dealing with the environment. Therefore, the applicant made an application to the P&E Court and sought an injunction against the council from carrying out the works pursuant to the certificate.

At the first review of the application, the council raised the issue of the P&E Court's jurisdiction to deal with the application. The P&E Court expressed serious doubts as to the issue and declined to grant an interlocutory injunction sought by the applicant. The P&E Court however directed the applicant to provide to the council material upon which she intended to rely upon to, amongst other things, establish the jurisdiction of the P&E Court and adjourned the matter.

His Honour Judge Searles DCJ identified the following issues, which were possibly to be determined:

- firstly, whether the P&E Court had jurisdiction to deal with the applicant's application;
- secondly, whether the applicant had standing to bring the application;
- thirdly, whether the injunction sought by the applicant should be granted.

His Honour, however, had similar concerns on the issue of jurisdiction and considered it appropriate to deal with that issue first before proceeding to determine the other issues.

Whilst the applicant referred to the *Environmental Protection Act 1994* (**EPA**), the *Land Act 1994*, the *Nature Conservation Act 1992* (**NCA**) and the QHA in her written outline of submissions, in the applicant's oral submissions on the issue of jurisdiction, she relied solely upon the EPA and the NCA.

Environmental Protection Act 1994

The applicant contended that she was an "interested person" for the purpose of section 505 (Restraint of contraventions of Act etc) of the EPA. The applicant referred to various sections of the EPA (including section 4 (How object of Act is to be achieved) of the EPA) in her submissions but essentially, without identifying any specific provisions of the EPA founding jurisdiction of the P&E Court to deal with the application, she contended that the P&E Court had jurisdiction because:

- there was no prohibition in the EPA which would prevent the application from being brought;
- the application sought to protect the environment and the EPA dealt with the protection of the environment and the court was one which was referred to in schedule 4 (Dictionary) of the EPA.

The council disagreed with the applicant's contention that the EPA conferred jurisdiction on the P&E Court. The council argued that the applicant had no relevant interest for the purpose of section 505(1)(c) (Restraint of contraventions of Act etc) of the EPA as "*the applicant was not one whose interests were affected by the issue of the subject Exemption Certificate*". Further, leave of the P&E Court had not been sought or granted pursuant to section 505(1)(d) (Restraint of contraventions of Act etc) of the EPA.

Nature Conservation Act 1992

The applicant contended that, by reference to section 6 (Community participation in administration of Act) of the NCA, she was an "interested person" for the purpose of the NCA.

The applicant further contended that the P&E Court had jurisdiction to deal with the application because the Certificate was within the scope of "*a licence, permit or other authority issued or given under a regulation*" under section 173B (Court may make declarations) of the NCA and the P&E Court was the relevant court for the purpose of section 173B (Court may make declarations) of the NCA.

The council submitted, and the applicant accepted, that the Yeronga Memorial Park was not a conservation park and therefore, not a protected area for the purposes of the NCA. Accordingly, having regard to section 4 (Object of Act) of the NCA, the council submitted that the NCA had no application.

Decision

His Honour considered the applicant's contention that she was an "interested person" for the purpose of the EPA and the NCA spoke more to her standing than to jurisdiction.

His Honour noted the applicant had not identified any specific provision under the EPA or the NCA founding jurisdiction in the P&E Court to deal with the application.

His Honour agreed with the council's submissions and concluded that the applicant, by referring to objects, preambles and miscellaneous sections of legislation, had not established that the P&E Court had jurisdiction to deal with the application. Accordingly, his Honour did not find it necessary to deal with the other two identified issues and ordered that the application be struck out.

Held

Order was made that the applicant's application be struck out for want of jurisdiction.

The cumulative effect of the modern state-of-the-art Roma saleyard

Samantha Hall | Vivien Little

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bassingthwaighte v Roma Town Council & Ors* [2010] QPEC 91 heard before Jones DCJ

October 2010

Case

This was an appeal by David and Suzanne Bassingthwaighte (**appellants**) against the decision of the Roma Town Council (**respondent**) to refuse a development application for a material change of use (sales yards development and motor vehicle workshop and Environmentally Relevant Activity No. 28 – truck washing facility) at 370-444 Warrego Highway, Roma (**development application**).

Facts

The appellants lodged a development application for "modern state-of-the-art" cattle yards on land located on the Warrego Highway approximately 3.5km west of Roma. The location of the development proposal was on 35 hectares of land designated Rural under the planning scheme and was located in an area broadly characterised as a mixture of rural, rural residential and industrial uses. The existing cattle yard owned by the respondent was located just off the Warrego Highway to the east of the town within Industry zoned land.

The development application was impact assessable and attracted approximately 600 submissions. 11 of the submitters elected to join the appeal as co-respondents.

Issues raised in the appeal included:

- the characterisation of the proposed development;
- amenity (including visibility, odour, noise and lighting);
- traffic;
- ground water and surface water;
- good quality agricultural land (**GQAL**);
- how the proposal sat within the planning scheme of Roma; and
- need.

Decision

As the development application was impact assessable, his Honour Judge Jones noted that the decision of the assessment officer must not compromise the achievement of the desired environmental outcomes (**DEOs**) of the planning scheme or conflict with the planning scheme unless there are sufficient grounds to justify the approval despite the conflict.

His Honour found the development application to be in serious conflict with a number of important objectives and outcomes identified for the rural designation in the respondent's planning scheme. The location of the proposed development did not protect and enhance the rural scale, intensity, form and character of the area and would compromise community well being and local amenity.

While individually the issues of odour, scale and lighting did not constitute sufficient conflict with the planning scheme, the cumulative effects of the issues, together with the adverse impacts associated with noise, created such an unreasonable level of adverse impact, as to create serious conflict with the planning scheme.

Furthermore, his Honour could not find grounds to justify approval despite the conflicts with the planning scheme, as there were no circumstances in which the development application could make good or offset the negative impacts.

Held

The appeal was dismissed.

Application to re–enliven lapsed development approval

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *John Andrew Devy and Maxine Gayle Devy (as trustee for the Devy Family Trust) v Logan City Council* [2010] QPEC 96 heard before Rackemann DCJ

October 2010

Case

This was an application for a declaration under section 818(2) (Proceedings for declarations) and for orders under section 820(1) (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009* (**SPA**).

The purpose of the application was to obtain orders which would, in effect, re-enliven a lapsed development approval.

Facts

John Andrew Devy and Maxine Gayle Devy (**applicants**) were the owners of land which was subject to a development approval for reconfiguring a lot from one lot into three. That approval was granted on 18 August 2005.

By letter dated 30 January 2008, the council approved an application for operational work. The works then commenced in July 2008 and were eventually completed in October 2009. A substantial amount of money was spent on those works, including by way of headworks and parks contributions.

It was accepted that the development approval for reconfiguring a lot lapsed in August 2009 by reason of the operation of section 3.5.21 (When approval lapses if development not started) of the *Integrated Planning Act 1997* (**IPA**). At the relevant time, however, the applicants were under the misapprehension that the approval would not lapse until four years after the operational work approval. Consequently, no request for an extension was made within the time allowed under the IPA.

The applicants and, indeed, the council, thereafter continued to act in a manner which was consistent with the approval still being in force, although, it was recognised that that was not so.

Decision

His honour Judge Rackemann noted that under the IPA the court's power to make orders, in effect, excusing non-compliance, was restricted and resulted in a number of cases where technicality triumphed over substantive justice. His Honour also noted that this situation had been recognised and remedied by the legislature in the SPA which provides an untrammelled discretion where a, "provision has not been complied with - or fully complied with".

The declaration which was sought under section 818 (Proceedings for declarations) of the SPA, in the current circumstances, was one that the development approval had lapsed under the IPA. Section 820 (Proceedings for particular declarations and appeals) of the SPA provides if, in a proceeding, under 818(2) the court finds that a provision of the repealed Act has not been complied with, or has not been fully complied with, the court may deal with the matter in a way the court considers appropriate.

The failure on the part of the applicants to have sought an extension within time and to have inadvertently allowed the application to lapse, in his Honour's view, fell within the terms of section 820 (Proceedings for particular declarations and appeals) of the SPA. In those circumstances, subsection (1) permitted the court to, "deal with the matter in the way the Court considers appropriate".

His Honour noted that the remedy was, of course, discretionary but found, however, that the circumstances set out in evidence revealed that it was simply a case of an honest mistake which was to be corrected within a reasonable time and in circumstances where the council had no opposition to the orders being made. In those circumstances, his Honour was prepared to exercise his discretion to make the relevant orders.

Held

His Honour declared that the development approval for the reconfiguring a lot lapsed on or about 13 August 2009. His Honour further ordered that it be taken that the said approval was extended to 30 October 2010.

Failure to register title no impediment to ownership of land

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Acker & Ors v Whitsunday Regional Council* [2010] QPEC 95 heard before Rackemann DCJ

November 2010

Case

This was an application by Acker, Polanski and Carmichael Consulting Pty Ltd (**appellants**) to the Planning and Environment Court (**P&E Court**) to appeal against a decision of the Building and Development Tribunal (**tribunal**) regarding an enforcement notice issued to the appellants by the Whitsunday Regional Council (**council**).

Facts

The council issued an enforcement notice to the appellants under section 248(1) (Enforcement notices) of the *Building Act 1975* to demolish and remove a building located at 14 Carpet Street, Collinsville (**site**) which had been extensively damaged by fire and was in a derelict state.

A notice under section 248 (Enforcement notices) of the *Building Act 1975* may only be given to "the owner". The appellants denied that they were the owners of the site within the meaning of "owner" under the *Building Act 1975*.

The appellants appealed to the tribunal against the issue of the enforcement notice, which found, dismissing the appeal, that the appellants were the owner of the site under the *Building Act 1975*. The appellants then sought to appeal the decision of the tribunal to the P&E Court on an issue of law, being whether the appellants were, in fact, "the owners" of the site for the purposes of the *Building Act 1975*.

The relevant aspect of the definition of "owner" in the *Building Act 1975* was set out in sub-paragraph (i) of the definition, which provided that the owner was "the person for the time being entitled to receive the rent for the building or structure or would be entitled to receive the rent for the building or structure if the building or structure were let to a tenant at a rent".

At the time the enforcement notice was issued, on 2 August 2007, the registered proprietor of the land was Mr Kable. In September 2004, the appellants entered into an agreement to purchase a large number of properties from Mr Kable. The appellants agreed to discharge Mr Kable's indebtedness to Atlantic Funds Management Ltd, to assume all rates and land tax liabilities in respect of the properties and to pay a sum of $135,000 for the properties listed in a schedule to the contract. The site the subject of the enforcement notice was not listed in the schedule, however, the evidence before the P&E Court indicated that there was an oral agreement between Mr Kable and the appellants for the site to be transferred as if it had been included in the schedule.

On 23 September 2004, Mr Kable executed an instrument of transfer of the site. The appellants' solicitors executed the same transfer on their behalf in early 2005. The consideration for the transfer was recorded as $9,000. The appellants were unable to register the transfer because a certificate of title had been issued and was being held by a solicitor who, having done work for Mr Kable and the appellants, refused to lodge the duplicate to register the transfer as he was purporting to exercise a lien for unpaid fees.

The question for the P&E Court was whether the appellants were "the owners" of the site at the time the enforcement notice was issued.

Decision

His Honour Judge Rackemann referred to section 117 (Rent and benefit of lessee's covenants to run with the reversion) of the *Property Law Act 1974* which provides that the right to receive rent passes with the reversionary estate in the land. Here, the vendor had been paid and handed over a transfer in registrable form, however the transfer had not been registered. Consequently, the legal title to the reversionary estate had not passed to the appellants.

His Honour stated that while legal title does not pass until registration of the transfer, rights and interests are created from the time the vendor and the purchaser enter into the agreement for sale. Moreover, the purchaser is ordinarily obliged to complete the transaction, however, this does not mean that the reversionary estate has passed in equity. Whatever rights had been acquired by the appellants upon entering into the agreement to purchase the property, those rights did not constitute full beneficial ownership.

However, Mr Kable was a paid vendor at the time the enforcement notice was issued. His Honour Judge Rackemann indicated that a paid vendor becomes a bare trustee of the legal estate, pending its transfer. Whilst Mr Kable, as vendor, had not done all that he was required to do to give effect to the transfer under the *Land Titles Act 1994*, his failure to carry out that obligation was not inconsistent with the existence or nature of the bare trust, under which the vendor has the obligation to effect the transfer of title.

His Honour Judge Rackemann stated that a bare trustee is one who "*has no interest in the trust assets other than that existing by reason of the office of trustee and the holding of the legal title, pending registration of the transfer*". Mr Kable no longer held legal title to the site for the purpose of using and profiting from the site for financial benefit. He was merely in a position of holding title for the purpose of effecting the transfer and had no active duty to perform in respect of the site. As such, Mr Kable was not at liberty to demolish the building on the site, as the enforcement notice directed.

The P&E Court concluded that the full equitable title in the reversionary estate passed to the appellants. The appellants had the right to possession and receipt of the rent in respect of the site. Accordingly, the appellants were, at the time the council issued the enforcement notice in respect of the site, the owners for the purposes of sub-paragraph (i) of the definition in the *Building Act 1975*.

Held

The appeal was dismissed.

Frivolous or vexatious claim

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Whitsunday Regional Council v McCracken & Ors* [2010] QPEC 104 heard before Rackemann DCJ

November 2010

Case

This was an application brought by the Whitsunday Regional Council (**council**) to the Planning and Environment Court (**P&E Court**) seeking declarations that Michelle Ann McCracken (**McCracken**) had not complied with parts of earlier orders and also orders for its costs of and incidental to its application from 4 December 2009 and McCracken's application from 5 February 2010 on frivolous or vexatious ground.

Facts

On 23 August 2007, the council filed an originating application in the P&E Court seeking enforcement orders in relation to unlawful earthworks and clearing on Lot 20 on RP748499 (**land**). Enforcement orders were made on 27 June 2008 which required McCracken to carry out remediation or restoration works, including engineering and revegetation works within specified times (**initial orders**).

On 23 October 2009, the council filed an application which sought to vary the initial orders by requiring, amongst other things, the provision of bonds to secure performance of the works (**council's application**). At the relevant time, McCracken had not complied with the initial orders.

With the consent of the parties, the P&E Court varied the initial orders (**first amended orders**) but adjourned the application for bonds for further review on 30 October 2009.

On 4 December 2009, the P&E Court ordered that if McCracken failed to provide a certificate of stability in accordance with the first amended orders, she would be required to provide a bond in the sum of $84,600.

A certificate of stability was provided to the council by the required date but it was later found to be deficient and McCracken was ordered by the court on 18 January 2010 to provide bonds in the sums of $84,600 and $108,790 within specified times.

On 5 February 2010, McCracken filed an application which sought to extend the time for provision of the bonds pending a determination of the application, and for final orders deleting the requirement for the bonds, or otherwise varying their amounts and the time and circumstances of provision (**McCracken's application**). The interlocutory order sought was made on the same day.

McCracken's application was set down for hearing commencing 12 April 2010 but it was adjourned on the first day when it became evident that the parties' experts were in disagreement. On the same day, the experts were ordered to conduct further joint meetings and provide further joint expert reports.

Further joint reports were subsequently provided, in which agreement was reached between the experts, which formed the basis of new orders (which included provision for bonds and varied the requirements imposed by the earlier orders) made by the court on 28 May 2010, with the consent of the parties.

However, the council sought in this application:

- declarations in respect of McCracken's non-compliance with previous orders (**declarations**);
- an order for its costs of the council's application from 4 December 2009 because McCracken's opposition to the orders as to bonds, sought and made on 4 December 2009 and 18 January 2010, was frivolous or vexatious (**first costs order**); and
- an order for its costs of McCracken's application from 5 February 2010 because it was frivolous or vexatious (**second costs order**).

Decision

With respect to the declarations, having regard to the substantive orders already made, his Honour Judge Rackemann did not believe it was necessary nor would it serve any purpose by making the declarations.

With respect to the first costs order, the council primarily based its submissions on the issues of compliance and whether McCracken had a basis to contend that there would be compliance. At the outset, his Honour indicated that it was a discretion of the P&E Court, not an entitlement of the council, to have orders varied to include provisions for bonds. His Honour further indicated that, even if McCracken had in fact had no legitimate expectation of being able to comply with the orders, she was not bound to consent to orders for the bonds sought by the council, nor did her failure to consent mean her response to the council's application for the provision of bonds was frivolous or vexatious.

Having considered the circumstances in which the council sought the provision of bonds and the way the matter had been conducted by both parties, his Honour did not regard McCracken's conduct in general to be unreasonable. In the circumstances, his Honour concluded that McCracken's response to the council's application for the provision of bonds was not frivolous or vexatious, and even if it was so, it would not warrant an exercise of the discretion to order costs.

With respect to the second costs order, the council submitted that under no circumstances did McCracken have any basis to contend that the revegetation work had been done or that a certificate of stability could be satisfactory. The P&E Court was invited by the council to consider McCracken's application in light of her earlier non-compliance and failure to seek variations prior to the council's application. His Honour however did not believe McCracken's application could be characterised as frivolous or vexatious. As part of his determination, his Honour had due regard to the nature of the new orders made and the fact that they were made with the consent of the council. His Honour also took into account the circumstances under which McCracken claimed that appropriate revegetation had been done as well as her financial ability to provide the bonds (which was supported by an affidavit of a chartered accountant). His Honour concluded that he was not persuaded that McCracken's application was frivolous or vexatious, and even if it was so, the P&E Court's discretion to order costs should not be exercised.

Held

An order was made that the council's application for costs and declarations be dismissed.

Single event to constitute material change of use

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Somerset Regional Council v Bradford* [2010] QPEC 109 heard before Robin QC DCJ

November 2010

Case

This was an application by the Somerset Regional Council (**council**) for an enforcement order to prevent the respondent (**Bradford**) from running a 5 day event described as the "Fernvale Bulls, Boxing and Music" event (**event**). The council took the view that the activity represented development, being a material change of use under the *Sustainable Planning Act 2009* (**SPA**), which required an appropriate development approval be obtained or the use be stopped.

Facts

The event was an annual event and 2010 was to be the third time the event had been held. The council had been concerned in the past about the event in respect of environmental impact, certification of food vendors, waste and supply of drinking water. However, the council allowed the 2009 event to go ahead subject to conditions including the provision of traffic lights on a narrow unsealed access road leading to the site, but required an appropriate development approval be obtained prior to future events.

Bradford did not make a development application to the council for a development permit for the material change of use until early August 2010. The application contained limited pertinent information and no application fee. Therefore, the application was not a "properly made" one. In any event, the late timing of the application meant that the giving of an approval by the council prior to the scheduled event in September 2010 was impossible, given the application was impact assessable and required public notification.

On 9 September 2010, the council resolved to seek the enforcement order. The originating application by the council sought to restrain Bradford and others associated with him from using the land "for the purposes of outdoor entertainment, music festival, rodeo, Fred Brophys' Boxing trip, without first having obtained a development permit authorising the use".

Decision

In his judgment, his Honour Judge Robin QC accepted the reliance of the council on the judgment in *Gosford City Council v Popran Creek Pty Ltd* [1995] 89 LGRA 208 which established that a single event can involve a material change of use and development. Whilst acknowledging that *Gosford* was decided by reference to New South Wales legislation, his Honour held that the SPA has the same effect.

His Honour made an order under section 604 (Making enforcement order) of the SPA, that the event constituted outdoor entertainment and was assessable development, the carrying out of which required a development permit. The order also restrained Bradford and his servants or agents from using the land for the purpose of outdoor entertainment including the event. However, the operation of the order was suspended until 1 October 2010, effectively allowing the event to take place in September 2010.

With respect to the apparent authorisation of a development offence for unlawful use of the land that such an order created, his Honour provided the following observation:

> *it is notorious, in my opinion, that there is conniving at alleged development offences in hundreds or thousands of instances throughout the State in which local governments allow enforcement proceedings to remain on the back burner, so to speak, while development applications are made with a view to regularising unlawful uses.*

Further, his Honour held that payment of the development application fee by Bradford to the council during the course of the hearing by the Planning and Environment Court (**P&E Court**), thereby converting the development application into a properly made one, was a very important factor bearing on the P&E Court's exercise of discretion to suspend the operation of the enforcement order, as the payment put Bradford in the situation of having seriously applied to regularise the proposed activities.

Held

The P&E Court made an enforcement order restraining the event until an appropriate development permit was obtained, however, the operation of the order was suspended in order to allow the 2010 event to occur.

Conflict with scheme: Residential use on preferred rural use land

Samantha Hall | Katherine McGree

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Greenhill Development Partnership v Isaac Regional Council & Ors* [2010] QPEC 93 heard before Jones DCJ

November 2010

Case

This was an appeal by Greenhill Developments Partnerships (**Greenhill**) to the Planning and Environment Court (**P&E Court**) against the decision of the Isaac Regional Council (**council**) to refuse an amended development application lodged by Greenhill seeking development permits for reconfiguring a lot to create 12 residential lots and a balance area, and material change of use for 12 houses (**proposed development**), where the preferred land use under the planning scheme for the Broadsound Shire Council (**scheme**) was rural.

Facts

Under the scheme, the preferred use of the subject land, Lot 101 on Survey Plan 126375 (**land**), was rural, in which a number of consistent uses were identified, including primary and secondary industry and public utility uses. Both the reconfiguring a lot and material change of use elements of the development application were code assessable under the scheme. The land abutted Greenhill village, a coastal village providing limited public service facilities with basic shopping requirements about one kilometre to the west and more extensive services available about a half hour drive away.

Four issues were before the P&E Court. The first issue for determination was in relation to concerns about satisfactory water supply and effluent disposal.

The second issue was whether the proposed development was in conflict with the scheme due to:

- the rural preferred land use designation and the intent of the scheme to encourage "consistent" uses within the rural area, which included an intention to limit residential development in areas remote from usual urban services and amenities; and/or
- inconsistency with a Desired Environmental Outcome requiring that towns and villages provide strong social and economic focal points for their respective communities, where residents have access to urban and community services, infrastructure and employment opportunities.

The third issue was whether the proposed development would otherwise be an out of sequence/piecemeal proposal and the fourth was whether a town planning ground, including need, would justify approval of the proposed development notwithstanding the conflict with the scheme.

Decision

The experts appointed by Greenhill and the council agreed that appropriate conditions could be imposed by the council to deal with the water supply and effluent disposal issues. Accordingly, his Honour Judge Jones determined that these concerns did not constitute a justification for refusing the proposed development.

The P&E Court held, however, that the proposed development did conflict with the intention of scheme, notwithstanding the location of the land immediately north of the Greenhill village, in part because there was nothing in the scheme to indicate any intention of the council to encourage growth of Greenhill village. In his Honour's view, it was for this reason, rather than the non-compliance of the proposed development with the relevant Desired Environmental Outcome or the out of sequence nature of the proposed development that the proposed development conflicted with the scheme.

His Honour considered that the evidence of need which might have justified overriding inconsistencies with the scheme, was not sufficient to make good or offset the conflicts: the level of demand, at its highest, could only be described as "modest".

Held

An order was made that Greenhill's appeal be dismissed.

Garden Cities of Tomorrow or a Brave New World

Ian Wright

This article discusses the idea of land use planning being a utopian construct. It argues that the local community's assessment of Queensland's planning system should shift from dystopian to utopian. It specifically refers to *Garden Cities of Tomorrow* by Ebenezer Howard and *Brave New World* by Aldous Huxley

November 2010

Abstract

Land use planning is a utopian construct. Land use plans are intended to envision an ideal community whilst the planning process is intended to take the existing reality with all its contradictions and envision a future which is to be produced by a sequence of transformations of what currently exists.

Land use planning should therefore be open to the criticism of being utopian in that it seeks something which is too good to be practicable.

Land use planning in Queensland however is not being criticised by the community as something which is too good to be practicable but rather as something which is too bad to be practicable.

The paper argues that the community's assessment of the Queensland planning system as dystopian rather than utopian derives from concerns that land use planning is carried out without adequate reference to vision, evidence, the community, the environment, infrastructure, financial prudence and governance.

The paper argues that land use planning should look for and disseminate notions of ideal forms such as Ebenezer Howard's *Garden Cities of Tomorrow* rather than merely seeking to alienate people and restricting individualism to control the perceived ugly consequences of present day behaviour reminiscent of Aldous Huxley's *Brave New World*.

Planning's utopian tradition

Politicians, planners and lawyers have more in common than they realise.

Politicians continue to look for and disseminate notions of ideal or utopian forms that are based on our traditions. For example, in announcing that the Urban Land Development Authority will take responsibility for the major greenfield areas of Ripley Valley, Greater Flagstone and Yarrabilba, the Queensland Premier stated that "*These will be model communities where children can walk to school, workers can live near to their public transport and families will be guaranteed greenspace for recreation and the lifestyle that Queensland is famous for*".[10]

Planners and architects also utilise a planning process that takes the existing reality with all its contradictions and envisions an ideal community that is to be achieved through a sequence of transformations of what currently exists.

The language of utopia has underpinned the visions of perfect cities and ideal spaces such as the modernist schemes of Ebenezer Howard's *Garden Cities of Tomorrow* and Le Corbusier.

The vision of a perfect community based on specified traditions is also reflected in the development of Australia's post war suburbs of the last century with their strong American tradition and the proposed development of transit oriented communities in this century with their European tradition.

Lawyers like planners also practice in a utopian world where their professional decision making in service of the Crown is expected to be divorced from their personal beliefs.

The utopian ideals of politicians, planners and lawyers alike can be traced to a book titled Utopia written in 1516 by Sir Thomas More, an English lawyer and Roman Catholic Saint.[11]

The book describes from the perspective of a traveller, the social, political and legal systems of the fictional island of Utopia and contrasts those arrangements to the European nation states of the time.

Utopia is described as an ideal community where there is no private property, men and women are educated alike, there is religious tolerance and the advice to and decisions of government, are not conflicted by political reality.

[10] Bligh, A (2010) Three New Model Cities for SEQ, Ministerial Press Statement 25 May 2010.
[11] Sir Thomas More (1516) Of the Best State of a Republic and of the New Island Utopia.

Prophetically the book foreshadows the very conflict between personal beliefs and service to the Crown that would ultimately result in More's execution by Henry VIII for refusing to take the oath of supremacy of the Crown over the Church.

For servants of the Crown such as Ministers and public servants such as planners and lawyers, More's execution by the Crown exemplifies the recurring conflict between our personal beliefs and our professional responsibilities to the Crown.

A person caught in this conflict must make a More's choice. They must strictly adhere to their personal beliefs and suffer, like More, the consequences of their failure to support the Crown. Alternatively, they must accommodate the Crown by compromising their personal beliefs.

Planning's dystopian reality

Given that land use planning is a utopian construct, one would expect that the planning system would be criticised as being utopian in that like More's Utopia, it seeks something which is too good to be practicable.

However, today the planning system is not being criticised as utopian but rather as dystopian, that is something which is too bad to be practicable.[12]

The assessment of the planning system as dystopian rather than utopian appears to derive from community concerns that planning is carried out without sufficient reference to vision, evidence, the community, the environment, infrastructure, financial prudence or governance.

This paper considers each of these concerns and makes suggestions for possible reform to the planning system to ensure a more utopian planning system.

Planning without vision

The planning system is often criticised as being too focussed on detailed matters of development control in particular the failings of the development assessment system in terms of over–regulation, under–resourcing, stakeholder interference and development approval delays.

The focus on development control is a direct consequence of the continuing economic reform agenda commenced in the 1980s which seeks to boost economic performance by increased competition and the use of market or business like mechanisms.

As a result, the planning system was reformed to remove strategic land use and structure planning frameworks on the basis they represented impediments to competition in the private sector and that market mechanisms could better co–ordinate the planning and delivery of land use and infrastructure. For the reasons that are discussed later in this paper, these assumptions, particularly in relation to infrastructure, have proved to be wrong.

It is therefore critical that the planning system renew its focus on the visionary.

The State government has sought to respond to this issue by requiring a strategic framework to be included in a planning scheme prepared under the *Sustainable Planning Act 2009*. However, the current Queensland Planning Provisions with which planning schemes must comply, do not ensure that either strategic frameworks or planning instruments are visionary.

However, the Queensland Planning Provisions will achieve their stated goal of economic efficiency through consistency of format and structure.

The achievement of this goal will be further reinforced by the fact that since the advent of the *Integrated Planning Act 1997* a whole generation of Queensland planners have not been exposed to the strategic planning skills that once characterised the training of their predecessors.

It is interesting to reflect upon the fact that those somewhat ageing planners who are today recognised as the intellectual leaders of the Queensland planning profession did not develop their reputations as development assessment managers who gave expert evidence in Planning and Environment Court appeals. Rather, their reputations as planning experts were made as strategic planners who articulated planning principles in strategic planning instruments that were visionary in their focus.

State and local governments should therefore commit to preparing planning instruments which set out a clear vision of the strategic public interest outcomes to be achieved. This could be facilitated by amending the Queensland Planning Provisions to ensure that planning instruments are:

- place specific, not generally applicable, as was the case with many planning schemes prepared after the *Integrated Planning Act 1997*;
- expressed to be forward looking and not present looking;
- innovative not mechanical;
- unique not repetitive.

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12 John Stuart Mill (1868) in a speech to the British Parliament recorded in Hansard Commons 12 March, 1868.

Planning without evidence

The focus of orthodox planning is on the assessment of development against predetermined quantitative standards. This is clearly reflected in the structure of the planning schemes prepared under the *Integrated Planning Act 1997* and in the proposed Queensland Planning Provisions which prescribe the content of planning schemes to be prepared under the *Sustainable Planning Act 2009*.

The structure of these planning schemes is responsive to the requirements of the *Integrated Planning Act 1997* and the *Sustainable Planning Act 2009* which are primarily concerned with the administration of the integrated development assessment system.

State government agencies have responded to the development control focus of State planning legislation by investing significant resources in the administration of the integrated development assessment system at the expense of strategic planning based on evidence.

In my opinion, State and local government agencies have not invested significant resources in evidenced based strategic planning with dramatic consequences, especially in relation to the planning and delivery of infrastructure.

State and local government agencies should therefore commit to strategic planning which is based on evidence. This could be facilitated by the following reforms:

- The requirement for evidence based planning instruments should be embodied in the *Sustainable Planning Act 2009*.
- State and local planning instruments should be supported by a separate strategic planning document that sets out the planning evidence on which the strategic framework is based.
- A proposed planning instrument that is not based on planning evidence should be challengeable at law.
- The outcome statements in a planning instrument should only be able to be set aside if the evidence on which they are based is out of date or there is strong persuasive evidence to the contrary. This will provide more certainty to stakeholders than the current position where "sufficient grounds" can be used to set aside the outcome statements in a planning scheme.

Planning without the community

There is a frequent misconception amongst planners that the rights of a landowner to use their land is granted by a planning instrument. It is the common law that grants a landowner the right to use their land.

Planning instruments on the other hand restrict the common law rights of landowners in support of public interest outcomes which benefit the community as a whole.

For example, low density residential development may be restricted to support environmental outcomes, as in the case with the protection of open space, or to support economic outcomes such as the protection of industrial areas or the development of higher density transit orientated communities.

It is therefore incumbent on State and local governments to inform the community and landowners in particular, of the public interest outcomes and supporting evidence that are the basis for the restriction of the rights of a landowner.

State and local governments, acting in accordance with State planning legislation, frequently present the community with a planning instrument, without any comment as to the public interest outcomes to be achieved or the supporting evidence. The community is then requested to provide submissions on the planning instrument, not having any right to seek a review of the planning instrument.

In a situation where the local community is not involved in the preparation of a planning instrument and is not provided with information or a right of review of the planning instrument, it is little wonder that the community feels disengaged with the planning system.

State and local governments should therefore commit to engage the community in the planning system. This could be facilitated by the following reforms:

- The requirement for local planning instruments to contain local area provisions that are prepared by the local community through a planning process facilitated by local government.
- The requirement for all planning instruments to be supported by a statement of the public interest outcomes that are being sought to be achieved and the evidence in support of those outcomes.
- The requirement for all planning instruments to be prepared in consultation with relevant community interests and to be supported by a statement of the community engagement which has been undertaken.
- The requirement for all planning instruments to be subject to a legal right of review if they are not prepared in accordance with these requirements.
- Finally, as a general rule, strategic land use and infrastructure planning should be carried out by democratically elected and accountable institutions such as State and local governments and not by the private sector or statutory authorities unless there is an overriding need in the public interest.

Planning without the environment

Planning should also have a relationship to the sustainability of natural systems which should be measured in terms of their environmental resilience and the carrying capacity of the environment in which development is proposed.

Planning should also seek environmental benefits such as the enhancement of degraded natural systems, as a cost of providing for continued development which may adversely impact on existing natural systems.

Whilst it is the purpose of the *Sustainable Planning Act 2009* to seek to advance ecological sustainability, there is little evidence to support the contention that scientific measures such as environmental resilience and carrying capacity are actually used in the preparation of or the performance monitoring of, planning instruments. From a policy viewpoint, land use planning instruments are generally considered to be a scientific free zone.

State and local governments should therefore commit to ensuring that planning instruments are prepared and monitored on a proper scientific foundation to achieve the sustainability of natural systems. This could be facilitated by the following reforms:

- The requirement for all planning instruments to be prepared to ensure the sustainability of natural systems and the enhancement of degraded natural systems as a cost of providing for development which may adversely impact on existing natural systems.
- The requirement for the performance of all planning instruments to be monitored from a scientific perspective in terms of the sustainability of natural systems.

Planning without infrastructure

The community's concerns with the planning system has been reinforced by ongoing shortcomings in the planning and delivering of critical infrastructure, including electricity generation and distribution (2004), coal ports and rail infrastructure (2005), water supply infrastructure in South East Queensland (2006), public transport infrastructure in South East Queensland (2007), hospital infrastructure (2008) and more recently road transport infrastructure (2009).

The status of these infrastructure networks reflect systemic problems in the planning and delivering of critical infrastructure in Queensland. These problems include the following:

- First, the State public service has been deskilled in terms of its ability to plan and deliver critical infrastructure, a topic to which I will return later in this paper.
- Second, the national competition policy agenda of commercialisation, competitive neutrality and privatisation has resulted in planning and delivery functions being shared by an assortment of State government departments, State government owned corporations, local governments, local government owned corporations and private service providers without clear accountabilities. This was recently exemplified by the confusion of responsibilities over critical public health and safety issues such as water fluoridation and flood warnings in South East Queensland.
- Third, the planning and delivery of infrastructure such as roads, hospitals and schools which is the capital component of State government functions such as transport, health and education has become divorced from the planning and delivery of the other aspects of those functions. For example, the State focus on capital investment in hospitals and schools at the expense of systems (such as the Health Department payroll system) and people (such as the training of doctors and teachers).
- Fourth, the infrastructure planning and delivery process has become skewed in terms of responding immediately to the interests of powerful interest groups rather than considered public policy.
- Finally and most importantly for current purposes, the frameworks for planning and delivery of infrastructure are not co–ordinated and are not integrated with land use.

The State government has sought to address these issues through the following reforms:

- The South East Queensland Infrastructure Plan and Program 2009–2026 (**SEQIPP**) has been prepared to support the South East Queensland Regional Plan 2009-2031 (**SEQ Regional Plan**).
- A Queensland Infrastructure Plan is to be prepared which will integrate the SEQIPP, the Queensland Roads Investment Program and other State infrastructure planning documents.
- A new office of Growth Management Queensland has been created to manage the State government's growth agenda.

Whilst these reforms are strongly supported, they do not go far enough however, and in particular do not address the following problems:

- First, the Queensland Infrastructure Plan merely recycles the previous policy to prepare annual State infrastructure plans. This was announced by the State government in Strategic Infrastructure for Queensland's Growth in 2000 but was never implemented.

- Second, it is inherently difficult for strategic planners who do not have the required technical skills to take account of detailed technical considerations or to mobilise the commitment of those who have the detailed technical skills. Any strategic planner who has been involved in the preparation of a priority infrastructure plan for a local government will testify to these problems.
- Third, the conflicts which inherently arise between different functions can only be resolved by entities with real political power which at the administrative level are the Directors General of State government departments and at the Ministerial level are the Premier and the Treasurer. Ominously, Growth Management Queensland is only an office within the Department of Infrastructure and Planning.
- Fourth, there has been no integration of infrastructure and land use in local government planning instruments. Infrastructure charging plans and benchmark development sequences under the *Integrated Planning Act 1997* were replaced by priority infrastructure plans which were prepared by local governments without the benefit of a drafting template until 2009. As a result the State interest checks of some local government priority infrastructure plans submitted before 2009, are now reaching their fourth anniversary.
- Fifth, the State government has brought forward, in the name of housing affordability in South East Queensland, the land use planning for some 300,000 people in the major greenfield areas of Flagstone, Yarrabilba, Ripley Valley and Caloundra South without commitment to the planning and delivery of infrastructure. The obvious consequence is that urban development will lead infrastructure.
- Sixth, the requirement that structure plans for regional development areas, which bestow significant development entitlements on landowners, be made without any legally enforceable commitment by those landowners in the form of infrastructure agreements to fulfil the development obligations necessary to provide for those development entitlements.
- Finally, the SEQIPP is deficient in that its planning horizon of 2026 does not accord with the 2031 planning horizon of the SEQ Regional Plan and does not take account of the State infrastructure which is now required as a result of the bringing forward of the major greenfield areas and the making of structure plans for regional development areas. Furthermore the SEQIPP does not take account of the significant maintenance burden of existing State infrastructure which is currently unfunded.

The State government should therefore commit to fundamentally reforming Queensland's infrastructure planning and delivery frameworks to address these problems. This process could be commenced by the following reforms:

- The infrastructure planning and delivery frameworks should be codified in legislation.
- The infrastructure planning and delivery responsibilities and accountabilities of each relevant agency should be clearly stated in the legislation.
- Relevant agencies should be subject to a statutory duty to provide information to and co-operate with other relevant agencies.
- Disputes within relevant agencies should be resolved by the relevant Chief Executive whilst disputes between relevant agencies should be resolved by Chief Executives of the relevant agencies and in the absence of resolution, by the Premier through the cabinet process.
- If these arrangements are not successful, consideration should be given to the establishment of an independent expert agency with statutory powers to provide the necessary co–ordination and integration of infrastructure planning and delivery.

The consequences of continuing to plan without infrastructure are that State and local governments, particularly in South East Queensland, will continue to be faced with the chronic underprovision of infrastructure for urban development.

Planning without financial prudence

The existence of an infrastructure deficit will continue to place significant pressure on State and local government budgets.

It is clear that insufficient revenue is being generated by State and local governments to fund the infrastructure deficit.

The State government has sought to finance the infrastructure deficit through increased borrowing albeit at the expense of the State's credit rating, increased taxes principally in the form of increased mining royalties and land tax, increased Commonwealth government grants and the sale of State government assets.

It will also be necessary for local governments to increase borrowing, increase rates and to increase infrastructure charges for development infrastructure.

However the scale of the infrastructure deficit is such that it will be necessary for both State and local governments to find new revenue sources to fund infrastructure for urban development.

This could be facilitated by the following reforms:

- The introduction of infrastructure charges or a betterment tax for State infrastructure.

- The introduction of innovative mechanisms such as growth area bonds, securitised borrowings, special charges and business improvement districts which are used in the United States and the United Kingdom to finance local government infrastructure.

Planning without governance

Finally it is critical that land use and infrastructure planning is carried out by institutions which have appropriate governance structures.

The State government is to be congratulated for completing a substantial local government reform program which has resulted in the amalgamation of local governments to form regional councils. The new regional councils are much larger and have a better capacity to undertake planning, development assessment, asset creation and management.[13]

However there is also an immediate need for real reform of the State public service particularly in relation to infrastructure planning and delivery, the public administration of which is beset by a multitude of problems:

- First, public administration is politicised in terms of being focussed on the opinions of influential interest groups rather than public policy with the result that the public interest is often replaced by the private interests of those interest groups.
- Second, the management philosophy whereby management is seen as a generalist co-ordinating process that does not require technical skills, has resulted in a deskilling of the public service especially in the planning and delivery of infrastructure.
- Third, the focus on securing federal funding to compensate for the State's weak tax base, economic underdevelopment and the resulting vertical fiscal imbalance has caused power in the public service to move from technical specialists to those who are responsible for finance and intergovernmental relations.
- Fourth, Ministers of the Crown now appear to consult Ministerial advisers (or private servants) in preference to public servants with knowledge, skills and experience in the relevant area who are concerned with the public interest.
- Fifth, public administration is not based on a rigorous public policy process of cost benefit analysis carried out in a professional environment but rather is influenced by media driven short term populism that is carried out in a political environment.
- Finally, it would appear that the predominant guiding principle of public administration is not the public interest but political realities.

The result in Queensland is a decline in policy making capacity; the so–called "hollowing out" of government and a loss of organisational memory.[14]

It is therefore critical in the public interest that the State government commit itself to a process of real public sector reform which will ensure the reskilling and depolitisation of the public service, particularly in relation to the planning and delivery of infrastructure.

Conclusions

A planning system in which planning is carried out without vision, evidence, community, environment, infrastructure, financial prudence or governance is not utopian in the sense that it is too good to be practicable.

Rather such a planning system is dystopian in the sense that is too bad to be practicable. Indeed it is something other than planning.

The planning system does not look for and disseminate notions of perfect communities or ideal spaces such as that sought by Ebenezer Howard or Le Corbusier.

Rather the planning system merely seeks to alienate people and restrict individualism to control the perceived ugly consequences of present day behaviour, reminiscent of Aldous Huxley's *Brave New World* or George Orwell's *1984*.

The planning system emphasises the need for stakeholders to conform rather than excel. As such the planning system as presently structured is incapable in the long term of increasing economic efficiency or achieving ecological sustainability and is in urgent need of fundamental reform.

This paper provides some practical suggestions as to how the planning system may be reformed so that planners can once again pursue Ebenezer Howard's *Garden Cities of Tomorrow* rather than have their behaviours and actions controlled by a planning system subject to political influences rather than the interests of the individual.

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13 Infrastructure Australian Major cities Unit (2010) State of Australian Cities 2010, Commonwealth of Australian p129.
14 Prasser, S (2005) The State of priorities: On Queensland's infrastructure mess p4.

Planners have become a lightning rod for people's sense of frustration

Ian Wright

This article is a reproduction of a speech delivered by the UK Minister of Decentralisation on 30 December 2010. It outlines that planners have become the lightning rod for people's frustration and that restoration of respect for town planning must occur

November 2010

On the 30th of December 2010 the UK Minister for Decentralisation delivered a very interesting speech at a UK Town and Country Planning Association Event, in which the Minister said that planners were a "lightning rod for people's sense frustration" and spoke of the need to restore the "respect and pride to town planning". This is a very interesting speech that we have reproduced for your consideration:[15]

I'm pleased to be here today to set out some of the next steps in Government's proposals for putting communities in control of their own destiny through the planning system; and delighted to be able to say more about how the forthcoming Localism Bill will change planning for the better.

But let me start by talking about the wider context. Planning isn't a job – it's a vocation. All of us hope we leave a legacy in our professional life. Planners certainly do leave a legacy. They shape the workplaces where we spend thousands of hours each year; the homes we go home to the evening, and the schools where our children learn. At its best, their work is much more than functional. It inspires and elates.

So my starting point as planning Minister is that planners have an awesomely important job to do. I take very seriously my responsibility of enabling them to do that job to the very highest standards. But I agree with the TCPA that at present the planning system is not doing its job "as well as it should".

The current framework is bureaucratic. Last year, local authorities spent 13 per cent more in real terms on planning than they did five years ago – despite a 32 per cent drop in the number of applications received.

It is too centralised: regional spatial strategies imposed housing targets which made people feel put upon. And it is ineffective. The levels of housebuilding last year were the lowest in peacetime since 1924.

Evidence suggests that commercial development is suffering, and businesses say that the planning system is a barrier to growth. This government has ambitious proposals to make the system fit to meet the challenges of the 21st century.

Above all, we want to change the philosophy behind local planning. We want to move away from a system with significant elements of imposition from above, to one with participation and involvement at its heart – not just warm words, or a commitment in principle, but real opportunities for people to have a say. And away from a system that seeks to resolve the different needs of different groups at a local level by imposing choices from above, towards one which enables a mature debate at local level.

I'm delighted to have the chance to talk about these issues at the TCPA – for two reasons. One, your manifesto recognises in its very first clause the need for a planning system... "based on widespread community engagement." You have been a consistent champion of that principle, and a powerhouse of expertise on how it's done in practice. Two – TCPA's great strength is that it brings together all the different interests in planning – community groups, developers, businesses and more. It represents, at a national scale, the kind of coming together that we want to help happen in local discussions about planning.

The Big Society means putting real power in the hands of local people. It is based on the idea that in very many areas of life people can make the best decisions about what's best for themselves, for their family, for the place where they live. I think that people should be able to make real choices about planning – much as they should be able to make choices in relation to healthcare or education – as a matter of principle.

But evidence also suggests that restoring power to a very local level may have the practical effect of helping people feel positive about development. Imposition alienates. As any parent can tell you, telling someone to do something – even when you're absolutely convinced that it's in their best interests – doesn't always work. IPSOS Mori research from this summer says too many people feel locked out and "done to" by the planning system.

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[15] Michael Donnelly, 'Clarks Rallying Cry to Planners' on Planning Blog (1 December 2010) <http://planningblog.wordpress.com/2010/12/01/clarks-rallying-cry-to-planners>.

A typical comment from the research said: "I feel powerless – what can we do?" It's simpler to say "no" than to engage with a system that doesn't seem to listen to you. The reaction to the old regional spatial strategies seemed to bear this out. The South West regional strategy alone attracted 35,000 written objections. Conversely, proper discussion with local people encourages a sense of ownership about development. Experience suggests that developers of major projects have a better chance of securing consent if they carry out consultation with local communities before they make a planning application.

And the TCPA's own guide to community planning obligations gives a wealth of evidence about how involvement lets people see the benefits of development, and helps them be prepared to say "yes". Take the story of Ascott-Under-Wychwood in Oxfordshire. The local shop closed in 1998. When, in 2002, local people found out about plans to convert a farm, they saw their chance to get a village shop back again. In exchange for the developer gifting a shop to the community, they said they would put up no objection to the developer's plans. They were supportive, because they could see what was in for them. The shop is still going strong.

Or take what's happening with Burgess Hill Town Council in Sussex – who have begun a conversation with local people about the possibility of new housing – making the case that the extra investment that it would make possible could help pay for road improvements, a sports centre, new civic amenities, upgrades to the local station or a new business park. Our proposals are designed to enable this kind of mature debate about local planning everywhere. Because the problem is, although participation has been recognised as an essential element of good planning since the Skeffington Report in 1969, and although there are some examples of developers and planners getting it very right indeed, there are too many instances of participation being a an unimaginative add-on to the planning process.

We want to embed participation in the way the system works. Instead of having decision-makers consult local communities, we want to enable local people to make more decisions themselves. We want to hand over power and responsibility so that local communities have real choices, and experience the real consequences of those choices.

The Localism Bill contains several measures to achieve this. The Government has begun consulting on proposals for a new homes bonus. We would match the additional council tax raised over the following six years for new homes and properties brought back into use. It is proposed that there will be an additional amount for affordable homes. I made clear earlier this month that we intend to introduce changes to the community infrastructure levy – making sure that the benefits of growth are felt at a very local level indeed. We plan to require in law that local authorities set aside a meaningful proportion of revenue raised to be spent on infrastructure as neighbourhoods see fit.

And we will introduce neighbourhood planning alongside existing plans – placing an unprecedented level of influence and power at a very local level. The principle is simple. Local people come together and agree, "this is what we want our area to look like. Here is where we want the new homes to go and how we want them designed; here is where we want new shops and offices; here are the green spaces we want to protect".

Where people are most keen to take control and have certainty over development, they will be able to confer full planning permission, so that where the local community is crying out for new homes, developers can get on with building them. In other areas, people will be able to grant outline planning permission – with conditions on, say, the design details. When the neighbourhood plan has been prepared, people will vote on them in a local referendum. With a simple majority, the plan will come into force.

This is a rethinking of how planning operates – creating new pressures and powers that operate from the bottom up, rather than the top down. It offers a scope for self-determination unheard-of until now.

Localism in planning will create the freedom and the incentives for those places that want to grow, to do so, and to reap the benefits. It's a reason to say yes. I look forward to discussing these proposals in more detail with many of you when the Localism Bill is published and begins to make its way through parliament.

Opening up planning will requires non-legislative changes too. I'd be first to argue that planning demands special skills, but I don't think the best way to enable planners to do their job is to set endless prescription and guidance. The current sum of circulars, policy statements and so forth is bigger than the complete Works of Shakespeare, and not nearly as entertaining. Guidance on this scale flirts with the absurd: there's no way a practitioner can keep it all in mind.

Let alone the poor non-expert. This is a harmful side-effect: opacity is a barrier to community involvement. It's time for a radical review to simplify and streamline policy and guidance, to make it easier for community groups to understand and engage with it, and to give proper scope for planners to use their professional discretion. Our proposals imply changes to the role of town planners. In one sense, planners have been the first victims of the flaws of the current planning system.

Often, their job has involved much too much development control – saying yes and no to individual projects on a case by case basis – and too little genuine planning, thinking about the long-term needs of an area, talking to local people, and drawing up positive proposals for the future. Planners have become a lightning rod for people's sense of frustration. Instead of being the agents of imposition, they should have much more scope to help local people articulate their vision for their town or village or neighbourhood.

As Ann Skippers, the RTPI President for 2010, said earlier this year: "We should be proud to say [...] when we are asked, that we are planners. Say it well and say it loudly and say it again if you need to." Neighbourhood planning – which will see planners working with and for the community – should help achieve what Anne and I both want to see – planners being properly valued and respected for what they do.

There are three common arguments made against greater community involvement in planning. The first argument is about willingness. It says, do people really want to get involved in local planning issues? Aren't they busy enough with their jobs and family lives? In fact, people care deeply about the look and feel of the places where they live. Planning can in fact be the gateway that gets people involved in civic life. They might start by signing a petition to protect a local tree – they might end up volunteering on a regular basis, standing as a school governor, or becoming a councillor.

The second argument is about capacity. It says: even if they are interested, have people got the capacity to articulate what they want – and make a meaningful contribution to debate? There are two points to make in response to that. There's an inherent difference in expectations between centralists and localists. Centralists are a glum lot. Their outlook is predicated on the idea that, left to themselves, people can't make decisions in their own best interests. Localists, by contrast, are optimistic about people's good sense, generosity, and ability to make sound decisions. In planning – as in other areas of life – we start from the basis that people are inherently capable.

But planning also of course requires the application of specialist skills. We recognise that in some circumstances people will need some support to make the most of the opportunity to get involved. That's why, if a very local area wants to draw up its neighbourhood plan – we will require the local authority to provide support. We will also fund independent advice, so that local communities and neighbourhood groups who are new to the topic can learn from what has worked well in other areas.

The third argument against local planning is about equality. It says – are you, in effect, empowering those who are already powerful – giving the well-organised an opportunity to channel unwanted development towards the places where the less well-organised live?

There are several points to make in response here. One is that the provision of advice and support should enable those who want to, to draw up their neighbourhood plan, no matter where they live. Another is that there will be some safeguards in the system. Neighbourhood plans will need to be consistent with wider local plans. If the wider areas needs lots of new houses, they neighbourhood plan will not be a means to refuse development altogether. An independent assessment will make sure that neighbourhood and local plans are consistent.

But there's a much bigger point. This concern is based on the assumption that people come to the table thinking "development is bad." In fact, if local people have a chance to voice an opinion, and to see and feel the benefits of development, they have reasons to say "yes".

There is significant change ahead for planning. Taken as a whole, our reforms will help get England out of the housebuilding trough, make businesses see planning as a reason to invest, not a disadvantage, and give planners opportunity and encouragement to do what they do best: to create amazing, inspirational places.

Above all they will give communities a far greater sense of ownership over decisions that make a big difference to their quality of life. They will allow for the exercise of genuine power at a local level; and put the ideals of the Big Society at the very heart of planning. I look forward to working with you all to make sure these reforms deliver the change we all want to see.

State resource entitlement required for preliminary approval

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Northeast Business Park Pty Ltd v Moreton Bay Regional Council & Anor* [2010] QPEC 112 heard before Robin QC

November 2010

Case

This was an appeal by Northeast Business Park Pty Ltd (**appellant**) to the Planning and Environment Court (**court**) against a decision of the Moreton Bay Regional Council (**council**) to refuse a development application for a preliminary approval for material change of use, and for variations to the applicable planning scheme under section 3.1.6 (Preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997* (**IPA**) in relation to a large mixed use development, including a marina (**development application**) to be constructed on land located at Farry Road, Burpengary and to be accessed via the Caboolture River (**site**).

Facts

In 2004, the appellant lodged the development application with the former Caboolture Shire Council. The appellant later purchased adjoining land to the west of the site which was the subject of a development application for a preliminary approval for a mixed use business and industrial park.

On 21 June 2006, the Northeast Business Park Project, comprising those two development applications, was declared a project of significance by the Coordinator-General under the *State Development and Public Works Organisation Act 1971* (**SDPWO Act**).

Consequently, in accordance with section 37 (Applications for material change of use or requiring impact assessment) of the SDPWO Act, the information and referral stage and the notification stage of IDAS did not apply to either application.

On 26 November 2007, the appellant lodged an application with the council to change the original development application to align with an environmental impact statement prepared for the project. The environmental impact statement for the project was publicly notified from February to April 2008.

On 31 October 2009, the Coordinator-General issued a report in relation to the project, recommending that the council approve the proposed development subject to conditions. The Coordinator-General's report was taken to be a concurrence agency's response in respect of the development application under the IDAS.

Preliminary legal issues

The council raised the following preliminary legal issues in respect of the development application:

- the development application did not state the way in which approval was sought to vary the effect of local planning instruments for the land as required by section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA (**3.1.6 point**);
- the development application was not supported by evidence required by section 3.2.1(5) (Applying for development approval) of the IPA for taking or interference with a State resource (**State resources point**).

The council was joined in the State resources point by the Chief Executives of the Department of Environment and Resource Management and the Department of Employment, Economic Development and Innovation (**co-respondents**) who were granted leave to appear.

Decision 3.1.6 point

His Honour Judge Robin QC referred to the decision of the Court of Appeal in *Stockland Developments Pty Ltd v Thuringowa City Council* [2008] QPELR 151 which indicated approval of the decision in *Lagoon Gardens v Whitsunday Shire Council* [2006] QPELR 490 and endorsed the principle that determining whether an application for development complies with section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA requires an objective interpretation.

It was necessary for the court to consider the operation of the development application in relation to the 1988 planning scheme, which applied at the time the development application was originally made in 2004, and the 2005 planning scheme, which applied at the time the development application was changed in 2007. The planning report and area plan submitted as part of the environmental impact statement for the project focussed on the variation of arrangements in the 2005 planning scheme.

The court concluded that the development application as made in 2004 contained a clear statement to the effect that levels of assessment which would ordinarily apply in the rural zone were to be changed for a dozen or so types of "development" or uses relevant to the project. Moreover, the IDAS forms which were completed in 2004 clearly indicated the change from "rural" to the new uses identified.

The development application as changed in 2007 contained levels of assessment which had been refined in accordance with the 2005 planning scheme. His Honour Judge Robin QC stated that the material submitted as part of the development application as changed was not in any way misleading or intended to conceal what the application was for.

His Honour Judge Robin QC concluded that, reading the development application objectively, it did state the way in which the effect of the planning instruments was sought to be varied.

State resources point

In considering the operation of section 12 (State resources (schedule 10)) of the *Integrated Planning Regulation 1998*, his Honour Judge Robin QC stated that "involves" is a word of extraordinarily wide import.

His Honour referred to the decision of Judge Searles in *Barro Group v Redland Shire Council & Ors* [2009] 3 QPELR 564, in which Judge Searles acknowledged that an application involves interfering with a State resource if development the subject of it would have that effect, even if there was no physical manifestation, even if any physical manifestation was dependant on further approvals being obtained.

The court stated that the material presented by the council established that the appellant's project, if realised, would involve State resources, given that the project would involve capital dredging of several kilometres of the Caboolture River, involving some 550,000 cubic metres of dredge spoil, maintenance of a dredge pump line along the river and in Farry Road, capital dredging works of extended duration, use of dredge spoil on at least the land the subject of the development application, construction of a fishing platform with canoe landings on the bank of, and extending into, the river and the removal of the bank of the river to construct a lock which would permit access to and from the marina.

The court was not persuaded that the necessity for further applications for development approval made any difference to the requirement to obtain the evidence required by section 3.2.1(5) (Applying for development approval) of the IPA.

The court noted that the Coordinator-General's report referred to the need to obtain State resources, and in part expressed confidence that the appellant could obtain the allocations required. His Honour Judge Robin QC concluded that whilst the Coordinator-General's report could potentially be seen as committing relevant State entities, such as the co-respondents, given the meaning of the report, neither the legislation nor the Coordinator-General's opinions gave such a wide-ranging effect.

Exercise of the court's discretion

Both the council and the co-respondents accepted that it was open to the court to relieve the appellant from its asserted non-compliance under section 820 (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009*.

The court concluded that no special order was required in relation to the 3.1.6 point, however, a special order was required in relation to the State resources point, essentially to the effect that the appellant may proceed on the basis of providing evidence of allocation of or entitlement to relevant State resources as required under section 3.2.1(5)(a) (Applying for development approval) of the IPA.

Held

The appeal was adjourned for the parties to agree which State resources were involved in the proposed development the subject of the development application prior to the court making an order in respect of the appeal.

Court exercises discretion to revive development application

Samantha Hall

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Maryborough Investments Pty Ltd v Fraser Coast Regional Council & Anor* [2010] QPEC 113 heard before Durward SC DCJ

November 2010

Case

This was an application by Maryborough Investments Pty Ltd (**applicant**) for relief from non-compliance with section 3.2.12(2)(a) (Applications lapse in certain circumstances) of the *Integrated Planning Act 1997* (**IPA**), being a failure to give material to a referral agency within 3 months.

Facts

The development application was made on 19 April 2007, in respect of land adjoining the Mary River at Granville, near Maryborough. The development application progressed through the IDAS process, however, it was later discovered that a response to an information request made by the Department of Transport and Main Roads (**DTMR**) (formerly Department of Main Roads) had not been provided due to an oversight.

Decision

The application was filed in the Planning and Environment Court (**court**) after the commencement of the *Sustainable Planning Act 2009* (**SPA**), giving rise to the application of section 820 (Proceedings for particular proceedings and appeals) of the SPA.

The court decided to exercise its discretion under section 820 (Proceedings for particular proceedings and appeals) of the SPA excusing the applicant's non-compliance.

In his judgment, his Honour Judge Durward SC referred to the cases of *Calvisi Holdings Pty Ltd v Brisbane City Council & Anor* [2008] QPELR 545, *Muir & Anor v Logan City Council & Anors* [2008] QPELR 552, *National Properties Group v Toowoomba City Council & Anor* [2008] QPELR 40 and *Volker v Scenic Rim Regional Council & Anor* [2009] QPELR 114 in support of the exercise of the court's discretion in the circumstances.

His Honour also considered the consent of the parties to the exercise of the court's discretion and the significant cost, delay and inconvenience to all parties which would result in a lapsed development application, as factors supporting the exercise of the court's discretion.

His Honour observed that this case was that which the broad discretion of the SPA was intended to remedy and a failure to exercise the court's discretion in the circumstances would result in an inflexible and technical application of the SPA.

Held

The application was granted, the applicant's non-compliance was excused pursuant to section 820 (Proceedings for particular proceedings and appeals) of the SPA, the consequences of non-compliance were relieved and the development application was revived. The period for complying with section 3.2.12(2)(a) (Applications lapse in certain circumstances) of the IPA was also extended.

Furthering our understanding of "substantially different development"

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Auspacific Engineers Pty Ltd v Scenic Rim Regional Council & Ors* [2010] QPEC 117 heard before Robin QC DCJ

November 2010

Case

This was a preliminary hearing as to whether changes to the development application the subject of the appeal were "minor changes".

Facts

The proposed changes to the development application could be summarised as follows:

- an increase in the number of residential low density lots from 224 to 298;
- reduction of the overall development footprint;
- widening of a pathway to provide vehicular traffic between the northern and southern parts of the proposed development;
- an increase in development impacts;
- a change from self-sufficient water and sewerage arrangements to a connection to town water and the sewerage system serving the locality.

Decision

His Honour Judge Robin QC observed that by operation of section 821(2)(b) (Application of repealed IPA, s 4.1.52) of the *Sustainable Planning Act 2009* (**SPA**), "minor change" was to be determined by reference to section 350 (Meaning of minor change) of the SPA, the key question being whether the changes resulted in a "substantially different development".

In respect of the increase of proposed lots, interestingly, his Honour provided that whilst reference was made to percentage increases in lots in older approaches to "minor change", 'the legislative arrangements render inappropriate a simplistic exercise limited to one of calculating percentage increases'.

His Honour considered that in the circumstances, the increase in lots did not result in a substantially different development given that the development footprint was reduced.

Similarly, his Honour held that a connection which would spare future residents from having to use a main road, and the additional impacts the changes placed on the proposed development did not result in a substantially different development. His Honour also held that the change in water and sewerage arrangements would not result in a substantially different development.

Interestingly, his Honour provided that 'consistency with planning arrangements does not seem to me to bear on whether one form of development is substantially different from another'.

Held

His Honour held that the changes to the proposed development would not result in a substantially different development and were therefore a "minor change".

A question of jurisdiction: A standard building regulation certificate of classification

Samantha Hall | Katherine McGree

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stevenson Group Investments Pty Ltd v Nunn & Ors* [2010] QPEC 114 heard before Durward SC DCJ

November 2010

Case

This was an application by Stevenson Group Investment Pty Ltd (**applicant**) to the Planning and Environment Court (**court**) to determine whether the court had jurisdiction to deal with allegations relating to a certificate of classification. The respondents to the application also sought costs, which they submitted they incurred because of the applicant's failure to comply with the court's procedural requirements.

Facts

The applicant was the owner of six apartments in a building (**Deep Blue 1**) in a development of three buildings comprising Tangalooma Island Resort. The respondents included the owner of the resort, the private certifier, the architect, some of the apartment owners, the Brisbane City Council and the Queensland Fire and Rescue Service.

The applicant alleged that the certification of classification issued for Deep Blue 1 in November 2005 was void because Deep Blue 1 was not 'substantially completed' as defined in section 92 (Meaning of substantially completed) of the *Standard Building Regulation 1993* (**SBR**). The respondents asserted that the court did not have jurisdiction to hear and decide the certificate of classification allegation (**preliminary issue**) because the issue of a certificate of classification under the SBR was not a 'matter done' as required by section 4.1.21 (Court may make declarations) of the *Integrated Planning Act 1997* (**IPA**). The applicant's submission was that a clear link was established between the certificate of classification process administered by the SBR and the IPA as follows:

- the certificate of classification process was a code for the integrated development assessment system (**IDAS**) process in the IPA; and
- the management of the use of the premises connected the SBR process to the IDAS process in the IPA.

The application was initially commenced by an originating application and the originating application was subsequently substituted by a statement of claim. The respondents (except for Brisbane City Council) applied for orders that the applicant pay their costs incurred because of the applicant's failure to comply with the court's procedural requirements in respect of both the originating application and the statement of claim. The applicant submitted that the respondents' application for costs was premature because neither the preliminary nor the substantive issues of the matter had been determined (**costs issue**).

Decision

In respect of the preliminary issue, his Honour Judge Durward considered that the connections sought to be made by the applicant between the SBR and the IPA were not sufficient to satisfy the strict construction of the court's jurisdiction as conferred by section 4.1.21 (Court may make declaration) of the IPA. In other words, the certificate of classification process under the SBR was not a matter done, to be done or that should be done under the IPA. His Honour also drew a distinction between the use of premises in the SBR context, which relates to occupation of premises, and the 'lawfulness of use' in the IPA context, which is strictly a planning matter.

In respect of the costs issue, his Honour commented that it may be open to characterise some part of the conduct of the applicant as deserving of a costs order but was not persuaded that the costs order sought by the respondents was appropriate given the stage of proceedings.

Held

- On the preliminary issue, the application was refused.
- On the costs issue, the application was refused.

"The Summerhouse" at New Farm Park

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Blue Sky Pty Ltd v Brisbane City Council & Anor* [2010] QPEC 116 heard before Durward SC DCJ

November 2010

Case

This was an appeal by Blue Sky Pty Ltd (**appellant**) against the decision of the Brisbane City Council (**respondent**) to refuse a development application for a development permit for a material change of use, reconfiguring a lot (a lease sub-division) and a preliminary approval for carrying out building work (**development application**) at 137 Sydney Street, New Farm (**land**).

Facts

The land was located within New Farm Park, which was included in the Parkland Area classification of the *Brisbane City Plan 2000* (**planning scheme**) and was heritage listed by the respondent and also included on the Queensland Heritage Register. New Farm Park was surrounded by the Brisbane River (to the east), Brunswick Street (to the south), Sydney Street (to the west) and residential development and the Powerhouse Centre for the Live Arts (to the north).

The original kiosk facility (known as "the Summerhouse") was established in about 1914 in the vicinity of the land, which was subsequently refurbished to include an outdoor dining area and a marquee for the conduct of functions and operated until it burnt down in a fire in September 2000. The Summerhouse was re-opened in about November 2000, using a temporary facility to house the kitchen and the dining area with the marquee which survived the fire. In 2002, the appellant was offered by the respondent a lease in respect of the land to re-establish the Summerhouse.

The development application was made jointly by the appellant and the respondent in 2003 to facilitate a re-establishment of the Summerhouse restaurant and kiosk with a facility which would include a takeaway food kiosk, café/restaurant featuring indoor and outdoor dining and a function room facility. The development application was impact assessable.

The development application was refused by the respondent because the proposed uses and the intended scale of the development were in conflict with the various components of the planning scheme in its full context and the respondent considered its location, design and impacts were not appropriate or acceptable.

Issues raised in the appeal included town planning (parkland focussed), heritage values, amenity (including noise and traffic) and arboreal.

Decision

Given that the proposed development was impact assessable, his Honour noted that the proposed development was required to be assessed against the whole of the planning scheme. His Honour further noted that the Planning and Environment Court (**court**) was required to consider the decision and to identify the nature and extent of the conflict and to assess, in the context of the planning scheme as a whole, whether there were planning grounds of sufficient weight to justify an approval, despite the conflict and bearing in mind the proscription in the repealed *Integrated Planning Act 1997* against prohibiting development.

His Honour did not believe the proposed development would create an additional risk of the spread of "phellinus noxious" (being an arboreal issue contended by the respondent). His Honour was satisfied that it was not necessary to apply the precautionary principles with respect to the issue and held that the issue alone could not reasonably justify a refusal of the development application.

His Honour however found that the proposed facility was a commercial development in New Farm Park and its scale and intensity were significant and the permanent function room was such that the entire proposed development as a complex was a destination, rather than a facility which would support or was merely ancillary to other uses within New Farm Park.

His Honour disagreed with the appellant's submission that "*if there is conflict, it is at the minor or lower end of the spectrum*". In his Honour's view, the proposed development was in significant conflict with a number of provisions of the planning scheme, in particular, its adverse impact on the heritage values of New Farm Park and the amenity of the adjacent residential areas (due to the size, scale and intensity of the proposed development) and the traffic (primarily parking) and noise (primarily hours of operation) issues arising out of the proposed development.

His Honour did not consider there were sufficient grounds to approve the proposed development despite the conflict with the planning scheme and accordingly, held that the appeal be dismissed.

Held

The appeal was dismissed.

Constitutional challenge to operate an aircraft

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Douglas William McIllwraith v Scenic Rim Regional Council* [2010] QPEC 126 heard before Robin QC DCJ

December 2010

Case

This was an appeal by Douglas William McIlwraith (**appellant**) against the decision of the Scenic Rim Regional Council (**council**) to approve the appellant's development application for a development approval dated 14 May 2007.

Facts

The appellant lodged with the council a development application for a development approval dated 14 May 2007 to operate a private airstrip (**development application**). A decision of the council dated 1 February 2008 (**council's decision**) approved the development application.

The appellant appealed to the Planning and Environment Court (**P&E Court**) against the council's decision and sought the following orders or judgment:

- any necessary extension of time pursuant to section 4.1.55 (Court may allow longer period to take an action) of the *Integrated Planning Act 1997*;
- the development application be declared void as the council's decision was not required;
- costs.

The appellant filed an application in pending proceeding in the P&E Court on 1 November 2010 seeking, amongst others, an order that:

> *... it be determined as a preliminary point in the proceeding that the respondent does not have the legislative power under the Integrated Planning Act 1997 to regulate the operation of aircraft on, from and above the surface of the Applicant's land because the whole of the surface of the relevant land is subject to the constitutional control of the Commonwealth of Australia by the promulgation of Danger Area 673 such that any express or implied function pursuant to the Integrated Planning Act 1997 is rendered invalid by s 109 of the Australian Constitution.*

Decision

His Honour observed that the appeal was a constitutional challenge based on section 109 (Inconsistency of laws) of the Constitution of the Commonwealth and the appellant's proposition was that the matters the subject of the appeal were regulated federally and that the State or its local governments played no role in them.

Given that the appeal was a constitutional challenge under the Constitution of the Commonwealth, the council raised the relevance of section 78B (**Notice to Attorneys-General**) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and its impact which, to some extent, refrained the court from dealing with the appeal.

His Honour however believed that whilst any directions given by the court might prove of little value if an Attorney-General intervened, it was within the power of the court to give directions to the parties to prepare affidavit material and exchange it between the parties.

The appellant had in fact advised the Commonwealth and six State Attorney-Generals of the appeal and received a written indication of a lack of interest in taking steps in the appeal, except for the Attorney-Generals for Queensland and Western Australia. His Honour however noted that the P&E Court could not assess the adequacy of the steps taken by the appellant in advising the Attorney-Generals of the appeal in the absence of proper evidence, in particular, the Attorney-Generals were not given the appeal document. In any case, his Honour was of the view that the Attorney-Generals might not have been given a "reasonable time" as required by section 78B (Notice to Attorneys-General) of the Judiciary Act to consider the matter the subject of the appeal as they only had one month to do so.

The council further contended that the appellant had not established that it had notified the concurrence agencies and submitters in respect of the development application as well as the Chief Executive of the appeal. The appellant argued that the constitutional issue was being dealt with as a preliminary point pursuant to Rule 19(5) (Orders or directions) of the *Planning and Environment Court Rules 2010* and it was not necessary for the submitters to be involved in such exercise. His Honour however considered it to be appropriate, as a matter of caution, if the submitters and the concurrence agencies were to be notified of the appeal.

His Honour considered the relief which sought an extension of time should perhaps be dealt with first because the appeal has been commenced "well out of time" and there might be little point in an attempt to ventilate the constitutional issue if the appeal could not be entertained by the P&E Court at all.

His Honour noted it might be appropriate that if the issue of delay could not be overcome, the appellant might proceed by way of an originating application seeking a declaration to the effect that the development application and the council's decision were void. To that end, the appellant submitted that the P&E Court could direct that the notice of appeal filed by the appellant be treated as an originating application pursuant to Rule 14 (Proceeding incorrectly started by application) of the *Uniform Civil Procedure Rules 1999*. Whilst his Honour expressed some doubts on the proposition submitted by the appellant, given that the parties have not had an opportunity to prepare, his Honour ordered that:

- the appeal be adjourned for a mention on 9 December 2010;
- the appellant be entitled to have returnable, together with the appeal, any originating application which may be filed for the purposes of regularising procedural matter if so advised.

Held

The appeal was adjourned for a mention on 9 December 2010.

Approval in part not qualified

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Metroplex Management Pty Ltd v Brisbane City Council & Ors* [2010] QCA 333 heard before McMurdo P, Chesterman JA and Atkinson J

December 2010

Case

This case was an application for leave to appeal the Planning and Environment Court's (**P&E Court**) decision to dismiss Metroplex Management Pty Ltd's (**Metroplex**) appeal to that court. Metroplex appealed to the P&E Court the Brisbane City Council's deemed refusal of its development application for a preliminary approval under section 3.1.5 (Approvals under this Act) of the *Integrated Planning Act 1997* (**IPA**) over a large site near the Ipswich Motorway and Centenary Highway interchange.

Facts

The area of the site was a little over 109 hectares and was designated Special Purpose Area SP3 – Major Defence and Communication Facility but that designation had been overtaken by events and was no longer appropriate.

The proposal identified three precincts into which the site was to be divided for the purposes of development. One precinct was a Waterways and Open Space Precinct of 11.554 hectare. There was also to be a Metroplex Industry Precinct of 80.541 hectare. The industry precinct was to be developed for three uses – Industry in accordance with the *Brisbane City Plan 2000* (**City Plan**) definition, Warehouse in accordance with the definitions in the City Plan including ancillary office space and Offices not ancillary to the proposed industry or warehouse which would allow up to 98,000m^2 for offices.

The development application ran into trouble because of that part of the proposal which would have allowed the development of up to 98,000m^2 of office space unconnected with the proposed industrial use or warehousing. Such a large office component conflicted with the Southeast Queensland Regional Plan which identified the Ipswich CBD and Springfield as the proper locations for offices in Brisbane's west. Faced with this obstacle, Metroplex asked the P&E Court to approve its development application in part by excluding from the Metroplex Industry Precinct the component of non-ancillary office space.

The P&E Court declined to approve part of the development application and the primary judge ruled that he had no power to do so. In its application for leave to appeal the P&E Court's decision Metroplex submitted that the opinion of the primary judge contained a legal error and that there was no implied limitation on the P&E Court's power to approve part of an application.

Decision

The council submitted, both before the P&E Court and the Court of Appeal (**court**) and the primary judge accepted, that the limitation on approving changed applications found in section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA that a change to an application be only a minor change, should be implied into the power under section 3.5.11 (Approvals under this Act) of the IPA to approve an application in part.

Metroplex submitted in the court that that interpretation of the IPA was erroneous and that the power to approve part of an application was, according to the terms of section 3.5.11 (Approvals under this Act) of the IPA, unqualified.

Chesterman JA found that there was nothing in the terms of either section 4.1.52(2)(b) (Appeal by way of hearing anew) or 3.5.11 (Approvals under this Act) of the IPA which made the provisions of one relevant to the other, noting that neither was made subject to the other, neither refers to the other and these sections deal with different subject matter. Section 3.5.11 (Approvals under this Act) of the IPA had as its subject matter, the approval of applications in whole or in part or their refusal. Section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA has as its subject matter, the approval of an application by the court which differed from the application made to the assessment manager.

McMurdo P, with whom Atkinson J agreed, considered that the court's construction in *SLS Property Group Pty Ltd v Townsville City Council & Anor* [2009] NSW LEC 133 of section 3.5.11 (Approvals under this Act) of the IPA and its interaction with section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA was correct. In SLS Property Group, the Court of Appeal found that where the only material difference between the application and the approval is that the development approved is part of the development for which the application was made, the case falls, prima facie, within the terms of section 3.5.11 (Approvals under this Act) of the IPA. For a viable argument to arise that the case was outside section 3.5.11 (Approvals under this Act) of the IPA, there must be features of the development which was approved which justified characterising that development as something materially different from that which was applied for, other than the mere fact that it was part of what was applied for. Her Honour found that this was a sensible and workable way of marrying the two provisions, consistent with the purpose of the IPA.

Chesterman JA, with whom McMurdo P and, consequently, Atkinson J agreed, found that the terms of section 3.5.11 (Approvals under this Act) of the IPA and the authority of SLS Property Group meant that the primary judge erred in his construction of that section. McMurdo, with whom Atkinson agreed, found that the primary judge erred in law in considering that the power under section 3.5.11 (Approvals under this Act) of the IPA to approve an application in part was qualified on an appeal to the P&E Court by the requirement of section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA that the court must not consider a change to the application unless the change is only a minor change.

Held

The application for leave to appeal was granted and the appeal allowed setting aside the order of the primary judge. The matter was remitted to the P&E Court to be determined according to law.

Court of Appeal confirms decision of Planning and Environment Court

Samantha Hall

This article discusses the decision of the Queensland Court of Appeal in the matter of *Eames v Brisbane City Council & Anor* [2010] QCA 326 heard before Holmes and Muir JJA and Mullins J

December 2010

Case

This case relates to an application for leave to appeal to the Court of Appeal (**court**) the decision of the Planning and Environment Court (**P&E Court**) in *Eames v Brisbane City Council & Anor* [2010] QPEC 14, which was discussed in our April 2010 publication of Legal Knowledge Matters.

The application to appeal to the court was premised on an error of law by the P&E Court in deciding the preliminary point of whether the development application was properly made, in that owner's consent was not obtained for land which had the benefit of an easement because of an inconsistency with the terms of the easement. The P&E Court held that owner's consent was not required as there was no inconsistency between the proposed development and the terms of the easement.

Facts

The proposed development was to gain sole vehicle access to and from the development land via an easement over a neighbouring lot. The applicant was the owner of land that adjoined the proposed development which also had the benefit of access via the easement.

The issue for determination by the P&E Court was whether the material change of use the subject of the proposed development included waste disposal and whether the method of collection of waste was inconsistent with the terms of the easement which was for access only.

In his judgement at first instance, his Honour Judge Rackemann found that the activity of vehicles entering on the land, stopping and collecting the rubbish was an activity that already happened and was not a function of the material change of use, meaning any inconsistency was not something generated by the material change of use.

On appeal to the court, the appellants argued that the primary judge erred in his categorisation of the use and further argued that there was no right granted by the easement that would allow rubbish collection trucks to stand in the easement while collecting the rubbish.

Decision

In the Court of Appeal's judgment, her Honour Justice Mullins observed that the matter was complicated as it was a consideration of whether there was a properly made application after the imposition of conditions relating to waste collection. Her Honour held that the issues should be considered primarily in the context of the application lodged with the council rather than focusing on the conditions of the development approval relating to waste collection.

In determining whether there was a properly made development application, the court referred to *Barro Group Pty Ltd v Redland Shire Council* (2009) 169 LGERA 326. However it was able to distinguish the current appeal. Unlike the application in *Barro*, the development application in question disclosed the terms of the easement and did not expressly propose any activities on the easement which prima facie fell outside the terms of the grant under the registered easement.

The court noted that the manner in which rubbish was collected previously (ie rubbish collection trucks entering and stopping on the easement) was not the only method available. The terms of the easement allowed for the wheelie bins from the development to be wheeled to the street for collection. It was found that the second respondent always intended to observe the terms of the easement in connection with the development and the development was able to proceed consistent with that expressed intention.

Held

It was held that the development application was properly made and the application for leave to appeal was dismissed with costs.

Costly consequence of failure to comply with environmental protection orders

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Chief Executive Department of Environment & Resource Management v Hole & Anor* [2010] QPEC 118 heard before Britton SC DCJ

December 2010

Case

This was an application by the Chief Executive, Department of Environment and Resource Management (**DERM**) under rule 899 (Substituted performance) of the *Uniform Civil Procedure Rules 1999* (**UCPR**) for substituted performance of an order of the Planning and Environment Court (**P&E Court**) made on 26 February 2010 (**order**).

The order required Hole, the first respondent, to comply with the requirements of an Environmental Protection Order (**EPO**) dated 29 October 2008 issued by DERM in respect of activities on land described as Lot 1 on RP 212094 situated on the corner of Lancaster Street and Thackeray Street, Toowoomba (**premises**). The order also required Hole to comply with condition E5 of a development permit dated 23 June 2004 issued by Toowoomba City Council in respect of the premises (**development permit**).

Facts

The premises were formerly used by Hole to carry on a business as a tyre recycling facility. Condition E5 of the development permit relevantly provided as follows:

> *The total quantity of waste tyres stored at the authorized place for recycling must not exceed an amount equal to 3000 passenger car tyres in whole or equivalent parts.*
>
> *Note: Tyres must be stored in lots of no more than 300 to allow access in the event of an emergency.*

On or about 14 December 2007, DERM became aware that the number of tyres stored on the premises exceeded the number permitted by the development permit and was estimated to be approximately 180,000.

DERM proceeded to take enforcement actions against Hole to seek to achieve compliance by Hole with the development permit. DERM issued several environmental protection orders, the final EPO being issued on 29 October 2008, which required Hole to remove all tyres and parts of tyres from the premises in order to comply with condition E5 of the development permit. The EPO was the subject of the order made by the P&E Court on 26 February 2010.

The affidavit material provided by DERM established non-compliance with the EPO. Moreover, it was established that upon an inspection of the premises by DERM, there had been no significant change to the number of tyres stored at the premises since the order was made.

It was also submitted that the breach of condition E5 of the development permit was not merely a technical one and that a catastrophic fire at the premises would have the potential to have a significant adverse effect on the environment and human health and safety.

The premises had been owned by Rhode, the second respondent, and were rented to Hole pursuant to an arrangement entered into on 1 June 2005. That arrangement was subsequently terminated on or about June 2008 and Hole was no longer entitled to be in occupation of the premises.

Rhode deposed to a number of facts which supported the application made by DERM and indicated that she had been suffering financial hardship due to not receiving any rent from Hole since June 2008 and that she was unable to let the premises to another tenant until the tyres were removed.

The application the subject of the appeal was for an order that the P&E Court appoint DERM to perform all acts necessary to ensure the number of tyres stored on the premises complied with condition E5 of the development permit. An order was also sought that Hole pay DERM's costs and expenses caused by his failure to comply with the order including the costs to be incurred by DERM under the order sought.

Decision

Rule 889(1) (Substituted performance) of the UCPR provides that if a non-money order requires a person to perform an act and the person does not perform the act, the court may appoint another person to perform the act and order the person liable under the order to pay the costs and expenses caused by the failure to perform the act.

The P&E Court indicated that the grant of the relief sought by DERM was discretionary and rule 889 (Substituted performance) of the UCPR did not attempt to fetter the exercise of the discretion by the P&E Court.

His Honour Judge Britton SC was satisfied that the failure by Hole to remove the tyres at the premises constituted a significant risk to the environment in the event of a fire occurring.

Hole had a public duty to comply with the conditions of the development permit to operate the type recycling business, an environmentally relevant activity, under the *Environmental Protection Act 1994* (**EPA**) and to comply with the general environmental duty under section 319 (General environmental duty) of the EPA.

The purpose of the application by DERM was to enforce compliance with those duties. Moreover, it was in the public interest that compliance with those duties be enforced.

The P&E Court was satisfied that it was appropriate to make the order sought by DERM.

Held

The P&E Court made an order in the terms sought by DERM, that it be appointed to perform all acts necessary to ensure that the tyres stored on the premises complied with condition E5 of the development permit. Hole was required to pay DERM's costs and expenses caused by his failure to comply with the order and the costs to be incurred by DERM under the order for substituted performance.

Exercise of discretion to grant enforcement orders

Samantha Hall | Katherine McGree

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Patella Properties Pty Ltd & Ors* [2010] QPEC 122 heard before Robertson DCJ

December 2010

Case

This was an application by the Sunshine Coast Regional Council (**council**) for a declaration and enforcement orders in the Planning and Environment Court (**P&E Court**) as to whether the respondent property developers had a development approval for a material change of use of premises (**MCU approval**) and whether they had committed breaches of the MCU approval.

Facts

Mr and Mrs Patella, a married (now separated) couple, operated two successful property development companies. Each of Mr and Mrs Patella and the companies were respondents in this application (referred to collectively as Patella).

Patella purchased a 7.29 hectare property at Buderim in April 2006. The initial intention for the site was to build a residence with rooms that could accommodate private yoga classes, spiritual lectures and gatherings. The council granted an operational works permit for works to service the residence.

By late 2006, Patella sought to develop the property as a community facility which could be hired for the purposes of yoga classes, spiritual lectures and gatherings and Patella lodged the associated material change of use application (**MCU application**). The MCU application was deemed to be refused by the council after long delays but was subsequently approved with conditions by the P&E Court after the parties negotiated a consent order.

As part of the narrowing of the issues, it was necessary for the P&E Court to determine whether the development approval for material change of use had been abandoned. Mrs Patella, as the owner of the land at the time of the proceedings, had stated unequivocally in an affidavit that the material change or use had been abandoned. The issue was whether this statement of intention was confirmed by an action or conduct.

In draft orders before the P&E Court, the Patella's acknowledged the commission of a development offence by contravening the permit for operational works in relation to the construction of the driveway. Specifically the driveway constructed had a two lane carriageway with a guard rail, and had used fill to widen the approved road base whereas the permit limited the driveway to a single lane with three overtaking bays and the widening of the road base by cut only.

In these circumstances the P&E Court's discretion to make enforcement orders was engaged. The factors considered in the exercise of the discretion included:

- Mr and Mrs Patella's genuine desire to give something back to the community;
- the unlikelihood that a successful developer against whom no previous breach of planning law was alleged would wilfully ignore conditions to achieve a development for no commercial return;
- the development of the site had been financially and emotionally costly for Mr and Mrs Patella, and was likely a contributing factor to their marriage breakdown;
- Mr Patella had a transformative and positive change of attitude during the course of the proceedings;
- council officers by issuing a variety of stop work, compliance and demand notices but not following through after no action was taken or a letter was received from a Patella consultant, demonstrated an ambivalent attitude towards alleged breaches of permits and local laws;
- if council officers had followed through with earlier demands the dispute may never have eventuated;
- there had been long and unacceptable delays in the assessment process;
- the evidence of the council's engineer was not confined to observations and opinions framed by his expertise as an engineer and he had allowed himself to become an advocate for the council.

Decision

His Honour Judge Robertson determined that the use as a community facility pursuant to the MCU approval had been abandoned because the strong expression of intent by the landowner was accompanied by actions, including that Mr Patella had directed a spiritual teacher to the effect that the premises were no longer available for meetings.

His Honour also held that the appropriate response to Patella's conduct was the exercise of the P&E Court's discretion to grant enforcement orders. To do so would send a strong message to any developer who may think to proceed with a development without proper approvals or to act contrary to the conditions of permits given.

Held

Application for enforcement orders granted.

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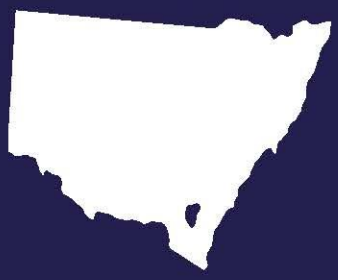

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