COLIN BIGGERS & PAISLEY LAWYERS

JOURNAL OF LEGAL KNOWLEDGE MATTERS

Volume 16, 2018

PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

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

COLIN BIGGERS & PAISLEY LAWYERS

Our Planning Government Infrastructure and Environment group

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

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

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

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

Our specialist expertise and experience

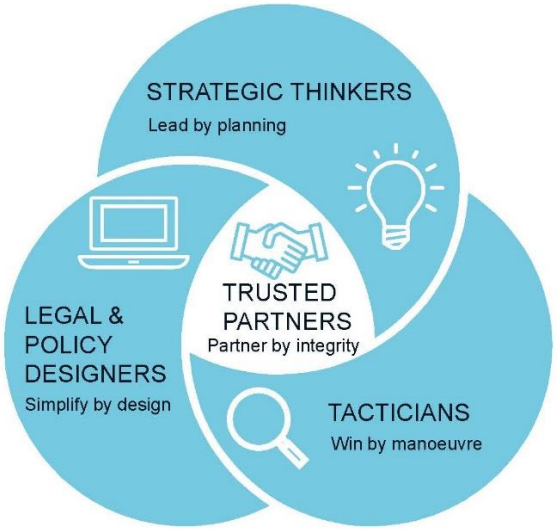
Our Planning Government Infrastructure and Environment group is recognised for our specialist expertise and experience:

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

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

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

Environment – Legal excellence in all areas of environmental law and policy.



Lead, Simplify and Win with Integrity

Our Team of Teams and Credo

Our group practices collectively as an *East Coast Team of Teams*, which is known for its *Trusted Partners*, *Strategic Thinkers*, *Legal and Policy Designers* and *Tacticians*.

Our Credo is to *Lead, Simplify and Win with Integrity*, and we practice personally so as to *partner by integrity*, *lead by planning*, *simplify by design* and *win by manoeuvre*.

We believe that continual and exceptional performance is the foundation of success, and we apply our integrity and character, critical reasoning and technical process of strategy to ensure an unparalleled level of planning, design and manoeuvre to achieve that success.

COLIN BIGGERS & PAISLEY LAWYERS

Contents

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Index

Index (cont'd)

Index (cont'd)

Index (cont'd)

Index (cont'd)

Index (cont'd)

COLIN BIGGERS & PAISLEY LAWYERS

Table of Legislation

Australian Capital Territory

Commonwealth

New South Wales

Queensland

Table of Legislation (cont'd)

Queensland (cont'd)

Victoria

Table of Cases

Table of cases (cont'd)

Table of cases (cont'd)


COLIN
BIGGERS
& PAISLEY
LAWYERS

COLIN BIGGERS & PAISLEY LAWYERS

Supreme Court of Queensland finds council's utility charges for water services to be invalid due to failure to comply with legislative requirements and failure to exercise power to levy utility charges in accordance with the Local Government Act 2009

William Lacy | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *The Mount Isa Irish Association Friendly Society Ltd v Mount Isa City Council* [2017] QSC 316 heard before Daubney J

January 2018

In brief

The case of *The Mount Isa Irish Association Friendly Society Ltd v Mount Isa City Council* [2017] QSC 316 concerned two applications to the Supreme Court of Queensland (**Court**) by The Mount Isa Irish Association Friendly Society (**Applicant**). The Applicant sought declarations that the Mount Isa City Council (**Council**) invalidly levied almost $50,000 of utility charges for water services for two of the Applicant's properties.

The Court considered the proper construction of section 101 of the *Local Government Regulation 2012* (**LGR**), which deals with the working out of utility charges for water services, to determine whether the Council had complied with the requirements under the LGR. The Court found that the Council had not complied with requirements about how utility charges for water services are to be worked out under the LGR.

Further the Court determined that the Council had failed to exercise its power to levy utility charges for water services in a transparent and efficient manner and that the exercise of the power in this manner was inconsistent with section 4 of the *Local Government Act 2009* (**LGA**), in particular with the local government principles contained in that section of the Act.

The Court consequentially found that the Council's utility charges for water services were invalid.

The Council adopted a rate of $202 per unit for water services

The Council had a broad power and discretion in respect of levying rates and charges. The general power to levy rates and charges was contained in section 94 of the LGA with further matters being set out in the LGR. Importantly section 101 of the LGR prescribed how utility charges for water services were to be worked out as follows:

> *(1) The utility charges for a water service must be charged–*
>
> *(a) wholly according to the water used; or*
>
> *…*
>
> *(b) partly according to the water used, using a 2-part charge.*
>
> *(2) The utility charges for the water used must be worked out on the basis of–*
>
> *…*
>
> *(b) if the water used is measured by a water meter–*
>
> *(i) an amount for each unit, or part of a unit, of water that is used; or*
>
> *(ii) a fixed amount plus an amount for each unit, or part of a unit, of water that is used over a stated quantity.*
>
> *…*

For the 2016/2017 financial year, the Council adopted a rate per unit charge or service for water of $202 for a set water entitlement of 112.5kL, with a further charge per kL applicable for water consumed above the entitlement. The number of units allocated to different types of properties was determined on the basis of the classification of the property, for example a Dwelling – single house/dwelling was allocated 8 units in Mount Isa. The Council's Revenue Statement noted that the "*units applied to different types of properties have been established for many years and Council is generally satisfied that they reflect the relative costs of service*".

It is relevant to note that it was agreed by the parties that this charging arrangement was not a 2-part charge under section 101(1)(b) of the LGR.

The Court was required to determine the proper construction of section 101 of the LGR

The Applicant argued that the Council's decision to impose a rate of $202 per unit meant that the Council had not complied with the requirement under section 101(1)(a) of the LGR to charge for water wholly according to the water used.

The Council argued that its decision to charge a rate per unit complied with section 101(1) as its utility charges for water services had been worked out in accordance section 101(2)(b)(ii) of the LGR which provided for utility charges for water services to be worked out on the basis of a fixed amount plus an amount per unit of water.

The Court considered the apparent conflict in section 101 of the LGR between the need for a water service to be charged wholly according to use and the ability for charges to worked out on the basis of a fixed amount. The Court, referring to the High Court's judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 (**Project Blue Sky**), noted that reconciling conflicting provisions often requires a determination of the hierarchy of the provisions, specifically which of the provisions is the leading provision and which is the subordinate provision.

The Court found that section 101(1) of the LGR was the leading provision and that the ability to work out charges in accordance with section 101(2)(b)(ii) of the LGR was only available in circumstances where the Council had adopted a 2-part charge under section 101(1)(b) of the LGR. As a 2-part charge had not been adopted by the Council it had failed to comply with section 101(1) of the LGR when it levied water charges on the Applicant.

The Court considered whether the failure to comply with the LGR rendered the utility charges for water invalid

Having determined that the Council had not complied with section 101 of the LGR, the Court was required to consider the effect of this non-compliance. Again referring to the High Court's judgment in Project Blue Sky, the Court noted that the failure to comply with a condition regulating the exercise of statutory power will not necessarily invalidate the act done under the power. There must be a legislative intent to invalidate the act where there is a failure to comply with the condition.

In the context of section 101 of the LGR there was an express statement made by the subordinate legislature in section 101(3) of the LGR that "[u]*tility charges for water are not invalid only because the local government does not comply with this part*" [our emphasis].

The inclusion of the words "*only because*" led the Court to distinguish the circumstances before it from those before the High Court in *Minister for Immigration and Multicultural Affairs v Palme* (2003) 216 CLR 212 where the words of the *Migration Act 1958* (Cth) clearly provided that a failure to comply with a provision of that Act should not invalidate the decision. By contrast, section 101(3) of the LGR left open the possibility of invalidity where non-compliance was combined with another factor.

The Court found that the Council failed to exercise its power under section 94 of the LGA in a manner consistent with the local government principles

The LGA required anyone performing a responsibility under that Act to do so in accordance with the local government principles stated in section 4 of the LGA. The local government principles relevantly included a requirement for "*transparent and effective processes, and decision-making in the public interest*".

The Applicant argued that the charges were invalid as not only had the Council failed to comply with section 101 of the LGR but the Council's decision to levy rates and charges under section 94 of the LGA had been made in a manner which was inconsistent with the local government principles in section 4 of the LGA.

The Court found that the Council had not exercised its power in a manner consistent with section 4 of the LGA in particular the principles in respect of transparency and effective processes and decision making. The Court did not find the Council's explanation in its Revenue Statement, or the other material before the Court, about the adopted method for determining the amounts of levied water charges or the allocation of units to different classes of land to be indicative of a transparent or effective process.

The Court stated that section 4 of the LGA is more than merely aspirational and noted as follows:

> *That language clearly places a duty on any decision-maker before performing a responsibility, or exercising a power, under the Act to at least turn his or her mind to the principles, especially where such a decision concerns compliance with a procedure imposed by legislation* (see [49]).

The Court stated that the Council "*should have turned its mind to the local government principles in the LGA when it resolved to determine its utility charges for the rates period*" (see [48]).

The combination of the Council's non-compliance with the LGR and its failure to exercise its power to levy utility charges in accordance with the local government principles led to the Court invalidating the utility charges for water services

The Court found that the non-compliance with section 101 of the LGR combined with the failure to exercise its power to levy utility charges under section 94 of the LGA in a manner consistent with the local government principles meant that the Council's utility charges for water services were invalid.

Land Court recommends approval of an application for a mining lease and environmental authority for the Kevin's Corner Mine in the Galilee Basin

Shaun Pryor | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Hancock Galilee Pty Ltd v Currie & Ors* [2017] QLC 35 heard before WL Cochrane

January 2018

In brief

The case of *Hancock Galilee Pty Ltd v Currie & Ors* [2017] QLC 35 concerned a referral to the Land Court of Queensland of an application made by Hancock Galilee Pty Ltd for a mining lease (MLA 70425) and an environmental authority for a combined underground and open cut thermal coal mine in the Galilee Basin in Central Queensland, for the project generally referred to as the Kevin's Corner Mine.

The Kevin's Corner Mine is proposed to consist of two open-cut pits and three underground longwall operations estimated to extract 30 million tonnes of coal every year for 30 years or more.

The Court recommended that the application for the mining lease be granted and that the application for the environmental authority be approved subject to the conditions set out in the draft environmental authority.

Issues generally

The Court considered the objections and submissions in respect of the application and heard evidence from experts in the fields of groundwater, ecology, environmental science, water quality and economics, as well as evidence from the Applicant's Executive General Manager of Development Projects and the assessment manager at the Department of Environment and Heritage Protection.

The key issues in the hearing related to groundwater, economics and matters of public interest.

Despite submissions that the case was similar to the Land Court's decision in respect of the proposed Alpha Coal Mine (being the case of *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection* (2014) 35 QLCR 56) in which the Court recommended refusal of the relevant mining lease, the Court was not prepared to accept that the evidence was the same and should therefore be decided in the same way.

Groundwater

With respect to groundwater, it was submitted by the third respondent, Coast and Country Association of Queensland Incorporated (**CCAQ**), that the Applicant's evidence on groundwater was "*unsatisfactory*" and that the "*impacts on groundwater in the area surrounding Alpha and Kevin's Corner mines are likely to be far greater than the applicant suggests*" (see [69]).

The basis for this submission was the failure by the Applicant's expert to plot the hydraulic head in the D-E sandstone for data monitoring bore AVP-14. The Applicant contended that this "*made a material difference to the groundwater contours and flow directions in the western and south-western parts of the Alpha lease area*" (see [197]).

The Applicant's expert conceded that the data monitoring bore AVP-14 had not been incorporated into the modelling. However despite extensive cross-examination on this point, the Court found that nothing in the evidence established that the failure was significant.

Whilst both experts acknowledged that the modelling had limitations, the Court agreed with the Applicant's expert that the modelling process was an iterative process which would continue once the mine starts.

The CCAQ further contended that the introduction of the *Water Reform and Other Legislation Amendment Act 2014*, which had not commenced, would have the effect of amending the *Water Act 2000* that the Applicant would no longer require a water licence from 6 December 2015 onwards and that the Court should not rely on later approvals under the *Water Act 2000* to deal with the issues surrounding groundwater.

However, the Court agreed with the Applicant's submissions that the proper approach to be taken was to "*consider and analyse the potential impacts of groundwater issues on the environment as part of the broader considerations under MRA s 269(4) and EPA s 223*" and "*recognise that further detailed examination of these issues will also occur, and further conditions may also be imposed, under the Water Act processes*" (see [254]).

Overall, the Court preferred the evidence of the Applicant's expert and found that the evidence of CCAQ's expert had no foundation in hard data and was based upon speculation and hypothesising.

The Court accepted that the long term impact upon groundwater and the drawdown of groundwater caused by the mining operations would have some impact on groundwater in the surrounding area and consequently upon surrounding grazing and farming properties. The Court also acknowledged that only future and ongoing studies and monitoring would ascertain the true effect.

The Court found that this conclusion was not sufficient to recommend against the approval of the application and found that the groundwater impacts were appropriately dealt with and managed by the conditions imposed by the Department of Environment and Heritage Protection in the draft environmental authority and also by the Federal government approval granted under the *Environment Protection and Biodiversity Conservation Act 1999*.

Economics

Despite contentions on behalf of CCAQ's expert that a cost benefit analysis should be conducted, the experts agreed that the common practice in assessing the economic impact of mining projects as part of the EIS process in Queensland is the use of input-output models.

In adopting this model, the experts agreed that, while the proposal involves a significant amount of investment, it represents only a small percentage of economic output or employment in the context of the Australian and Queensland economies.

The experts also agreed that if the mine were able to produce 30 million tonnes per year as projected, in the absence of any royalty waiver, it would be liable for royalties of between $145 to $168 million dollars per annum which would be a significant contribution to the State.

The Court was satisfied that the project was likely to have positive economic outcomes and was not convinced that any of the negative economic consequences amounted to anything other than "*inevitable structural change in a modern economy*" (see [329]).

Court found compliance with the statutory requirements in the Mineral Resources Act 1989 and Environmental Protection Act 1994 and recommended that the mining lease application and the environmental authority application be approved

The Court considered its obligation, in making a recommendation to the Minister, to take into account and consider the factors in section 269 of the *Mineral Resources Act 1989* and section 191 of the *Environmental Protection Act 1994*.

The Court found no basis upon which to recommend refusal of the grant of the mining lease, notwithstanding that it will convert otherwise useful grazing land into a coal mine.

The Court also found that the conditions imposed under both the *Environmental Protection Act 1994* and the *Environment Protection and Biodiversity Conservation Act 1999* were adequate to deal with the environmental impacts caused by the proposed mining operations.

In considering what was in the public interest, the Court considered the individual rights and interests of affected landowners and lessees, as well as the overall advantages of the proposed mine. Relevantly, the Court noted that the provisions of the *Mineral Resources Act 1989* provide for compensation for affected landowners and contain requirements to enter into make good agreements. The Court ultimately found that, whilst rights and interests would be affected, those affected would be compensated and any disadvantages were not sufficient to outweigh the advantages of the proposal.

The Court concluded that, whilst the exploitation of mineral resources of this magnitude would result in the disruption of other land uses and have "*negative impacts and undesired consequences*" on the environment, those consequences were outweighed by the benefits that would result from the development of the mine (see 378]).

The Court ultimately recommended that the mining lease application be granted and that the application for the environmental authority be approved subject to the conditions set out in the draft environmental authority.

Land Court refuses an application for disclosure of a document of an expert

Thomas Massey | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Company 57 Pty Ltd as TTE v Department of Transport and Main Roads (No. 2)* [2017] QLC 23 heard before FY Kingham

January 2018

In brief

The case of *Company 57 Pty Ltd as TTE v Department of Transport and Main Roads (No. 2)* [2017] QLC 23 involved an application to the Land Court for an order that the Department of Transport and Main Roads disclose certain documents.

The issues before the Court were as follows:

- whether the Department could be compelled by a Court order to disclose documents in the possession of the Department's expert where there was no evidence that the Department had control over the documents in question; and
- whether the documents sought to be disclosed by the Applicant were directly relevant to a matter in issue in the proceedings.

The Court noted that the onus was on the Applicant to establish that the order for disclosure is to be made.

An affidavit of the Department's expert addressed many of the categories of documents sought to be disclosed by the Applicant. The Department's expert was not required for cross-examination concerning these documents and there was no evidence to contradict the expert's affidavit. As such, given the uncontested nature of the expert's evidence, the Court found that the documents in these categories did not fall within the subject matter of the request for disclosure.

The request sought the disclosure of an extract from a text book that had been referred to in a report prepared by the Department's expert which was included in the Quarry Expert's Joint Report (**Joint Report**). The Court determined that this document fell outside the scope of what was disclosable under the application.

The Court refused the application on the basis that the Applicant had not satisfied its obligations under Rule 211 of the *Uniform Civil Procedure Rules 1999* (**UCPR**) in that it had failed to establish that the documents in question were in the possession of or under the control of the Department and directly relevant to a matter in issue in the proceedings.

The Court also ordered that the Applicant pay the Department's costs of the application.

The Court found that the requested documents were not under the control of the Department

In relation to those documents that the Department's expert had not addressed in the expert's affidavit, there was no evidence that the documents were under the Department's control as required under Rule 211 of the UCPR.

The Applicant sought to rely on the case of *Erskine v McDowall* [2001] QDC 192 in which the plaintiff was successful in seeking orders requiring a defendant to make an application to a government department under the *Freedom of Information Act 1982* (Cth) for copies of documents in the government departments' possession. The Court distinguished *Erskine v McDowall* on the basis that the defendant in that case was the only party with the means of obtaining the documents in question. In the present case, the Applicant had the opportunity to request the documents from the Department's expert and could have obtained the documents through a subpoena or non-party disclosure.

The Court found that the documents were not directly relevant to a matter in issue in the proceeding

The Court noted that the Joint Report had been prepared and as such the experts were restricted from departing or qualifying an opinion in the Joint Report without the Court's leave to do so.

The Court also noted that the Applicant had failed to identify the relevance of the requested documents to a matter in issue following the Joint Report.

The Court therefore refused the application and ordered that the Applicant pay the Department's costs of the application for disclosure.

COLIN BIGGERS & PAISLEY LAWYERS

Land Court found that making a vigorous case is not inconsistent with the duties of a model litigant

Sinead Garland | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Suncorp Metway Insurance Pty Ltd v Valuer-General (No. 3)* [2017] QLC 53 heard before WA Isdale

January 2018

In brief

The case of *Suncorp Metway Insurance Pty Ltd v Valuer-General (No. 3)* [2017] QLC 53 concerned an application for costs made by Suncorp Metway Insurance Pty Ltd after its appeal against a valuation under the *Land Valuation Act 2010* (**LVA**) was successful. The Appellant alleged that the Valuer-General's conduct was frivolous or vexatious and that the Valuer-General failed to properly discharge its responsibilities during the course of the appeal. In particular, the Appellant alleged that the Valuer-General's conduct was frivolous because it engaged in conduct that was unmeritorious.

The Appellant appealed to the Court against a valuation by the Valuer-General under the LVA. The Appellant was successful and it applied for an order for costs. The Appellant contended that the Valuer-General relied upon groundless assertions to justify the valuation of the land and by doing so brought serious and unjustifiable trouble to the Appellant and expense to correct the valuation.

The Court found that the Valuer-General's conduct was not frivolous or vexatious or unmeritorious. The Valuer-General was simply found to be unsuccessful. By presenting a vigorous case in defence of the valuation, the Valuer-General's conduct was not inconsistent with the duties of a model litigant. The Valuer-General had not failed to properly discharge its responsibilities during the course of the appeal and as a result the Appellant's application for costs was refused.

The Court found that when using its discretion to make an order for costs, the Court shall not take into consideration circumstances that are not provided for under section 171(2) of the Land Valuation Act 2010

The Valuer-General submitted that the concept of "unmeritorious conduct" is not relevant for the purpose of determining whether costs should be awarded as the Court is not required to take into consideration any circumstance not mentioned in section 171(2) of the LVA. The Valuer-General contended that the Court only has a discretion to make an order for costs if one of the circumstances under section 171(2) of the LVA is enlivened.

The Court agreed and rejected the Appellant's submission that it was entitled to costs because "unmeritorious conduct" is not an applicable consideration under section 171(2) of the LVA.

The Court considered the parties submissions about whether the conduct was frivolous or vexatious

Relying upon the Court's decision in *Brisbane Square Pty Ltd v Valuer-General* [2015] QLC 40, the Appellant contended that the words "frivolous or vexatious" "*should be given their normal meaning*". In particular, "*a party relying upon groundless assertions and putting parties to serious and unjustifiable trouble can be sufficient*".

As such, the Appellant submitted that the Valuer-General's conduct was frivolous or vexatious during the course of the appeal for the following reasons:

- The Valuer-General 's valuation was originally $39,500,000 and was reduced during the course of the appeal to $34,500,000. The Court found that the valuation should be $13,800,000, which suggested that there was a gross error by the Valuer-General.
- The Valuer-General valued the wrong thing.
- The Valuer-General included leases at a late stage in the proceeding and by doing so acted contrary to a model litigant.
- The Valuer-General's valuation evidence was of poorly analysed or unsuitable sales.

- The Appellant was put to serious and unjustified trouble and expense to correct the Valuer-General's valuation.

The Valuer-General submitted that the circumstances set out in section 171 of the LVA were not enlivened in this case and as such the Court was not required to exercise its discretion to award costs. The Valuer-General relied on the following reasons in support of its position:

- The Appellant's real objective was to establish that the land was valueless or had a nominal value, such as one dollar.
- The Courts routinely accept the evidence of one party and reject evidence from the other.
- The ultimate valuation of $13,800,000 was far from the zero value or one dollar value contended by the Appellant.
- The Court found that the value of $13,800,000 would be likely to represent the value at the lower end of the highest and best use of the land.
- The Court found some usefulness in the Valuer-General's expert's valuation.
- The Court did not fully adopt the evidence of either valuer.
- There was no evidence of any additional expense having been incurred as a result of the Valuer-General's conduct.
- Costs are not punitive.

The Court found that in determining whether conduct is frivolous or vexatious the Court is to have regard to the context of the case as a whole

The Court observed that when deciding what makes legal proceedings vexatious, the relevant test to be applied is that from the decision of *O'Shea v Cameron* [1996] 2 Qd R 218. In that case it was held that "*the broad test potential concerns such factors as the legitimacy or otherwise of the motives of the person against whom the order is sought, the existence or lack of reasonable grounds for the claims sought to be made, repetition of similar allegations or arguments to those which have already been rejected, compliance with or disregard of the court's practices, procedures and rulings, persistent attempts to use the court's processes to circumvent its decisions or other abuse of process, the wastage of public resources, and funds, and the harassment of those who are the subject of the litigation which lacks reasonable basis*".

The Court observed that the Valuer-General did not commence the appeal and therefore did not commence action for any improper purpose. The Valuer-General relied on expert evidence to justify its valuation and, although the evidence was unsuccessful, it was of some use.

Looking at the Valuer-General's conduct in the context of the whole case, the Court was not satisfied that the Valuer-General's conduct was frivolous or vexatious or that the Valuer-General failed to properly discharge its responsibilities in the appeal.

For these reasons, the Court found that there was no basis for the Court to exercise its discretion to award costs under section 171(2) of the LVA and rejected the Appellant's submission that there should be an order as to costs.

The Court went on to state that it would not have exercised its discretion to award costs in favour of the Appellant for the following reasons:

- The Appellant originally contended for a nil or nominal valuation yet the Court ultimately found that the appropriate value was $13,800,000.
- The Appellant did little to assist the Court to arrive at the correct valuation.
- The conduct of the Valuer-General was directed towards assisting the Court.
- The conduct of the Valuer-General did not lengthen the proceeding or put the Appellant to additional expense.
- The Appellant simply presented its case which it prepared from the outset.

Planning and Environment Court fines campground operators for contempt of Court for continued unlawful use of land

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Whitsunday Regional Council v Branbid Pty Ltd & Anor* [2017] QPEC 66 heard before Everson DCJ

January 2018

In brief

The case of *Whitsunday Regional Council v Branbid Pty Ltd & Anor* [2017] QPEC 66 concerned an originating application in the Planning and Environment Court. The Whitsunday Regional Council (**Council**) sought punishment against each of the Respondents for contempt of court for failure to comply with the orders of the Planning and Environment Court made on 8 February 2017. The orders relevantly required the Respondents to cease providing temporary accommodation to people in campervans and tents on the subject land.

The Court found that the Respondents were in contempt of court, having failed to cease the operation, and imposed fines and ordered the Respondents to pay a percentage of the Council's costs.

Orders of the Planning and Environment Court

The Planning and Environment Court made a declaration that the use of land located at Miowera Saleyards, Roma Peak Road, Bowen, by Branbid Pty Ltd, the First Respondent, for temporary accommodation for campervans and tents was a development offence because it was assessable development requiring a development permit and no development permit had been issued.

The Planning and Environment Court ordered that the First Respondent and Mr Brett Fallon, the Second Respondent, cease providing or permitting to provide temporary accommodation to people in campervans, tents, or caravans on the subject land without obtaining an effective development permit for that use.

Contempt of court

Prior to the initial proceeding before the Planning and Environment Court, the First Respondent was issued with a show cause notice and a subsequent enforcement notice to remedy the development offence, however they were ignored. In the proceeding before the Planning and Environment Court, the Second Respondent argued strongly against the relief sought by the Council as he believed it was an arbitrary and unreasonable attack on his and the First Respondent's freedom to use the subject land as they pleased.

In the subsequent proceeding, the Planning and Environment Court found that each of the respondents were in contempt of court as the evidence clearly showed beyond a reasonable doubt that they had continued the unlawful use of the subject land. Additionally, the Court noted that continuing the unlawful use of the subject land provided a commercial benefit to both Respondents as the customers had paid a $5 fee to stay per night.

Legislative framework

Under section 36 of the *Planning and Environment Court Act 2016* (**PEC Act**) a Planning and Environment Court judge has the same power to punish a person for contempt as a District Court judge, and the *District Court of Queensland Act 1967* applies to the Planning and Environment Court in the same way as it applies to the District Court.

Section 129 of the *District Court of Queensland Act 1967* states that a person is in contempt of the District Court if the person fails to comply with an order of the Court without a lawful excuse. Section 129 also provides that a District Court judge has the same power as a Supreme Court judge to punish as if it were contempt of the Supreme Court.

The UCPR apply to contempt of court proceedings. Rule 904 of the UCPR states that a person against whom a non-monetary order is to be enforced must be notified of the terms of the order in an appropriate manner. The Court observed that both Respondents were notified of the terms of the proposed orders by both email and via the post to their nominated addresses.

It is required under rule 926 of the UCPR that the Respondent be personally served with the originating application and any affidavit. The Court in this instance noted that personal service did not initially occur but held that personal service was ultimately conducted.

Court identified relevant factors for determining whether to impose a fine

The Council sought the imposition of a fine against the Respondents. The Court identified the following as being the relevant considerations in arriving at the appropriate relief:

- the characterisation of the conduct constituting the contempt;
- given that the penalty to be imposed is a fine under the *Penalties and Sentences Act 1992*, the financial circumstances of the offender and the burden imposed on the offender.

The Court held that the unlawful use of the subject land by the Respondents was for financial gain. The financial gain from the unlawful use however was not particularly lucrative as the Respondents only charged customers $5 per night to stay. The Court also considered the capacity of each Respondent to pay any potential fine. The First Respondent owned the subject land unencumbered and therefore had a notable financial asset. The Second Respondent was the sole director of the First Respondent and received a pension. On that basis, the Court found that the Second Respondent's financial circumstances were not substantial and took this into account when imposing the fine.

Costs

The Council also sought an order that the Respondents pay its costs in respect of the contempt proceedings. The Court took into account His Honour Justice McCurdo's statement in *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118 in which His Honour stated that indemnifying a party by requiring costs to be paid by the contemnor as between solicitor and client is to impose a further sanction or punishment for the contempt and can be onerous.

In respect of the legal requirements for a costs order, the Court noted that an order for costs can only be under sections 60 and 61 of the PEC Act. In this case, the proceeding was an originating application for contempt of court which is not provided for under sections 60 and 61 of the PEC Act. The Court was however satisfied that under the UCPR, where the power to punish for contempt is found, rule 932 allows the Court to award costs for punishment for contempt of court.

The Court fined the Respondents and ordered that they pay the Council's costs

The First Respondent was fined $15,000 and the Second Respondent was fined $5,000 for contempt of court. The Planning and Environment Court referred the fine against the Second Respondent to the State Penalties Enforcement Registry for recovery.

The Council also sought an order that the fines be paid into their operating fund under section 246 of the *Local Government Act 2009*. The Court found however that section 246 did not apply in this case as it only applies to proceedings brought by a local government for an offence against a Local Government Act.

In determining the order for costs, the Court took into account over-representation of the Council and the duplication of material brought before the Court. The Court held that the Respondents were to pay only 60% (30% each) of the Council's costs on an indemnity basis.

Planning and Environment Court awards costs after relevant development application is withdrawn

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Conias Hotels Pty Ltd & Anor v Ross Neilson Properties Pty Ltd & Ors* [2017] QPEC 65 heard before R Jones DCJ

January 2018

In brief

The case of *Conias Hotels Pty Ltd & Anor v Ross Neilson Properties Pty Ltd & Ors* [2017] QPEC 65 concerned an application for costs to the Planning and Environment Court made by Conias Hotels Pty Ltd and City Commercial Holdings Pty Ltd (**Applicants**) against Ross Neilson Properties (**Respondent**).

The Respondent had lodged a development application for the retention of an existing building and the construction of a mixed use high rise development. The development application included 133 car parks with vehicle access via a laneway which was encumbered by existing easements. The easements not only benefitted the Respondent but also the Applicants. The Applicants were concerned over increased traffic and congestion due to the laneway. The Applicants were also concerned that the proposed development would limit their right to develop over the easement in the future and also that the development application did not include consent from all relevant land owners.

The Applicants commenced a proceeding by way of an originating application in the Planning and Environment Court on 3 March 2016.

The hearing of the proceeding was to commence on 19 May 2016 but was adjourned after the Respondent sought to raise a jurisdictional issue. The hearing was re-listed for 28 November 2016 but the Respondent was granted leave on 25 October 2016 to discontinue the Applicants' proceeding on the basis that the Respondent's development application had been withdrawn. The Applicants sought payment of their costs of and incidental to the proceeding.

The Respondent contended that the Applicants had already enjoyed success because the development application had been withdrawn and therefore an award of costs was not necessary. The Respondent submitted that the decision to withdraw the development application was not a commercial decision and had no relation to the Applicants' proceeding. The Court found otherwise. The Court held that from the evidence given, it was clearly a commercial decision to withdraw the development application.

The Court ordered that the Respondent pay the Applicants' costs of the proceeding from 19 May 2016 to 25 October 2016.

Background

The development application was made by the Respondent to the Brisbane City Council in May 2015. The proposed development involved the redevelopment of land located at 500 George Street, as a mixed use high rise development.

One of the significant issues about the development application was the proposed laneway vehicle access. The proposed vehicle access to the development via a laneway was encumbered by existing easements. The Court noted that these easements benefitted the subject site, another site (referred to as Lot 1) and also land owned by the Applicants. The Applicants had concerns about increased traffic in the laneway and argued that the proposed development would limit the right to develop over the easement in the future. Furthermore, the development application failed to include the consent of the Applicants.

On 3 March 2016, the Applicants commenced proceedings challenging the validity of the development application and whether they were landowners who should have consented to the development application. The proceeding was listed for hearing on 19 May 2016 but was adjourned as the Respondent raised a jurisdictional issue and expanded the relief it sought under section 440 of the now repealed *Sustainable Planning Act 2009* (**SPA**). The hearing was re-listed to be heard on 28 November 2016 however leave was granted on 25 October 2016 to discontinue the proceeding at the request of the Respondent as the development application had been withdrawn by the Respondent.

Relief sought by the Applicants

The Applicants sought the following relief:

- the Respondent pay the Applicants' costs of and incidental to the proceeding; or in the alternative;
- the Respondent pay the Applicants' costs of and incidental to the proceeding; from and including 20 May 2016, or in the further alternative;
- the Respondent pay the Applicants' costs thrown away by the adjournment of the hearing on 19 May 2016.

In brief, the Applicants submitted that the following elements of the development application supported an award of costs:

- the development application did not include all of the relevant land;
- the development application did not include consent to making the development application from all of the owners of the relevant land;
- the development application was not properly made.

Specifically, the Applicants sought the following relief:

- an order pursuant to section 456(7) of the SPA that the Council and the Chief Executive cease all steps to process, assess and decide the development application;
- an order that the development application be returned to the application stage as it was not properly made; and
- an order that the Council, the Chief Executive, and the Respondent pay the costs of the application.

The Court found that neither the Council nor the Chief Executive were required to be involved in the proceeding concerning costs.

Reasons mitigating against adverse cost orders

The Respondent resisted the application for the costs order. The Respondent submitted that the Applicants overstated the extent to which their case enjoyed good prospects of success for the following reasons:

- the technical evidence regarding traffic did not support their case;
- the Applicants down played the force of the Respondent's case before the Court; and
- it was wrong to suggest that the Respondent was unreasonable in its defense as the Respondent had "*forceful points to agitate in its favour which cannot be said unarguable*" (see [9]).

The Respondent submitted that each party should bear its own costs of the proceeding as the matter was fairly balanced, and the early ending of the proceeding did not reflect the merits of the Respondent's case.

The Court referred to an affidavit sworn by a general manager of the Respondent. The affidavit noted that the Respondent was given advice stating that the prospects of succeeding in the proceeding were good for the following reasons:

- the overtures to the Applicants to resolve the matter were rejected;
- the financial environment had changed substantially and due to this, Mr Ross Neilson (director of Ross Neilson Properties) thought it may not be possible for Northbridge MJN Pty Ltd to obtain finance to acquire Lot 1 and carry out development;
- the market for multiple dwellings had substantially softened; and
- commercial terms could not be agreed with the Feros parties for a further option extension.

The affidavit stated that due to the fact that Northbridge MJN Pty Ltd no longer had control of Lot 1, Mr Neilson instructed the general manager to withdraw the development application.

The Court's decision

The Court ordered that the Respondent pay the Applicants' costs of the proceeding from and including 19 May 2016 to 25 October 2016. Lot 1 was owned by the "Feros parties" who were not a party to the proceeding. The Court found that no meaningful enquiries had been made by the Respondent to ascertain the likelihood of financing the purchase of Lot 1. The Court noted that the Respondent had no adequate explanation regarding the finance of the Feros purchase and the affidavit of the Respondent's general manager provided no reasonable defense. The Court further established that the evidence given by the general manager concerning the "*softening of the market*" was less than persuasive.

The Respondent contended that the Applicants had enjoyed success by default due to an event which was not connected to the proceeding and therefore an order of costs was not justifiable. Furthermore, the Respondent stated that the development application was withdrawn due to the fact that the Respondent no longer controlled the land the subject of the development application and that the decision to withdraw was "*unrelated to the merits of the Applicants' proceeding*" (see [22]). The Court rejected this submission. The Court noted that the "*event*" that resulted in the development application being withdrawn was clearly showcased in the general manager's affidavit, being that the Respondent made a commercial decision to not continue with the proposed development. The Court found that the proceeding came to end due to a "*self-interested commercial decision*", and the Court could not see a reason to deny the Applicants' costs.

Conclusion

The Court stated that the discretion to award costs under section 457 of the SPA is "*an open one and is not to be approached either on the basis that there is a presumption that costs follow the event or on the basis that there is some form of underlying presumption that each party should bear their own costs*" (see [18]). The Court also referred to His Honour Justice McHugh's statement in *Oshlack v Richmond River Council* [1998] HCA 11 that "*costs are not awarded to punish the unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party*" (see [19]).

The Court could see no reason as to why the Applicants should be denied a favourable cost order. The Court ordered that the Respondent pay the Applicants' costs of the proceeding from and including 19 May 2016 to 25 October 2016.

Application to the Planning Act

The costs powers under section 457 of the SPA which were considered by the Court in this case were amended on 19 May 2017. These amended costs powers are now provided for under section 59 of the *Planning and Environment Court Act 2016*.

Contamination and pollution incidents in NSW: What's the difference and what are your duties?

Todd Neal | Katherine Edwards

This article discusses contamination and pollution incidents in New South Wales and the duties which exist in reporting these incidents

January 2018

In brief – Developers should seek legal and environmental advice to help manage risk, protect the environment and safeguard land values

When dealing with land contamination there needs to be both consideration of the legal definition of "contamination" as well as "pollution incident". These words are legally defined terms and there are differences between the concepts of "contamination" and "pollution incidents" that need to be closely analysed to ascertain one's responsibilities under NSW legislation when confronted with either.

This article explains the legislative framework in NSW that deals with contamination and pollution incidents. We explore:

- What is the difference between contamination and pollution incidents?
- Who has a duty to report contamination and pollution incidents to a government authority?
- When does a duty to report contamination and pollution incidents arise?

PFAS in the spotlight but other forms of contamination include petrol spills and buried asbestos

Last year raised considerable uncertainty and fear surrounding the extent of contamination caused by the use of per- and poly-fluoroalkyl substances (**PFAS**) chemicals across Australia. The risk (if any) posed to human health caught the attention of:

- the public;
- the media;
- lawyers;
- environmental scientists; and
- Federal and State (for example, NSW, QLD, VIC) governments.

However, PFAS are but one form of contamination that needs to be managed properly to avoid harm to the environment. Other types of contamination include petrol spills and buried waste such as asbestos. As urban redevelopment continues to make way for new housing, environmental law obligations will need to be at the front and centre of due diligences for development, and activities that may lead to pollution or contamination.

Contamination and pollution incidents legislative framework and regulatory authorities in New South Wales

There are two key pieces of legislation that deal with contamination and pollution incidents:

- *Contaminated Land Management Act 1997* (NSW) (**CLM Act**).
- *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

The regulatory authorities responsible for exercising the powers within these acts are generally the NSW Environment Protection Authority (**NSW EPA**) and local councils.

What is the difference between contamination and pollution incidents?

Contamination is different to pollution. It is important to distinguish the two so that the correct legislative requirements are used to deal with the situation at hand.

"Contamination of land" is defined in section 5 of the CLM Act to mean:

> *the presence in, on or under the land of a substance at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment.*

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

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

One obvious difference between the two concepts is that contamination of land requires the presence of a contaminated substance, whereas a pollution incident is based on the actual or likelihood of pollution occurring. To provide an example, where a contaminant is found in groundwater, surface water or soils from a historical use, this would be treated as contamination. On the other hand, if a contaminant was used and it entered or was likely to enter groundwater, surface water or soils, this would be treated as a pollution incident.

However, whether a particular incident leads to contamination of land or a pollution incident is not always legally straightforward and requires careful consideration of the facts of the matter.

Who has a duty to report contamination?

Section 60 of the CLM Act identifies who is responsible for reporting contamination. The responsibility lies with:

- a person whose activities have contaminated the land;
- an owner of land that has been contaminated whether before or during that owner's ownership.

While those persons mentioned above have a duty to report contamination, the duty is only triggered where the criteria identified in section 60(2) of the CLM Act are met. The criteria in section 60(2) of the CLM Act deals with, amongst other things, the potential for the substance to spread, the level of the contaminant, as well as referring to other thresholds that must be met. The technical nature of the criteria means sometimes expert evidence from a suitably qualified environmental consultant is required to determine whether the duty to report contamination has been triggered.

The NSW EPA has also prepared *Guidelines on the Duty to Report Contamination under the Contaminated Land Management Act 1997* (dated September 2015) to assist in determining whether the duty arises. These Guidelines should be used by the environmental consultant.

There are different maximum penalties that apply to persons who do not comply with the duty to report contamination with the highest being $1,000,000 for a corporation whose activities have contaminated land and a further $77,000 for each day the offence continues.

Who has a duty to report a pollution incident?

Section 148 of the POEO Act identifies who is responsible for reporting a pollution incident. Where a pollution incident occurs in the course of an activity, so that material harm to the environment is caused or threatened, a duty to notify relevant authorities may arise for:

- a person carrying on the activity;
- a person engaged as an employee in carrying on the activity;
- an employer who is notified of an incident by an employee or who otherwise becomes aware of a pollution incident;
- an occupier of the premises on which the pollution incident occurs;
- any person engaged in carrying on an activity as an agent for another.

Relevant authorities that may need to be notified include:

- NSW EPA;
- Local council;
- Ministry of Health;
- SafeWork;
- Fire and Rescue.

Section 152 of the POEO Act makes it an offence to fail to notify relevant authorities of a pollution incident. The maximum penalty for a corporation is $2,000,000 and in the case of a continuing offence, a further penalty of $240,000 for each day the offence continues. The maximum penalty for an individual is $500,000 and in the case of a continuing offence, a further penalty of $120,000 for each day the offence continues.

However, it must also be noted that section 151 of the POEO Act removes the duty to report a pollution incident if the person is aware the incident has already come to the notice of each relevant authority.

When does the duty to report contamination arise?

Section 60(4) of the CLM Act requires a person who has a duty to report contamination to notify the NSW EPA "as soon as practicable after the person becomes aware of the contamination".

As set out above, there are normally technical investigations that need to be undertaken, most likely by a suitably qualified environmental consultant, before a duty to report the contamination is triggered. However, this cannot be assumed and the technical criteria cannot be used as a means of defeating one's duty to report contamination.

This is because section 60(5) of the CLM Act states:

> *A person is taken to be aware of contamination for the purposes of this section if the person ought reasonably to have been aware of the contamination.*

Section 60(9) of the CLM Act states the matters that are to be taken into account in determining when a person should reasonably have become aware of the contamination. Those matters are:

> *(a) the person's abilities, including his or her experience, qualifications and training,*
>
> *(b) whether the person could reasonably have sought advice that would have made the person aware of the contamination,*
>
> *(c) the circumstances of the contamination.*

The above matters must be considered together in assessing whether a duty to report contamination exists.

When does the duty to report a pollution incident arise?

The provisions determining when a duty to report a pollution incident exists are very different to those for the duty to report contamination.

Section 148 of the POEO Act states that the duty to report a pollution incident arises:

> *…immediately after the person becomes aware of the incident, notify each relevant authority of the incident and all relevant information about it.*

The use of the word "immediately" rather than "as soon as practicable", that is used for the duty to report contamination of land, creates a sense of urgency for reporting pollution incidents. The amount of time that it takes for a person to report a pollution incident can be used to determine whether or not that person complied with their duty, if it arises, to report a pollution incident. It can also be a factor in determining any penalty that may be issued for a pollution offence, together with any steps that are taken to mitigate the offence.

When reporting a pollution incident, detailed information identified in section 150 of the POEO Act must be provided. This includes information on:

> *(a) the time, date, nature, duration and location of the incident,*
>
> *(b) the location of the place where pollution is occurring or is likely to occur,*
>
> *(c) the nature, the estimated quantity or volume and the concentration of any pollutants involved, if known,*
>
> *(d) the circumstances in which the incident occurred (including the cause of the incident, if known),*
>
> *(e) the action taken or proposed to be taken to deal with the incident and any resulting pollution or threatened pollution, if known,*
>
> *(f) other information prescribed by the regulations.*

Section 150(3) of the POEO Act goes further to create an ongoing duty to report additional information immediately, as it comes to light. How one is supposed to notify the relevant authorities is dealt with in clause 101 of the *Protection of the Environment Operations (General) Regulation 2009* (NSW) that requires verbal notification to each relevant authority that is then to be followed up in writing within seven days of the date of the pollution incident.

Developers should consider seeking professional guidance on their duties to report

There are two separate duties to report both contamination of land and pollution incidents. The duties depend on the events that have or may have occurred.

In some cases there will be ambiguity surrounding whether there is a duty to report or not. Indeed, there may be uncertainty if the substance is an emerging contaminant, which means that its effects on the environment or human health are unclear. The NSW EPA describes PFAS as an "emerging contaminant" on its website under PFAS investigation program information.

In these situations, it is important to remember to seek professional guidance to:

- **Protect yourself.** You need to know whether you could be held to be liable for contamination or pollution and what your obligations may be in both the short and long term.
- **Protect your land.** Doing what is right for the environment will also safeguard the value of your land to the extent possible.

These uncertainties can be navigated through legal and environmental advice. This will in turn mitigate regulatory risk, as well as help to ensure that the environment is protected and land values are safeguarded.

Changes to the Environmental Planning and Assessment Act 1979 (NSW) to be implemented soon

Todd Neal | Katherine Edwards | Anthony Landro | Sejuti Kundu

This article discusses the changes expected to be implemented in 2018 to the *Environmental Planning and Assessment Act 1979* (NSW)

January 2018

In brief – The largest number of changes to the Environmental Planning and Assessment Act 1979 (NSW) since it commenced almost 40 years ago are expected to be implemented in the first half of 2018

Environmental Planning and Assessment Amendment Bill 2017

The *Environmental Planning and Assessment Amendment Bill 2017* was assented to by NSW Parliament on 23 November 2017 approving the changes. The Bill is now awaiting proclamation.

Given the large scope of amendments to the Act, a staged approach will be used to introduce the changes to allow for a well-informed transition to the new measures and requirements for all stakeholders.

Amendments to the Environmental Planning and Assessment Act 1979 (NSW)

The primary purpose of the amendments has been identified as "to promote the confidence in our State's planning system".

Four "underlying objectives" have been identified to achieve the primary purpose:

- to enhance community participation;
- to promote strategic planning;
- to increase probity and accountability in decision-making;
- to promote simpler, faster processes for all participants.

The table below sets out a concise summary of the amendments made to the Act.

WHAT'S NEW	THE EFFECT OF THE AMENDMENT	COMMENTS
Structural changes	Structural changes to the Act include the introduction of 10 principal parts with decimal numbering of all provisions, relocation of certain provisions to schedules and the regulations, updated objects of the Act and updated language.	The numerical amendments mean learning new section numbers. However, the amendments will enhance readability and clarity, which will help stakeholders understand the provisions, thereby ensuring an accessible Act.
Additional objects of the Act	The additional objects of the Act that have been included in the amendments promote: ▪ the sustainable management of built and cultural heritage (including Aboriginal cultural heritage); ▪ good design and amenity of the built environment, and ▪ the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.	The updated objectives highlight the importance of sustainable management, good design and amenity, and proper construction and maintenance. Agencies that administer the Act will need to give significant consideration to these key principles. The new object "to promote good design in the built environment" dovetails with the release of the draft NSW Government's Architecture and Design Policy for New South Wales, which lays the foundation for "design-led planning".

WHAT'S NEW	THE EFFECT OF THE AMENDMENT	COMMENTS
Removal of objects of the Act	Three objects of the Act have been removed: ▪ the protection, provision and co-ordination of communication and utility services; ▪ the provision of land for public purposes; ▪ the provision and co-ordination of community services and facilities.	The following redrafted objects will most likely result in minimal substantive changes: ▪ to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources; ▪ to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.
Community participation plan	The Act will require all planning authorities to prepare a community participation plan about how and when it will undertake community participation when exercising relevant planning functions (unless the council has a community strategic plan under section 402 of the *Local Government Act 1993* (NSW) that includes all the matters required in a community management plan). Community participation plans will need to meet mandatory requirements including: ▪ public exhibition for a minimum periods plans, development applications and other matters; ▪ public notification requirements of plans or applications; and ▪ public notification of the determination or reasons for a determination.	For planning authorities, challenges will be twofold: ▪ developing workable and meaningful community engagement that avoids "engagement fatigue"; and ▪ ensuring implementation of the plan given that the validity of a development consent can hinge on whether proper community participation has been provided. For developers, community participation plans will be another plan to navigate in the development application process. For the community, the aim of community participation plans is to increase confidence in decisions made. Despite the benefits for the community, engagement processes will not be standardised across NSW, therefore participation requirements will vary from one local government area to another, creating more work for councils and developers.
Community participation principles	Planning authorities will need to consider new community participation principles included in the Act when preparing a community participation plan.	Principles include: ▪ the community's right to be informed about planning matters that affect it; ▪ planning information should be in plain English, easily accessible and in a form that facilitates community participation in planning; and ▪ planning decisions should be made in an open and transparent way and the community should be provided with reasons for those decisions (including how community views have been taken into account). The principles won't necessarily yield the same result for each council's community participation plan. Therefore, plans will vary from one local government area to another. However, the aim is to enhance *effective* community participation in the planning system, not consistent community participation.

WHAT'S NEW	THE EFFECT OF THE AMENDMENT	COMMENTS
Statement of reasons for decisions	The Act will require written reasons to be given for decisions made by planning authorities.	The preparation of statements of reasons will potentially add time to the process however stakeholders will know the formal basis of a decision. But, the requirement for written reasons will also potentially increase challenges by third parties to decisions, reducing the certainty of decision-making.
Local strategic planning statement	The amendments to the Act will require each council to prepare and make a local strategic planning statement, which it must review at least every seven years. The statement must include or identify: ▪ the basis for strategic planning in the area; ▪ planning priorities for the area; ▪ actions required for achieving those planning priorities; and ▪ the basis on which the council is to monitor and report on the implementation of those actions. The statement will need to align with the regional and district plans, and any applicable community strategic plan under local government legislation. The Planning Secretary may issue requirements with respect to the preparation and making of local strategic planning statements.	Local strategic planning statements are proposed to complete the line of sight from regional and district plans. This is in addition to Regional Plans and District Plans, which were introduced in the last year. The Planning Secretary's power to issue requirements is intended to ensure councils planning fits within the broader geography of the area.
Review of Local Environmental Plans (LEPs) and State Environmental Planning Policies (SEPPs) every five years	The Act will require councils to review their LEPs and the Planning Secretary to review relevant SEPPs at least every five years to determine whether they should be updated.	Changes in population, infrastructure and strategic plans will need to be considered in the reviews to ensure development controls in LEPs and SEPPs are up-to-date. While councils and the Planning Secretary will possess the discretion to decide if an LEP or SEPP should be updated after a review, the review process will alert strategic planners to changes that might be required. This reform is necessary as recent years have shown that the suitability of land zones are rapidly changing. The challenge will be to incentivise councils to procure the rezoning of the sites expeditiously, as inertia and cost can often impact these processes even if there are proper planning grounds for rezoning.

WHAT'S NEW	THE EFFECT OF THE AMENDMENT	COMMENTS
Standardised Development Control Plans (DCPs)	The amendments to the Act specify that regulations can allow for the creation of a standard, online format for DCPs, and authorise the Minister to publish requirements as to their form, structure and subject-matter.	Whilst the requirement for councils to prepare standardised DCPs is not mandatory, there are a number of benefits they could bring including: ▪ understanding of how DCPs work in one area, without having to relearn things when looking at DCPs in another area; ▪ professionals in the industry will have a uniform format across DCPs saving time and cost; and ▪ easier uploading onto electronic platforms. The content will remain at the discretion of councils, but access to model provisions prepared by the Department of Planning and Environment will greatly enhance uniformity.
Powers to accept written undertakings	The Act will empower the Secretary to accept a written undertaking by a person in relation to planning matters. If a term of the undertaking is breached, the Planning Secretary can apply to the Court for an order: ▪ directing compliance with that term of the undertaking; ▪ directing payment to the State of an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach; ▪ any order that the Court thinks appropriate directing the person to compensate any person who has suffered loss or damage as a result of the breach; ▪ to prevent, control, abate, mitigate or make good any actual or likely damage to the built or natural environment caused by the breach; and ▪ any other order the Court considers appropriate.	It is unknown how these new powers will be used in practice and whether consent authorities will apply pressure to obtain these undertakings in return for the grant of development consents as we see in the case of voluntary planning agreements. However, we expect these should discourage calculated breaches of the Act. Of course, breaches will only be discouraged where enforcement action is taken against failures to comply with the terms of a written undertaking. The use of such undertakings is common under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), and it is possible a shift towards this mechanism will occur.
Directions regarding method of determining the extent of the public benefit made by a developer	The Act will empower the Minister to make determinations or give directions about the method of determining the extent of public benefit provided by a developer under a planning agreement.	At the time it was proposed in early 2017, it coincided with the proposed Ministerial direction and revised voluntary planning agreement practice note. However, the draft Ministerial direction and the revised voluntary planning agreement (**VPA**) practice note have not been adopted. The introduction of a written methodology for determining the public benefit, should provide greater fairness and reasonableness to the VPA process.

WHAT'S NEW	THE EFFECT OF THE AMENDMENT	COMMENTS
		While this opportunity to prescribe the methodology for determining the public benefit will exist when the changes are made, landowners and developers will only see the benefits if the Minister exercises these powers under the Act.
Reimbursement of council's cost to investigate and enforce compliance	Councils will have the power to impose a levy on applicants making development applications for the purposes of reimbursing a council's costs incurred in investigating and enforcing compliance with the requirements of the Act relating to development requiring consent.	This change involves the potential imposition of an additional cost on applicants for development consents. Essentially, it is a means to push the cost of ensuring compliance with conditions of development consent back onto landowners/developers. It should be understood that the levy will only be implemented if the regulations are amended to make provision for it and if a particular council adopts the levy. Therefore, the status quo may remain for some time.
Powers to suspend work under a complying development certificate	Councils will have new investigative powers to suspend work under a complying development certificate for up to seven days to investigate. Whether the work complies with applicable development standards.	Complying development is generally fast paced and council staff have difficulty in exercising their compliance and enforcement powers to ensure improper or flawed complying development is not built. While complying development is meant to be low impact, this new provision will help to ensure that it remains that way when it is being constructed.
Validity of complying development certificates	The Court may by order declare that a complying development certificate is invalid if: ▪ proceedings for the order are brought within three months after the issue of the certificate; and ▪ the certificate authorises the carrying out of development for which the Court determines that a complying development certificate is not authorised to be issued.	This overcomes the Court of Appeal decision (*Trives v Hornsby Shire Council* [2015] NSWCA 158) that held the characterisation of complying development could only be made by the certifier, and that a Court could not look into this matter as a question of "jurisdictional fact" – making it difficult to invalidate. As a result of the changes, the Court will be able to objectively determine whether the complying development certificate is in accordance with the relevant standards.
Validity of other certificates	The Court may by order declare that a construction, subdivision works, subdivision, or compliance certificate is invalid if: ▪ proceedings for the order are brought within three months after the issue of the certificate; and ▪ the plans, specifications or standards of work specified in the certificate are not consistent with the development consent for the building work or subdivision work.	The ability to seek an order in relation to the validity of an occupation certificate is excluded from the new provision. Appeals in relation to occupation certificates will continue to be limited to being made by the applicant for the certificate, rather than for example, an objector.
Limitations on certifiers	The regulations may be amended to limit the type of complying development that can be certified by an accredited certifier.	This will allow the government to play with the levers of housing supply. No doubt if or when supply catches up, the more intense types of complying development will be "turned off".

WHAT'S NEW	THE EFFECT OF THE AMENDMENT	COMMENTS
Deferred commencement complying development certificates	The Act will allow for the "deferred commencement" of complying development certificates in certain circumstances.	The use of deferred commencement conditions in complying development certificates will enable the earlier activation of the consent once the lots are created. While this pragmatism is to be commended, the ability for the certifier to impose deferred commencement conditions appears at large.
Special infrastructure contributions	Special infrastructure contributions will be able to be required as a condition to the grant of development consent for developments within a special contributions area.	This cost is currently incurred by the developer and has the potential to increase development costs. We can expect to see more Ministerial directions imposing special infrastructure contributions to raise funds for the infrastructure required in high growth priority precincts.
Local planning panels	Amendments to the Act include: ▪ the requirement for a council to constitute a single local planning panel if it is in an area prescribed by the regulations; and ▪ making it clear that a person is not ineligible to be a member of a local planning panel merely because the person carries on the business of a planning consultant.	This is already a requirement for councils within the Greater Sydney Region and the City of Wollongong. As such, we may see the regulations updated to include areas outside of Sydney and Wollongong to establish a single local planning panel.
Independent Planning Commission	The amendments to the Act change the name of the Planning & Assessment Commission (**PAC**) to the Independent Planning Commission (**IPC**). Additionally, the power of the PAC to review any development, activity, infrastructure or project, if requested to do so by the Minister, has been removed.	The Independent Planning Commission is responsible for making decisions about the most complex developments in the State. The removal of the review function aims to reduce the processing time for State Significant Development (**SSD**) applications.
Section 96 modification applications to regularise works	There are two changes to the Act in relation to section 96 modification applications: ▪ Consent authorities must take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified. ▪ Consent authorities will be able to charge a levy to applicants making development applications such as modification applications that will be set out in the regulations.	The current system permits applicants to apply to modify a consent to regularise work already constructed in breach of the development consent. Despite the Bill initially proposing to change this, the changes will not reverse this ability. However, changes to this process exist: ▪ The consent authority needs to consider the reasons for the grant of the original consent. ▪ Imposing a levy on applicants to deter unauthorised works.
Regional Planning Panels	Additional provisions in the Act specify that property developers and real estate agents are not eligible to be a member of a Sydney district or regional planning panel.	This amendment to the Act builds on the recent reforms by strengthening the rules for Sydney and joint regional planning panels to be in line with the local planning panel provisions.

WHAT'S NEW	THE EFFECT OF THE AMENDMENT	COMMENTS
Enhanced powers of the Planning Secretary	The Planning Secretary will be provided "step in" rights to act on behalf of an approval body for the purposes of informing a consent authority whether the approval body will grant approval or of the general terms of its approval. This power will only arise where the Planning Secretary is authorised by the regulations or where there is an inconsistency between two or more general terms of approval.	This change will only apply to designated development where councils are the consent authority. Some of the most significant blockages occur for larger State significant infrastructure and development projects.
Transitional arrangements for Part 3A projects	The government is making progress towards closing off the transitional arrangements for former Part 3A projects. The changes to the Act include repealing the transitional provisions in Schedule 6A of the Act and transferring them to the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* (NSW). Approvals under Part 3A can be surrendered for a new development consent without the requirement for the development to be reassessed. However, the consent authority may modify the manner in which the continued development is to be carried out for the purpose of consolidating the development consents applying to the land.	This change does **not** remove the transitional provisions for Part 3A approvals as the provisions will be contained with a regulation. The Minister's second reading speech indicated the government "is absolutely committed to the repeal of the transitional arrangements for Part 3A". As such, further amendments may be announced by the Minister at a later date. Now is the time to lodge section 75W modification applications to avoid the "substantially the same development" test that will arise once Part 3A ends.
Transferrable conditions	The changes will allow for development consents to be granted subject to specified conditions that cease to have effect on the issue of an authorisation under another act relating to that development.	This will remove overregulation and duplication which can add to confusion and complexity. This is likely to arise where a development consent imposes conditions relating to that development as well as an Environment Protection Licence, or for mining where a mining lease comes into place. It will mean the relevant regulatory authority responsible for enforcement may change hands during the life of development in respect of aspects of the development and its operation.
Financial assurance	Part 9.4 of the *Protection of the Environment Operations Act 1997* (NSW) that relates to the provision of financial assurances to secure or guarantee funding for or towards the carrying out of works or programs under an Environment Protection Licence, are to be carried over to development consents.	This means consent authorities will have the power to impose a condition in a development consent requiring an applicant to provide a financial assurance (eg a bank guarantee or a bond) to secure or guarantee funding for or towards the carrying out of works or programs required by or under the development consent. This is but another tool for consent authorities to ensure compliance with development consents. How the financial assurance is to be calculated is yet to be announced. A policy direction has not been publicly released by the NSW Environment Protection Authority who is responsible for imposing financial assurances on holders of Environment Protection Licences.

Developers will be impacted by changes to the Environmental Planning and Assessment Act 1979 (NSW)

These amendments will see the largest number of changes to the Act implemented since the Bill was passed in 1979.

Overall, the changes expand the powers of consent authorities and impose additional obligations on them for community participation and strategic planning. The expansion is likely to impact developers by increasing the cost of development and compliance, as the provisions within the Act are tightened.

NSW civil construction market program grants announced in effort to reduce waste

Todd Neal | Katherine Edwards

This article discusses the introduction of the Civil Construction Market Program Grants by the NSW Environment Protection Authority

January 2018

In brief – The NSW Environment Protection Authority (EPA) has introduced a major recycling incentive for the construction industry in their efforts to reduce waste

$2.5 million is available for eligible organisations that can divert construction and demolition waste from landfills in the NSW civil construction sector.

The EPA is pressing ahead with its Civil Construction Market Program Grants that opened on 24 January 2018. Individual grants up to $150,000 will be available for eligible organisations including:

- businesses;
- non for profit organisations;
- councils;
- industry bodies;
- product stewardship groups.

This is the first opportunity for organisations in the civil construction industry to obtain a benefit from the Business Recycling Grants offered by the EPA. At this stage there is no indication as to whether there will be a second round of grants.

The availability of the grants appears to stem from the real need to divert waste from landfills and promote recycling and reuse of materials where possible. However, it is not surprising that to qualify, the recycling and reuse of material must be lawful and take place within NSW.

The target materials of Round 1 include crushed materials, recovered aggregates, clay, soil, sand and rock as well as fly ash, slurry and slags. Understanding how the resource recovery orders and exemptions created by the EPA under Part 9 of the *Protection of the Environment Operations (Waste) Regulation 2014* (NSW) can be utilised will in our view be critical in being able to demonstrate that the activities are worthy of a grant.

Examples of eligible activities provided by the EPA include:

- recycling spoil material into roadbase;
- using glass fines in roads or pathways;
- recovering bricks.

Construction organisations with links to a licenced resource recovery facility are in a prime position to be awarded the grant. However, the grant may also be used to assist organisations with high start-up costs, as well as the large costs for dealing with waste. In addition, the grant is likely to promote innovative ways to recycle and reuse waste, and at the same time, compliance with the law.

Round 1 of the grants opened on 24 January 2018.

Existing Queensland government policies which provide local governments with powers in respect of waste management are set to expire and now is the time to transition waste management to local laws

William Lacy | Nadia Czachor | Ian Wright

This article discusses the powers of local governments in respect of waste management

February 2018

In brief

Local governments currently have certain devolved powers in respect of waste management which are contained in Part 2A of the *Waste Reduction and Recycling Regulation 2011* (**WRRR**) and Chapter 5A of the *Environmental Protection Regulation 2008* (**EPR**).

The provisions contained in Part 2A of the WRRR and Chapter 5A of the EPR cover various aspects of waste management. For example, these provisions provide local governments with the ability to designate areas for waste collection and the ability to impose requirements for the supply, use and storage of waste containers on serviced premises. These provisions also include offence provisions which are currently devolved to local governments for enforcement, for example enabling local governments to pursue the unlawful disposal of waste at a waste facility.

Both Part 2A of the WRRR and Chapter 5A of the EPR will expire on 1 July 2018, with this date having been extended on two previous occasions by legislative amendment.

Local governments should act now to ensure that appropriate local laws are in place to cover the matters currently provided for under the WRRR and EPR.

Local laws must comply with the requirements in the *Local Government Act 2009* and *City of Brisbane Act 2010*. These Acts relevantly include requirements in respect of any anti-competitive provisions.

Consequentially local governments may need to consider whether any changes to current methods of waste management will be necessary once the scope of local laws replacing the provisions in the WRRR and EPR have been determined.

Queensland government proposes significant reforms to the financial assurance and rehabilitation framework for resource activities

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Linc Energy Ltd (in Liq); Longley & Ors v Chief Executive, Department of Environment and Heritage Protection* [2017] QSC 53 heard before Jackson J

February 2018

In brief

The Queensland government has sought to strengthen its financial assurance and rehabilitation framework in response to cases such as *Linc Energy Ltd (in Liq); Longley & Ors v Chief Executive, Department of Environment and Heritage Protection* [2017] QSC 53 which we have previously reported on in the context of resource companies seeking to disclaim liability for their environmental obligations.

In 2016 the Queensland government commissioned the Queensland Treasury Corporation to carry out a review of the financial assurance framework for the resources sector. The findings of that review were published in the *Review of Queensland Financial Assurance Framework*.

In 2017 the Queensland Treasury Corporation released the *Better Mine Rehabilitation for Queensland Discussion Paper*, *Financial Assurance Framework Reform Discussion Paper* and *Financial Assurance Review – Providing Surety Discussion Paper*, which proposed significant reforms to the rehabilitation and financial assurance frameworks in Queensland for resource activities.

Mineral and Energy Resources (Financial Provisioning) Bill 2018

In furtherance of the reform proposals, on 15 February 2018 the Queensland government introduced the *Mineral and Energy Resources (Financial Provisioning) Bill 2018* into Parliament.

The purpose of the Bill is to:

- reform the existing financial assurance provisions for resource activities; and
- introduce new rehabilitation and closure plan requirements for mining leases and related environmental authorities.

Financial assurance reforms

The Bill proposes to establish a new financial provisioning scheme to deal with the environmental impacts of resource activities. The financial provisioning scheme proposes to include a scheme fund, surety arrangement and the appointment of a scheme manager who would be responsible for managing the scheme fund and cash surety account, entering into arrangements with resource companies, categorising and allocating risk, and conducting annual reviews.

Rehabilitation and closure plan reforms

The Bill also proposes to amend the *Environmental Protection Act 1994* to require all applications for an Environmental Authority to provide progressive rehabilitation and closure plans. The plans must demonstrate how and where environmentally relevant activities will be carried out on the land in a way that maximises the progressive rehabilitation of the land to a stable condition and provide for the condition to which the land must be rehabilitated before it can be surrendered.

Planning and Environment Court details the process and considerations for a minor change application made to the Court under the Planning Act 2016

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *G8C Pty Ltd ATF Crick Family Trust v Sunshine Coast Regional Council* [2017] QPEC 77 heard before Long SC DCJ

February 2018

In brief

The case of *G8C Pty Ltd ATF Crick Family Trust v Sunshine Coast Regional Council* [2017] QPEC 77 concerned an application to the Planning and Environment Court seeking minor changes to a combined development approval previously given by the Court, being a preliminary approval to override the *Maroochy Plan 2000* for a material change of use for Core Industry, a development permit for General Industry and the reconfiguration of a lot on land located at 8-12 and 18 Sandalwood Lane, Forest Glen.

The Applicant sought to make minor changes to a development approval given by the Planning and Environment Court

The Council refused a development application made by the Applicant on behalf of the landowner to override the *Maroochy Plan 2000*. The Applicant appealed the refusal to the Planning and Environment Court and the Court ordered approval subject to conditions.

The Applicant later sought support from the Council and the Department of Infrastructure Local Government and Planning (**DILGP**) to make the following minor changes to the development approval:

- amalgamation of approved lots 1 and 2 into a single lot, such that the total number of lots was reduced from 4 to 3; and
- adjustments to lot sizes, drainage easements, corner truncations and internal road alignments.

Both the Council and DILGP gave pre-request responses confirming their support for the changes.

The Planning and Environment Court was bound to assess and decide the minor change application

The minor change application was made under section 78 of the *Planning Act 2016* (**Planning Act**). The Court remained the assessment manager for the application in accordance with section 78(3)(b) of the Planning Act as it had given the relevant development approval.

The Court identified that it was bound to assess and decide the application in compliance with Chapter 3, Part 5, Subdivision 2 of the Planning Act, but was not otherwise bound by the process by virtue of section 78(4) of the Planning Act.

The proposed changes were determined not to result in substantially different development

The Court firstly assessed the proposed changes against the elements of section 78 of the Planning Act to determine whether they are appropriately characterised as minor.

The Court held that whether changes are in fact minor is a matter of fact and degree requiring a broad and fair assessment with guidance from the *Statutory Guideline 06/09* made under the now repealed *Sustainable Planning Act 2009* and Schedule 1, section 4 of the Development Assessment Rules.

The Court held that section 4 of the Development Assessment Rules is not an exhaustive list of changes that will result in substantially different development and will therefore not be a minor change.

A town planning expert engaged by the Applicant was of the opinion that the proposed changes would not create a new use, involve a new parcel of land, affect the operation of the proposed development, or significantly impact upon traffic flows or infrastructure.

The town planning expert relevantly identified that the key question was whether the proposed changes would dramatically change the development's bulk and scale. The town planning expert noted that combining two small lots into a single larger lot would potentially allow for a single larger building.

The Court found that the continuing effect of condition 21 of the approval, which required development to be consistent with approved plans, would prevent changes to the bulk and scale of the relevant buildings.

The Court otherwise accepted the town planning expert's evidence and determined that the proposed changes would not result in substantially different development.

The Court held that the proposed changes would not result in outcomes that would preclude a conclusion of a minor change

The Court identified that paragraph (ii) of the "minor change" definition required it to assume a hypothetical application was made for the entire development including the changes. The Court found that the proposed changes would not result in the inclusion of prohibited development, referral to new or additional referral agencies, or require public notification and were therefore appropriately categorised as being minor changes.

The Court proceeded to assess and decide the minor change application

The Court found that, after assessing the minor change application, section 81(4) of the Planning Act required it to either approve the changes, with or without imposing development conditions, or to refuse the changes.

In deciding the application, the Court noted that section 81(2) of the Planning Act required it to consider the following:

> *(a) the information the applicant included with the application; and*
>
> *…*
>
> *(c) any pre-request response notice or response notice given in relation to the change application; and*
>
> *…*
>
> *(da) all matters the responsible entity would or may assess against or have regard to, if the change application were a development application; and*
>
> *(e) another matter that the responsible entity considers relevant.*

The Court identified that section 81(3) of the Planning Act relevantly provides as follows:

> *For subsection (2)(d) and (da), the responsible entity –*
>
> *(a) must assess against, or have regard to, the matters that applied when the development application was made; and*
>
> *(b) may assess against, or have regard to, the matters that applied when the change application was made.*

In accordance with section 81(3) of the Planning Act, the Court had regard to pre-request notices from the DILGP and the Council and placed significant weight on the fact that neither party opposed the proposed changes.

The Court ultimately approved the changes, citing the following conclusions from the Applicant's town planning expert:

- the development of three lots instead of four would not result in further conflict with the superseded *Maroochy Plan 2000*;
- the reduction in lot yield would not result in further impacts on matters addressed by the *Maroochy Plan 2000* overlays and reconfiguring a lot code; and
- that the subject site was now zoned for industrial development under the current planning scheme, such that if a fresh application was made for the proposed three lot subdivision it would be code assessable and classed as a consistent use.

Planning and Environment Court found not to be the responsible entity for a change application

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Becker v Brisbane City Council* [2017] QPEC 71 heard before Kefford DCJ

February 2018

In brief

The case of *Becker v Brisbane City Council* [2017] QPEC 71 concerned an originating application to the Planning and Environment Court (**Court**) to change a development approval under section 78 of the *Planning Act 2016* (**Planning Act**).

The Court held that every word of section 78 must be given meaningful operation and construed in the context of Chapter 3, Part 5, Division 2, Subdivision 2 and section 48 of the Planning Act.

The Court ultimately found that the Brisbane City Council (**Council**) was the responsible entity for the change application and declined to exercise its discretion to hear the application.

The Applicant questioned to whom the change application should be made

The Applicant initially applied to the Council to change a development approval. The Council opined that the Court was the responsible entity for the change application as the relevant development approval was given as a result of a Court order.

The Applicant consequently applied to the Court and questioned to whom the change application should be made. To resolve the issue the Court considered section 78 of the Planning Act which relates to the making of a change application.

The parties agreed that section 78(3)(b) of the Planning Act was applicable to the change application

Section 78(3)(b) of the Planning Act relevantly lists the circumstances in which the Court will be the responsible entity for a change application. The parties agreed that section 78(3)(b) of the Planning Act applied to the change application for the following reasons:

- the change application was for a minor change;
- the development approval was given as a result of a Court order; and
- the development application was code assessable and was not subject to any properly made submissions.

The Court found ambiguity in section 78(3)(c) of the Planning Act

The Court found that ambiguity lay in the application of section 78(3)(c) of the Planning Act, which nominates the "*assessment manager*" as the responsible entity if no other sub-paragraphs of section 78 apply.

The Court identified that Schedule 2 of the Planning Act provides the following definition of assessment manager:

> *(a) has the meaning given in section 48; and*
>
> *(b) includes a prescribed assessment manager and a chosen assessment manager.*

The Court considered section 48 of the Planning Act, which relates to who the assessment manager is for a development application and emphasised as follows:

- the assessment manager is the person responsible for assessing and deciding part or all of a development application; and
- a regulation generally prescribes who is the assessment manager to the development application.

The Court found that every word of section 78 of the Planning Act must be given meaningful operation

The Court found that if it was the intention of the legislature for the Court to be the responsible entity for all minor change applications involving a development approval resulting from a Court order, it could have easily omitted section 78(3)(b)(iii), which makes reference to properly made submissions.

The Court also held that section 78 must be construed in the context of section 48 of the Planning Act so as to give each word in the provision meaningful operation. The Court determined that the opinion reached by the Council deprived section 78(3)(b)(iii) of such operation.

The Court held that the Council's interpretation of section 78 was inconsistent with other provisions within Chapter 3, Part 5, Division 2, Subdivision 2 of the Planning Act

The Court considered the reference to "*assessment manager*" within section 78(3)(c) in the context of other provisions within Chapter 3, Part 5, Division 2, Subdivision 2 of the Planning Act.

The Court identified that section 80 of the Planning Act requires a person proposing to make a change application to give notice of the proposal and the details of the application to "*an affected entity*". The Court held that the assessment manager is taken to be an affected entity, where the Court is the responsible entity under section 80(2)(c) of the Planning Act.

The Court also held that section 83(1)(g) of the Planning Act relevantly requires that responsible entities other than the Court give a decision notice for a change application to the Court if the original approval resulted from a Court order.

The Court held that section 83(1)(g) operates to reinforce the legislature's acceptance that situations will arise in which the Court will not be the assessment manager for a change application despite having given the development approval.

The Court ordered that the change application be referred back to the Council

Based on the above reasoning, the Court found that it was not the responsible entity for the change application and therefore dismissed the originating application.

To avoid unnecessary delay the Applicant nevertheless requested that the Court exercise its discretion under section 37 of the *Planning and Environment Court Act 2016* and consider the matter. The Applicant's request was aided by the fact that the Council was not opposed to the ultimate relief sought and was prepared to allocate appropriate internal resources to resolve the matter.

The Court expressed sympathy in relation to the Applicant's plight but held that it was appropriate for the Council to decide the change application given the extensive obligations imposed by Chapter 3, Part 5, Division 2, Subdivision 2 of the Planning Act.

COLIN BIGGERS & PAISLEY LAWYERS

Even if an entity is an "entity directly affected" by a permissible change request, there is no standing before the Planning and Environment Court

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Aveo Clayfield Pty Ltd v Brisbane City Council* [2017] QPEC 60 heard before Everson DCJ

February 2018

In brief

The Planning and Environment Court decision of *Aveo Clayfield Pty Ltd v Brisbane City Council* [2017] QPEC 60 involved an application in a pending proceeding by a third-party who wished to be joined as a co-respondent by election.

The proceeding involved an application under section 369(1)(d) of the *Sustainable Planning Act 2009* (**SPA**) by the Applicant seeking orders to change various aspects of a development approval for a retirement village on land situated at 469 Sandgate Road, Albion. The development approval was issued by the Court on 12 February 2016.

The SPA continued to apply to the proceeding despite the *Planning Act 2016* (**Planning Act**) coming into effect on 3 July 2017 as the application was filed on 21 June 2017.

The scope of the permissible change application

The Applicant contested that the changes it sought to make to the development approval were "permissible changes" within the ambit of section 367 of the SPA.

The procedure for changing a development approval under the SPA required that a copy of the request be given to various entities which afforded them the opportunity to object to the request. Submitters or other third-parties, however, were required to be served and given the same opportunity.

The third-party and its contentions

The development approval was issued by the Court and therefore the process for changing the development approval was to file an originating application in accordance with rule 8 of the *Planning and Environment Court Rules 2010* (**PECR**), which relevantly states as follows:

> *8 Originating process respondent*
>
> *(1) An originating application must name as a respondent the entity directly affected by the relief sought.*

The third-party, being the entity that owns land adjoining the land the subject of the development approval, asserted that it was an "entity directly affected" by the changes to the development approval and should be a co-respondent to the proceeding because it "[would] *suffer a direct impact if the proposed changes are approved, including privacy, amenity, traffic and potential acoustic impacts*".

Was the third-party directly affected by the changes to the development approval?

To determine whether the third-party was an entity directly affect by the changes to the development approval, the Court referred to its decision in *Dillon v Douglas Shire Council* [2004] QPEC 50 where it relevantly held as follows:

> *The word 'directly' is a common word in the English language and, to my mind, it is well understood. Relevantly, it means 'immediately' or 'straight away'. If an originating application seeks an order that a person do something or refrain from doing something, that person is directly affected. Here, the council is directly affected because immediately the court declares the meaning of the provisions, the council will be bound to administer them in a way consistent with the interpretation and declarations. However, the declarations which the court may make, if it makes any, will not require [the applicant] immediately to do or not to do anything.*

The Court contrasted this position with its more recent determination in *Donovan v Brisbane City Council* [2016] QPEC 041 where it relevantly held as follows:

> *… the test laid down in Dillon is peculiar to the relief therein sought, namely declaratory relief. The test is not of universal application whatever the relief sought. That is not the only manner in which a person may be directly affected by relief sought. In Dillon, the relief sought was a declaration relating to certain provisions of the relevant legislation. In determining whether the appellant was directly affected for the purposes of rule 8 of the [PECR], the Court first considered the nature of the relief sought and concluded that the applicant, was not directly affected because it was not required to do anything or refrain from doing anything.*
>
> *Here, the relief sought is quite different. If granted, it will entitle the Applicant to proceed with the proposed construction. One should proceed on the basis that any approval granted will be pursued and exploited to the intent that construction will take place. The mere fact that the Applicants for Joinder will not be immediately required to partake or forgo some course of action, as the test in Dillon suggests, does not mean they are not directly affected by the relief sought by the Originating Application.*
>
> *The Applicants for Joinder have submitted that the proposed changes, as a result of the permissible change to the development approval in the Originating Application will directly affect their use and enjoyment of their property …*

In attempting to reconcile these two approaches, the Court considered the following principles of statutory interpretation stated by the Court of Appeal in *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* [2014] QCA 147, which had regard to the decision of the High Court of Australia in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28:

> *… the process of construction must always begin by examining the context of the provision that is being construed.*
>
> *A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.*
>
> *However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning…*

In applying these principles of statutory construction, the Court made the following observations:

- It is not the legislative intent that the PECR, which is subordinate to the substantive legislative provisions in the SPA, expand the rights of parties who otherwise do not have a right to be heard in respect of a request to change a development approval.
- That the assessment of a permissible change application is a confined enquiry which is informed by the relevant provisions of the SPA. The fact that the responsible entity in this case was the Court did not warrant an alternative interpretation of rule 8 of the PECR such that a third-party, who did not otherwise have a right to be heard would be given an opportunity to be heard simply because the procedure for making the request to change the development approval necessitates the filing of an originating application.

Conclusion

The Court held that rule 8 of the PECR did not confer rights upon a third-party that otherwise did not exist under the SPA and that any literal interpretation of rule 8 of the PECR which suggested otherwise should be avoided.

The Court therefore dismissed the application for joinder.

Relevance to the Planning Act

The procedure for requesting a change to a development under section 369 of the SPA is now provided for under section 78 of the Planning Act. The procedure has remained largely unchanged and this decision in respect of the SPA is relevant albeit not binding in respect of the Planning Act.

Planning and Environment Court has discretionary power in considering whether to grant an extension to the currency period under section 388 of the Sustainable Planning Act 2009

Sinead Garland | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Lake Maroona Pty Ltd v Gladstone Regional Council* [2017] QPEC 25 heard before Bowskill QC DCJ

February 2018

In brief

The case of *Lake Maroona Pty Ltd v Gladstone Regional Council* [2017] QPEC 25 involved an appeal against the Council's decision to refuse an application under section 383 of the *Sustainable Planning Act 2009* (**SPA**) for an extension of a currency period for a development approval for a multi-unit residential development.

Extending the period for a development approval

The case was decided under the SPA. Relevantly the assessment manager was to have regard to the matters under section 388 of the SPA when considering whether an extension under section 383 of the SPA should be granted. The Court determined that the test in *Mantle v Sunshine Coast Regional Council* [2015] QPEC 30 is to be applied when determining matters under section 388 of the SPA. In that case, it was held that the matters under section 388 of the SPA are to be considered but do not form preconditions to an approval. Hence, the matter is one of discretion which is to be exercised in the circumstances of each case having regard to the specified considerations.

The assessment manager must have regard to the consistency of the approval, including its conditions, with the current laws and policies

The Court must take into consideration the relevant provisions of the SPA and the local planning policies when determining the consistency of a development approval. In this case, the relevant local planning policy was the *Gladstone Regional Council Planning Scheme 2015* (**Planning Scheme**). In particular, the Court took into consideration the provisions in the Planning Scheme that related to the Low density residential zone code and the relevant assessment criteria for low density residential developments in deciding whether an approval is consistent with the current laws and policies under section 388 of the SPA.

Both parties relied upon the expert evidence of town planners in advancing their case before the Court.

Low density residential zone code

The Planning Scheme relevantly stated that the Low density residential zone code aims to provide for "*predominantly detached dwelling houses… supported by community uses and small scale services and facilities that cater for local residents*".

The Council's expert submitted that the approved development failed to satisfy the purpose of the Low density residential zone code. The Low density residential zone, "*only provides for predominantly detached dwelling houses within existing suburban areas*". It was contended that if the Court was to rely on the exact wording of the Planning Scheme, the approved development failed to satisfy the purpose of the Low density residential zone code and as such was not consistent with the respective laws and policies in place.

The Applicant's expert submitted that the term "*predominantly*" is not to be mistaken for the word "*exclusively*". "Predominantly" should not be taken as a prohibition on the other type of development in the Low density residential zone. The expert contended that the approved development was consistent with the Planning Scheme provisions as the approved development would not detract from the predominant form of detached dwelling houses in the area and that the development is a low rise development that is consistent with the low density character of the region.

The Court determined in favour of the Applicant and held that the development was consistent with the purpose and requirements of the Low density residential zone.

Built form assessment criteria (Performance Outcome PO3)

The Council's expert opined that the approved development did not satisfy the assessment criteria for built form under Performance Outcome PO3 on the basis that a multi-unit dwelling was unsuitable in the Low density residential zone.

The Council's expert accepted that the approved development would satisfy the built form criteria under Performance Outcome PO3 if the expert's interpretation of the development was incorrect and a multi-unit development was suitable within the Low density residential zone.

The Applicant's expert considered that the approved development satisfied the requirements under Performance Outcome PO3.

The Court preferred the opinion of the Applicant's expert, having performed a site visit of the area in question, and accepted that the approved development satisfied the assessment criteria under Performance Outcome PO3.

Residential density assessment criteria (Performance Outcome PO4)

The Council's expert considered, in relation to the residential density assessment criteria (Performance Outcome PO4), that the width and form of the approved development was not in keeping with the amended low density character of the area.

The Applicant's expert claimed that having regard to the density ratio provided in Performance Outcome PO4, the approved development satisfied the assessment criteria and was consistent with the low density character of the area.

The Court was persuaded by the evidence of the Applicant's expert who identified factors indicating that the approved development was consistent with the low density character of the area.

In summary, the Court found that although the approved development is not the predominant form of housing contemplated in the Low density residential zone, this fact alone does not mean that the development is inconsistent with the Planning Scheme provisions. As such, the Court preferred the view of the Applicant's expert and determined that the approved development was consistent with the current laws and policies under the relevant Planning Scheme.

The assessment manager must have regard to the community's current awareness of the development approval

The Court found that although the Council's expert contended that the population in the development area had changed since the original application was approved, it was reasonable to infer that there was a general level of community awareness about the approved development.

The assessment manager must have regard to the likelihood of a submission if the request for an extension was refused

The Council's expert considered that since there was a change in the economic climate since the original development approval was granted, there would likely be an adverse submission made by the public in relation to the proposed development. The Court found that although this may occur, since the development approval was consistent with the current laws and policies, the possibility of a submission being made does not warrant a refusal to an extension request.

Summary

In summary, the Court granted the Applicant an extension to the relevant period for the development approval.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court approves a permissible change to remove internal access road

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sailmist Pty Ltd v Sunshine Coast Regional Council & Anor* [2017] QPEC 63 heard before Long SC DCJ

February 2018

In brief

The case of *Sailmist Pty Ltd v Sunshine Coast Regional Council & Anor* [2017] QPEC 63 concerned an application to the Planning and Environment Court for a permissible change under section 369(1)(d) of the *Sustainable Planning Act 2009* (**SPA**) to remove an internal access road from an approved reconfiguration of a lot at Kundra Park, Queensland.

The Court considered uncontested evidence from expert witnesses and had regard to the Council's consent before ultimately finding the application fell within the meaning of a permissible change under section 367 of the SPA and should therefore be approved.

The Applicant applied for a permissible change to a development permit

The Applicant filed an application with the Court on 15 June 2017 which sought a permissible change under section 369(1)(d) of the SPA to a development permit granted by the Court in 2015.

The relevant development permit approved a reconfiguring a lot to create 27 lots on land situated at 672-680, 716-718 Diddillibah Road and 11, 13, 45, 79, 115 and 147 Eudlo Flats Road, Diddillibah and Maroochydore Road at Kundra Park. Evidence before the Court confirmed that the second of three stages was under construction by the time the application was commenced.

The Applicant satisfied the requirements of section 371 of the SPA by providing the Court with evidence of the relevant landowner's consent to the permissible change application.

The permissible change sought to remove an internal access road

The permissible change sought to remove an internal access road from the approved development so that all 27 lots would access the wider road network via a single internal road that connected to an intersection with Eudlo Flats Road.

The effect of this change would result in two lots close to Diddillibah Road having access to the internal road via long driveways and footpaths. The driveways on these lots would also allow emergency vehicles to access Diddillibah Road through a locked gate.

The Court considered the elements of section 367 of the SPA

The Court identified that the consideration of a permissible change application under section 369 of the SPA requires assessment against section 367 of the SPA, which relevantly states the following:

> *367 What is a permissible change for a development approval*
>
> *(1) A permissible change, for a development approval, is a change to the approval that would not, because of the change—*
>
> *(a) result in a substantially different development; or*
>
> *(b) if the application for the approval were remade including the change—*
>
> *(i) require referral to additional concurrence agencies; or*
>
> *(ii) for an approval for assessable development that previously did not require impact assessment—require impact assessment; or*
>
> *(c) for an approval for assessable development that previously required impact assessment—be likely, in the responsible entity's opinion, to cause a person to make a properly made submission objecting to the proposed change, if the circumstances allowed; or*

(d) cause development to which the approval relates to include any prohibited development.

(2) For deciding whether a change is a permissible change under subsection (1)(b) or (d), the planning instruments or law in force at the time the request for the change was made apply.

The Council consented to the Applicant's proposed permissible change

The Council consented to the Applicant's proposed permissible change as the internal road which was to be removed fell on a ridgeline and would therefore be extremely expensive and difficult to maintain to a safe standard.

The Court referred to the decision in *Wroxall Investments Pty Ltd v Cairns Regional Council* [2011] 1 QPELR 92 in which it was determined that issues relating to the road network external to the development are the responsibility of the Council. The Court found that it was appropriate to give significant weight to the Council's support.

The Court found that the proposed permissible change would not result in substantially different development

The Court found that the *Ministerial Guideline: Statutory Guideline 06/09*, 11 December 2009 may assist in determining whether the impacts of a permissible change will result in substantially different development.

Nevertheless, the application was supported by uncontested evidence from expert witnesses, including a town planner, environmental scientist and bushfire consultant who all found that the proposed change would not result in a substantially different development for the following reasons:

- The steep terrain and the need for vegetation clearing to give effect to the originally proposed intersection with Diddillibah Road would have resulted in less than ideal outcomes in respect of cost and safety.
- The unsuitable nature of the proposed single means of road access to Eudlo Flats Road with respect to traffic capacity and safety in the event of a bushfire event.

The Court determined that no issue arose pursuant to section 367(1)(b) or (d) of the SPA

The Court determined that the application complied with section 367(1)(b) of the SPA after finding that the proposed change if included in a new application would not require referral to additional concurrence agencies or trigger impact assessment where it was previously not required. The proposed permissible change was also found to satisfy section 367(1)(d) of the SPA as it avoided the inclusion of prohibited development.

The Court found that there was no likelihood of a properly made submission being made in objection to the proposed permissible change

The Court identified that the majority of the 33 properly made submissions lodged against the original development application favoured the proposed reconfiguring of a lot. Two other submissions raised concerns about the appropriateness and safety of access onto Diddillibah Road.

The Court concluded that in these circumstances there was no likelihood of any properly made submissions being made in objection to the proposed permissible change.

The permissible change continued to be assessed under the SPA despite its repeal

The Court identified that it was appropriate to continue to assess and determine the permissible change in accordance with the SPA despite it being repealed and replaced by the *Planning Act 2016* (**Planning Act**) on 3 July 2017. The Court came to this conclusion after finding that the Planning Act clearly intends to transitionally preserve the operation of the SPA provisions upon which the application relied.

The Court found that it was unnecessary to resolve submissions from the Applicant that characterised the application as being of an administrative kind

The Applicant relied on section 288 of the Planning Act to argue that the application was of an administrative character and only brought before the Court as a consequence of the original development permit having been given by the Court.

The Applicant made this submission to distinguish the application from a "proceeding" in the Planning and Environment Court within the meaning of section 311 of the Planning Act. In doing so the Applicant hoped to avoid more specific provisions relating to proceedings.

Whilst noting that section 288(1) of the Planning Act is expressed broadly enough to sufficiently capture the present application the Court found that it was unnecessary to finally resolve whether the Applicant's contention on this issue was correct.

The Court found that the changes sought by the Applicant were permissible changes

The Court ultimately found that the changes sought by the Applicant were permissible changes within the meaning of section 376 of the SPA and ordered that the application be approved.

Planning and Environment Court declares non-compliance due to electronic error during public notification

Nina Crew | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Townsville City Council v Queenston Pty Ltd; Townsville CC v Lautaret Pty Ltd* [2017] QPEC 68 heard before Durward SC DCJ

February 2018

In brief

The cases of *Townsville City Council v Queenston Pty Ltd; Townsville CC v Lautaret Pty Ltd* [2017] QPEC 68 concerned originating applications by the Townsville City Council (**Council**) seeking a declaration in respect of the non-compliance with the public notification requirements under the *Sustainable Planning Act 2009* (**SPA**) for each development application lodged with the Council by Queenston Pty Ltd and Lautaret Pty Ltd.

The Court declared that there was non-compliance with section 305(2) of the SPA, as the assessment manager could not accept submissions for the development applications during the public notification period due to an electronic error that occurred within the ePlanning portal, and section 314(3)(a) of the SPA because the assessment manager could not have regard to the contents of the properly made submissions which formed part of the common material for each development application.

The Court heard both originating applications together under the transitional provisions of the Planning Act 2016

The Court heard the originating applications together due to the unusual situation which arose from the failure of the electronic lodging system of the Council during the public notification period for each of the development applications.

Whilst the Council's originating applications were filed after the commencement of the *Planning Act 2016* (**Planning Act**), the development application of Queenston Pty Ltd was lodged on 18 November 2016 and the development application of Lautaret Pty Ltd was lodged on 17 February 2017. The Court stated that section 288(2) of the Planning Act provides that the SPA continued to apply to the originating applications.

The Council undertook re-advertisement of the development applications following the malfunction of the electronic lodging system

An electronic error that occurred in the Council's electronic lodging system resulted in the following:

- a number of people had lodged submissions and received an automated email from the Development Submissions Mailbox which acknowledged receipt of those submissions;
- there was no evidence of those submissions being received in the Development Submission Mailbox;
- the Council's officers could not ascertain the identities of the persons who attempted to lodge a submission or the contents of the submissions attempted to be made.

The Council re-advertised the development applications for a further period and took steps to attempt to ascertain the identities of those who made submissions during the original public notification period, those steps included publishing a notice in a local Townsville newspaper advising that submissions identified as having been made in the notification period were not received due to technical difficulties with the electronic submissions process and contacting the internet service providers which related to each IP Address listed in the relevant web serve logs to identify the submitters.

The Court found that the Council's electronic lodging system malfunctioned and that the properly made submissions could not be accepted

The Court accepted that the Council's electronic lodging system malfunctioned and found that the properly made submissions could not be accepted and therefore the assessment manager could not have assessed the development applications against those properly made submissions which were not received.

The Court found that there was non-compliance with section 305(2) of the SPA

The Court found that, despite the re-advertising and the further steps taken by the Council, there was non-compliance with section 305(2) of the SPA as the Council, in its capacity as the assessment manager for the development applications, did not accept the submissions which were properly made submissions.

The Court noted that under sections 440(1) and (2) of the SPA the Court may deal with the matter of non-compliance in the way the Court considers appropriate. The Court considered the case of *MLJ Accommodation Pty Ltd v Gladstone Regional Council* [2012] QPEC 79 where a development application was allowed to proceed to consideration on its merits subject to public notification being repeated in the proper way "*…to ensure that members of the public were offered the opportunity they have been denied to have a say…*".

The Court found that there were similarities between the originating applications and the circumstances in *MLJ Accommodation Pty Ltd v Gladstone Regional Council*. The Court declared that its discretion should plainly be exercised in favour of the proposals jointly submitted by the parties to provide for the following:

- a further public notification of the notice in the local daily newspaper in Townsville allowing 15 days from date of publication for any person to make a written submission;
- any submission that complies with the SPA and is a properly made submission is to be treated as such;
- the submissions already received in respect of each development application to be treated as properly made submissions for the development applications;
- the end date for the notification stage for the development applications to be the day after the aforementioned 15 day period.

Application to the Planning Act 2016

The Court's discretion to deal with non-compliance under section 440 of the SPA has been preserved in section 37 of the *Planning and Environment Court Act 2016* such that considerations of the kind made by the Court in this case will continue to be relevant.

High Court confirms that subsequent owners of reconfigured land are bound by the conditions of a development approval made prior to reconfiguration of the land

Dee Ardham | Nadia Czachor | Ian Wright

This article discusses the decision of the High Court of Australia in the matter of *Pike v Tighe* [2018] HCA 9 heard before Kiefel CJ, Bell, Keane, Gordon and Edelmann JJ

March 2018

In brief

The case of *Pike v Tighe* [2018] HCA 9 concerned an appeal to the High Court of Australia (**Court**) against the Queensland Court of Appeal's decision in respect of proceedings commenced by the Appellant in the Planning and Environment Court (**P&E Court**) for the Respondent's failure to comply with a condition of a development approval.

The development approval was given by the Townsville City Council (**Council**) for the reconfiguration of a lot into two smaller lots. The approval was subject to certain conditions. The Respondent is the owner of lot one and the Appellant is the owner of lot two.

The first question raised in the appeal was whether section 245 of the *Sustainable Planning Act 2009* (**SPA**) requires a subsequent owner of reconfigured land to comply with a condition of a development approval that was made prior to the reconfiguration and not satisfied by the original owner. The second question raised in the appeal was whether the P&E Court can make an enforcement order under the SPA requiring a subsequent owner to comply with the condition of a development approval that was made prior to the reconfiguration and not satisfied by the original owner.

The Court considered the effect of section 245 of the SPA and held that the Court of Appeal made an error in finding that the Respondent, as the subsequent owner of lot one, is not required to comply with the relevant condition, being condition two, of the development approval. The Court confirmed that conditions remain attached to reconfigured land and bind subsequent owners. The Court held that the P&E Court could make an enforcement order under the SPA requiring the Respondent to comply with condition two.

It is noted that the SPA is now repealed and the equivalent of section 245 of the SPA is found in section 73 of the *Planning Act 2016* (**PA**). Accordingly, the Court's decision remains good law under the PA. The Court's decision reinforced the importance of applying the core principles of statutory interpretation to ensure that legislative provisions are interpreted correctly.

The Council approved the reconfiguration of land subject to conditions

The Council approved a development application made by the original owner for the reconfiguration of the subject land in May 2009. The approval was subject to certain conditions including condition two which required an easement be provided over lot one to allow pedestrian and vehicle access, on-site manoeuvring and connection of services and utilities for the benefit of lot two.

The original owner of the original parcel of land executed an easement with no mention of on-site manoeuvring or the connection of services and utilities. Despite this inconsistency, the Council approved the survey plan to carry out the reconfiguration.

The Appellant commenced proceedings in the P&E Court

The Appellant argued that the Respondent is required to comply with condition two under section 245 of the SPA. The Appellant contended that the Respondent failed to comply with condition two and sought an enforcement order from the P&E Court requiring the Respondent to comply with condition two.

Section 245(1) of the SPA provides that a development approval attaches to the land and binds the owner and any subsequent owners of the land. Section 245(2) of the SPA provides that section 245(1) applies even if reconfiguration of the land is approved.

The P&E Court accepted the Appellant's argument and held that section 245 of the SPA requires conditions of the development approval to remain attached to land after reconfiguration. As a result, the P&E Court found that the Respondent committed a development offence for failure to comply with condition two. However, the P&E Court did not make an enforcement order on the basis that the two parties would agree upon the appropriate terms for the Respondent to comply with condition two.

The Respondent appealed the decision of the P&E Court to the Court of Appeal

The Respondent argued that a development offence had been committed by the original owner for failure to comply with condition two as the owner of the original parcel of land. The Court of Appeal accepted the Respondent's argument and held that the P&E Court made an error in finding that the Respondent had committed a development offence for failure to comply with condition two.

In respect of section 245 of the SPA, the Court of Appeal found that condition two was not "*a continuing and freestanding obligation served from the simultaneous creation of the approved configuration*". The Court of Appeal found that section 245 of the SPA only binds the original owner of the original parcel of land to carry out the reconfiguration. Accordingly, the Court of Appeal found that condition two attaches to the original parcel of land but does not attach to lot one and lot two after reconfiguration.

The Court of Appeal cited *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 (**Hillpalm decision**) to establish that an enforcement order can only be made against the person who committed the development offence. The Court of Appeal held that an enforcement order cannot be made against the Respondent as the Respondent is not required to comply with condition two.

The Appellant appealed the decision of the Court of Appeal to the Court

The Appellant maintained that section 245 of the SPA imposes condition two on the Respondent as it continues to apply even after the reconfiguration of land. The Appellant cited section 245(2) of the SPA as an explicit indication that condition two remains attached to the reconfigured land.

The Court accepted the Appellant's argument and held that the Court of Appeal made an error in concluding that condition two of the development approval binds the original owner as it only attaches to the original parcel of land.

The Court held that the Court of Appeal incorrectly interpreted section 245 of the SPA

The Court held that the Court of Appeal had "*glossed*" over section 245 of the SPA and incorrectly interpreted the provision. To highlight the flaws in the Court of Appeal's interpretation, the Court provided the example of a large residential development that is subject to conditions. If the Court of Appeal's interpretation is accepted and the conditions had not been complied with after registration of the survey plan, the P&E Court would lack the power to make an enforcement order against the developer or subsequent owners. The Court noted that this example illustrates how the Court of Appeal's interpretation restricts the scope of section 245 of the SPA and jeopardises the protection of the public interest in the effective use of land.

The Court cited the case of *Peet Flagstone Pty Ltd v Logan City Council* [2015] QPELR 68 and held that the Court of Appeal's interpretation of section 245 of the SPA contradicts the statutory character of a condition as the price a developer must pay for a development approval.

The Court rejected the Court of Appeal's consideration of the Hillpalm decision. The Hillpalm decision concerned whether effect should be given to a condition of a local government's approval to reconfigure land in circumstances where the legislation did not contain the equivalent of section 245 of the SPA. The Court found "*striking*" differences between the Hillpalm decision and this appeal.

The Court applied a core principle of statutory interpretation and considered the natural and ordinary meaning of section 245 of the SPA. The Court confirmed that the natural and ordinary meaning of the provision is to attach condition two to all of the land. The Court held that there is no need to ignore this meaning and minimise the effect of the provision by only attaching condition two to the original parcel of land. The Court concluded that section 245 of the SPA expressly attaches condition two to the reconfigured land and binds the Respondent as the subsequent owner of lot one.

The Court held that the P&E Court could make an enforcement order

The Court confirmed that the Respondent committed a development offence for failure to comply with condition two under section 580 of the SPA. The Court held that the P&E Court could make an enforcement order under sections 601, 604 and 605 of the SPA requiring the Respondent to comply with condition two.

The Court acknowledged the harsh nature of the SPA which exposes a subsequent owner to a penalty simply by acquiring land that is bound by conditions of an existing development approval. However, the Court noted that an enforcement order is discretionary and the P&E Court is required to consider such circumstances when making the order.

The Court clarified that the Respondent did not commit the offence by simply acquiring land with the conditions attached to it. The Court held that the Respondent committed an offence by refusing to comply with condition two within a reasonable amount of time. The Court noted that more than three years had elapsed since the Appellant commenced proceedings in the P&E Court. The Court held that three years is a reasonable amount of time for the Respondent to comply with condition two.

The Court allowed the appeal

The Court allowed the appeal and set aside the decision of the Court of Appeal. The Court redirected the matter to the P&E Court for the making of final orders against the Respondent.

There were sufficient grounds to approve the continued use of non-resident workers' accommodation in a residential zone despite its conflicts with the Chinchilla Shire Planning Scheme 2006 and Western Downs Planning Scheme 2017

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ausco Modular Pty Ltd v Western Downs Regional Council & Anor* [2017] QPEC 58 heard before Kefford DCJ

March 2018

In brief

The case of *Ausco Modular Pty Ltd v Western Downs Regional Council & Anor* [2017] QPEC 58 concerned an appeal against the decision of the Western Downs Regional Council (**Council**) to refuse a development application to allow the continued use of non-resident workers' accommodation at 184 Zeller Street, Chinchilla.

The Co-respondent, Grow Chinchilla Pty Ltd, made a properly made submission and elected to join the appeal and continued to oppose the proposed development.

The proposed development comprises the following:

- 1,000 rooms in demountable cabins that are single storey in height;
- on-site facilities including separate laundry facilities, kitchen and dining facilities, indoor fitness centre, and formal and informal recreation areas;
- approximately 750 car parks;
- landscaped surrounds and a dam near the north-east corner of the subject site;
- a management and reception building.

The Court found that there were sufficient grounds to approve the proposed development despite conflicts with the provisions of the *Chinchilla Shire Planning Scheme 2006* (**Chinchilla Planning Scheme**) and *Western Downs Planning Scheme 2017* (**Western Downs Planning Scheme**). In doing so, the Court considered a number of matters including the following:

- the nature, scale and density of the proposed development;
- the impacts of the proposed development;
- the need for the proposed development.

The Court considered the planning scheme that was in force at the time of the development application as well as the planning scheme that subsequently took effect

The Court confirmed that the appeal was to proceed by way of a hearing anew in accordance with section 495 of the *Sustainable Planning Act 2009* (**SPA**). Also, the appeal was to be decided based on the laws and policies that were applicable at the time of the development application; however, the Court could give weight to any new laws and policies the Court considered appropriate in accordance with section 495(2) of the SPA.

The parties agreed that the Western Downs Planning Scheme, which came into force on 20 March 2017, should be given substantial weight even though the development application was made on or about 28 January 2016 and at the time the Chinchilla Planning Scheme was in force.

The Court found that the proposed development conflicted with the provisions of the Rural residential zone code under the Chinchilla Planning Scheme

The Council and Co-respondent alleged that the proposed development conflicted with the provisions of the Rural residential zone code under the Chinchilla Planning Scheme. The alleged conflicts were said to arise from the nature, scale and density of the proposed development, and character impacts. In particular, the following provisions of the Rural residential zone code were alleged to be in conflict:

- Section 4.2.3.3(2) (Code Purpose), which relevantly states as follows:

  The Rural Residential "Zone" continues as an area for low density detached houses in a rural setting.

- Sections 4.2.3.3(4)(c) and (d) (Code Purpose), which relevantly states as follows:

  (4) Within the Rural Residential "Zone", "development";

  ...

  (c) is located, designed and operated in a manner that protects and enhances the low density rural residential scale, intensity, form and character;

  (d) does not prejudice or impact adversely on other "uses" including those within other "Zones".

- Section 4.2.3.4 (Performance Criteria, Acceptable Solutions and Self Assessable Applicability – "Material change of Use"), which relevantly includes the following performance criteria:
  - PC5 Residential Activities – Density;
  - PC8 Transport Movements;
  - PC9 Building and Structure Design;
  - PC28 Noise Emissions.

The Appellant accepted that the proposed development would conflict with the Chinchilla Planning Scheme in that:

- the buildings are not in the form of detached houses;
- the density of the proposed development is not limited to a single dwelling on a large lot;
- "*the conflict is more than minor or technical*".

The Court found it appropriate for the Appellant to concede that the proposed development was in conflict with sections 4.2.3.3(2) and 4.2.3.3(4)(c) and performance criteria PC5 and PC9. Although the Court found that the proposed development was in conflict with those provisions, the Court was satisfied that "*the conflict was not accompanied by any undue impact*".

The Court also considered the provisions of the Western Downs Planning Scheme and found that the proposed development conflicted with those provisions

The Council and Co-respondent alleged that the proposed development, which was included within the Low density residential zone under the Western Downs Planning Scheme, conflicted with the Low density residential zone code.

The Court confirmed that the proposed development, being non-resident workers' accommodation, was inconsistent with the purpose of the Low density residential zone because it did not involve a dwelling house use or community use.

Whilst noting that the proposed development was not completely out of character development within the locality and that no unacceptable amenity impacts accompanied it, the Court found that a decision to approve the proposed development would be in conflict with the Low density residential zone code.

The Court considered the matters that mitigated the extent of the conflict with the Chinchilla Planning Scheme

The Court stated that the following matters mitigated the extent of the conflict with the Chinchilla Planning Scheme:

- the proposed development did not conflict with the desired environmental outcome in relation to community expectations and needs;

- it was not alleged that the proposed development conflicted with the overall outcomes and performance outcomes of the Rural residential zone code that were relevant to "*managing the separation of incompatible uses, avoiding prejudice to rural residential activities and managing impacts to acceptable levels*";
- Zeller Street has a mixed character, which includes industrial uses, rural residential, low density residential and showgrounds.

The Court found that there were sufficient grounds, including a need for the proposed development, to approve the proposed development despite the conflicts

The Court found that there were sufficient grounds to approve the development application including a need for the proposed development in that:

- Base Camp, the existing other non-resident workers' accommodation, would not be capable of providing accommodation during peak season;
- hotels or motels in Chinchilla were not capable of providing accommodation for workers;
- in the absence of the proposed development, Base Camp would effectively monopolise the non-resident workers' accommodation market in Chinchilla.

The Court found that there were sufficient grounds to approve the proposed development despite its conflicts with the Chinchilla Planning Scheme and Western Downs Planning Scheme. The appeal was adjourned for the Court to hear the matters relating to reasonable and relevant conditions to ultimately approve the proposed development.

Planning and Environment Court upholds Council's refusal of a development application to convert a public park into a shopping centre carpark to address a history of anti-social behaviour

James Nicolson | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *IVL Group Pty Ltd & Anor v Redland City Council* [2017] QPEC 73 heard before Rackemann DCJ

March 2018

In brief

The case of *IVL Group Pty Ltd & Anor v Redland City Council* [2017] QPEC 73 concerned a development application for a material change of use to convert a public park into a landscaped carpark extension for an adjacent shopping centre.

The subject land had been dedicated to the State as a park, with the Council as trustee, under the conditions of the earlier approval for the adjacent shopping centre. Now located within the Open space zone under the Redlands Planning Scheme, the park was also shown as part of an "*Urban Habitat Corridor*" for the purposes of the Strategic Framework and as "*Bushland Habitat*" on the Habitat protection overlay map.

The appeal focussed on the public interest in removing a park with inherent CPTED (crime prevention through environmental design) issues and a history of anti-social behaviour as a ground to justify approval despite clear conflict with the Redlands Planning Scheme, in circumstances where the park contained ecological values of local significance and the community was adequately served by recreational facilities.

The Court noted that the proposed development "*is of an uncommon kind and has an unusual history*", ultimately dismissing the appeal and upholding the Council's refusal.

Conversion of park instigated by the Council to address a history of anti-social behaviour

Approximately 0.91 hectares in area, the park had been dedicated as part of the historical shopping centre approval to provide a vegetated buffer and pedestrian connection between the shopping centre and adjacent residential areas. However, the park had since developed a history of reports of problematic antisocial and criminal behaviour.

The Council encouraged IVL Group, the owner of the adjacent shopping centre, to acquire the land and amalgamate it into the centre's carpark. The Council subsequently resolved to surrender its trusteeship, the State and the Council provided written consent for the lodgement of the development application and IVL Group entered into a conditional contract of sale, notwithstanding that the existing shopping centre carpark was functioning without capacity issues.

Following local government elections, the Council changed its position within a month of the development application being lodged and, contrary to the Council officers' recommendation but consistent with a body of local resident opposition, refused the development application.

"A proposal to replace a park with CPTED problems with a carpark with CPTED problems"

The parks and recreation expert witnesses agreed the CPTED characteristics of the park were less than desirable, with one expert of the view that "*it's hard to get a worse site*".

The park was elongated in shape and sandwiched between an acoustic fence adjacent the rear service areas of the shopping centre on one side, and the fenced rear yards of adjacent dwellings on the other. As a consequence of its location, shape, considerable vegetation and poor lighting, there was limited, if any opportunity for casual surveillance into or within the park.

However, despite the documented history of anti-social and criminal behaviour within the park, there was disagreement between the experts as to the prevalence and seriousness of those behaviours. Interestingly, following the proposal to replace the park with a carpark, residents had either stopped complaining or reported that problems had diminished.

The experts further acknowledged that while the carpark would provide a more open area with greater opportunities for general activity, lighting and casual surveillance, there remained the potential for an array of different vehicle-facilitated or related anti-social behaviours including "*hooning*", which was known to occur elsewhere in the precinct.

The Court accepted that there was a level of continuing anti-social behaviour associated with the park due to its current configuration and management, and concluded that the development was "*a case of a proposal to replace a park with CPTED problems with a carpark with CPTED problems*" and the public benefit was to be weighed with other relevant considerations.

Park not needed to adequately meet the active and passive recreation needs of the community

The subject park was located adjacent to a full size neighbourhood park containing embellishments including children's play equipment, cleared kick-about areas and retained bushland habitat.

The parks and recreation expert witnesses agreed, and the Court accepted, that the catchment is well served by open space areas for active and passive recreation and the park, which was the subject of the development application, was not required to meet those needs of the community, either by itself or as part of an expansion to the adjacent neighbourhood park.

Park contained values of environmental significance that would be compromised were development to proceed

The ecology expert witnesses agreed that the park contained values that are of environmental significance, consistent with the site being mapped as "*Bushland Habitat*" on the Habitat protection overlay under the current Redlands Planning Scheme and as "*Local Environmental Significance*" on the Environmental significance overlay under the draft *Redland City Plan 2015*.

The evidence showed that the park supports a variety of native flora including at least 153 trees, of which 109 were identified as koala habitat trees, which provide habitat resources for a number of native fauna. The site also provided potential for fauna linkages and connections within the local and broader landscape.

Consequently, the Court found that the conflicts with the Habitat protection overlay were more than minor.

Court not satisfied public interest sufficient to warrant approval in the face of clear and significant conflict with the Redlands Planning Scheme

While the Court acknowledged the public interest in closing a park with significant CPTED deficiencies and a history of anti-social behaviour in a community well served by recreational open space, it nevertheless found that the proposal "*squarely conflicts*" with the Redlands Planning Scheme and runs counter to the reasonable expectations of the community.

The Court found the park to have a number of positive values, including legitimate informal daytime recreational use, a function as a buffer and physical separation from the shopping centre, visual relief, attractive visual character and amenity, and ecological values of local significance. If approved, those positive values would be lost in circumstances where an extension to the shopping centre carpark was not needed and would continue to have significant CPTED deficiencies.

In the circumstances, the Court was not persuaded that the public interest ground was sufficient to warrant a decision to approve the development application in the face of the clear and significant conflict with the Redlands Planning Scheme.

Proposed service station in the Open space and environmental protection zone is approved by the Planning and Environment Court, despite conflicts with the planning scheme

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *King of Gifts (Qld) Pty Ltd v Redland City Council* [2017] QPEC 64 heard before Kefford DCJ

March 2018

In brief

The case of *King of Gifts (Qld) Pty Ltd v Redland City Council* [2017] QPEC 64 concerned an appeal to the Planning and Environment Court by King of Gifts (Qld) Pty Ltd against the decision of the Redland City Council (**Council**) to refuse a development application for a material change of use to develop a degraded and disused farm for a combined service station, drive through restaurant and associated effluent treatment system.

The Council alleged conflict with more than 120 provisions of the Redlands Planning Scheme Version 4 (**Planning Scheme**) and 20 provisions of the draft *Redland City Plan 2015* (**Draft Planning Scheme**). By the second day of the hearing, the Council reduced the number of alleged conflicts to 93 which broadly concerned the following subject matters:

- visual amenity impacts;
- ecological impacts;
- nature and location of the use and character of the built form.

The Court did not consider the nature and extent of the identified conflicts as serious, and ultimately held that the economic need for a service station in the location of the proposed development provided sufficient grounds to justify approval.

The Court found that approval of the proposed development would not compromise the ability to implement the Draft Planning Scheme

The Court's consideration of the nature and extent of the identified conflicts was focused on the Planning Scheme as the provisions of the Draft Planning Scheme effectively replicated the provisions of the Planning Scheme. Therefore, the Draft Planning Scheme did not amount to a shift in planning policy that would justify the refusal of the proposed development.

The Court found that the development had been designed to limit the adverse visual amenity impacts occasioned by the proposed development

The Council submitted that, if approved, the proposed development would be at variance with the existing built form and character of the area which reflected a "*non-urban or rural landscape setting*" and for which the Planning Scheme contemplated "*low key*" development "*akin to a detached dwelling, within a native habitat area, and as part of a fauna movement corridor*" (see [30]).

The Court accepted the evidence of the Council's expert that the type and scale of the proposed development would change the existing built form and character of the location, as it would involve an "*intensively developed complex … with a distinctly urban character*" and in particular, because of the night time glow created as a result of the 24 hour a day use (see [31] - [33]).

The Court held that the incompatibility between the proposed development and the semi-rural landscape setting gave rise to a conflict with the Planning Scheme. However, the Court did not consider the conflict as serious and held that it was tempered by, among other things, the existing vegetation and topography of the subject site, the low rise appearance of the building height being markedly less than the "*height that could be achieved by a compliant two storey house*", and the ability to screen the proposed acoustic fence with attractive landscaping (see [34]).

In assessing the effluent treatment system, the Court was satisfied that the cropped grass, intended for irrigation, did not present a conflict with the provisions relevant to visual amenity because parts of the subject area would include patches of native grass and some trees. Further, the proposed development would not prevent the local waterway on the subject site from providing natural urban separation envisaged by the Planning Scheme.

The Court found that the Planning Scheme did not require that development enhance the environmental values of the subject area

It was submitted by the Council that the Planning Scheme required that development enhance, protect and maintain the ecological values in the area, in particular the existing fauna corridor, and anything less would give rise to a conflict.

The Court did not construe that requirement as requiring strict compliance and held that it was enough that development maintain the "*ecological processes and community wellbeing*" (see [46]). Further, the strategic framework under the Planning Scheme, while seeking to encourage enhancement of environmental values, "*left open the prospect that enhancement would be coupled with development*" (see [53]).

The Court found that the Planning Scheme did not prescribe the extent to which habitat and native vegetation is to include trees and shrubs

The northern portion of the subject site required over 5,000 square meters of irrigated grassland to accommodate the effluent treatment system. The Council submitted that the irrigated grassland was not sufficient to meet the requirements of the Planning Scheme because it did not constitute native habitat or enhance the fauna corridor as it lacked "*diversity of either flora or fauna*" (see [71]).

The Court was satisfied that the grassed area was the type of habitat sought by the Planning Scheme and therefore held there was no identifiable conflict in terms of ecological impacts.

The Court held that approval of the proposed development would give rise to a conflict with the Planning Scheme in terms of the nature and location of the use and character of the built form

The Appellant's town planning expert conceded that a service station and drive through restaurant on the subject site was not a low-key use, although he did contend that "*as far as a service station goes it's a low-key service station*" (see [80]).

The Court did not consider this description as relevant as the use of a service station was fundamentally inconsistent with the types of low-key uses envisaged by the Planning Scheme and for that reason, incompatible with the locality.

The Court found that the extent and nature of the identified conflicts were tempered by a number of design considerations

In addition to the low rise appearance of the proposed development, the effluent treatment system would have a negligible visual impact as a consequence of, among other things, its location set below the tree-line and its park like appearance.

Having regard to the planning rationale underpinning the Planning Scheme, the Court concluded that the overall visual amenity and environmental goals of the Planning Scheme would not be materially compromised by the proposed development.

The Court found a clear and strong level of economic need for a service station and drive through restaurant

The number of residents and the limited number of service stations in the area demonstrated an existing and unsatisfied demand for the proposed development. Further, the projected population increase in Redland City and the projected growth of the fuel market in the primary trade area highlighted the importance to provide for an additional two service stations.

The Court held that the co-location of the proposed service station and drive through restaurant would satisfy the existing need by providing "*increased convenience, choice and competition*" in the growing market (see [102]).

The Court accepted that other relevant grounds supported approval of the proposed development, in particular the absence of ecological impacts and the minimal visual impact, however it did not consider these at length as the economic need was sufficient to justify the approval.

Planning and Environment Court dismisses a development application for a poultry farm consisting of 700,000 birds in the Somerset Regional Council

Shaun Pryor | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Douglas Phipps and Others v The Chief Executive, Department of Local Government, Infrastructure and Planning and The Chief Executive and Another; Douglas Phipps and Others v Somerset Regional Council* [2018] QPEC 5 heard before Rackemann DCJ

March 2018

In brief

The case of *Douglas Phipps and Others v The Chief Executive, Department of Local Government, Infrastructure and Planning and The Chief Executive and Another; Douglas Phipps and Others v Somerset Regional Council* [2018] QPEC 5 concerned two appeals to the Planning and Environment Court. The first was against the Council's refusal of a development application for a development permit for a material change of use (Intensive Animal Industry – poultry farm with 700,000 birds in 14 sheds) and an environmentally relevant activity. The second appeal was against the decision of the Chief Executive of the Department of Agriculture and Fisheries to refuse the environmental authority.

The proposed development was for the establishment of eight poultry sheds, each housing up to 50,000 birds as well as to increase the number of birds in the existing six sheds from 41,000 to a maximum of 50,000 each.

The main issue in the appeals was the potential of the proposal to cause an odour nuisance to the sensitive receptors, being the occupants of dwellings within the broader area.

The Court assessed the proposed development against the relevant planning instruments and found that the proposed development would likely cause an undue odour impact. Consequently, the Court dismissed both appeals.

Compliance with the planning scheme

The Court examined the proposed development for compliance with the relevant provisions of the planning scheme, namely the Strategic Framework, the Rural Zone Code, the Intensive Animal Industry Code and the High Impact Management Area Overlay Code.

In respect of the Strategic Framework, the Court noted that in respect of air and noise, the planning scheme sought "*the maintenance of a high quality air and noise environment consistent with the natural/rural values of the region, the protection of the amenity enjoyed by sensitive land uses and the natural environment more generally*".

The Court suggested that if the proposal was found to cause significant odour nuisance then it would be counter to the objective sought to be achieved in the strategic outcomes.

In respect of the Rural Zone Code, the Court noted that the proposed development will be in conflict with the provisions of the code where the proposal is found to be detrimental to the amenity of the area by reason of odour.

In respect of the Intensive Animal Industry Code, the Court noted that the purpose of the code included that the use not cause environmental harm or nuisance by way of air quality, and avoids any potential adverse effects on the amenity and character of the locality or nearby sensitive uses.

The relevant acceptable outcome, A01.5, which is specific to poultry farms, required compliance with an odour criteria of 2.5 OU, 99.5 per cent, one-hour average for a sensitive land use site in a Rural Zone.

Compliance with the relevant State Development Assessment Provisions

The Department of Infrastructure, Local Government and Planning was a concurrence agency for the development application made to the Council and was required to assess the proposed development against the relevant State Development Assessment Provisions.

The Department alleged conflict with a number of provisions of that module, in particular PO3, which relevantly provided that the activity be "*designed and managed to minimise adverse effects on the amenity of the surrounding community*".

The Department alleged that such a provision would be "*offended in the event that the development application were found to have an undue and adverse impact upon amenity by reason of excessive odour*".

Compliance with the regulatory requirements

The Chief Executive of the Department of Agriculture and Fisheries as the assessment manager for the development application for the environmental authority was required to assess the proposed development against the regulatory requirements, having regard for the matters in section 176(2)(b) of the *Environmental Protection Act 1994* which relevantly included the standard criteria.

The regulatory requirements ultimately required the activity to be operated in a way that protects the environmental values of air by not discharging air contaminants that have an adverse effect on the environment.

The Department submitted that to the extent the evidence establishes that the proposal would likely cause a significant adverse odour impact, the development application should be refused.

Court found that the proposed development would likely cause an undue odour impact

In determining whether the proposed development would cause an adverse odour impact, the Court heard evidence from air quality experts called on behalf of the Appellant and both Departments.

The Court also considered the modelling prepared in the course of the application assessment process but noted that it was, by peer review, found to be "*wanting*". For example the modelling used a K factor input value of 1.5 when the accepted practice was to use a K factor of 2.2. The model also did not take into account the full number of birds that were sought to be accommodated in the proposal.

It is noted that the Appellant did not seek to rely on this modelling in the course of the trial, but rather sought to cast doubt upon the accuracy of any modelling at all and suggested that it was unfair and not in the public interest to apply the results of the odour modelling to the development application.

The experts for both Departments relied upon revised odour dispersion modelling which showed that the odour criteria would be exceeded for 26 sensitive land uses in proximity to the site and concluded that the proposed development would cause an odour nuisance.

The Court considered several assumptions in respect of the model including the planting of vegetative buffers and the impacts of an existing poultry farm immediately to the north of the subject site but ultimately accepted the evidence of the experts for the Departments and found that the proposal would likely cause an undue odour impact.

The Court further considered that there was insufficient need for additional chicken sheds in the area and that the economic benefits of the proposal were not sufficient to warrant overlooking the odour impacts of the proposal.

The Court consequently dismissed both appeals.

Breach of permissible height limit under the Brisbane City Plan 2014 proves fatal to the approval of a multi-unit development in a traditional single unit dwelling locality

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Petty & Ors v Brisbane City Council & Anor* [2018] QPEC 2 heard before RS Jones DCJ

March 2018

In brief

The case of *Petty & Ors v Brisbane City Council & Anor* [2018] QPEC 2 concerned a submitter appeal against the decision of Brisbane City Council (**Council**) to approve a development application that sought to reconfigure four existing lots into two, relocate a pre-1947 traditional building and develop a multi-unit three storey development in a location that was dominated by large pre-1947 single unit character dwellings.

The proposal to develop a three storey multi-unit complex was the subject of the dispute. The Appellants' primary submission was that the proposed development conflicted with the *Brisbane City Plan 2014* (**City Plan**) to the extent that it would effectively result in an impermissible built form due to its "*height, bulk, scale, density and size*" (see [11]).

The starting point for the Court was to affirm (see [17]-[22]) the general principles of statutory construction as instructive to its construction of planning schemes. In particular, the Court pointed to the principle in *Newing & Ors v Silcock & Ors* [2010] QPEC 49 [2010] QPELR 692 which relevantly provides that planning schemes "*should be construed broadly, rather than pedantically or narrowly and with a reasonable, practical approach*" (see [19]). Similarly, the Court referred to the often cited principle in *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QPELR 686 in which the Court held as follows:

> [t]*he fact that planning documents are to be construed precisely in the same way as statutes still allows for the expressed view that such documents need to be read in a way which is practical, and read as a whole and as intending to achieve balance between outcomes…* (see [21]).

The Court ultimately found in favour of the Appellants and held that the planning grounds submitted by the Respondent and the Co-Respondent, on balance, were not sufficient to justify approval of the development application. The Court addressed the following issues:

- whether the proposed development conflicted with the City Plan to the extent that it gave rise to adverse impacts in relation to the height, bulk, scale and size of the development, unacceptable heritage and character, sub-tropical design outcomes, landscaping and amenity, setback and separation; and
- whether the proposed development was contrary to the reasonable expectations of the residents.

The Court found that the proposed building height was in stark and clear conflict with the City Plan

In their submissions the Appellants raised two significant conflicts with the City Plan. The first was the height of the proposed multi-unit building because it exceeded the 9.5 metre restriction. The second was that the proposed development exceeded two storeys and was not within walking distance of a transport node as was required by the Low medium density residential zone code under the City Plan.

The Court did not consider the second identified conflict as fatal and held that it would be impracticable to find the development application would fail on the basis that the three storey development was not within close proximity to transport. To arrive at such a conclusion would be to interpret the City Plan in an "*inflexible way*" and would therefore be "*contrary to the underlying philosophy of a performance based planning scheme*" (see [101]).

In terms of impact to the streetscape the Appellants' town planner contended that the difference between a two storey and three storey development would be noticeable and the 9.5 metre limit was "*not an invitation to squeeze in another storey*" (see [100]).

The Court held that while elements of the roof exceeded 9.5 metres the exceedance was of little significance and could not reasonably create a genuine conflict. It was the lift structure that exceeded the height criteria by 2.3 metres and the fire stairs that elevated the roof structure to 10.8 metres that created an inconsistency with the character of the local area and ultimately placed the proposed development in material conflict with the City Plan. Further, the proposed landscaping and existing vegetation would have little impact in ameliorating the height intrusion.

The Court found that the proposed development provided a sensitive transition to the built environment and was presented in a well-considered manner

The Court preferred the evidence of the Co-Respondent's architect and agreed that the overall design of the proposed multi-unit dwelling was sympathetic to the built form environment. For example, the proposed building design utilised architectural devices including "*steps in its form, both horizontally and vertically*", the inclusion of generous eaves to shade the walls and "*prominent verandah elements with … traditional lightweight detailing*" (see [78]).

The Court was sympathetic to the Co-Respondent's position because, but for the issue of height, the Co-Respondent had "*produced an attractive unit development which would in many respects sit comfortably within its location*" (see [110]).

The Court found that the comparison between the proposed roof design and the roof pitch typically associated with a pre-1947 dwelling revealed a clear conflict

The Traditional character design overlay code required that "*development provides roof forms which complement traditional roof styles of dwelling houses constructed in 1946 or earlier that are located nearby in the street in terms of roof pitch and proportion*" (see [60]). The Court emphasised that it was the requirement that roof designs complement, not replicate pre-1947 roof designs (see [62]).

While the Court acknowledged that care had been taken to assimilate the proposed roof design with the pre-1947 character, it was clear that the main design goal was to keep the roof within the 9.5 metre height restriction and so could not be said to "*complement the traditional roof forms*" (see [64]).

The Court found that any identified conflicts in respect of sub-tropical design, landscaping and amenity, setback and separation were minor and could not warrant refusal

The Appellants submitted that the nature and extent of the deep planting and the extent of the site coverage gave rise to unacceptable open space and amenity impacts. The City Plan required that deep planting, among other things, provide shade and informal recreation space and be "*easily accessible for building occupants*" (see [42]). Because of the existing proposed retaining wall the "*functionality*" required could not be met (see [44]).

The site coverage was expressed to be around 53% and so exceeded the 45% maximum site coverage criteria under the City Plan. Also, it was submitted by the Appellants that set back and separation created a conflict because the proposal presented a very wide rear façade and would appear very close to the rear adjoining houses.

The Court was not persuaded that the identified conflicts were substantial and held that "[t]*hat an acceptable outcome is not met is not necessarily fatal in a performance based planning scheme*" (see [49]).

The Court held that the concept of reasonable expectations of the residents, having regard to the City Plan, would be a relevant consideration

The Appellants submitted that their reasonable expectations were informed by the provisions of the City Plan and the previous decision of the Court in *Platinum Design Architects v Brisbane City Council* [2016] QPEC 58 "*given the similar treatment of the subject land and the parcel considered in that appeal*" (see [32]).

The proposed development was within the Low medium density residential zone which relevantly contemplated three storey developments in certain circumstances. The Court therefore concluded in the appropriate circumstances, the possibility of a three storey development would have had to be expected.

The Court concluded that population growth could be accommodated in a compliant two storey multi-unit development and the submitted planning grounds were not sufficient to warrant approval

The Co-Respondent's economist contended that the proposed development reinforced the compact form of settlement in a growth area resulting in efficient use of existing infrastructure and represented an opportunity to contribute to the planning objectives of the *South East Queensland Regional Plan 2009*, in particular by "*accommodating significant population growth in infill development*" (see [113]).

The Court was not persuaded by the totality of evidence given by the Co-Respondent's economist, especially when cross examined about the level of demand for multi-unit development in the subject area. Relevantly, the Court agreed with counsel for the Appellants that the evidence of the Co-Respondent's economist indicated that there was in fact a '*material excess of supply*' in the area of the proposed development (see [117]).

Finally, the Court affirmed that it is not the function of the Court "*to substitute planning strategies*" which have been adopted by a planning authority and therefore it could not ignore the clear conflict with the City Plan concerning height (see [133]).

Visual amenity impacts trump any prospective need resulting in the refusal of a proposed service station

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *United Petroleum Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 8 heard before Rackemann DCJ

March 2018

In brief

The case of *United Petroleum Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 8 concerned an appeal by United Petroleum Pty Ltd against the Gold Coast City Council's refusal of the Appellant's development application for a development permit for a material change of use for a service station and a shop on land situated at Hilda Street and the Gold Coast Highway, Mermaid Beach.

The site was located between a neighbourhood centre, a cluster of mixed use developments and residential streets.

The proposed development included a proposal for a twenty-four hour service station, trading seven days a week. The plans depicted a modern service station with illuminated signage comprising of three fuel pumps with a canopy structure of 6.5 metres. The shop component of the proposal was to be located on the eastern boundary near the Gold Coast Highway and would face the adjoining residential dwellings.

Issues

The Council refused the decision on the grounds that the development application conflicted with the following provisions of the *Gold Coast Planning Scheme 2003* (**2003 Planning Scheme**):

- the intent for the Residential Choice Domain;
- the performance criteria in the Residential Choice Domain Place Code;
- the Service Station Code; and
- the Retail And Related Establishments Code.

The Court afforded significant weight to the *Gold Coast Planning Scheme 2016* (**2016 Planning Scheme**) as it came into force shortly after the development application was made. Relevantly, the Council argued that the development application conflicted with the following provisions of the 2016 Planning Scheme:

- the Strategic Framework;
- the Medium Density Residential Zone Code;
- the Commercial Design Code; and
- the Service Station Code.

The Court summarised the conflicts to broadly concern conflicts with the applicable Domain, amenity, location and need.

Issue 1 – Conflicts with the Residential Choice Domain

Under the 2003 Planning Scheme, the subject land was included in the Residential Choice Domain. The purpose of this Domain is stated to be "[to] *support the development of a residential pattern comprising mixed dwelling types, including detached dwellings and apartment buildings that relate well to each other*" (see [21]).

The Court held that this Domain did not restrict the development of a service station as it is a "*support service*". The Court noted that the Domain sought to support residential densities that were moderately higher than traditional detached dwelling areas and to provide for support services commensurate with local residents' needs.

The Court noted that the shop component of the development application did in fact conflict with the Domain as a "shop" did not appear in the "table of development" in the Domain provisions, unlike a service station. The town planners opined however that if approval of the service station was acceptable there should be no difficultly also approving the shop use.

Issue 2 – Amenity

The Court attributed significant concern to the impact that the proposed development would have on the visual amenity of the residential area.

The Court accepted that the locality within which the proposed development is located is comprised of four 'character units', being as follows:

- beachside interface;
- beachside neighbourhood;
- highway corridor; and
- canal estate interface.

The Court found that the proposed development fell within the beachside neighbourhood, beachside interface and the highway corridor.

In relation to the highway corridor, the Court contended that the proposed development was not incompatible with the "*image and identity*" of the corridor given its mixed use character.

In relation to the beach neighbourhood, the Respondent contended that the proposed development would sharply contrast with the characteristics of the beachside neighbourhood, particularly the adjacent streets of Hilda Street and Seaside Avenue.

The Court focused its attention on the units which directly faced the proposed service station on Hilda Street and Seaside Avenue. The Court found that those occupants would be subject to significant visual amenity impacts.

In particular, the Court was concerned about the impact the proposed development would have on the dwelling owned by one of the Co-respondents. The Court found that the proposed development would impact on the Co-respondent's property in two ways. Firstly, a substantial part of the underside of the service station's canopy would cause a negative visual impact. Secondly, an acoustic barrier would be erected around the Co-respondents property, also causing a significant visual impact. The Co-respondent gave evidence that the proposed development will cause a sense of enclosure to the surrounding neighbours and would seriously detract from the amenity of the area. The Court accepted this evidence and noted that even though the 2003 Planning Scheme did not preclude a service station use in the Residential Domain, the built form of the proposed development would cause significant and unacceptable visual impacts on the immediate neighbours and ultimately warranted the refusal of the development application.

Issue 3 – Location

The Court considered the range of dwellings which neighboured the proposed development. In relation to the apartments to the north of the proposed development, the Court found that it would have an incremental effect on the residents. The Court found however that the effect was not significant as these residents are already subjected to exposure from Hilda Street.

In relation to noise, pollution and lighting, the Court found that the proposed development complied with the relevant provisions in the 2003 Planning Scheme.

Issue 4 – Need

The Court noted that need in these circumstances would be established if on balance the proposed development would improve the services and facilities available to the community.

The Court accepted the evidence presented by the Appellant's expert economist Mr Duane. Mr Duane noted that at the time of the proceeding, residents of the relevant catchment area travel up to 15 minutes for a service station. The Court accepted that this was not convenient for the modern consumer. The Court was therefore satisfied that the subject site was conveniently located for a service station, however the economic evidence with respect to the expectant growth of trade of the service station demonstrated that the need for a service station was insignificant.

2016 Planning Scheme

The Court also afforded significant weight to the provisions under the 2016 Planning Scheme. Under the 2016 Planning Scheme, a service station is impact assessable development within the relevant zone. The Court noted that the relevant assessment criteria included the following:

- Strategic Framework;
- Medium Density Residential Zone Code;
- Commercial Design Code; and
- the Service Station Code.

The Court referred to section 3.4.5.1(14) of the Strategic Framework, and relevantly found that the development was a stand-alone, small scale commercial use development under the Strategic Framework. The Court held that development meeting the following criteria is supported in the subject location:

- does not undermine the existing or new neighbourhood centres;
- provides a direct service to the immediate neighbourhood;
- maintains a compatible form and scale to nearby development;
- does not unduly detract from local character; and
- is not a service station, bar, hotel, nightclub, or supermarket use.

The Court held that the proposed development plainly did not meet the criteria and was therefore in conflict with the Strategic Framework.

The Court noted that at the time the appeal was commenced, the Medium Density Residential Zone Code contemplated the development of a service station if it was appropriately designed and did not detract from the residential amenity of the area. The Medium Density Residential Zone Code was subsequently amended to remove this provision and subsequently did not support the development of a service station within the area. The Court noted however that, in any event, the proposed development would conflict with the Overall Outcomes of the unamended version of the Medium Density Residential Zone Code as the proposed development diminished the residential amenity of the locality.

The Court also noted that the proposed development conflicted with Performance Outcome 4 of the Service Station Code because it would abut a residential land use and was inconsistent with the local amenity characteristics.

The Court therefore held that the proposed development was in conflict with the 2016 Planning Scheme, in particular the relevant provisions in the Strategic Framework.

Findings

The Court was satisfied that the proposed development conflicted with the 2003 Planning Scheme and the 2016 Planning Scheme, particularly because of the visual amenity impacts, and there were not sufficient grounds to warrant approval.

Planning and Environment Court dismisses submitter appeal for a mixed use development despite conflicts with the Maroochy Plan 2000

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Development Watch Inc & Anor v Sunshine Coast Regional Council & Anor* [2018] QPEC 6 heard before Long SC DCJ

March 2018

In brief

The case of *Development Watch Inc & Anor v Sunshine Coast Regional Council & Anor* [2018] QPEC 6 concerned a submitter appeal against the decision by the Sunshine Coast Regional Council (**Council**) to approve a development application for a development permit to reconfigure a lot (1 into 44 lots) and a development permit for a material change of use (44 detached houses and 510 square metres of shops). The proposed development included the construction of 43 two-storey buildings. Thirty-three of the allotments were proposed to be exclusively used as dwelling houses with the remaining 10 allotments to be used for both commercial and residential use.

The grounds of the appeal were that the proposed development conflicted with the Maroochy Plan 2000 (Maroochy Plan) in the following ways:

- *Issue 1* – fragmentation to the Village Centre.
- *Issue 2* – inconsistency with the desired character of the locality.
- *Issue 3* – conflict with the Code for Reconfiguring a Lot and the Code for Town and Village Centres.
- *Issue 4* – conflict with the Code for Transport, Traffic and Parking.

The Appellants argued that there were no sufficient grounds warranting the approval of the development application.

The Court dismissed the appeal on the basis that there were sufficient matters of public interest to approve the proposed development despite the conflicts with the Maroochy Plan.

Construction of the Maroochy Plan

The Court noted that the usual principles of statutory construction apply to the interpretation of planning schemes. The Court applied the principles of statutory interpretation set out in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 which relevantly stated as follows:

> *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined by reference to the language of the instrument viewed as a whole.*
>
> *Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated … by adjusting the meaning of the competing provisions to achieve the result which will best give effect to the purpose and language of the provisions while maintaining the unity of all the statutory provisions.*

The Court also noted the following from *Luke & Ors v Maroochy Shire Council & Watpac Developments* [2003] QPELR 447:

> *the proper method of construction … [involves] identification of those parts of the planning scheme which are germane to the issues of the case, and their consideration to discern the tenor of the scheme, as a whole, and, by that process, to discover whether or not the proposed development accords with the scheme.*

Issue 1 – fragmentation to the Village Centre

The Appellants argued that the proposed development is in conflict with the Retail and Centres Hierarchy under the Maroochy Plan. The Appellants submitted that relevant provisions of the Maroochy Plan seek to maintain the Village Centre for commercial and retail development, and that the proposed development contemplated by the Maroochy Plan would not provide for the scale of retail and commercial development as it is primarily small lot housing.

The Appellants also argued that the proposed development does not adequately meet the provisions under Part 3.11 of the Maroochy Plan, being the Statement of Desired Precinct Character for Planning Area Number 11 Coolum Beach, as only 10 of the 43 detached houses could be categorised as being a shop-top residential use. The Appellants submitted that the proposed development only goes part way to satisfying the requirements of the planning scheme and does not cater for the mixed-use goals envisioned for the Village Centre Precinct.

The Court relevantly held that the proposed development is not in contravention with Part 3.11 of the Maroochy Plan as development in a Village Centre Precinct is not solely for retail and commercial facilities. The Court determined that the proposed development adequately provides for a mix of uses as it includes both residential and retail development which is encouraged under the Maroochy Plan.

Issue 2 – inconsistency with the desired character of the locality

The Court determined that the proposed development was not in conflict with the relevant strategic intent and local policy under the Maroochy Plan. The Court held that it would not be appropriate to find the proposed development to be in conflict with the Maroochy Plan for the following reasons:

- A "detached dwelling" is a preferred and acceptable use in the Village Centre Precinct.
- The proposed development would provide for mixed-use development as it includes a range of residential, retail and commercial facilities, therefore meeting the expectations set in the General Intent for Centre Precincts.
- There was no evidence that the proposed development is in conflict with the relevant provisions of the Maroochy Plan regarding the commercial role of the Village Centre Precinct, as the dwellings in the Tourist Node could be used for visitor accommodation.
- The small scale nature of the proposed development meets the General Intent for Centre Precincts under the Maroochy Plan as Village Centre Precincts "*are expected to have premises that remain relatively small scale*" (see paragraph [98]). The small scale nature of the proposed development balances the tensions that arise between the reservation of the Precinct for commercial and residential development, and other potential uses of the Village Centre Precinct.
- The small allotment size of the proposed development does not meet the minimum size under the Code for Reconfiguring a Lot. The Court however relevantly held that the small allotment size seeks to achieve the desired character of the Village Centre Precinct and further emphasised that compliance with an acceptable measure is not mandatory and alternative solutions can be provided in order to satisfy the performance criteria.

Issue 3 – conflict with the Code for Reconfiguring a Lot and the Code for Town and Village Centres

The Appellants argued that the proposed development caused a serious conflict with the Code for Reconfiguring a Lot and the Code for Town and Village Centres. The argument was based on the following:

- The proposed development is inconsistent with the desired character of a Village Centre as the development is primarily for small lot housing with little retail development.
- The proposed development does not meet the minimum allotment size which is 1,200m² under the Code for Reconfiguring a Lot.
- The intended development form for a Village Centre is for retail and commercial development with higher density residential above, not predominately detached dwellings as contemplated by the proposed development.
- The proposed development does not meet the intended scale of retail and commercial development and will not adequately cater for the needs of future residents and visitors.

The experts for the Respondent and Co-respondent argued that there were no conflicts. It was submitted as follows in the relevant joint expert report:

- The proposed development will contribute to the established mixed uses of the area.
- The proposed development meets the intent of the Maroochy Plan as it will provide for a range of retail, commercial, and accommodation facilities.
- The proposed development is not in conflict with the Code for Reconfiguring a Lot as reconfiguration is concerned with land tenure.
- The proposed development is not in conflict with the acceptable or preferred outcomes for Village Centre Precincts as a "detached house" is a preferred or acceptable use in this type of centre.

The Court found that the proposed development was not in conflict with the Code for Town and Village Centres. The Court determined that the proposed development would provide additional mixed uses in the Village Centre Precinct and therefore meets the intent of the Maroochy Plan. The Court further noted that a "detached house" is a preferred or acceptable use in a Village Centre Precinct and therefore was determined to not be in conflict with the Maroochy Plan. The Court did however determine that the proposed development conflicted with the Code for Reconfiguring a Lot because the proposed lots did not meet the minimum allotment size. The Court relevantly stated as follows, "*… there is no warrant to regard the conflict as being technical or so minor as to be inconsequential*" (see paragraph [110]). The Court however went on to say that the "*point is that the consideration of the preferred lot dimensions means that the balancing of various aspirations of the strategic plan, for this Precinct in [the Maroochy Plan], demands that more particular weight be given to the statements of intended reservation of the Precinct for commercial and … residential development*" (see paragraph [110]).

Issue 4 – conflict with the Code for Transport, Traffic and Parking

The Appellants primary submission regarding transport, traffic and parking concerned the potential impact of the proposed development on pedestrian safety as a result of the direct vehicular access to the lots fronting Heathfield Road. The Co-respondent's traffic engineering expert proposed to combine some driveways and therefore reduce the total number of driveways. By combining some of the driveways, pedestrian safety would be improved in two ways. Firstly, pedestrian crossing distances would be reduced. Secondly, the number of cars exiting from a driveway at the same time would be reduced, therefore reducing traffic on the street at any one time. The Court agreed.

On-site and street parking was also an issue in the appeal. In particular, the Appellants argued that the extra street parking generated by the proposed development would cause a loss of 41 on-street car parking spaces. The Court relevantly held that the Maroochy Plan does not require that the existing potentiality for on-street be maintained. Further, the Court was satisfied that there is capacity in the surrounding streets to cater for the additional street parking demand. The Court was also satisfied that the on-site parking arrangements did not give rise to any conflict with the Maroochy Plan.

The Court determined that there was sufficient need for the proposed development to warrant approval despite the conflicts with the Maroochy Plan

The Court considered whether the need for the proposed development was sufficient enough to warrant approval of the proposed development despite the conflicts with the Maroochy Plan. The Court relevantly held that there was sufficient need for the development for the following reasons:

- The proposed development achieves the criteria set out in Desired Regional Outcome 8 of the *South East Queensland Regional Plan 2009-2031* as it provides housing choice and diversity, provides a diverse residential offering, and improves the general amenity of the area.
- The proposed development will not adversely impact the surrounding amenity.
- The development would involve mixed use development.
- There was sufficient interest in the development as 80% of the lots have been pre-sold.

Conclusion

The Court relevantly held that despite the conflicts with the Code for Reconfiguring a Lot greater weight should be given to the intention of the Village Centre Precinct - which is to provide a range of residential, retail and commercial facilities. The Court also held that there was sufficient need for the development and therefore, the Court dismissed the appeal.

Council did not owe a purchaser of land a duty to take reasonable care in the issuing of a limited planning and development certificate

Shaun Pryor | Daniel Tweedale | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Central Highlands Regional Council v Geju Pty Ltd* [2018] QCA 38 heard before Fraser and McMurdo JJA and Brown J

April 2018

In brief

The case of *Central Highlands Regional Council v Geju Pty Ltd* [2018] QCA 38 concerned an appeal by the Central Highlands Regional Council to the Court of Appeal against an earlier decision of the Supreme Court of Queensland to award damages against the Council for negligent misrepresentation of the current zoning of the land.

The case concerned the issuing of a limited planning and development certificate by the Council to the real estate agent of the seller of land, which incorrectly described the zone as "Town" and the precinct as being "Industrial" when in fact the land was zoned "Rural".

After receiving the limited planning and development certificate from the seller's real estate agent, the purchaser acquired a block of vacant land at Capella in Central Queensland.

The purchaser claimed damages on the basis that the Council negligently misrepresented the present zoning of the land and that it would not have purchased the land if the Council had not made the representation.

We previously reported on the original decision of *Geju Pty Ltd v Central Highlands Regional Council (No. 2)* [2016] QSC 279 in our March 2017 edition of Legal Knowledge Matters.

The Supreme Court at first instance found that the purchaser was a member of an identified class of persons likely to receive the certificate and to whom the certificate would be very likely to lead the purchaser to enter into a transaction of the kind it did enter into, and that the Council therefore owed the purchaser a duty to take reasonable care in describing the zone and precinct in the certificate.

The Court further found that the Council breached that duty by incorrectly describing the zone and precinct in the certificate and awarded damages for the difference between the price paid and the actual value of the land.

The Council appealed the decision of the Supreme Court on the following grounds:

- that it did not owe the purchaser a duty of care in the circumstances of the case;
- that the reliance on the certificate by the purchaser was not reasonable; and
- that if the claim were to succeed, there should be an apportionment of liability against the purchaser's solicitors and the Council's damages should be reduced by 45%.

The Court of Appeal allowed the appeal and found that the Council did not owe a duty of care in this case, but that if it did, there should be an apportionment of liability against the purchaser's solicitors.

Council did not owe the purchaser a duty to take reasonable care in the issuing of the planning and development certificate

The Court of Appeal considered the cases relied on by the Supreme Court at first instance to impose a duty of care. The Supreme Court at first instance found that this was not a novel case and that a duty of care was owed by reference to the High Court's decisions in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 and *L Shaddock & Associations Pty Ltd v Parramatta City Council (No. 1)* (1981) 150 CLR 225 as affirmed by *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

The Supreme Court also referred to the decision of *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 as authority for the proposition that "*a duty of care is owed not only to a person who requests information but also to a person dealing with the recipient of the information*".

The Court of Appeal relevantly stated the test from Esanda as follows (our emphasis):

> *it is necessary for the plaintiff to allege and prove that the defendant knew or ought reasonably to have known that the information or advice would be communicated to the plaintiff, either individually or as a member of an identified class, that the information or advice would be so communicated for a purpose that would be very likely to lead the plaintiff to enter into a transaction of the kind that the plaintiff does enter into and that it would be very likely that the plaintiff would enter into a such transaction in reliance on the information or advice and thereby risk the incurring of economic loss if the statement should be untrue or the advice should be unsound.*

The Court of Appeal found that whilst it was foreseeable that the seller might pass on the zoning information in the certificate to one or more of the people in the very broad class of persons who might rely upon that information in making serious financial decisions (such as an interested purchaser), there was no basis for concluding that the Council knew or ought to have known that the seller would do so or that the Council intended, knew, or ought to have known, that a person would buy the land in reliance upon the zoning information in the certificate.

The Court of Appeal further noted that in this case, four months had elapsed since the date of issue of the certificate and the date that the purchaser entered into the contract to purchase the land and that the identified class of potential purchasers "*would be confined to those to whom the certificate is supplied whilst it is reasonably considered to remain reliable despite the passage of time after issue of the certificate*".

The Court of Appeal further distinguished in *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 on the basis that in that case there was evidence that the Council knew and intended that potential purchasers would rely upon the certificate in deciding whether to purchase the land.

Statutory scheme

The purchaser submitted that the intention on the part of the Council that potential purchasers should rely upon the certificate could be ascertained from the *Integrated Planning Act 1997* (Qld) which required the Council to provide a limited planning and development certificate to an applicant and which also provided compensation provisions where the applicant for the certificate suffered financial loss because of an error in the certificate.

The Court of Appeal noted, however, that the claim the subject of the proceedings was not made under the statutory provisions but under the common law. The Court of Appeal also noted that the purchaser was not the applicant for the certificate in this case.

The Court of Appeal found that in any event the statutory provisions did not prove knowledge by the Council of the reliance, just that it would be reasonable to rely on the information in the certificate and that this was not sufficient to justify the existence of a duty of care in this case.

The Court of Appeal considered the vulnerability of the purchaser but did not find any other basis to impose a duty of care in this case. Accordingly, the Court of Appeal found that the Council did not owe the purchaser a duty of care.

Court found that in the event that the Council did owe the purchaser a duty of care, a finding of apportionment against the purchaser's solicitors was appropriate

In the Supreme Court it was alleged that the purchaser's solicitors were negligent in failing to take steps to obtain an accurate planning and development certificate which identified the correct property and zone.

The Supreme Court declined to make a finding of apportionment against the solicitors on the basis that there was no evidence that any search reasonably open to the purchaser or its solicitors would have revealed the true status of the land.

The Court of Appeal, however, found that it was not relevant whether the solicitors would have discovered the true zoning of the land if they had fulfilled their duty of care as it was admitted that the solicitors' acts or omissions independently caused the purchaser's loss.

Accordingly, the Court of Appeal found that if the Council did owe the purchaser a duty of care, then an apportionment of liability against the purchaser's solicitors in the amount of 45% was appropriate.

The Court of Appeal ultimately allowed the appeal and set aside the original judgment.

Court refuses a residential subdivision proposed close to a poultry farm due to reverse amenity concerns

Alexa Brown | Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Beerwah Land Pty Ltd v Sunshine Coast Regional Council* [2018] QPEC 10 heard before RS Jones DCJ

April 2018

In brief

The case of *Beerwah Land Pty Ltd v Sunshine Coast Regional Council* [2018] QPEC 10 concerned an appeal to the Planning and Environment Court against the Council's decision to refuse a development application (superseded planning scheme) for a development permit for reconfiguring a lot for a residential subdivision.

The Court held that the proposed development failed to provide the prescribed poultry farm buffer, which represented a major conflict with the *Caloundra City Plan 2004* (**City Plan 2004**), due to the potential reverse amenity implications of the proposed development. The Court dismissed the appeal and upheld the Council's decision to refuse the development application on the basis that there were no sufficient grounds to approve the proposed development despite the conflict.

Applicant lodged development application (superseded planning scheme)

The land the subject of the proposed development is relevantly located near existing residential development to the north-east, south and east. It is also located near a poultry farm and feed mill to the north-west.

The Applicant made a development application (superseded planning scheme) to the Council for reconfiguring a lot (1 lot into 16 lots), which was code assessable development under the then City Plan 2004.

Council failed to decide the development application in time

The Council failed to extend the decision-making period and the Applicant issued the Council with a Deemed Approval Notice, in response to which the Council purported to issue a Decision Notice which sought to limit the proposed development to three lots on the basis that "*residential dwellings are not permitted within the 400m poultry farm buffer contour*" (at paragraph [5]).

Council refused development application

Proceedings were commenced in the Planning and Environment Court and the Court determined that it was appropriate for it to exercise its discretion under section 440 of the now repealed *Sustainable Planning Act 2009* and return the development application to the decision making stage. The development application was subsequently refused by the Council on the basis that the proposed development conflicted with the then City Plan 2004.

Issues in the appeal

The Council relied on the following grounds to justify its decision to refuse the development application:

- failure to provide adequate buffers to take account for the nearby poultry farm;
- failure to appropriately integrate with surrounding land uses; and
- failure to provide suitable traffic access.

The Court rejected that the issues pertaining to traffic and layout were relevant. The issues therefore in the appeal were odour and reverse amenity arising due to the close proximity of the proposed development to the poultry farm.

Conflict with the City Plan 2004

The Appellant applicant contended that the odour from the poultry farm which was likely to be detected by future residents would not be greater than the "*Queensland odour criterion of 2.5OU, 99.5th percentile*" and would therefore not impact the amenity of the proposed development (at paragraph [45]).

The Council contended that there were flaws in the Appellant's odour modelling, namely that it was based on insufficient data. The Council therefore argued that the conclusion that the odour was not greater than the odour criterion was not in fact suitably supported by the evidence. The Council also contended that the proposed development may suffer reverse amenity impacts from the poultry farm.

The Court was unconvinced that the proposed development would not be affected by odour and agreed with the Council that the modelling was insufficient. The Court concluded that there were conflicts with the City Plan 2004 because there was a risk of an unacceptable reverse amenity impact due to an inadequate buffer separating the poultry farm and the proposed residential development.

Sufficient grounds

Having established the existence of material conflicts with the City Plan 2004, the Court turned to consider whether there were sufficient grounds to warrant approval notwithstanding the conflict.

The Court applied the test laid out in *Weightman v Gold Coast City Council* [2003] 2 Qd R 441, namely:

- examine the nature and extent of the conflict;
- determine if there are any relevant planning grounds and if the conflict can be justified on those grounds; and
- determine if the grounds in favour of the Applicant are, on balance, sufficient to justify approving the application notwithstanding the conflict (at paragraph [36]).

The Applicant agreed that following were sufficient grounds to justify the appeal notwithstanding the conflicts:

- desirability of the physical characteristics of the proposed development's location; and
- contribution to housing growth targets.

The Court was not persuaded however that there were sufficient grounds to justify approval notwithstanding the conflicts and, in particular, that there was no sufficient demand for additional residential development in that location.

The Court therefore dismissed the appeal and upheld the Council's decision.

Court allowed an appeal against a decision to refuse a development application for a combined service station finding sufficient grounds to support an approval

Rebecca Tang | Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *K & K GC Pty Ltd v Gold Coast City Council* [2018] QPEC 9 heard before Kefford DCJ

April 2018

In brief

The case of *K & K GC Pty Ltd v Gold Coast City Council* [2018] QPEC 9 concerned an Applicant appeal against the Council's decision to refuse a development application for a combined service station, coffee shop and take away food premise.

The Court allowed the appeal and held that there were sufficient grounds to justify approval of the proposed development despite the conflicts with the *Gold Coast Planning Scheme 2003* (**2003 Planning Scheme**).

Planning framework

At the time the development application was made, the 2003 Planning Scheme was in effect. The 2003 Planning Scheme designated five of the six lots the subject of the development application as being within the Residential Choice Domain, with the remaining lot designated as being within the Detached Dwelling Domain.

Relevantly, the *Gold Coast City Plan 2016* (**2016 Planning Scheme**) underwent public consultation in June and July 2014, approximately 15 months prior to the time the development application was made. The 2016 Planning Scheme designated all six lots as being partly within the Low Density Residential Zone and partly within the Medium Density Residential Zone and included the site in the suburban neighbourhood designation under the Strategic Framework.

Issues in the appeal

The issues in the appeal were as follows:

- the nature and extent to which the proposed development conflicted with the 2003 Planning Scheme having regard to the following:
  - a take away food premises and a fast food outlet were identified as undesirable uses;
  - the service station was an inappropriate use given the following:
    - insufficient setbacks;
    - unacceptable impact on residential character and amenity;
    - impermissible traffic implications;
    - the absence of a demonstrated need.
- whether there were sufficient grounds to justify the approval of the proposed development despite the conflict with the 2003 Planning Scheme; and
- whether the 2016 Planning Scheme should be given significant weight in the assessment of the proposed development.

Conflict with the 2003 Planning Scheme

The 2003 Planning Scheme relevantly provided that a takeaway food premise and a fast food premise were generally considered as inappropriate under the relevant zones. The Court agreed that the provision, on face value, indicated a clear policy that take away food and fast food outlets are not to be developed in either the Residential Choice Domain or Detached Dwelling Domain. However, the Court concluded that the proposed development should not be refused on the basis that the development would be of benefit to the local residents and would not have a significant impact on the hierarchy of centres.

The Court also rejected the Council's "unfounded" arguments relating to the insufficient setbacks and unacceptable impact on residential character and amenity. The Court found that the design of the proposed development not only fulfilled the requirements of the 2003 Planning Scheme in regards to the setbacks, residential character and amenity, but it also "*impresses as an exceptional design that not only respects the existing streetscape character, but also enhances it*" (see paragraph [64]).

The Council also submitted that the proposed development would give rise to unacceptable safety issues for motorists due to the short distance to decelerate when entering the site which conflicted with the Service Station Code under the 2003 Planning Scheme. The Court found that the proposed development satisfied the performance criterion and would not result in an unreasonable or intolerable increase in the safety risk that drivers presently confront whilst travelling in the area.

With respect to need, the Council conceded that there was a low level of need for the proposed service station but argued that this low level of need was insufficient in satisfying the Service Station Code. The Court had relied on its previous decision in *United Petroleum Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 8, in which it observed the following to justify its position (at paragraph [81]):

> *A need does not have to be particularly strong to be a demonstrable need. The provision ought however, consistently with the ordinary principles of construction, as they are applied to planning schemes, be interpreted as referring to a real or substantive (rather than trivial, immaterial, minor or insignificant) need which is capable of being shown or logically proved.*

The Court concluded that a decision to approve the proposed development would not conflict with the Service Station Code as there was a higher need for the proposed development than that conceded by the Council.

Sufficient grounds to justify approval

The Court considered whether there were sufficient grounds to justify the approval despite the proposed development conflicting with the 2003 Planning Scheme, in particular whether there was a determinative need as well as other matters of merit. The Council argued that there was no relevant demonstrated need for a 24-hour service station, as there were already pre-existing 24-hour service stations within the area, and that the low traffic volume in the area at night was indicative of the low level of need.

The Applicant argued that the existing 24-hour service stations within the area were reflective of the "*trends and expectations of the community in relation to the access of petrol stations and their associated convenience stores*" (see paragraph [255]). The Court agreed with the Applicant's submission that access to a 24-hour service station would be beneficial to the physical wellbeing of the community.

The Court also found that a 24-hour service station would extend the choice available to residents and therefore was satisfied that there was a demonstrated need for the proposed service station to operate 24 hours a day.

In relation to the 2016 Planning Scheme, the Council contended that the Court should exercise its discretion to afford the 2016 Planning Scheme significant and overwhelming weight on the basis that the draft 2016 Planning Scheme was publicly exhibited between June and July 2014 which was approximately 15 months prior to the submission of the development application and that the proposed development conflicted with the 2016 Planning Scheme.

The Court concluded that it would be unfair to give the 2016 Planning Scheme determinative weight as the Council had not referenced the 2016 Planning Scheme in its decision notice. Additionally, the Court found that the decision to approve the proposed development would not cut across the 2016 Planning Scheme and therefore did not create significant conflict with the 2016 Planning Scheme so as to warrant refusal of the development application.

The Court therefore found that there were sufficient grounds to justify the approval of the development application despite the conflicts with the 2003 Planning Scheme.

Planning and Environment Court confirms costs do not automatically follow success

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wason v Gympie Regional Council (No. 2)* [2018] QPEC 012 heard before Everson DCJ

April 2018

In brief

The case of *Wason v Gympie Regional Council (No. 2)* [2018] QPEC 012 concerned an application to the Planning and Environment Court for costs brought by the Appellant following a successful appeal against the Council's decision to refuse a development permit for reconfiguring a lot.

The Court dismissed the application on the basis that the Appellant was not completely successful and that the Council's concerns in respect of the development application were legitimate.

Parties' contentions

The Appellant contended as follows:

- costs should be awarded as the Appellant was successful in respect of every issue in dispute in the appeal; and
- costs should be awarded as the Council acted unreasonably in its approach to the appeal as it incorrectly applied its own planning scheme.

In response, the Respondent submitted as follows:

- the Appellant was not successful in respect of every issue in dispute in the appeal as the Court preferred the evidence of the Council about the suitability of the land;
- the Court accepted the Council's argument that the land contained some good quality agricultural land and was not entirely limited to grazing as contended for by the Appellant; and
- the Council correctly applied its own planning scheme regarding the fragmentation and preservation of good quality agricultural land.

The Court noted that the Council was successful in demonstrating that the land did contain good quality agricultural land and, further, that the Council had genuine concerns about the preservation of good quality agricultural land and found that this was reflected in the relevant planning scheme.

Court has discretionary power to award costs

The Court noted its discretionary power to award costs under section 457(1) of the now repealed *Sustainable Planning Act 2009* and had regard to its decision in *Ferreyra v Brisbane City Council* [2016] QPEC 010 where it held as follows:

> *The discretion is a broad one, to be exercised judicially, but without any presumption that costs ought to follow the event, or otherwise, on the basis that there is some qualified protection against an adverse costs order.*

Court dismissed application for costs

The Court found that the Appellant failed to present a strong argument as to why costs should be awarded. The Court was unconvinced that a costs order was appropriate in circumstances where the Council held genuine concerns in relation to the fragmentation of good quality agricultural land.

Council allows Calderbank offer to lapse but is not required to pay costs

Alexa Brown | Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Quintenon Pty Ltd v Brisbane City Council* [2018] QPEC 13 heard before Rackemann DCJ

April 2018

In brief

The case of *Quintenon Pty Ltd v Brisbane City Council* [2018] QPEC 13 concerned an application in the Planning and Environment Court by the Applicant for costs on a standard basis following its success in an earlier appeal in which it successfully overturned a deemed refusal of a mixed use development for aged care accommodation, assisted living units, medical consulting rooms and health training facilities.

The Applicant sought costs in the following three circumstances:

- costs on an indemnity basis from the date a Calderbank letter of offer was made;
- costs for the Council's adjournment of the costs hearing; and
- costs for the costs application.

The Council argued that each party should bear its own costs as was the default position under section 457 of the now repealed *Sustainable Planning Act 2009* (**SPA**).

The Court dismissed the application for costs relating to the Calderbank letter and the application for costs of the costs application but granted costs on a standard basis for the delay caused by the Council's adjournment of the costs application.

Background

The Applicant lodged with the Council a development application for a material change of use which was refused primarily due to conflicts with the now superseded *City Plan 2000* (**City Plan**) particularly in relation to height limits due to the larger than normal floor-to-ceiling ratios.

The parties proceeded to undergo an alternative dispute resolution process, which failed to deliver an outcome. The Applicant commenced a successful appeal against the Council's decision.

Court's discretion to award costs

The Court noted its broad discretion under section 457 of the SPA. The Court also noted its previous decision in *Hydrox Nominees Pty Ltd v Noosa Shire Council* [2014] QPEC 60 where it held that the Court's discretion is open (at paragraph [3]).

Applicant claimed entitlement to costs following successful appeal

The Applicant claimed it was entitled to costs for the following reasons:

- the Council failed to engage with the Calderbank offer;
- the Council failed to inform the Applicant of the concerns Council had with its development proposal;
- the Council failed to engage an expert;
- the Council advanced an argument that there was no community or economic need for the proposed development without engaging an expert and while recognising out of Court there was an economic need for the proposed development; and
- the Council abandoned grounds during the course of the hearing.

The Court determined that failing to engage an expert to counter the Applicant's expert did not warrant a costs order. Furthermore, the Court held that the Council's conduct in the initial appeal, including abandoning grounds and advancing an argument concerning the economic or community need for the proposed development, was acceptable.

The Court afforded considerable time to whether it was reasonable for the Council to allow the Calderbank offer to lapse.

Applicant presented a Calderbank offer to the Council offering a significant reduction in height before the appeal

The Applicant sent a "without prejudice" letter to the Council before the appeal was commenced offering to modify their proposal to satisfy the height limit in the City Plan. The Council was amenable to the reduction in height, however, it was concerned about how the Applicant would address the additional issues raised by its experts. The Council did not inform the Applicant that it was amenable to the height reduction.

In response to the Calderbank offer, the Council sought additional plans from the Applicant which addressed the following:

- the changes to the proposed development; and
- the new issues arising from the modified proposal, which included:
  - traffic generation;
  - building form;
  - future cross block link;
  - deep planning; and
  - overshadowing.

The Applicant refused to provide the detailed plans until the Council had accepted their offer. The Council allowed the offer to lapse.

Court determined that it was reasonable for the Council to let the Calderbank offer lapse

The Court determined that it was reasonable for the Council to let the Calderbank offer lapse. The Court relied upon the case of *J & D Rigging Pty Ltd v Agripower Australia Limited & Ors* [2014] QCA 23 in which it was held that the Court can consider the following matters when determining the reasonableness of rejecting a Calderbank offer (at paragraph [6]):

- the stage of the proceeding at which the offer was rejected;
- the time allowed to consider the offer;
- the extent of the compromise offered;
- the offeree's prospects of success, assessed as at the date of the offer;
- the clarity with which the terms of the offer were expressed; and
- whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it.

The Court relevantly determined that the offer was given at an early stage at which time the Council's concerns were still legitimate even if they would have failed at a later date. Furthermore, although the offer was kept open for an adequate time and the terms were clear, the terms would have necessitated an absolute acceptance or refusal of the modifications to the development proposal.

The Court found that the terms of the Calderbank offer did not allow for the height issue to be separated from the additional issues, thereby requiring the Council to accept or refuse the proposal as a whole. Therefore, if the Council had accepted the Calderbank offer they would also have given away their ability to litigate or negotiate on the additional issues.

The Court found that the Council was acting reasonably in letting the Calderbank offer lapse in order to resolve the additional issues with the development application. The Court therefore determined that the lapse of the Calderbank offer did not enliven an entitlement to costs.

Court satisfied that the Applicant entitled to its costs thrown away by adjourned direction hearing

The Court held however, that the Council should pay the Applicant's costs on a standard basis for the adjournment of the costs hearing requested by the Council to procure additional information and the subsequent directions hearings required due to the adjournment.

Conclusion

The Applicant was unsuccessful in their application for costs in relation to the lapsed Calderbank offer. However, the Applicant was awarded costs arising from the adjourned costs hearing and the consequential need for a directions hearing in relation to the costs application, brought about by the Council.

Distributor-retailer gets complete costs having enjoyed complete success

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MC Property Investments v Unity Water (No. 2)* [2018] QPEC 1 heard before Robertson DCJ

April 2018

In brief

The case of *MC Property Investments v Unity Water (No. 2)* [2018] QPEC 1 concerned an application to the Planning and Environment Court by the Respondent distributor-retailer for costs following its success in defending an earlier challenge brought by the Appellant against an infrastructure charges notice.

The Court found that the Appellant had no reasonable prospects of success in its appeal against the infrastructure charges notice and held that the Appellant should pay the Respondent's costs, including those associated with the costs application.

Appeal against the Respondent's infrastructure charge notice

The Appellant requested that the Respondent internally review the relevant infrastructure charges notice. The Respondent decided not to withdraw the infrastructure notice. The Appellant appealed the Respondent's decision to the Planning and Environment Court. The Court dismissed the appeal for the following reasons:

- the Appellant had failed to establish any of the grounds in section 99BRBO(3) of the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*;
- the Appellant had erroneously focused on the concept of "additional demand" in section 99BRCJ of the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*; and
- the Appellant had relied on a "*highly speculative argument*" which purported that the development did not create additional demand on truck infrastructure despite there being an additional 19 connections to the trunk infrastructure network as a result of the development.

Having been successful in the appeal, the Respondent made an application for costs on a standard basis. The Appellant opposed the costs application and referred to the Respondent's submission as being a "*cheap shot*" and that there was "*cynicism implicit in the Respondent's submission*" (see paragraph [2]).

Relative success of the parties

The Court noted its broad discretion to award costs and that it is to be exercised judicially. The Court acknowledged that the success of a party is not a determinative factor but it is clearly relevant and can be a significant consideration in some cases.

The Court found that "*the Appellant never had any reasonable prospects of success*" and that the Respondent enjoyed complete success in the appeal, which it was obliged to contest (see paragraph [9]).

On that basis, the Court held that the Appellant should pay the Respondent's costs on a standard basis.

Land Court restates principles of valuation in dismissing appeal

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Land Court in the matter of *Aria Securities Pty Ltd as TTE v Valuer-General* [2018] QLC 2 heard before WA Isdale

April 2018

In brief

The Land Court's decision in *Aria Securities Pty Ltd as TTE v Valuer-General* [2018] QLC 2 concerned an appeal against the Valuer-General's value of the Appellant's land located on the corner of Merivale and Peel Streets in South Brisbane.

The Valuer-General initially valued the land at $30,000,000. The value was reduced after objection to $23,000,000. The Appellant appealed that decision to the Court. The Appellant contended that the correct valuation of the subject land should be revised to $20,800,000.

The subject land is included within a Principal Centre under the Strategic Framework and the High Density Mixed-Use Zone under the *Brisbane City Plan 2014*. The Court was satisfied that a block of land of its size (2,738m²) in this zone can be developed to a maximum building height of 30 storeys with a maximum site cover of 80%. The Appellant's valuer and the Valuer-General's valuer provided a joint report to the Court where they considered three comparable sales.

The Court found that the valuer for the Appellant used the wrong valuation method. The Court determined that the Appellant's valuer "*contaminated the process*" by considering the applied value in order to reach the valuation. The Court considered this to be a "*fundamental error*" (see paragraph [22]), where "*no reliable conclusion on valuation could be safely drawn from the valuation evidence* [provided by the Appellant]" (see paragraph [40]).

The Court dismissed the appeal and confirmed the valuation contended for by the Valuer-General because the Appellant failed to prove a more appropriate value.

Highest and best use of the land

The Valuer-General contented that the value of the subject land was $23,000,000 whereas the Appellant contended that the value of the subject land was $20,800,000. There was no dispute in relation to the highest and best use of the land. Both the Valuer-General's valuer and the Appellant's valuer agreed that the highest and best use of the land would be for a 30-storey development with "*public open space and design excellence*" (see paragraph [3]).

Agreed valuation method

Both valuers agreed to value the subject land by comparing the land, on a rate per square metre basis, with vacant or lightly improved sales of land in fee simple with existing use rights and allowing for any encumbrances (see paragraph [12]). The valuers analysed three comparable sales. They arrived at the same values except sale one.

The comparable sales were as follows:

- ***Sale One*** – the Valuer-General's valuer valued the land at $19,821,047 whilst the Appellant's valuer valued it at $18,728,561, being a $1,092,486 difference between the two;
- ***Sale Two*** – the Valuer-General's valuer and the Appellant's valuer both valued the land at $21,322,338; and
- ***Sale Three*** – the Valuer-General's valuer and the Appellant's valuer both valued the land at $22,061,439.

Dispute regarding Sale One

The Appellant's valuer admitted under cross-examination that, in order to reach his valuation, he considered the applied site value being the reduced valuation arrived at following objection and arrived at in another process. This method was not the method that the two valuers agreed to use in their joint report. The Court held that the Appellant's valuation method was not acceptable as the Appellant's valuer did not value the land in the agreed way and "*contaminated*" the process by considering the applied value of the site (paragraph [22] and [23]).

The Court's preferred valuation method

The Court referred to a number of cases in which the correct valuation method was used. The Court referred in particular to the following relevant principles from the cases:

- ***Thomson v Department of Natural Resources and Mines*** **[2007] QLC 92 at [7]** – "*The question before the Court is the correct valuation of the subject land, not the correct valuation of an area*".
- ***Bignell v Chief Executive Department of Lands*** **(AV92-65 unreported Land Appeal Court 4 March 1996) at [11]** – "*What is to be decided…is the proper value of the subject land by reference to sales evidence about comparable unimproved properties*".
- ***Musumeci v Valuer-General*** **(2014) 35 QLCR 185** – "*It has long been recognised that it is desirable that valuations of comparable lands made for the purposes of the Act should bear proper relativity to one another, provided the valuations are soundly based*".
- ***NR and PG Tow v Valuer-General*** **(1978) 5 QLCR 378 at [381]** – "*Courts of the highest authority have laid down that the best value is to be found in the sales of comparable properties, preferably unimproved, on the open market around about the relevant date of valuation and between prudent and willing, but not over anxious parties*".

Court confirms value contended for by Valuer-General

The Court found that the Appellant's valuer did not use an acceptable or reliable method to value the land. The Court noted that the Appellant's valuer did not use the method agreed to in the joint report with the Valuer-General's valuer. The Court decided that it was not acceptable to depart from the agreed method and blend the applied value with the valuation derived from the analysis of the comparable sales. The Court held that the method utilised by the Appellant's valuer was unreliable and departed from the valuation method accepted by the Court.

The Valuer-General's valuer did not use the applied site values of the three sales and the Court was therefore happy to rely on these values.

Decision

The Court confirmed the value contended for by the Valuer-General's, being $23,000,000, as no reliable alternative valuation could be drawn from the Appellant's valuation evidence. The appeal was dismissed.

COLIN BIGGERS & PAISLEY LAWYERS

Land Court reduces the value of the land for the Tennyson Reach development based on the Appellant's analysis of the comparable sales

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Land Court in the matter of *Body Corporate for 'Tennyson Reach' Community Titles Scheme 39925 v Valuer General* [2018] QLC 3 heard before WA Isdale

April 2018

In brief

The case of *Body Corporate for 'Tennyson Reach' Community Titles Scheme 39925 v Valuer General* [2018] QLC 3 concerned an appeal to the Land Court against the Valuer-General's valuation of land comprising three sites of the Tennyson Reach development on King Arthur Terrace in Tennyson.

The Valuer-General contended that the value of the subject land was $18,500,000. The Appellant appealed the determination to the Land Court and argued that a valuation of $14,500,000 was more appropriate.

The Court favoured the Valuer-General's evidence regarding the highest and best use of the subject land and the valuation method but favoured the Appellant's analysis of the comparable sales, with the result that the Appellant's appeal was allowed and the value of the subject land was reduced.

Issues in the appeal

The appeal concerned the following issues:

- the highest and best use of the subject land as at the valuation date;
- the correct valuation method; and
- the comparable sales to be used to value the subject land.

The highest and best use of the subject land

The subject land is comprised of three sites which are subject to easements which comprise the Tennyson Reach development. Site One is 10,000m² and is improved with two residential towers. Site Two is 6,387m² and is improved with one residential tower. Site Three is 1,931m² and is located on the opposite side of the road and is improved with a gymnasium, swimming pool and a waste disposal facility for the benefit of the residential towers on Site One and Site Two. As at the valuation date, Site One and Site Two were in the High Density Residential Zone and Site Three was in the Special Purpose (Utility Services) Zone under the *Brisbane City Plan 2014*.

The Appellant's valuer opined that the highest and best use of the subject land was the current use with minor changes to Site Two. The Valuer-General's town planning expert disagreed and argued that a more intense residential use was the highest and best use of all three sites comprising the subject land.

The Valuer-General's town planning expert argued that the *Brisbane City Plan 2014* allows for greater height limits than the planning scheme which applied at the time of construction, being the *Brisbane City Plan 2000*. It was argued that the greater height limits resulted in additional development opportunities.

The Appellant's valuer opined that the greater height limits under the *Brisbane City Plan 2014* would not have resulted in higher development due to economic constraints. The Court noted that this was merely the opinion of the valuer and not supported by any relevant analysis.

The Court agreed with the Valuer-General's town planning expert that the *Brisbane City Plan 2014*, which allows for greater building height, would enable greater development potential for the subject land. The Court noted that the Appellant did not present evidence from a town planning expert in response to the Valuer-General's town planning expert.

The Valuer-General also relied on evidence given by a valuer. The Court preferred the evidence of the Valuer-General's valuer, which was consistent with the Valuer-General's town planning expert, being that the highest and best use of the subject land was specifically a 15 storey residential building on each of Site One and Site Two, and a low to medium density 3 storey residential building on Site Three.

Correct valuation methodology

Both valuers used a direct comparison method to determine the value of the subject land.

The Appellant's valuer used the following five bases for the comparison:

- rate per square metre of site area;
- rate per potential or approved unit;
- rate per potential or approved two bedroom equivalent;
- rate per potential or approved bedrooms; and
- rate per square metre of gross floor area.

The Valuer-General's valuer used one basis, being a rate per square metre of site area.

The Court determined that the correct method to value the subject land was to apply a rate per square metre, and that the other methods that the Appellant's valuer sought to use could not be used because the units of measurement could not be quantified by the existing buildings (see paragraph [43]).

Expert witnesses considered a number of comparable sales to determine the value of the land

The experts' joint report considered eleven comparable sales for the purpose of valuing the subject land. The Appellant's valuer relied on sales numbered one, two and three, and valued all three separate sites as a whole. The Valuer-General's valuer relied on sale number two and sales numbered four to eleven, and valued Site Three separately to Site One and Site Two.

The Valuer-General's valuer put significant reliance on sale six which the Court deemed to be incomparable as the sale was not in the conventional market. Furthermore the Valuer-General's valuer did not provide an explanation as to how the unadjusted rate used in the valuation was determined. The Court held that "*the sales relied upon by the respondent do not support the value claimed to be deduced from the sales*" (at paragraph [101]).

The Court was satisfied that the Appellant's comparable sales represented the range of possible values for the subject land. It held that the Valuer-General's comparable sales evidence did not establish a satisfactory basis for the Court to accept its valuation as correct.

Court determined that the Appellant's valuation was preferred

In respect of the issues in the appeal, the Court relevantly found as follows:

- the Court agreed with the Valuer-General's town planning expert that the highest and best use of the subject land was one with more residential development;
- the Court determined that the correct valuation method was to apply a rate per square metre of site area; and
- the Court determined that the Appellant's valuation, based on the comparable sales one, two and three, was correct.

The Court agreed with the valuation contended for by the Appellant's valuer and held that the value of the subject land was $14,500,000.

Planning and Environment Court determines that the Planning Act 2016 applies to an appeal commenced post 3 July 2017

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21 heard before Kefford DCJ

May 2018

In brief

The case of *Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21 concerned an appeal to the Planning and Environment Court by Jakel Pty Ltd, Nickall Pty Ltd and Agia Pty Ltd against the refusal by the Brisbane City Council of a development application in respect of land located at 28-30 Attewell Street, Nundah for the following:

- partial demolition and relocation of an existing pre-1947 dwelling house forward on the subject site;
- reconfiguration of the boundary of the existing two lots to create a front lot containing the dwelling house and a rear battle-axe lot; and
- a three storey building containing six units on the rear lot.

The Council alleged conflict with a number of provisions of the *City Plan 2014* (**City Plan**), particularly that the proposed development conflicted with provisions in respect of proximity to public transport and inadequate landscaping, character and amenity.

The Court dismissed the appeal on the basis that the proposed development conflicted with the City Plan, and that an appropriate balance between infill development opportunity and other planning considerations, such as the existing and planned character and amenity of the relevant street, could not be achieved.

Appropriate decision framework

The development application was lodged and assessed by the Council under the *Sustainable Planning Act 2009* (**SPA**). Whilst the parties agreed that the SPA continued to apply to the Council's assessment and decision of the proposed development, the parties were in dispute about the decision framework that applied to the appeal.

The Appellants submitted that the Court is to assess and decide the appeal pursuant to section 45 of the *Planning Act 2016* (**Planning Act**). However, the Council submitted that the Court was required to assess and decide the appeal under the regime in the SPA.

The Court examined the transitional provisions in the Planning Act in relation to proceedings such as this, which had not commenced when the Planning Act came into force.

The Court found that the decision framework in the Planning Act is to apply to an appeal commenced after 3 July 2017.

Relevantly, the Court held that there is an express distinction in section 311 of the Planning Act between an appeal that was started under the SPA, to which the Planning Act states the SPA will continue to apply, and an appeal started under the Planning Act, to which the Planning Act states that the proceeding is to be brought under the Planning Act.

The Court was satisfied that the broader legislative intent supports the Court's interpretation relevantly for the following reasons:

- there is an express distinction between a right of appeal started under SPA and that which is started under the Planning Act in section 76 of the *Planning and Environment Court Act 2016* (**PEC Act**);
- section 312 of the Planning Act provides that the right to appeal under the SPA applies only for matters listed in that section which supports the intent that where the Planning Act provides a right of appeal, the appeal is to be commenced, heard and determined under the Planning Act; and
- the appeal is by way of hearing anew, in accordance with section 43 of the PEC Act and a different decision framework is therefore acceptable, given that the decision is by way of a hearing anew.

The Court concluded that the combined effect of section 46(2) of the PEC Act and sections 45(6) and (7) of the Planning Act is to require the Court to assess the development against the statutory instruments that applied at the time the development application was properly made. It went on to hold that planning schemes are statutory instruments under section 7 of the *Statutory Instruments Act 1992*.

Consequently, the Court held that the combined effect of section 311(4) of the Planning Act and section 76(3) and section 43 of the PEC Act required the Court to assess the proposed development within the framework of the Planning Act regime. However, the assessment is against the planning scheme as it applied at the time the development application was properly made, with weight to be given to the amendments to the planning scheme to the extent the Court considers appropriate.

Court found that the proposed development did not conflict with the Low-Medium Density Residential Zone Code or the Nundah District Neighbourhood Plan Area in the City Plan

The Council alleged conflict with the City Plan, particularly Overall Outcome 7(b)(i) in the Low-Medium Density Residential Zone Code, and Overall Outcome 3(a) in the Nundah District Neighbourhood Plan Area, which relevantly limits development to the following:

- "*predominantly 2 storeys, or of up to 3 storeys in height where located within easy walking distance of a public transport node*";
- "*the district has a mix of low density and low–medium density housing as its dominant land use. Medium density housing is concentrated in close proximity to major transport nodes…*".

The Appellants submitted that Overall Outcome (7)(b)(i) was not a prescriptive limit on built form to two storeys, and that alternatively the proposed development was "*within easy walking distance*" of several public transport nodes.

Although the Court held that the proposed development was not within "*easy walking distance*" of a public transport node, it held that the reasoning in *Lake Maroona Pty Ltd v Gladstone Regional Council* [2017] QPEC 25 was apposite and that Overall Outcome (7)(b)(i) demonstrated a clear preference for two storey development to predominate, but did not exclude three storey development where it is located outside the easy walking distance to a public transport node.

Therefore, despite the proposed development being three storeys high and outside "easy walking distance" of a public transport node, the Court held that the proposed development was not in conflict with Outcome (7)(b)(i) as the form of the relevant street will still be predominantly two storeys.

With respect to Overall Outcome (3)(a) in the Nundah District Neighbourhood Plan Area, the Court held that the Overall Outcome states that the medium density uses are to be "dominant" and "concentrated", but does not state that the uses are the only acceptable land use. Therefore, the Court held that approving the proposed development would not result in a conflict.

Court found that the proposed development would represent an overdevelopment of the site and an unacceptable amenity outcome

The Council also alleged that the proposed development would have an unacceptable built form, particularly with respect to "*building height, bulk, scale, transition, setbacks and separation*", and would have an unacceptable character and amenity outcome in relation to the relevant streetscape (see [152]).

The Appellants submitted that the proposed development complemented the streetscape by retaining the pre-1947 dwelling in the front lot, that the built form is appropriate in relation to the subject street, and that the multiple dwelling nature of the development application excused the limited separation and transition between the pre-1947 dwelling and the three storey dwelling.

The Court, however, held as follows:

- due to the reconfiguration of lot boundaries the building setback and separation are to be assessed individually, which resulted in a significant conflict with the City Plan;
- the three storey building would be visible behind the pre-1947 dwelling resulting in lower street amenity; and
- the proportion of the built form to open space was not appropriate in the relevant street.

Overall, the Court held that the proposed development represented "*an overdevelopment of the site in its locational context and an unacceptable outcome in terms of visual impact on the streetscape and amenity of the residents of the proposed development and adjoining land*" (see [278]).

Court found that the proposed development did not achieve an appropriate balance

The Appellants submitted that the Court should consider the following relevant matters:

- the proposed development would deliver infill development opportunities;
- the proposed development would help to achieve a balanced mix of housing densities and types;
- the proposed development would be located close to a major centre and regular bus services; and
- the proposed development would assist in achieving sustainability principles around walkable catchments to major centres and public transport.

The Court rejected all of these matters and found that they did not balance out the proposed development's conflict with the City Plan, particularly in respect of the existing and planned character and amenity of the relevant street.

The appeal was therefore dismissed.

Planning and Environment Court refuses an application for the creation of an additional lot at Tamborine Mountain

Shaun Pryor | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Guerin & Anor v Scenic Rim Regional Council & Ors* [2018] QPEC 016 heard before Everson DCJ

May 2018

In brief

The case of *Guerin & Anor v Scenic Rim Regional Council & Ors* [2018] QPEC 016 concerned an appeal to the Planning and Environment Court by the Appellants for a development application for reconfiguring a lot (1 into 2) in respect of land located at Tamborine Mountain, which was refused by the Scenic Rim Regional Council.

The Council alleged conflict with a number of provisions of the *Beaudesert Planning Scheme 2017* (**Planning Scheme**), in particular the Tamborine Mountain Zone Code and the Reconfiguring a Lot Code, which restricted the creation of additional lots in the Village Residential Precinct within which the land was located.

The Planning and Environment Court dismissed the appeal on the basis that the proposed development was in significant conflict with the provisions of the Planning Scheme and that the grounds identified by the Appellants were not sufficient to justify approving the proposed development, notwithstanding the conflict.

Applicable legislative regime

The Court firstly addressed the fact that whilst the development application was made under the *Sustainable Planning Act 2009* (**SPA**), the *Planning Act 2016* (**Planning Act**) and *Planning and Environment Court Act 2016* had commenced shortly afterwards.

The Court determined that under section 311 of the Planning Act, the proceedings could only be brought under the Planning Act as the appellants "*had, immediately before the commencement, a right to start proceedings*" (see [3]).

However, the Court found that whilst the appeal was brought under the Planning Act, the relevant provisions of the SPA applied to the hearing and determination of the issues in the appeal because that was the legislative regime in place at the time the assessment manager decided the development application giving rise to the appeal.

The Court noted that under the SPA, the assessment manager's decision must not conflict with the Planning Scheme unless there are sufficient grounds to justify the decision, despite the conflict.

However, it should be noted that another judge of the Planning and Environment Court in *Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21 has subsequently held in similar circumstances that the relevant provisions of the SPA do not apply to the hearing and determination of the appeal and the relevant provisions of the Planning Act apply to the appeal. Accordingly, the matter is now the subject of significant legal uncertainty.

Court found that the proposed development conflicted with the Tamborine Mountain Zone Code in the Planning Scheme

The Council alleged conflict with the Planning Scheme, in particular Overall Outcomes 58 and 59 and Specific Outcome 49 of the Tamborine Mountain Zone Code and Specific Outcome 7 of the Reconfiguring a Lot Code.

In respect of the Tamborine Mountain Zone Code, Overall Outcome 59 and Specific Outcome 49 required reconfigurations to comply with the "*standards*" in Table 5.4.6B of the Reconfiguring a Lot Code which relevantly provided that additional lots are not created unless in accordance with the development approval for a material change of use that has not lapsed.

The Appellants did not have such a development approval but submitted that the restriction and qualification could not be properly defined as a "*standard*" within the dictionary meaning of that word.

The Court examined the dictionary definition of "*standard*" but rejected the Appellants' technical submission on the basis that the meaning of the provision was clear.

The Court found that Table 5.4.6B of the Reconfiguring a Lot Code did not allow further reconfigurations in the Village Residential Precinct of the Tamborine Mountain Zone without an existing development approval which had not lapsed, and found that the proposed development was consequently in conflict with Overall Outcome 59 and Specific Outcome 49.

In respect of the alleged conflict with Overall Outcome 58, the Appellants submitted that the proposed development was consistent with the reasonable expectations of residents in the zone, as the proposed development would be consistent with the "*established pattern of subdivision in the vicinity of the land*" (see [11]).

However, the Court heard evidence from the town planning expert for the Appellants who acknowledged that the reasonable expectations of residents of the zone are derived from the provisions of the Planning Scheme.

The Court found that the proposed development was not consistent with the reasonable expectation of residents of the zone, given the clear conflict with Table 5.4.6B of the Reconfiguring a Lot Code in the Planning Scheme and the fact that no new lots had been created in the Village Residential Precinct of the Tamborine Mountain Zone since the commencement of the Planning Scheme.

Court found the proposed development conflicted with the Reconfiguring a Lot Code in the Planning Scheme

The Council also alleged conflict with Specific Outcome 7 of the Reconfiguring a Lot Code, which relevantly provided that "*further division of land in the … Village Residential Precinct … is not envisaged as supporting infrastructural services cannot be provided*".

The Appellants submitted that there was no conflict with Specific Outcome 7 on the basis that on-site water and sewerage infrastructure would be provided.

The Court found, however, that such an exception would not apply here and would only be made where additional lots would be provided in accordance with a development approval for a material change of use that had not lapsed.

The Court ultimately found that further subdivision on Mount Tamborine was not envisaged by the Planning Scheme and that the proposed development was consequently in significant conflict.

Sufficient grounds

In order to justify the proposal, the Appellants sought to rely on the proposed development's compliance with other provisions of the Planning Scheme as a sufficient ground to overcome the conflict.

The Court found that whilst the extent to which the proposed development complied with the Planning Scheme was a matter of public interest and therefore a ground which may be relied upon, it was not on its own sufficient enough to overcome the significant conflict with the Planning Scheme.

The Appellants also sought to rely upon the additional choice of housing which would be provided by the creation of an additional lot at Tamborine Mountain, however, they did not put forward any evidence of a planning need.

The Court ultimately found that the grounds relied upon were insufficient to justify the approval of the proposed development. notwithstanding the conflicts and dismissed the appeal.

Planning and Environment Court excuses Council's non-compliance with statutory timeframes for deciding development application and sets aside deemed approval for 175 lot subdivision

James Nicolson | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Moreton Bay Regional Council v Fairland Group Pty Ltd* [2018] QPEC 19 heard before Morzone QC DCJ

May 2018

In brief

The decision of *Moreton Bay Regional Council v Fairland Group Pty Ltd* [2018] QPEC 19 concerns an application to the Planning and Environment Court by the Moreton Bay Regional Council which sought the exercise of the Court's discretion to excuse the Council's non-compliance with the statutory timeframes for deciding a development application by an Applicant for reconfiguring a lot (9 lots into 175, plus 5 balance lots).

The non-compliance arose from an administrative error whereby a notice to the Applicant's consultants extending the decision-making period for the development application was mistakenly sent the morning after the last day of the decision-making period. The Council's non-compliance resulted in the Applicant obtaining a deemed approval without the Council undertaking a full assessment of the merits of the proposed development.

The Court ultimately excused the Council's non-compliance, set aside the deemed approval and returned the development application to the decision stage to be re-assessed and decided by the Council in the ordinary manner.

In exercising its discretion to excuse the Council's non-compliance, the Court had regard to the following matters:

- the Council's explanation and conduct leading to the non-compliance;
- whether the Applicant had acted to its detriment in reliance on the deemed approval; and
- the interests of the community, in particular the following:
  - the relevance of draft amendments to the Council's planning scheme; and
  - the lack of infrastructure planning in the location of the proposed development.

Council's non-compliance was due to an administrative error and not borne out of dilatory behaviour

The Court accepted evidence from a Council officer which explained that the non-compliance with the statutory timeframe was the result of a mistaken belief that the notice extending the Council's decision-making period had been successfully emailed on the evening of the final day for doing so, when in fact the email did not leave the Council's system until the following morning due to the Council's internal work flow processes.

The Court found that "*it is tolerably clear that the officer was not sitting idle, and the non-compliance was not borne out of dilatory behaviour*" (see paragraph [72]). The Court further found that the Applicant's development application had been the subject of a minor change for which the application fees were not paid until the day before the end of the decision-making period, such that in law the Council had less than one business day to assess and decide the changed development application.

Applicant had not acted to its detriment in reliance on the deemed approval

The Applicant conceded that it had not acted to its detriment in reliance on the deemed approval. The Court found that "*within a day of the deemed approval notice, [the Applicant's] consultant was informed of the council's intention to commence these proceedings and [the] foreshadowed proceedings were filed the next day*" (see paragraph [75]).

The Court was satisfied that the Applicant had not acted to its detriment in any material way.

Court's discretion to excuse non-compliance requires consideration of whether it is in the interests of the community that the development be subject to a full merits assessment rather than a deemed approval

Consistent with the Court's reasoning in earlier decisions regarding the exercise of the Court's discretion to excuse non-compliance, the Court observed that "*these matters require consideration of the extent it is in the interests of proper planning and those of the public or community, for the relevant application to be subject to a full merits assessment process, rather than a deemed approval*" (see paragraph [79]).

In considering the interests of the community, the Court had regard to the Council's arguments regarding draft amendments to the Council's planning scheme and the issue of unplanned infrastructure.

It was premature to consider the relevance of draft amendments to the Council's planning scheme in the absence of sufficient material

The Court considered arguments by the Council that the Applicant's deemed approval would, contrary to the *Coty Principle*, cut across and make more difficult to implement draft amendments to the Council's planning scheme. Those draft amendments would provide for development in the location of the Applicant's deemed approval to be brought within a Coordinating Infrastructure Agreement framework, which provides for the planning, coordination, sequencing, delivery and operation of infrastructure.

The Court considered the Council's reliance on the *Coty Principle* to be premature in the context of the exercise of the Court's excusatory powers given that "*there is insufficient material to form any considered view about whether the proposal may significantly prejudice the proposed planning direction*" (see paragraph [85]). The Court therefore did not form a view as to whether it should exercise its discretion to excuse the Council's non-compliance on the basis of the *Coty Principle*.

There was uncertainty around the infrastructure required to service the Applicant's deemed approval

The Court heard evidence from Council officers that the land which was the subject of the Applicant's deemed approval was not yet serviced by stormwater or transport infrastructure and was located within a future urban growth area for which limited planning had been carried out.

The Court found that "*the type and density of the proposed development demands services that require significant assessment and planning to promote efficient and cohesive development … for example, necessary road upgrades for Clark Road, Lindsay and Oakey Flat Road including associated paths, intersections and drainage infrastructure*" (see paragraph [91]).

The Court observed that the level of uncertainty around the infrastructure required for the Applicant's deemed approval was "*reflected in the infrastructure charges sought in the council's draft deemed approval conditions*", which the Court noted to be "*incongruous with anticipated charges and other approvals*" (see paragraph [91]).

Conclusion

Having considered the community interests, the Court concluded that the Applicant's development application "*was not afforded the required level of assessment and consideration during the IDAS process*" (see paragraph [92]), particularly in light of the fact that the development application was changed by the Applicant less than one business day before the Council was required to make a decision.

The Court concluded that "*it is in the interests of proper planning and those of the public or community, for the changed application to be returned to the decision making stage to endure a full merits assessment process, rather than a deemed approval*" (see paragraph [93]).

Planning and Environment Court finds that non-compliance by honest mistake does not attract automatic excusatory relief in every instance

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Abbot Point Bulkcoal Pty Ltd v Chief Executive, Administering the Environmental Protection Act 1994* [2018] QPEC 18 heard before Kefford DCJ

May 2018

In brief

The case of *Abbot Point Bulkcoal Pty Ltd v Chief Executive, Administering the Environmental Protection Act 1994* [2018] QPEC 18 concerned an application brought by the Respondent, the Department of Environment and Science (**DES**), for excusatory relief for its failure to comply with the service provisions under the *Environmental Protection Act 1994* (**EPA**) in relation to an environmental evaluation notice (**EEN**).

The issue to be determined by the Court was whether it should exercise its discretionary powers under section 37 of the *Planning and Environment Court Act 2016* to excuse the Respondent's failure to give written notice of its decision, following an internal review of the EEN, within 10 business days as required under section 521(8) of the EPA.

Factual background

On 18 September 2017, the Respondent issued an EEN to the Appellant which required that the Appellant undertake an environmental investigation and submit a report in relation to that investigation to the Respondent by 8 December 2017.

The Appellant requested an internal review of the Respondent's 18 September 2017 decision. On 17 October 2017, a delegate of the Respondent varied the 18 September 2017 decision, which extended the date that the Appellant was required to submit its environmental investigation report to 22 December 2017.

The Respondent provided written notice of its review decision to the Appellant less than 12 hours after the prescribed timeframe. The Respondent therefore failed to comply with section 521(8) of the EPA, which required that written notice be given to the Appellant within 10 business days from the date the review decision had been made. The consequence of the Respondent's non-compliance was that its original decision was deemed to be its final decision.

The non-compliance occurred because of the failure of an officer of the Respondent to send the written notice once he had received a copy of the review decision, which was on the last day the service was required. The officer of the Respondent realised that he needed to send the written notice shortly before boarding a flight, and decided not to send the notice once his flight had landed out of "*professional courtesy*" because it was, at that point, outside of business hours (see [9]).

On 30 November 2017, the Appellant filed a notice of appeal in relation to the Respondent's original decision and review decision, and sought a stay order to avoid committing an offence for failure to submit its environmental investigation report by 8 December 2017.

Respondent requested that the Court exercise its discretionary powers to waive its non-compliance with the EPA

On 22 February 2018, the Respondent applied for excusatory relief of the Court for its non-compliance.

The Appellant opposed the granting of excusatory relief on the basis that the Respondent had not provided adequate explanation for its delay and there was insufficient justification as to why the Court should exercise its discretionary powers in favour of the Respondent, especially given that the consequence of non-compliance was expressly stated in the EPA.

The Court found that from the time the Appellant's notice of appeal was filed until the Respondent's admission of its non-compliance, the Appellant "*had to proceed on the basis that there were live issues in the appeal in respect of the non-compliance*" (see [20]).

Court held that the unambiguous consequence of non-compliance stated in the EPA should not be readily avoided by the Court's excusatory powers

The Respondent submitted that the Court should exercise its excusatory powers because the non-compliance was minimal given the delay was less than 12 hours, the non-compliance was not deliberate and arose by reason of mistake, and "*no prejudice had been identified by the Appellant that would warrant refusal*" (see [44]).

The Respondent also contended that it would be "*artificial*" for the Court to focus on the Respondent's original decision, which did not reflect the Respondent's current position at the time of the proceeding.

The Court held that the Respondent was not prevented from clarifying whether its original decision or the review decision reflected its current position in its statement of facts and contentions and therefore the Respondent's contention was a "*hollow one*" (see [43]).

The Court acknowledged that the non-compliance was a mistake. However, it did not accept that the delay was minimal and held that to take such a position would be to ignore the Appellant's legal rights and obligations that arise from the issuing of an EEN. In particular, the delay of the Respondent left the Appellant "*exposed [to] the potential commission of offences from 8 December 2017 rather than from 22 December 2017*" (see [34]).

The Court referred to the principle in *Beerwah Land Pty Ltd v Sunshine Coast Regional Council; Woodlands Enterprise Pty Ltd v Beerwah Land Pty Ltd & Another and; Sunshine Coast Regional Council v Beerwah Land Pty Ltd* [2016] QPEC 55, which relevantly states that the Court should "*exercise a degree of caution*" in using its excusatory powers and the discretion "*should not be seen as a remedy to be applied whenever a deemed approval arises by reason of an assessment manager's honest mistake*" (see [28]).

Ultimately, the Court was not satisfied that the non-compliance of the Respondent should be excused.

Court of Appeal reverses Supreme Court decision and finds that an environmental protection order will, in certain circumstances, be terminated upon a disclaimer notice issued under the Corporations Act 2001 (Cth)

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Longley & Ors v Chief Executive, Department of Environment and Heritage Protection & Anor; Longley & Ors v Chief Executive, Department of Heritage Protection* [2018] QCA 32 heard before Gotterson and McMurdo JJA and Bond J

May 2018

In brief

The case of *Longley & Ors v Chief Executive, Department of Environment and Heritage Protection & Anor; Longley & Ors v Chief Executive, Department of Heritage Protection* [2018] QCA 32 involved an application for leave to appeal to the Court of Appeal a decision of the Supreme Court.

The Appellants were liquidators of Linc Energy Limited (in liquidation) (**Linc**) which was subject to an Environmental Protection Order (**EPO**) issued by the Respondent, the Department of Environment and Heritage Protection, in relation to an underground coal gasification project carried out by Linc on land near Chinchilla.

The Appellants sought to challenge the decision of the Supreme Court, which at first instance found that the Appellants' notice to disclaim the onerous property consisting of the land, infrastructure, environmental authority and resource tenements did not discharge Linc's liabilities under the EPO, and therefore the Appellants would not be justified in causing Linc not to comply with its environmental obligations.

The Court ultimately decided in favour of the Appellants. The Court held that the EPO was a liability in respect of the disclaimed property, and as a result the inconsistency that arose between the relevant provisions under the *Environmental Protection Act 1994* (**EPA**) and the *Corporations Act 2001* (Cth) (**Corporations Act**) is to be resolved in favour of the Corporations Act by section 109 of the *Constitution of Australia*. Therefore, the disclaimer notice terminated Linc's liabilities under the EPA.

Appellants gave notice disclaiming Linc's interests and liabilities with respect to the property

On 30 June 2016, under section 568 of the Corporations Act, the Appellants disclaimed the land, the mining development licence (**MDL**), the petroleum facility licence (**PFL**) and the environmental authority which were held by Linc for the purposes of its underground coal gasification project on the Chinchilla land.

Prior to the appointment of the Appellants as liquidators, Linc was issued with an EPO by the Respondent, which broadly required that Linc comply with its general environmental duty under the EPA. Specifically, Linc was required to, among other things, undertake activities such as sampling, monitoring and reporting to the Respondent about gas and groundwater, and was instructed not to dispose of equipment on the property so as to ensure Linc's compliance with the EPO.

The operation of the EPO, being a liability in respect of the disclaimed property, gave rise to an inconsistency between the EPA and the Corporations Act.

Court did not consider it necessary to determine whether the environmental authority was property capable of being disclaimed

The Respondent submitted that its admission that the Appellants had validly disclaimed the Chinchilla land and the MDL "*went no further than accepting that the Chinchilla land and the MDL were each 'property' for the purposes of s 568 of the Corporations Act 2001 (Cth)*" (see [95]).

The Court held that the Respondent could not change its position "*by seeking to mis-describe the way in which it had conducted the case*" (see [96]).

The Respondent also sought to distinguish the environmental authority as not constituting property capable of being disclaimed because it did not confer "*'property rights' but instead a 'freedom from liability' (for carrying out otherwise prohibited activity)*" (see [100]). The Court did not address further whether the environmental authority was property capable of being disclaimed.

Court found a clear and immediate connection between the disclaimed property and the liabilities under the EPO

The dominant issue for the Court was whether the EPO imposed liabilities in respect of the disclaimed property.

The Respondents submitted that the EPO imposed liabilities that were independent to any property held by Linc because an EPO could be issued to a related person who is not the owner of the property and therefore the EPO is a "*standalone statutory obligation which persists beyond any disclaimer*" of property (see [89]).

The Court held that the EPO was "*expressly issued with respect to the activities of Linc on [the Chinchilla] site under its MDL (and PFL)*" and that by disclaiming the property Linc no longer had authority to engage in those activities (see [104]).

The Court found that even if the liabilities of the EPO were not terminated, Linc was required to carry out activities on the Chinchilla land that was disclaimed. The "*purposes and terms*" of the EPO, in particular that Linc maintain relevant equipment on the Chinchilla land, created a connection between the liabilities of the EPO and the disclaimed property and performance of that requirement was "*impossible*" once the property had been disclaimed (see [109]).

The Court qualified its finding to the extent that the EPO was a liability capable of being disclaimed prospectively, therefore the liabilities of an EPO prior to the notice of a disclaimer could not be affected.

Court held that section 5G of the Corporations Act could not disapply the disclaimer provisions of section 568 of the Corporations Act

The Respondent argued that section 5G(8) and section 5G(11) of the Corporations Act operated to limit the application of the disclaimer provisions under section 568 of the Corporations Act to the extent of the inconsistency with the EPA.

The Court rejected the Respondent's submission and held that "*the disclaimer provisions do not recognise some limited type of disclaimer*". Further, the Court stated as follows (see [113]):

> [the Commonwealth Parliament could not have] *intended that by a disclaimer of property, a liquidator could cause a company to lose all of its rights and interests in respect of the property, but remain burdened by a liability in respect of it. That would be an absurd operation of the law which has a long recognised purpose of enabling a company to rid itself of burdensome obligations.*

The Court referred to the case of *HIH Casualty and General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083; (2003) 202 ALR 610, which dealt with the difficulty of section 5G of the Corporations Act in disapplying the winding up provisions of a corporation in one State or Territory and not another, and held that the Commonwealth provisions cannot have a "*differential operation in a certain State or Territory*" (see [124]).

Court reversed the decision of the Supreme Court as to costs and held that each party bear their own costs

The Court referred to the principle in *Farrow Finance Company Ltd (in Liq) v ANZ Executor & Trustee Co Ltd* (1997) 23 ACSR 521, which relevantly stated that where a proceeding involves novel or complex questions of law, the costs of the parties "*are to be paid by the liquidator and counted as costs in the liquidation*" (see [133]).

However, because of the adversarial nature of the proceeding and the onerous costs that would likely fall on the creditors, the Court found that it would be in the interests of justice that the Respondent pay its own costs. The Court therefore reversed the decision of the Supreme Court as to costs and held that each party bear their own costs.

Planning and Environment Court adjourns application for stays pending the resolution of related criminal matter

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bond v Chief Executive, Department of Environment and Heritage Protection* [2018] QPEC 15 heard before RS Jones DCJ

May 2018

In brief

The case of *Bond v Chief Executive, Department of Environment and Heritage Protection* [2018] QPEC 15 concerned two applications to the Planning and Environment Court. The first application was for the stay of the proceedings initiated by the Applicant. The second was an application to stay the operation of an Environmental Protection Order (**EPO**) under section 535 of the *Environmental Protection Act 1994* (**EPA**). The Applicant sought the stays pending the final resolution of related criminal proceedings involving the Applicant.

Background

The Applicant was the Chief Executive Officer and Managing Director of Linc Energy Limited (**Linc**), which was committed to stand trial on five criminal charges.

Linc entered into voluntary administration and went into liquidation on 23 May 2016. Two days later the Respondent issued an EPO against the Applicant, being the administrator for Linc.

The EPO required the following (at paragraph [3]):

> *(i) That by 25 August 2016 the applicant lodge a bank guarantee to the value of $5,500,000 to secure compliance with the EPO;*
>
> *(ii) By 26 September 2016 to submit a report to the respondent detailing works to be undertaken to achieve specified rehabilitation works referred to in the order; and*
>
> *(iii) By 1 November 2019 to carry out specified rehabilitation works to the land specified in the order.*

The Applicant initially sought an internal review of the Respondent's decision to issue the EPO, which was affirmed. It then appealed the decision to the Planning and Environment Court, where the Applicant was granted a stay until preliminary matters were resolved. The appeal concerning the preliminary matters was dismissed. The Applicant appealed the dismissal to the Court of Appeal, which also dismissed the appeal. The High Court dismissed the Applicant's application for special leave seeking to bring the matter before the High Court.

The Applicant's liability for the EPO crystallised with the refusal by the High Court to grant special leave because the stay of the proceeding was only granted until the preliminary matters were resolved, that resolution being the High Court's dismissal. Following the dismissal, the Applicant was in breach of two aspects of the EPO.

Court determined that there was no significant overlap of fact that would result in a real risk of prejudice that would warrant staying the proceeding

The Applicant argued that the proceedings should be stayed for the following reasons:

- there is factual overlap between the subject of the criminal charges and the subject of the appeal; and
- there is a real risk of prejudice.

The Applicant argued that Linc had complied with the EPO and its general environmental duty. To prove this, the Applicant argued it would be required to produce evidence about the processes used by Linc, which were alleged to have caused the environmental harm the subject of the criminal charges. This assertion formed the basis of its overlap argument.

Relevantly, the criminal charges were as follows:

- that Linc was "*wilfully and unlawfully causing serious environmental harm*" (see paragraph [15]); and
- that the Applicant failed to ensure that Linc complied with the EPA.

The Court held that there was a material difference between the charges, being that the charges against Linc concerned its actions, while those against the Applicant concerned the Applicant's conduct in relation to Linc's actions. Furthermore, the Court noted that a guilty verdict against Linc would not necessarily mean the same outcome for the Applicant.

The Court also held that the evidence on the processes used by Linc were largely irrelevant to the Applicant's pleadings and therefore did not pose a significant risk of prejudice.

Additionally, the Court held that there would be prejudice to the Respondent to allow the appeal to be left unresolved for an uncertain and lengthy period of time.

The Court held that the small risk to the Applicant was outweighed by the prejudice to the Respondent and the public interest due to an uncertain but lengthy delay.

Court weighed up the competing interests and concluded that there was no reason to stay the decision to issue an EPO to the Applicant

The Court observed that determining whether to grant a stay involves balancing the competing interests of the Applicant, the Respondent and the public.

In weighing up the competing interests, the Court determined as follows:

- In respect of the Applicant's interests, the Court agreed with the Applicant that it will suffer serious financial damage due to the interest relevant to procuring the $5,500,000 required under the EPO. The Court, however, pointed out that if the Applicant had made different tactical decisions, there would not have been a requirement for the proceedings.
- In respect of the Respondent's interests, the Court held that the Respondent had not advanced any evidence of prejudice against it.
- In respect of the public interest, the Court opined that there was a significant benefit in the timely resolution of the proceedings. The Court noted that the proceedings could take months or years to reach a final conclusion, given the possibility of appeals if the applications were granted.

The Court held that the prejudice that the Applicant may suffer from prosecuting the appeal is outweighed by the prejudice to the public interest, due to further uncertainty and lengthy delay.

Conclusion

The Court refused the Applicant's applications. However, the Court decided that the outcome of the criminal matter could have a material impact on the appeal and therefore deferred the final determination of the proceeding and adjourned it to a date following the verdicts of the jury in the criminal matter of *R v Linc Energy Ltd* (in liquidation).

The matter of *R v Linc Energy Ltd* (in liquidation) was recently concluded, which resulted in a $4.5 million fine and convictions recorded against Linc.

Court of Appeal confirms a landowner is liable for unpaid infrastructure charges resulting from a development approval obtained by a third party

Dee Ardham | Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Trevorrow v Council of the City of the Gold Coast* [2018] QCA 19 heard before Sofronoff P, Philippides JA and Douglas J

May 2018

In brief

The case of *Trevorrow v Council of the City of the Gold Coast* [2018] QCA 19 concerned an appeal to the Queensland Court of Appeal against a decision of the Queensland Supreme Court in respect of proceedings disputing infrastructure charges levied by the Gold Coast City Council (**Council**).

A tenant of the subject land made a development application for a material change of use after obtaining the written consent of the landowner. The Council approved the development application and levied infrastructure charges on the land in accordance with its then Priority Infrastructure Plan. The tenant did not pay the infrastructure charges levied by the Council.

The issue was whether a landowner is liable to pay outstanding infrastructure charges for a development approval where the application was made by a third party with the landowner's consent.

The Court of Appeal upheld the Queensland Supreme Court's decision that a landowner who consents to a development application for their land can be held liable for unpaid infrastructure charges, even if they did not make the development application. The Court held that infrastructure charges are to be taken as rates payable to the Council, thereby making a landowner liable for any unpaid infrastructure charges for their land.

This decision acts as an important reminder for landowners to be cautious when consenting to a development application made on their land by a third party. Landowners should be prepared to accept the liability for infrastructure charges levied on their land as a result of a third party's development application.

Council issued a notice requiring the landowner to pay the unpaid infrastructure charges

The Council approved a development application made by the tenant and issued an infrastructure charges notice in December 2008 under the then *Integrated Planning Act 1997* (**IPA**) as required by section 833 of the then *Sustainable Planning Act 2009* (**SPA**). The tenant appealed the notice and the Council subsequently issued a negotiated notice in November 2009 under the SPA after the IPA was repealed. After the tenant failed to pay the infrastructure charges, the Council included the unpaid infrastructure charges in a rates notice issued to the landowner for payment.

Appellant argued that the infrastructure charges notice could not be given to the landowner

The Appellant is the administrator for the registered owner of the subject land. The Appellant submitted that the Queensland Supreme Court at first instance had failed to acknowledge that an infrastructure charges notice could only be given to the applicant of a development application and not the landowner. To support its submission, the Appellant argued that "applicant" and "owner" are distinct concepts under the relevant provisions of the IPA and SPA. The Appellant contended that section 639 of the SPA requires the applicant to be the focus of attention for recovering infrastructure charges and not the owner. The Appellant cited section 637(1)(d) of the SPA to reiterate this distinction.

The Court of Appeal rejected the Appellant's submission and held that the Queensland Supreme Court was fully aware of the differences between "applicant" and "owner" under the SPA. The Court of Appeal accepted that there was a lack of evidence to support the restricted operation of section 639 of the SPA. In fact, the Court of Appeal found that section 637(1)(d) of the SPA expressly refers to a case where the relevant infrastructure is land owned by the applicant. The Court of Appeal acknowledged that the context was different, but highlighted that the legislature had relevantly referred to an example where an applicant owned land that was relevant to the operation and interpretation of the provision.

Appellant argued that the primary judge incorrectly interpreted section 639 of the SPA

The Appellant argued that the Queensland Supreme Court had made an error in finding that infrastructure charges are to be taken as rates under section 639 of the SPA. The Appellant accepted that unpaid rates can be recoverable from the landowner under the *Local Government Act 2009*, however, the Appellant contended that section 639 of the SPA only permitted recovery of infrastructure charges in respect of land owned by the applicant. The foundation of the Appellant's argument was that section 639 of the SPA did not create a fresh obligation for a non-applicant landowner and the primary judge's construction of the provision was "*double deeming*" the provision.

The Court of Appeal did not accept the Appellant's argument and found that the Appellant had failed to comprehend the actual intent of section 639 of the SPA. The Court held that section 639 of the SPA characterises infrastructure charges as rates irrespective of the entity which made the development application. The provision operates for a specified purpose and that is to ensure that infrastructure charges are recoverable by a local government.

The Court of Appeal referred to the High Court decision in *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 to find that there is nothing untoward about using the deeming provision in the way it was used by the Queensland Supreme Court. By providing that unpaid infrastructure charges are to be taken as rates under section 639 of the SPA, the Court of Appeal held that the infrastructure charges are deemed to be a charge payable by the landowner from time to time provided that the rights under the development approval were exercised.

Appellant argued that whether infrastructure charges are levied should be controlled by the landowner

The Appellant contended that, because a third party development application requires the landowner's consent, infrastructure charges should be in the control of the landowner at least to some extent. The Appellant argued that it is unfair that a landowner must consent to a development application before it is known whether infrastructure charges will be levied and how much it would cost. The Appellant adopted this reasoning to also strengthen its argument that section 639 of the SPA attaches liability for infrastructure charges to non-applicant landowners.

The Court of Appeal replied upon *Sushames v Pine Rivers Shire Council* [2007] 1 Qd R 382 to support its finding that a development approval attaches to the land and binds the landowner as a result. The Court noted that an approval does not attach to the applicant personally.

The Court of Appeal clarified that a landowner's consent is required for a third party development application to enable the assessment of a development application to proceed. Therefore, the landowner is consenting to the Council undertaking a statutory assessment of the development application. As a result, the landowner must accept that providing consent can result in new rights and obligations arising from the assessment which must be performed by persons taking the benefit of any development approval, including a non-applicant landowner.

Court of Appeal held that infrastructure charges are not payable until the development begins

The Court of Appeal stated that an owner controls the use of their land and that infrastructure charges for a material change of use are not payable until the change of use begins. Given the extent of this control, the Court of Appeal held that the owner is also placed in a position of responsibility to ensure its interests are protected through appropriate avenues so as to recover any unpaid infrastructure charges.

The Court of Appeal confirmed that the Queensland Supreme Court's interpretation of section 639 of the SPA was entirely harmonious and reflected the statutory scheme used for assessing a development application.

The Court of Appeal dismissed the appeal and the Appellant was ordered to pay the costs of the proceedings.

Planning and Environment Court declares that a purported infrastructure charges notice which does not include reasons in the accompanying information notice is not an infrastructure charges notice

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunland Group Limited & Sunland Developments No 22 Pty Ltd v Gold Coast City Council* [2018] QPEC 022 heard before Kefford DCJ

May 2018

In brief

The case of *Sunland Group Limited & Sunland Developments No 22 Pty Ltd v Gold Coast City Council* [2018] QPEC 022 concerned various applications in a pending proceeding in respect of a series of purported infrastructure charges notices issued by the Council for development on land at Mermaid Beach.

The Court was required to determine, among other things, the following:

- whether the Council had failed to provide "*reasons*" and therefore failed to provide an information notice under section 637(2) of the *Sustainable Planning Act 2009* (**SPA**); and
- whether there was a statutory intention that a failure to comply with section 637(2) of the SPA renders an infrastructure charges notice invalid.

The Court held that the purported infrastructure charges notices issued by the Council failed to comply with the requirements of section 637(2) of the SPA and were therefore invalid.

Did the Council fail to provide "reasons"?

Section 637 of the SPA sets out the requirements of an infrastructure charges notice. Relevantly, it requires that "*the infrastructure charges notice must also include, or be accompanied by, an information notice about the decision to give the notice*".

Section 627 of the SPA defines the term "*information notice*" as follows [emphasis added]:

> *information notice, about a decision, means a notice stating—*
>
> *(a) the decisions and the **reasons** for it; and*
>
> *(b) that its recipient may appeal against the decision; and*
>
> *(c) how the recipient may appeal.*

The Appellant contended that the term "*reasons*" is to be defined with reference to section 27B of the *Acts Interpretation Act 1954* (**AIA**), which states as follows:

> *If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also:*
>
> *(a) set out the findings on material questions of fact; and*
>
> *(b) refer to the evidence or other material on which those findings were based.*

The Council contended that section 27B of the AIA did not apply because a contrary intention appears in the SPA as to the requirements of an infrastructure charges notice and information notice.

In considering the parties' respective submissions, the Court observed that "*the absence of detail in section 627 of the [SPA] about the intended content of the 'reasons' was a strong indication that the legislature intended that the general statutory requirement enacted in section 27B of the Acts Interpretation Act 1954 would apply*" (see paragraph [44]).

The Court also observed that, despite the information required to be given under section 637(1) of the SPA, further information would likely be required to allow a recipient of an infrastructure charges notice to understand the basis of a local government's decision, and decide whether to make a submission about the notice or appeal the charge in the notice.

To that end, the Court concluded that it was the legislative purpose of section 637(2) of the SPA to require an information notice to set out a local government's findings on questions of material facts and the evidential basis for those findings to the extent that they may be critical to a decision whether to exercise appeal rights. The Court gave the following examples of findings on material questions of fact, which it considered are to be addressed in an information notice:

- a finding about whether, and on what basis, the use that is the subject of the development is for a particular use, which might be relevant to an appeal under section 478(2)(b)(i) or (ii) of the SPA;
- a finding about whether trunk infrastructure, that is the subject of a "*necessary infrastructure condition*" services or is planned to service premises other than the subject premises and the basis of the assessment of the cost of that infrastructure, which is relevant to an appeal under section 478(2)(b)(iii) of the SPA; and
- a finding about whether there is an existing lawful use of the premises or a previous lawful use, which is relevant to an appeal under section 478(2)(b)(ii) of the SPA.

The Court therefore held that the term "*reasons*" is to be defined with reference to section 27B of the AIA.

Did the Council fail to provide an information notice?

Each of the purported infrastructure charges notices issued by the Council contained a section entitled "*information notice*" which included the following text:

> *DECISION TO GIVE AN INFRASTRUCTURE CHARGES NOTICE*
>
> *Council of the City of Gold Coast has issued this Infrastructure Charges Notice as a result of the additional demand placed upon trunk infrastructure that will be generated by the development.*

The Court held that the purported information notice did not contain the requisite findings on material fact or the evidential basis for those findings. In this regard, the Court observed as follows:

> *… the recipient of an infrastructure charges notice is then entitled to:*
>
> *(a) make an agreement with the local government about paying the levied charge in a manner other than provided for in the notice (including by instalments);*
>
> *(b) make an agreement with the local government about providing infrastructure instead of paying part or all of the levied charge;*
>
> *(c) make submissions to the local government about the infrastructure charges notice, in an effort to persuade the local government to change the infrastructure charges notice; and*
>
> *(d) appeal, to this court, the decision to give the notice.*
>
> *Those rights are contingent on the receipt of an infrastructure charges notice, which must either include or be accompanied by an information notice that provides the reasons for the decision. The reasons must contain sufficient information for a recipient to meaningfully exercise the rights conferred.* (see paragraphs [54] and [55])

The Court concluded that the Appellant had been denied the opportunity to articulate grounds of appeal on the basis that the Council had failed to take a relevant matter into consideration or had taken into consideration an irrelevant matter. Accordingly, the Court was not satisfied that the purported information notices in each of the infrastructure charges notices contained adequate reasons for the purpose of section 627 of the SPA, regardless of whether those reasons were required to address those matters referred to in section 27B of the AIA.

Does failure to give reasons render an infrastructure charges notice invalid?

The Court referred to the judgment of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 where it held that:

> *An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends on whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition.*
>
> *A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid … In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".* (see paragraphs [91] and [93])

The Council contended that there was nothing in the SPA that suggested that an information notice complying with section 627 of the SPA was a precondition to exercising its power to issue an infrastructure charges notice. It also contended that even if a compliant information notice was a precondition to the exercise of the power to issue an infrastructure charges notice, there was no discernible legislative purpose to invalidate an infrastructure charges notice that does not strictly comply with section 637 of the SPA.

The Court disagreed with the Council's contentions and held that it was a purpose of the legislation that a document given in breach of section 637 of the SPA was not an infrastructure charges notice.

The Court therefore concluded that the purported infrastructure charges notices issued by the Council failed to comply with the requirements of section 637 of the SPA and on that basis were not infrastructure charges notices.

Unreasonable? No, not this infrastructure charges notice

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MC Property Investments Pty Ltd v Unity Water* [2017] QPEC 74 heard before Robertson DCJ

June 2018

In brief

The case of *MC Property Investments Pty Ltd v Unity Water* [2017] QPEC 74 concerned an appeal to the Planning and Environment Court by MC Property Investments Pty Ltd against Unitywater's decision regarding an infrastructure charges notice given to the Appellant for the connection of a development containing 20 units.

The Appellant alleged that the infrastructure charges notice was unreasonable and also that, if the Appellant's construction of the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (**SEQ Water Act**) is accepted, Unitywater should not have issued the infrastructure charges notice.

The Court held that the decision by Unitywater to levy the infrastructure charges notice was not unreasonable and did not accept the Appellant's construction of section 99BRCJ (Limitation of levied charge) of the SEQ Water Act. The Court therefore dismissed the appeal.

Background

Unitywater issued the Appellant with an infrastructure charges notice in relation to a 20 unit multiple dwelling building on land in Marcoola.

The parties agreed that the development involves an increased demand of 19 units on the existing sewer and water infrastructure. However, the Appellant alleged that because all of the relevant development permits had been approved before Unitywater gave its water approval, the development was not creating any additional demand.

The Council had agreed to the Appellant's request that a superseded planning scheme be applied to the development application, resulting in the development application for a material change of use being self-assessable.

Legislative framework

The Court noted that the appeal is akin to a form of judicial review of Unitywater's review decision regarding the issuing of the infrastructure charges notice. The Appellant is therefore required to demonstrate one or more of the matters in section 99BRBO(3) (Appeals about applications for connections—particular charges) of the SEQ Water Act, which are as follows:

- that the amount charged by Unitywater was so unreasonable that no reasonable distributor-retailer could have imposed the amount;
- the decision involved an error relating to the application of the relevant charge; or
- there was an error in the working out of the additional demand.

Court determined that the amount of the charge was not unreasonable in the circumstances

The Court had regard to the case law regarding the test for unreasonableness. The Court considered the case of *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 and concluded that the test is whether the decision reached by Unitywater to issue the relevant infrastructure charges notice was an irrational one, or one devoid of plausible justification.

The Court then considered Unitywater's arguments as to why its decision was not one that was irrational or devoid of plausible justification, being the following:

- Unitywater's internal review decision was of high quality and appropriately justified;
- there was additional demand warranting the imposition of additional charges to accommodate the increased demand; and
- the amount of the charge and the calculation of the charge was correct.

Court determined that the construction of section 99BRCJ of the SEQ Water Act as contended for by the Appellant would offend principles of statutory interpretation

Section 99BRCJ(2)(b)(iii) of the SEQ Water Act relevantly states as follows [our emphasis]:

> *(2) In working out additional demand—*
>
> *(a) ...*
>
> *(b) the demand on trunk infrastructure generated by the following must not be included—*
>
> *(i) ...*
>
> *(ii) ...*
>
> *(iii) other development on the premises if the development may be lawfully carried out **without the need for a further development permit** under the Planning Act.*

The Appellant alleged that, because the development was self-assessable and no further development permits were required in relation to the self-assessable material change of use application, no additional demand was generated by the development for the purposes of section 99BRCJ(2)(b)(iii) of the SEQ Water Act. The Appellant therefore argued that Unitywater should have excluded the additional 19 units in its calculation of the additional demand.

Unitywater alleged that further development permits were required for the development, such as development permits for operational work and building work, despite the development being self-assessable under the relevant planning scheme and not requiring any further development permits. The Court agreed.

The Court also held that additional demand was generated by the development by reference to the state of the premises as it existed before the issue of the development permit.

The Court held that the interpretation alleged by the Appellant would read words into the relevant section that are not there. It was not acceptable to confine the words "without the need for a further development permit under (the SPA)" as a reference only to the provision of the self-assessable development permit for a material change of use and exclude other types of development permits required for the development.

The Court held that the appeal was without merit and was dismissed.

COLIN BIGGERS & PAISLEY LAWYERS

Dwelling house or dual occupancy under the Bundaberg Regional Council Planning Scheme 2015?

Anne Hinton | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Lalis v Bundaberg Regional Council* [2018] QPEC 026 heard before Kefford DCJ

June 2018

In brief

The case of *Lalis v Bundaberg Regional Council* [2018] QPEC 026 involved an appeal to the Planning and Environment Court by the Appellant against the decision of the Bundaberg Regional Council (**Council**) to give an enforcement notice under section 168 of the *Planning Act 2016* (**Planning Act**) in respect of the Appellant's land in Kalkie.

The enforcement notice alleged that the Appellant had committed development offences under the *Sustainable Planning Act 2009* (**SPA**) and was continuing to commit development offences under the Planning Act, by carrying out assessable development, being the construction of two separate dwellings on the land (**Dwelling A** and **Dwelling B**), without all necessary development permits.

The Appellant argued that the land was lawfully being used as a "dwelling house" (including a secondary dwelling) and all relevant permits were in place. The Council's position was that the land was being unlawfully used for a "dual occupancy", as the Appellant did not have the necessary development permits.

The Appellant also submitted that the Court should use its discretion to set aside or stay the enforcement notice, if the Court determined that the use of the land was unlawful.

The Court held as follows:

- the land was being used for a "dual occupancy", and not a "dwelling house" and associated "secondary dwelling";
- there were no discretionary reasons to support setting aside the enforcement notice or staying its operation, rather "*there are, in fact, strong discretionary reasons that favour the Council receiving relief, including that there is a legislative purpose of upholding the planning law*" (at [86]).

The Court dismissed the appeal and considered the following issues in making that finding:

- whether the land included a "secondary dwelling";
- whether the smaller Dwelling B was used "in conjunction with, and subordinate to" Dwelling A; and
- whether the Court should exercise its discretion to set aside or stay the enforcement notice.

The Court determined that it would separately hear from the parties about appropriate orders to be made.

Lawful use of the land for a "dwelling house"

A primary consideration was whether the land contained a "secondary dwelling".

The land is included in the Low Density Residential zone under the *Bundaberg Regional Council Planning Scheme 2015* (**Planning Scheme**). It was accepted by the Appellant that the development of Dwelling A and Dwelling B on the land was not compliant with all acceptable outcomes of the Dual Occupancy Code. Relevantly, in this zone:

- a "dwelling house" was exempt development before 3 July 2017 when the *Planning Act 2016* commenced and is accepted development from 3 July 2017; and
- where the development is not compliant with all acceptable outcomes of the Dual Occupancy Code, a "dual occupancy" was code assessable development both before and after 3 July 2017.

Therefore, if the land contained a "secondary dwelling", the use would be lawful as it would be considered to be a "dwelling house". However, if the use of the land did not include a "secondary dwelling", the use would not be classified as a "dwelling house", but a "dual occupancy" (which includes "*premises containing two dwellings, each for a separate household, and consisting of: a single lot, where neither is a secondary dwelling or…*" (at [22]).

A "secondary dwelling" is defined in the Planning Scheme as follows [our emphasis]:

> *A dwelling used **in conjunction with, and subordinate to**, a dwelling house on the same lot. A secondary dwelling may be constructed under a dwelling house, be attached to a dwelling house or be free standing* (at [21]).

Relevantly, the Court considered whether the smaller Dwelling B was used "*in conjunction with, and subordinate to*" Dwelling A.

Court considered the meaning of "in conjunction with"

In considering the term "in conjunction with", the Court had regard to the following:

- the ordinary meaning of the term, being a joint enterprise, union or common purpose;
- the relevant Macquarie Dictionary definitions; and
- the judicial consideration of the phrase.

The Court noted that in *Forde v Toowoomba Regional Council* [2008] QPEC 114, the Court had considered the phrase "*…the establishment of commercial stables in conjunction with houses…*" and had cited a passage from *Sweeney Pastoral Company v Snowy River Shire Council* [1993] NSWLEC 189 as follows "*... "in conjunction with" denotes a connection or relationship or association, a quality which it is convenient to refer to as a "nexus"…. The clause requires the nexus to be between two uses. It is a question of function and accordingly, it is a functional nexus which is required.*"

The Appellant argued that Dwelling B is a "secondary dwelling" being used "in conjunction with" and subordinate to Dwelling A for a number of reasons. These included the following (at [52]):

- they have the same driveway;
- they are located on the same parcel of land;
- they are structurally integrated by a common wall; and
- Dwelling B has a smaller floor area.

The Court found that these arguments focussed on the built form of the dwellings and held that they did not demonstrate that the dwellings were being used "in conjunction with" each other. The Court also did not accept the Appellant's submission that "*the use of the word "conjunction", when used in this definition, shifts the focus only to the built form, rather than the use*" (at [53]).

The Appellant also argued that there was a functional nexus between the dwellings because there was a common driveway and structural integration of the dwellings. The Court did not accept the Appellant's submission and held that "*structural dependence does not demonstrate that one use is subordinate to the other or that there is a functional nexus between them*" (at [55]), and "*there is no relevant nexus or functional connection between the two dwellings. Each dwelling is used in a discrete and independent manner, separate to the other. Both dwellings have been let and tenanted separately and there is no evidence of any joint endeavours between the households*" (at [56]). The Court consequently decided that the two dwellings were not used "in conjunction with" each other.

The Court gave an example of how the two dwellings could be used "in conjunction with" each other, being if an extended family lived across the two dwellings to allow certain family members independence, however, the family generally operated as a single household unit.

Court considered the meaning of "subordinate"

The Court stated that for Dwelling B to be considered as a "secondary dwelling", it must also be subordinate to a "dwelling house" on the same lot. The Court referred to the Macquarie Dictionary definition of "subordinate" (including "*placed in or belonging to a lower order or rank; of lesser importance; secondary*") (at [58]) and "subordinate to" (including "*to make secondary to; to make subject or subservient to*") (at [59]). The Court discussed the differences in floor area between Dwelling A and Dwelling B, however, also noted that "*built form is only one consideration. In terms of use, there is no indication that one dwelling is subordinate to the other*" (at [61]).

The Court decided that the smaller Dwelling B was not being used "subordinate" to the larger Dwelling A. Consequently, the Court held that the land was being used unlawfully for a "dual occupancy" and not as a "dwelling house" and associated "secondary dwelling".

Discretionary grounds to set aside enforcement notice

The Appellant submitted that a number of factors were relevant as to why the Court should use its discretion to set aside or stay the enforcement notice. These included the following (at [68]):

- the use of the land had the benefit of a development approval and it should not be suggested that the use was conducted recklessly;
- the use is a "benign" use that is residential in character and is anticipated within residential areas;

- the dual occupancy/dwelling house issue appears widespread; and
- the matter involves complicated issues of statutory interpretation.

The Court acknowledged that it did not regard the Appellant's use of the land to be deliberately in defiance of the planning law. However, the Court did note that the Appellant's approval was for building works, which contained conditions limiting the ambit of the building works to use as a dwelling house with a secondary dwelling, and the Appellant had decided not to seek advice to ensure compliance with the conditions.

The argument that the use is a "benign" use was rejected by the Court, as a "dual occupancy" use has a higher level of assessment than a "dwelling house", notwithstanding that the use may be residential in character. The Court considered (at [75]) the report drafted by the Council's town planner about why the levels of assessment and use rights are significant, which included considerations such as "*essential service infrastructure capacity and planning; and amenity and expectations*". For the reasons outlined in the report, along with correspondence Council had received from concerned residents from the area about "secondary dwellings" being built in the area and rented out as two separate dwellings, the Court gave this discretionary factor little weight.

The Court was also not persuaded by any of the Appellant's other arguments and held that no discretionary reasons warranted an order be made for setting aside the enforcement notice or staying its operation, rather "*there are, in fact, strong discretionary reasons that favour the Council receiving relief, including that there is a legislative purpose of upholding the planning law*" (at [86]).

The Court dismissed the appeal and determined that it would separately hear from the parties about appropriate orders to be made.

Planning and Environment Court awards costs against an Appellant who continued litigation despite having no reasonable prospects of success

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Phipps v The Chief Executive Department of Local Government, Infrastructure and Planning; and Phipps v Somerset Regional Council and Anor* [2018] QPEC 25 heard before Rackemann DCJ

June 2018

In brief

The case of *Phipps v The Chief Executive Department of Local Government, Infrastructure and Planning; and Phipps v Somerset Regional Council and Anor* [2018] QPEC 25 concerned applications brought by the Somerset Regional Council (**Council**) and the State Government for costs against the Appellants.

The applications arise from the success of the Council and the State Government in prior proceedings, in which the Court upheld:

- the Council's decision to refuse a development application seeking a development permit for a material change of use for intensive animal industry (poultry farm); and
- the State Government's decision to refuse an environment authority for a prescribed environmentally relevant activity.

The Court ordered that the Appellants pay the costs of the Council and the State Government to be assessed on the standard basis.

Applicable costs regime

The prior proceedings were commenced on 20 June 2017. It was therefore accepted by the Council and the State Government that their applications fell for consideration under the "new" costs regime, rather than the provisions which formerly provided for an open discretion prior to 19 May 2017.

Accordingly, the general rule is that each party must bear its own costs in the proceedings. However, the Court may make an order for costs in certain circumstances, which relevantly include the following:

- where the Court considers the proceeding to have been frivolous or vexatious;
- where the Court considers an applicant for a development application did not give all the information reasonably required to assess the development application; or
- where an applicant does not properly discharge its responsibilities in the proceeding.

Contention of the Council and the State Government

The central contention of the Council and the State Government was that the prior proceedings were frivolous or vexatious.

The Court noted that the primary issue confronting the Appellants in the prior proceeding was the potential for odour nuisance. In this regard, it observed that (at [20]):

> *the proceedings were brought for the expansion of a commercial operation by the [Appellants] who, having abandoned reliance on the expert reports which they had commissioned and having not engaged any further experts of their choosing, decided to continue the litigation in the face of unanimous expert adverse opinions obtained by the other parties in circumstances where they had no reasonable prospects of success thereby putting the other parties, which in this instance are public bodies, to expense. They did so with notice as to their responsibility in the litigation and as to the possible consequences in terms of costs.*

Accordingly, the Court held that it was open as a matter of the Court's jurisdiction and appropriate in the exercise of the Court's discretion to order that the Appellants pay the costs of the prior proceedings, limited to a particular period of time.

The Court held that the Appellants ought to pay costs from:

> [the] *point in time after they had a reasonable opportunity to review and consider the joint expert report, as from that point [the Appellants] were aware that the unanimous view of the only experts engaged on the primary issue in the prior proceedings (i.e. the potential for adverse odour impacts) was adverse to them.*
>
> *Whilst the Appellants did not accept the view of the experts, they, as the party with the onus, had no competing expert evidence to support their contention that the proposal would have no adverse impact but nevertheless proceeded in the absence of any such evidence notwithstanding the warnings which at that time had been given by the Council and State Government.*

The Court ordered that the Appellants pay the costs of the Council and the State Government to be assessed on a standard basis.

Dismissed Councillor does not find relief from the Queensland Supreme Court

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Loft v Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs* [2018] QSC 96 heard before Burns J

June 2018

In brief

The case of *Loft v Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs* [2018] QSC 96 concerned an application to the Queensland Supreme Court by the Applicant seeking a review of the Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs' decision to recommend to the Governor in Council that the Applicant be dismissed as a Councillor and the Mayor of a local government.

The Applicant sought orders setting aside the Governor in Council's decision to dismiss the Applicant, and also a declaration from the Court that the *Local Government (Fraser Coast Regional Council – Dismissal of Councillor) Amendment Regulation 2018* (**Regulation**), which was passed to perfect the dismissal, is invalid.

The Court did not accept the Applicant's grounds of review for the Respondent's decision which were as follows:

- The Respondent unreasonably refused the Applicant's request for a time extension to respond to the notice that notified the Applicant that the Respondent would be recommending dismissal.
- The Respondent failed to take into account relevant considerations.
- The Respondent took an irrelevant consideration into account.
- A breach of natural justice occurred by the Respondent failing to acknowledge that a complaint was unproved.
- The Respondent did not rely on any evidence or material to justify the findings.
- The exercise of the power to dismiss the Applicant was so unreasonable that no reasonable person could have exercised the power.

As the Applicant failed to substantiate any ground of review, the Court dismissed the application and ordered that the Applicant pay the Respondent's costs on a standard basis.

Respondent's notice to the Applicant set out the reasons for its decision to recommend to the Governor in Council that the Applicant be dismissed

On 25 January 2018, the Respondent issued a notice to the Applicant under section 120 of the *Local Government Act 2009* (**LGA**) which notified the Applicant of the Respondent's decision to exercise its power under section 122(2)(c) of the LGA to recommend to the Governor in Council that the Applicant be dismissed as a Councillor.

The notice initially set out a summary of the 11 disciplinary findings that had been made against the Applicant, followed by the allegation against the Applicant which concerned a "leaked" email to an Australian Broadcasting Corporation journalist (**ABC Complaint**). The ABC Complaint was at the time under review by the Tribunal, but after the Respondent had recommended that the Applicant be dismissed, the Tribunal held the ABC Complaint to be "misconceived and lacking in substance" and therefore not made out.

The notice also set out the Respondent's reasons for recommending to the Governor in Council that the Applicant be dismissed, which included reliance on the 11 disciplinary findings and the ABC Complaint. Based on those reasons, the Respondent reasonably believed that the Applicant had breached the Local Government principles, which are set out in the LGA, and was incapable of discharging the responsibilities of a Councillor.

Court noted that section 144 of the LGA contains a provision stating the decision in question cannot be appealed but determines that the section cannot override the Court's supervisory powers

The Court noted that section 144 of the LGA purports to state that a decision of the Minister, such as the decision to give advice to the Governor in Council recommending dismissal, cannot be appealed to the Court.

The Court referred to relevant case law and determined that the Court can only determine a matter if it involves a jurisdictional error and therefore it was necessary for the Applicant to prove that there is a jurisdictional error.

The Applicant alleged the following six grounds of review to support the claim for relief.

Ground 1 – Refusal to grant request for extension of time

This ground concerned the Respondent's refusal to grant the Applicant's request for an extension of time to respond to the notice issued by the Respondent. This ground was abandoned.

Ground 2 – Failure to take into account relevant considerations

The Applicant alleged that the Respondent failed to take into account relevant considerations and that, because the ABC Complaint was still before the Tribunal, the Respondent did not have the opportunity to form its own view about the substance of the ABC Complaint.

Despite not knowing the outcome of the Tribunal's inquiry into the ABC Complaint, the Applicant alleged that the Respondent still relied upon the ABC Complaint as a reason for recommending that the Governor in Council dismiss the Applicant. However, the Court noted that neither the Respondent nor the Governor in Council would be bound by the Tribunal's decision and that the language used by the Respondent indicated that the ABC Complaint was unproven.

Further, the Applicant alleged that it was a function of the Tribunal, not the Respondent, to determine whether the ABC Complaint amounted to misconduct. In saying this, the Applicant relied on a construction of the LGA which the Court did not accept. Instead the Court determined that where the Minister reasonably believes that a Councillor has breached the local government principles or is incapable of performing their responsibilities, the Minister may act without requiring the Tribunal to conclude the issue. Consequently, this ground of review could not be sustained.

Ground 3 – Took into account irrelevant considerations

The Applicant alleged that the Respondent took an irrelevant consideration into account and also erred by failing to make a finding about whether the substance of the ABC Complaint was founded.

The Applicant alleged that the Respondent relied on "previous inappropriate disclosures". In relying on these, the Applicant further alleged that the Respondent was engaging in "propensity reasoning" by referring to previous conduct as a way of predicting future conduct. The Court, however, determined that the principles that prohibit "propensity reasoning" do not apply to an executive decision of this kind.

Therefore, the Court held that the Respondent was entitled to consider the "previous inappropriate disclosures" when making its decision and therefore regarded this ground of review as failed.

Ground 4 – Breach of the rules of natural justice

The Applicant alleged that a breach of the rules of natural justice occurred in relation to the making of the decision as the Respondent had failed to acknowledge that the ABC Complaint was before the Tribunal and "unproved". The Court noted that the Governor in Council was well-aware that the complaint was yet to be determined by the Tribunal and it therefore could not be said that the Governor in Council did not consider those points. Therefore, this ground of review was not accepted by the Court.

Ground 5 – No evidence or material to justify the findings

The Applicant alleged that there was no evidence or other material to justify the findings that the Applicant may engage in similar conduct in the future and that the Applicant's behaviour had damaged the standing of the Council. The Court disagreed and determined that the disciplinary history of the Applicant coupled with statements made by the Applicant were sufficient evidence to support the Respondent's findings, and therefore rejected this ground of review.

Ground 6 – So unreasonable that no reasonable person could so exercise the power

The Applicant alleged that the exercise of power to dismiss the Applicant was so unreasonable that no reasonable person could so exercise the power. However, this ground was reliant on the second or third ground being upheld, and since neither of those grounds were upheld this final ground of review was also rejected.

Conclusion

As the Applicant could not substantiate any grounds of review, the application was dismissed by the Court and the Court ordered that the Applicant pay the Respondent's costs on a standard basis.

Compensation agreement falls short of the requirements for review by the Land Court

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Exco Resources (Qld) Pty Ltd v Daniels & Ors* [2018] QLC 1 heard before PG Stilgoe

June 2018

In brief

The case of *Exco Resources (Qld) Pty Ltd v Daniels & Ors* [2018] QLC 1 concerned an application to the Land Court of Queensland commenced by Exco Resources (Qld) Pty Ltd seeking review under section 283B of the *Mineral Resources Act 1989* (**MLA**) of a compensation agreement, on the basis that the right to review under that section had been enlivened because it was a relevant compensation agreement, and there had been a material change in the circumstances following the issue of a mining lease.

The compensation agreement permitted the Applicant to conduct exploration activities on the Respondent owners of the land and provided that there would be further negotiations following the issue of a mining lease (**ML100077**) for compensation for the mining activities carried out under ML100077. No agreement had been reached between the Applicant and the Respondents as to the amount of compensation payable for the mining activities.

The Applicant argued that the agreement between it and the Respondents satisfied the requirements under section 283B of the MLA, being that the agreement was a compensation agreement under section 279 of the MLA and that its intention to now conduct mining activities met the requirement that there had been a material change in circumstances (at [15]).

The Court found that the parties had not, in fact, agreed on the compensation payable for the mining activities contemplated under ML100077, and therefore the compensation agreement did not enliven the Court's jurisdiction for review.

The Court found that the parties had not agreed on compensation for a mining lease

The Applicant argued that the compensation agreement entered into with the Respondents was an agreement under section 279 of the MLA for three reasons. Firstly, because it contemplated a compensation agreement be entered into between the parties before the granting of the mining lease. Secondly, because the compensation agreement expressly provided that it was an agreement under section 279 of the MLA. Thirdly, because the agreement was in writing and filed as required under the MLA.

The Court held that whilst the compensation agreement might appear to be an agreement made under section 279 of the MLA, it was limited to exploration activities only and lacked the essential requirement that compensation be agreed for mining activities. The compensation agreement, in fact, expressly stated that the Applicant was "*not permitted to remove any soil, sand, rock, gravel or other quarry material from the land*", activities inherent to the type contemplated under a mining lease (at [11]).

The material change in circumstances must relate to the circumstances of the mining lease

The Applicant submitted, and the Court agreed, that the relevant "*temporal reference point*" to resolve whether a material change in circumstances had occurred was to look at the time of the agreement.

The Applicant argued that a material change in circumstances had occurred because its intention to conduct mining activities had materialised since the time the parties entered into the compensation agreement. In rejecting the Applicant's submission, the Court referred to *ERO Georgetown Gold Operations Pty Ltd v Henry* [2015] QLAC 4, which relevantly states the test for a material change in circumstances as being as follows:

> *the condition is satisfied when there is a material difference between the circumstances for the mining lease when the compensation was originally agreed or determined, and the circumstances for the mining lease at the date when the change is said to have occurred, the change relating to circumstances relevant to the agreement about or determination of compensation.*

The Court confirmed that the circumstances which are relevant as to whether there has been a material change in circumstances are only the circumstances of the mining lease and not the intentions of the Applicant about whether or not it would conduct mining activities. The Court held that something more was needed to establish a material change in circumstances than the proposition that the Applicant entered into the compensation agreement on the premise that circumstances would materially change "*if*" it decided to carry out mining activities (at [20]).

The Court gave examples of what may amount to a "*material change in circumstances*", which included a change to the area of land that could be mined or an "*increase in the scale or the intensity of authorised activities*" (at [20]-[21]). The Applicant was unable to demonstrate any material change because it failed to submit a copy of the application for a mining lease and could not explain any material change. The Court therefore did not have jurisdiction under the MLA to review the agreement.

Want of jurisdiction could not be overcome because of the Applicant's frustration

The compensation agreement gave the Respondents compensation of $1 for the exploration activities and compensation for the mining activities under ML100077 was to be negotiated. The Applicant submitted that because of the Respondents' perceived unwillingness to meaningfully engage in negotiations for compensation for the mining activities, they were effectively trying to veto the mining activities. As a consequence, the Applicant argued that it would be in a worse position than if it had never entered into the compensation agreement if the Court did not have jurisdiction to intervene and review the compensation agreement.

The Applicant submitted that the Court must interpret section 283B of the MLA to best achieve the purpose of the MLA. In particular, the Applicant pointed to the MLA's objective to encourage and facilitate prospecting and exploring for and mining of minerals.

The Court held that it was required to read the MLA as a whole and that other objectives are relevant, including minimising land use conflict which includes the payment of fair compensation. Whilst there was evidence of a polarity of views about fair compensation, the Court was not satisfied that the Respondents did not want mining operations on their land.

The Court sympathised with the Applicant about its frustration because it could not immediately proceed with its mining activities. However, the Court could see no reason to exercise jurisdiction to review the compensation agreement where no jurisdiction existed.

Court of Appeal dismisses claims of error in law and upholds refusal for proposed hard rock quarry

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Boral Resources (Qld) Pty Limited v Gold Coast City Council* [2018] QCA 75 heard before Holmes CJ, Gotterson and Morrison JJA

June 2018

In brief

The case of *Boral Resources (Qld) Pty Limited v Gold Coast City Council* [2018] QCA 75 concerned an application to the Court of Appeal for leave to appeal a decision of the Planning and Environment Court to refuse a development application for a development permit for a hard rock quarry located in the Tallebudgera Valley Reedy Creek area of the Gold Coast.

The Court acknowledged that the case involved important questions regarding the interpretation of section 3.5.5.1(10) of the *Gold Coast City Plan 2016* (**City Plan**) and, for this reason, the Court granted leave to appeal. However, the appeal was ultimately dismissed.

We have previously reported on the original decision of *Boral Resources (Qld) Pty Ltd v Gold Coast City Council* [2017] QPEC 23 in our June 2017 edition of Legal Knowledge Matters which can be accessed here.

Grounds of appeal

The Applicant sought leave to appeal against the decision of the Planning and Environment Court on the basis that the primary judge had made errors of law by failing to correctly apply the City Plan.

Relevantly, the Applicant argued as follows (at [51]):

- The primary judge incorrectly interpreted the City Plan, particularly in the following respects:
  - not affording a "*practical*" and "*common sense*" meaning to the relevant provision of the City Plan;
  - the characterisation of koala habitats as a matter of environmental significance; and
  - the provisions concerning nature conservation were given significant weight to the extent of overriding section 3.5.5.1(10) of the City Plan.
- The primary judge failed to apply section 25 and section 36 of the *Sustainable Planning Act 2009* (**SPA**) and therefore wrongfully concluded that there was a conflict with the *Gold Coast Planning Scheme 2003* (**2003 Planning Scheme**).
- The primary judge made an error in law in concluding that there were no sufficient grounds to approve the development despite conflicts with the City Plan.
- The primary judge failed to give adequate reasons for his decision with respect to the following:
  - section 3.5.5.1(10) of the City Plan;
  - the nature and extent of the "*matters of environmental significance*"; and
  - there being no "*sufficient grounds*" to justify approval despite its conflict with the 2003 Planning Scheme and the City Plan.
- There being no "*sufficient grounds*" to justify approval despite its conflict with the 2003 Planning Scheme and the City Plan.
- As a consequence of the aforementioned errors of law, the primary judge therefore incorrectly decided that the Applicant's proposal was in material conflict with the City Plan and that there were no sufficient grounds to justify approval despite the conflicts.

Proper construction of section 3.5.5.1(10) of the City Plan

The Court dismissed grounds of appeal two to six on the basis that they had no merit. However, the Court found significance in the interpretation of section 3.5.5.1(10) of the City Plan and granted leave to appeal in respect of this ground of appeal.

Section 3.5.5.1(10) of the City Plan relevantly provides that in non-committed extractive resource areas at Reedy Creek, operations are only to be extended into the area if the following can be demonstrated:

- the amenity of nearby residential land is maintained;
- critical corridors are accommodated and matters of environmental significance are conserved, protected, enhanced and managed; and
- the green backdrop provided by ridgelines is not reduced when viewed from major roads and surrounding residential land.

The Applicant submitted that the primary judge, firstly, did not give a "*practical, common sense*" meaning to the provision and instead a limited interpretation was applied, and, secondly, necessary words such as "appropriately" or "to an acceptable level" were not interpolated into the provision. The Applicant relied upon the decision of *Lockyer Valley Regional Council v Westlink Pty Ltd* (2011) LGERA 63 at [20], in particular the oft quoted "*planning schemes should be construed broadly, rather than pedantically or narrowly, and with a sensible, practical approach*".

The Court rejected the Applicant's first submission and held that the primary judge had determined that section 3.5.5.1(10) of the City Plan was a provision that should not be construed or applied too strictly.

With respect to the Applicant's second submission, the Court found that it was not necessary for the words "appropriately" or "to an acceptable level" to be interpolated into the provision in order for it to operate sensibly and practically.

The Court conceded that the primary judge may have made an error of law in characterising the koala habitat as a matter of State Environmental Significance as the City Plan only classifies areas with essential habitat. However, the Court concluded that even if there had been an error, it did not constitute a ground to approve the development application, as the clearing of the 65 hectares of koala habitat could not sensibly be reconciled with the purposes of the City Plan.

The Applicant also submitted that the primary judge had afforded significant weight to sections 3.7.1(4) and 3.7.4.1(4) of the City Plan such that they overrode section 3.5.5.1(10) of the City Plan.

Relevantly, section 3.7.1(4) of the City Plan states that "*matters of environmental significance within biodiversity areas are protected in situ*" and section 3.7.4.1(4) of the City Plan states that "*in biodiversity areas, matters of environmental significance including vegetation and habitat for native flora and fauna are protected in situ...*".

The Applicant argued that there is a conflict between the requirements for protection in sections 3.7.1(4) and 3.7.4.1(4) of the City Plan, and the allowance for extractive resource operations in non-committed areas in section 3.5.5.1(10) of the City Plan, and that the conflict should be resolved in favour of section 3.5.5.1(10) of the City Plan, overriding sections 3.7.1(4) and 3.7.4.1(4) of the City Plan.

The Court found that although section 3.5.5.1(10) of the City Plan is specific to allowing extractive resource operations in non-committed areas, it did not mean that the application of section 3.7.4.1(4) of the City Plan should be displaced and ignored for the benefit of the former. The Court held that the requirement to protect koala habitat in sections 3.7.1(4) and 3.7.4.1(4) of the City Plan could co-exist with section 3.5.5.1(10) of the City Plan. Consequently, the Court held that there was no conflict between the provisions.

Therefore, whilst the Court granted leave to appeal, it ultimately dismissed the appeal and ordered that the Applicant pay the costs of the application and the appeal.

Planning and Environment Court allows an appeal in part against an infrastructure charges notice issued by Council

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Como Glasshouse Pty Ltd v Noosa Council* [2017] QPEC 75 heard before Robertson DCJ

July 2018

In brief

The case of *Como Glasshouse Pty Ltd v Noosa Council* [2017] QPEC 75 concerned an appeal to the Planning and Environment Court against an infrastructure charges notice (**Notice**) issued by the Noosa Council (**Council**) following the approval of a development permit for a material change of use for Cultivation - Type 2 Intensive for Crops (Greenhouse), High Impact Rural. The Council issued the Notice in the sum of $250,096 under the now repealed *Sustainable Planning Act 2009* (**SPA**) and the *Local Government Act 2009*.

The Appellant appealed against the Notice under section 478 (Appeals about infrastructure charges notice) of the SPA on the following grounds:

- *Ground One* – The Notice was so unreasonable that no reasonable relevant local government could have imposed it.
- *Ground Two* – The decision involved an error relating to the working out of additional demand under section 636 (Limitation of levied charge) of the SPA.

The Appellant failed in respect of Ground One. In respect of Ground Two, the Court found that the Council had made an error in working out the additional demand as it took into account the previous use of the land. The Court therefore allowed the appeal in part.

Ground One – The Notice was so unreasonable that no reasonable relevant local government could have imposed it

The Appellant relied upon section 478(2)(a) of the SPA and argued that the charge in the Notice was so unreasonable that no reasonable relevant local government could have imposed it.

Section 478(2)(a) of the SPA reflects the common law principle established in *Associated Provincial Picture Houses Limited v Wednesbury* [1948] 1 KB 223, namely that a decision of a decision maker may be reviewed if the decision is so unreasonable that no reasonable authority could ever have come to that conclusion. In respect of section 478(2)(a) of the SPA, the Planning and Environment Court has held that the decision must be an "*irrational one or one devoid of plausible justification*" (*Birkdale Flowers v Redland City Council* [2016] QPELR 231 at [64]).

Here, the Court observed that the Council followed the infrastructure charges regime set out in the State Planning Regulatory Provision (Adopted Charges) as required under the SPA, and levied the Notice in accordance with the Noosa Charges Resolution.

Relevantly, the Council used the Gross Floor Area (**GFA**) to determine the amount in the Notice. The Council gave no credit for the lawful existing development on the land, being a turf farm which comprised two small sheds and a dwelling house. The Court determined that the Council's method of calculation was consistent with the scheme lawfully promulgated and adopted by the Council. The Court went on to state that the scheme does not call for a "*comparative demand analysis*" as argued by the Appellant's experts and the scheme clearly calls for "*demand placed upon trunk infrastructure by development (to be) determined broadly having regard to the increase in GFA*", even though it may lead to unfair results (at [25]). The Appellant therefore failed with respect to Ground One.

Ground Two – The decision involved an error relating to the working out of additional demand under section 636 of the SPA

The Council must take into account the following in order to work out the additional demand under section 636 of the SPA:

> *(1) a levied charge may be only for additional demand placed upon trunk infrastructure that will be generated by the development.*
>
> *(2) in working out additional demand, the demand on trunk infrastructure generated by the following must not be included -*
>
> *…*
>
> *(b) a previous use that is no longer taking place on the premises if the use was lawful at the time it was carried out*.

The Court noted that at the time of issuing the Notice, the Council had evidence of the existing two sheds and the dwelling house, which were associated with the previous lawful use of the land as a turf farm. The Council determined the additional demand which would be generated by the development by reference to the GFA but made no allowance for the GFA of the existing two sheds and the dwelling house. As a consequence, the Court held that the Council did not comply with section 636(2)(b) of SPA as the Council included the demand on trunk infrastructure generated by the previous lawful use, being the turf farm use comprising the existing two sheds and the dwelling house. The Appellant was therefore successful with respect to Ground Two.

Court allowed the appeal in part as the Appellant was only successful in respect of Ground Two of the appeal

The Court noted that although the Appellant was successful in respect of Ground Two of the appeal, the Court could not, on a rehearing, formulate its own methodology for assessing additional demand.

Therefore, the Court allowed the appeal in part and adjourned the appeal to allow the additional demand to be calculated and agreed upon between the parties with liberty to apply where agreement could not be reached.

Planning and Environment Court dismisses an application for a minor change on the basis of extreme and materially different architectural treatment

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Spraybuilt Investments (1) Pty Ltd v Brisbane City Council* [2018] QPEC 3 heard before Everson DCJ

July 2018

In brief

The case of *Spraybuilt Investments (1) Pty Ltd v Brisbane City Council* [2018] QPEC 3 concerned an application to the Planning and Environment Court seeking, among other things, an order that changes to a development application came within the definition of a minor change under section 350 of the now repealed *Sustainable Planning Act 2009* (**SPA**).

In considering whether the proposed changes would not result in a substantially different development, the Court referred to the following test in *Northbrook v Noosa Shire Council* [2015] QPELR 664 (at [4]):

> *… determining whether or not the proposed development is a substantially different development requires a consideration of the definition of "substantial" which is defined … as, inter alia, "essential, material or important".*

The Court applied the test to the proposed changes from the perspective of the architectural presentation and noted as follows:

- there had been a significant reduction in gross floor area, with the proposed number of residential units reduced from 37 to seven;
- there had been a material reduction in the proposed building height from five storeys to three storeys with a partial fourth storey; and
- there had been a significant consequential reduction in bulk.

Importantly, the Court also observed that the combination of these changes had resulted in the proposed development changing from "*a bulky extremely modern looking five storey building with futuristic design elements to a much less bulky series of separated buildings which evoke traditional character elements such as predominantly gabled rooves*" (at [6]).

To this end, the Court held that on any objective assessment, the changes to the proposed development represented a completely different architectural treatment and were so extreme from a design perspective that what was now proposed was so different that it was essentially and materially different.

The Court concluded that the changes to the proposed development clearly represented a substantially different development under section 350 of the SPA.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court dismisses application to strike out appeal on the basis that the development application was piecemeal

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Trowbridge & Ors v Noosa Shire Council & Ors* [2018] QPEC 7 heard before Everson DCJ

July 2018

In brief

The case of *Trowbridge & Ors v Noosa Shire Council & Ors* [2018] QPEC 7 concerned an appeal against the Council's decision to refuse an impact assessable development application for 19 eco-cabins at Beach Road, Noosa North Shore.

The Co-respondents originally brought an application in pending proceeding which sought a number of declarations relating to the lawfulness of the development application and how it was processed by the Council.

However, the Co-respondents abandoned the pursuit of those declarations in favour of an order seeking to strike out the appeal on the ground that the development application was piecemeal, namely, because it did not include all of the land which was actually the subject of the development application and the consent of all owners.

The Court was therefore required to determine whether the relevant Co-respondents were able to advance such an argument in the application and, if so, whether it should succeed.

The argument of the Co-respondents

The Co-respondents contended that the development application was piecemeal because it did not include all of the land the subject of the application, namely, the common property. They raised the following two bases in support of their contention:

- as each lot is surrounded by an Exclusive Use Area (**EUA**), it was submitted that a change of use of a lot will necessarily also entail a change in use of the EUA which surrounds it; and
- there will be material increases in the scale and intensity of the use of the common property generally, as a consequence of the proposed change of use.

In relation to the second contention, the Co-respondents alleged that the proposed change in use will lead to permanent residents occupying the lots during winter and off-peak periods, which would place increasing demands on the leisure centre and on infrastructure, such as the water supply and sewerage infrastructure. It was also asserted that the proposed change in use will generate more waste.

The statutory framework

The Court considered the mandatory requirements for making a development application under section 260 of the now repealed *Sustainable Planning Act 2009* (**SPA**), which relevantly include the consent of the owner of the land, the subject of the application and any mandatory supporting information, including the identification of the land.

The Court referred to the judgment of the Court of Appeal in *Barro Group Pty Limited v Redland Shire Council* [2010] 2 QdR 206 in which it was observed that "*an application which is not a 'properly made application'… should not proceed to the subsequent stages of the IDAS process*" (at [8]).

The argument of the Appellants and the Respondent

In response to the Co-respondents' argument, the Appellants and the Respondent submitted that it was for the Respondent to determine whether the development application was properly made under the SPA. Further, the Appellants and the Respondent submitted that any allegation that it was not properly made, because it did not include all of the common property and therefore the consent of the body corporate, would require an application seeking a declaration to this effect.

The Appellants and the Respondent therefore submitted that the matter was one that could only be challenged by seeking remedies akin to judicial review, such as by alleging jurisdictional error on the part of the Respondent, and it was not properly the subject of a merits appeal.

In this regard, the Court held that it was common for discreet legal issues to arise in the course of an appeal and be determined as preliminary points by application brought within the appeal.

While acknowledging that these preliminary points were preferably dealt with by way of a discreet application for a declaration and consequential orders, the Court noted that it was unable to conclude that it could not deal with these issues by way of an application in pending proceeding.

The concept of a piecemeal application

In describing the concept of a piecemeal application, the Court referred to the judgment of the High Court in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485 and endorsed the view that it was important for an assessment manager or interested party to adequately understand the precise ambit of a proposed development in order to accurately gauge its true impacts.

However, the Court balanced this notion with the public policy considerations identified in *Bartlett v Brisbane City Council* [2004] 1 Qd R 610, namely, that in the context of applications by individual owners in a community title scheme, it would result in individual owners rarely, if ever, being able to make a development application. The Court rejected that this was a result that was intended by the legislature.

Given that the land the subject of the development application was clearly identified and that an interested party could readily gauge the extent of the contemplated changes to the use of it and its likely impacts, the Court dismissed the application.

COLIN BIGGERS & PAISLEY LAWYERS

Chief Executive of Department of Environment and Heritage Protection should not have issued a clean-up notice prescribing remedial works that would not prevent or minimise the contamination

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hungtat Worldwide Pty Ltd v Chief Executive of the Department of Environment and Heritage Protection* [2017] QPEC 62 heard before RS Jones DCJ

July 2018

In brief

The case of *Hungtat Worldwide Pty Ltd v Chief Executive of the Department of Environment and Heritage Protection* [2017] QPEC 62 concerned an appeal against the decision of the Respondent, Chief Executive of the Department of Environment and Heritage Protection, to issue a clean-up notice to the Appellant, Hungtat Worldwide Pty Ltd, for acid sulfate soil runoff from the subject land in accordance with section 363H of the *Environmental Protection Act 1994* (**Act**).

The Appellant was the owner of the subject land comprising significant land holdings, which are located southwest of Surfers Paradise and immediately to the west of Nerang Broadbeach Road. The road separates the subject land from a small canal development adjacent to the Nerang River. In particular, the subject land lies to the west of the Witt Avenue Canal.

The Respondent issued a clean-up notice on the basis that a contamination incident involving "*the release of acidic soil products and iron rich water*" from the subject land had occurred (at [6]). Subsequently, a second clean-up notice was issued to the Appellant prescribing remedial works to "*prevent or minimise the contamination*" (at [12]).

The Court found that the Respondent should not have issued the clean-up notice (**Notice**) setting out the remedial works for the purpose of preventing or minimising the contamination.

The Respondent had to establish at the higher end of the civil standard, being on the balance of probabilities, that the Notice was appropriately issued

The Appellant contended that the Respondent had to prove its case by establishing that it was appropriate for the Respondent to issue the Notice, and that the standard of proof had to be at a standard higher than the balance of probabilities.

The Respondent did not identify which party had to prove its case, however, it contended that the standard of proof should be simply on the balance of probabilities.

The Court applied the following reasoning of Rackemann DCJ in *Oakley v Chief Executive Administering the Coastal Protection and Management Act 1995* [2014] QPEC 58 and found that the Respondent had to establish its case (at [37]):

> *Prior to the issue of the notice it was for the chief executive to determine whether such a notice should issue. Such a notice ought not have issued unless the chief executive was satisfied that it was appropriate in the circumstances. Similarly, the court, on a de novo hearing, ought not dismiss the appeal unless it is so satisfied. In such circumstances the onus properly falls upon the respondent, as the authority contending that it is appropriate that the notice be given.*

The Court accepted the Appellant's contention that the standard of proof had to be at the higher end of the balance of probabilities. In doing so, the Court considered the following:

- the nature of the allegation made by the Respondent;
- the significant financial and managerial costs to comply with the Notice for an unknown period of time;
- the availability of penal sanctions for failure to comply with the Notice.

The Court accepted the evidence advanced by the expert witnesses that the remedial works prescribed in the Notice would not prevent or minimise the contamination

The Court accepted the following evidence advanced by the expert witnesses:

- *Appellant's expert witness* – The remedial works prescribed in the Notice were "neither practicable nor equitable" and that an alternative approach provided in the Joint Expert Report would be sufficient for the purpose of preventing or minimising the contamination.
- *Respondent's expert witness* – It was unlikely that the prescribed remedial works would prevent or minimise the contamination and the alternative approach provided in the Joint Expert Report would suffice.

Importantly, the Court was satisfied that a different approach to that prescribed in the Notice that was formulated by the witnesses would prevent or minimise the contamination, whereas what was prescribed in the Notice would not.

The Court was satisfied that the Appellant was a prescribed person for a contamination incident to whom the Respondent could issue the Notice

In exercising its discretion to issue the Notice under section 363H of the Act, the Respondent was not required to establish that the Appellant had committed the offence referred to in the Notice, however, it had to be satisfied that a "contamination incident" had occurred and that the Appellant was a "prescribed person for a contamination incident".

The Court was satisfied that a contamination incident occurred in accordance with the definitions of the terms in the Act, including "contamination", "release" and "contamination incident".

The Court rejected the arguments advanced by the Respondent that the Appellant was a "prescribed person" for the purpose of the Act because it was considered a person permitting the contamination incident to occur and that the Appellant was "*the owner, or person in control, of a contaminant involved in the incident*", in accordance with section 363G(b)(ii) of the Act. Regardless, the Court was ultimately satisfied that the Appellant was a "prescribed person" for the purpose of the Act as it was the occupier of the subject land at all relevant times.

The Court found that the Respondent should not have issued the Notice under section 363H of the Act

The Court considered whether the Respondent should have exercised its discretion to issue the Notice and ultimately found that the Notice should not have been issued for the following reasons:

- the works specified in the Notice would be a waste of time and money as they would not remedy the contamination incident;
- there was no evidence that the Respondent had or would have agreed to the operation of the floodgates in a manner that was identified by the expert witnesses;
- the financial and managerial burdens placed upon the Appellant to implement the works identified by the expert witnesses "*would amount to the imposition of unjustifiably disproportionate consequences*" (at [57]); and
- it was relevant to consider the fact that the Appellant inherited the contamination problems that were not fully appreciated at the time of the purchase of the subject land.

The Court ordered that the Notice be set aside and the proceeding was adjourned to hear any consequential orders.

COLIN BIGGERS & PAISLEY LAWYERS

Supreme Court of Queensland found valid written notice about contaminated land provided via an electronic data room had been given to buyer under the Environmental Protection Act 1994

William Lacy | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd & Anor* [2017] QSC 322 heard before Jackson J

July 2018

In brief

The case of *FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd & Anor* [2017] QSC 322 concerned a claim for damages for breach of contract in the Supreme Court of Queensland by FKP Commercial Developments Pty Ltd (**Plaintiff**). The Plaintiff sought damages from Albion Mill FCP Pty Ltd and its guarantor (**Defendants**) in the order of $5-6 million for the breach of a put and call option contract for the sale of land owned by the Plaintiff situated at 60 Hudson Street, Albion.

The Plaintiff was required to give written notice of the contaminated nature of parts of the land under the now repealed section 421 of the *Environmental Protection Act 1994* (**EPA**). In the event written notice had not been given, the EPA gave the buyer a statutory right to rescind the contract before the completion of the contract or possession under the agreement, whichever was earlier.

The Defendants contended that written notice had not been given under section 421 of the EPA on a number of grounds and that the contract had been rescinded. The Court considered each of the grounds raised by the Defendants and determined that notice had been given in compliance with section 421 of the EPA and, consequentially, the contract could not be rescinded under the EPA.

The Court considered the appropriate assessment of damages and concluded that the Plaintiff was entitled to damages in the sum of $5.25 million for damages for breach of contract.

Plaintiff was required to give written notice of the contaminated nature of parts of the land under the Environmental Protection Act 1994

The land included a number of lots which were included in the environmental management register under the EPA and were the subject of approved site management plans.

On 17 July 2015, when the contract was entered into, section 421 of the EPA required an owner of land on the environmental management register to give written notice of this fact, and the details of any site management plan, to a potential buyer of that land before agreeing to dispose of the land.

Where the owner did not comply with this requirement, the EPA provided the buyer with a statutory right to rescind the contract before the completion of the contract or possession under the agreement, whichever was earlier.

Since this time section 421 has been removed from the EPA by legislative amendment, however, a similar, but not identical, requirement is now contained in section 408 of the EPA. Despite this amendment of the EPA, section 421 continued to regulate the rights of the parties because of the operation of section 20(2)(c) of the *Acts Interpretation Act 1954*, which preserved the right accrued under section 421 of the EPA prior to its amendment.

Plaintiff disclosed search results for the contaminated lots to a corporate entity which did not ultimately enter the contract

The Plaintiff's initial negotiations for the sale of the land were with Fridcorp Projects Pty Ltd (**Fridcorp**). These negotiations included a due diligence process and proceeded on the basis that the purchaser of the land would be Fridcorp or a wholly owned subsidiary of Fridcorp.

As part of the due diligence process, the development director of Fridcorp requested that the Plaintiff provide data to enable Fridcorp to conduct a due diligence, including environmental contamination reports for the land. Fridcorp's development director suggested that this could be done by way of a data room or file share mechanism.

The Plaintiff established an electronic data room and uploaded various files, including a folder named "Land Contamination", which contained separate search responses for the contaminated lots that annexed the approved site management plans.

Albion Mill FCP Pty Ltd (**Albion Mill**), which entered into the put and call option contract on 17 July 2015, was ultimately not a wholly owned subsidiary of Fridcorp but rather the same individual who held all shares in both Fridcorp and Albion Mill. It is also relevant to note that the development director of Fridcorp was the sole director of Albion Mill when it entered into the contract.

Court considered whether the Plaintiff had complied with the requirement to give written notice under section 421 of the EPA

The Defendants asserted that the contract had been rescinded by Albion Mill for a failure on the part of the Plaintiff to comply with the notice requirements under section 421 of the EPA.

The Defendants asserted non-compliance with section 421 of the EPA on five grounds. These grounds, and the Court's consideration of each ground, were as follows:

- The first ground was that providing the relevant documents electronically by uploading them to the data room was not giving written notice. The Court considered relevant provisions of the *Acts Interpretation Act 1954* and the *Electronic Transaction (Queensland) Act 2001* and found that in circumstances where the development director of Fridcorp had consented to the relevant information being conveyed by an electronic data room, the Plaintiff was permitted to give the information in an electronic manner.
- The second ground was that providing the search responses for the contaminated lots among other information on a variety of other subject matters was non-compliant. The Court found that the EPA did not prescribe a form the notice must take and found no basis for non-compliance with section 421 of the EPA due to the fact that the written notice was given with other information.
- The third ground was that providing access to the search responses for the contaminated lots without specifying that doing so constituted giving written notice under section 421 of the EPA was non-compliant. The Court found that section 421 of the EPA did not include a requirement that the notice must be expressed as being given under that section.
- The fourth ground was that because the Plaintiff later stated that the due diligence material should not be relied upon, any notice otherwise given was non-compliant. The basis of this ground was that the Plaintiff had declined to give a contractual promise as to the accuracy of the information in the data room. In circumstances where there was no contention about the accuracy of the search results, the Court did not accept that the Plaintiff's failure to contractually assure the accuracy of the information should affect compliance with section 421 of the EPA.
- The fifth and final ground was that any notice that was otherwise compliant was given to Fridcorp and not to Albion Mill. It was clear in the materials before the Court that the development director of Fridcorp, who was also the sole director of Albion Mill at the time the contract was entered into, was aware of the contamination issues with the land. Being the sole director of Albion Mill, this individual was the directing mind of the company and his knowledge was the knowledge of the company. In the factual circumstances of the case, the Court found that written notice had been given in compliance with section 421 of the EPA.

Having dismissed each of the grounds raised by the Defendants, the Court found that the Plaintiff had given notice in compliance with section 421 of the EPA and, consequentially, it was not open to Albion Mill to rescind the contract.

Court found that the Plaintiff was entitled to damages for breach of contract

The Court considered the appropriate assessment of damages and the valuation evidence before it. The Court concluded that the appropriate amount of damages was the difference between the purchase price payable under the contract and the value of the land at the date of performance of the contract, being an amount of $8 million. Subtracting the $2.75 million already paid under the contract, the Court found that the Plaintiff was entitled to judgement against the Defendants of $5.25 million for damages for breach of contract, as well as interest on that amount.

COLIN BIGGERS & PAISLEY LAWYERS

Court of Appeal upholds the decision of the Planning and Environment Court refusing leave to appeal in a private certifier decision

Shaun Pryor | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Gerhardt v Brisbane City Council* [2017] QCA 285 heard before Fraser and Morrison JJA and Flanagan J

July 2018

In brief

The case of *Gerhardt v Brisbane City Council* [2017] QCA 285 concerned an application to the Court of Appeal made by a private certifier for leave to appeal against the decision of the Planning and Environment Court in *Gerhardt v Brisbane City Council* [2016] QPEC 48.

We previously reported on *Gerhardt v Brisbane City Council* [2016] QPEC 48 in our article *Queensland Parliament passes amendments to address the issues arising out of the decisions of a private certifier* dated 31 May 2017.

In *Gerhardt v Brisbane City Council* [2016] QPEC 48, the private certifier sought declarations that no application for a development approval was required to be made to the Council before it could assess and decide the building development application made to it.

The key issue before the Planning and Environment Court was whether the Council, as a concurrence agency, could assess the building development application against the Traditional building character (demolition) overlay code under the *Brisbane City Plan 2014*.

The Planning and Environment Court found that on a proper construction of the *Sustainable Planning Regulation 2009* and the *Brisbane City Plan 2014*, neither the private certifier as the assessment manager nor the Council as a concurrence agency could carry out an assessment of the building work against the Traditional building character (demolition) overlay code. The Court highlighted that the applicable regulatory scheme entrusted such judgments concerning the loss of traditional building character from particular areas to the local government as the assessment manager.

Consequently, the Court found that where the Council had not yet carried out its assessment against the Traditional building character (demolition) overlay code as an assessment manager, the private certifier could only grant a building development approval in the form of a preliminary approval.

Once the Council had assessed and decided the application and granted an approval in the form of a preliminary approval, only then could the private certifier grant a building development approval in the form of a development permit.

The Court of Appeal confirmed the decision of the Planning and Environment Court and dismissed the application for leave to appeal with costs.

The Applicant private certifier argued that the Council was required to assess the application as a concurrence agency against the Traditional building character (demolition) overlay code

The *Sustainable Planning Regulation 2009* relevantly gave the Council jurisdiction as a concurrence agency for the "amenity and aesthetic impact" for building work for a building or structure where it, among other things, had declared by resolution or in its planning scheme, that the form may have an extremely adverse effect on the amenity, or likely amenity, of the locality or be in extreme conflict with the character of the locality.

In this case, the Council had made such a declaration expressly in section 1.7.4 of the *Brisbane City Plan 2014* where certain building work in particular localities did not comply with the acceptable outcomes in the Traditional building character (**design**) overlay code [our emphasis].

The Applicant private certifier submitted that the express declaration in section 1.7.4 of the *Brisbane City Plan 2014*, which referred to the Traditional building character (**design**) overlay code [our emphasis], did not limit the required assessment to that code. The Applicant submitted that the "amenity and aesthetics" jurisdiction in the *Sustainable Planning Regulation 2009* contemplated demolition and consequently an assessment against the Traditional building character (**demolition**) overlay code [our emphasis], given that the definition of building work in the *Sustainable Planning Act 2009* included "*demolishing a building or other structure*".

Relying on the case of *Gerhardt v Queensland Building and Construction Commission* [2016] QCA 136, the Applicant also argued that a declaration of the kind mentioned in the *Sustainable Planning Regulation 2009* could also be implied from the planning scheme as a whole, notwithstanding the express declaration.

The Applicant submitted that the express declaration in section 1.7.4 of the *Brisbane City Plan 2014* did not justify the rejection of an implied declaration, as the express declaration comprehended building work only on certain pre-1946 dwellings described in the *Sustainable Planning Regulation 2009*, which did not comply with the acceptable outcomes of the mentioned codes.

Court found that the Sustainable Planning Regulation 2009 did not confer jurisdiction upon the Council acting as a concurrence agency to assess the application against the Traditional building character (demolition) overlay code

It was not disputed that the Traditional building character (demolition) overlay code did not form part of the building assessment provisions and that, consequently, only the Council had jurisdiction to assess the proposed development against it.

The critical issue was whether this assessment was as a concurrence agency or as an assessment manager for a separate development application, which would be required to be made.

The Court of Appeal found that the language of the *Sustainable Planning Regulation 2009* refers to "*built form rather than the absence of a building*" and therefore confined the "amenity and aesthetics" jurisdiction to a case where the building or structure will remain after the building work is carried out, rather than demolition.

The Court of Appeal also found that an implied declaration was not available in this case as it would be inconsistent with the express terms of the jurisdiction in the *Sustainable Planning Regulation 2009* and the express declaration in the *Brisbane City Plan 2014*.

The Court of Appeal considered that *Gerhardt v Queensland Building and Construction Commission* [2016] QCA 136 did not bind the Planning and Environment Court because it involved a previous version of the Council's planning scheme, which did not contain an express declaration in the terms of section 1.7.4 of the *Brisbane City Plan 2014*.

Consequently, the Court of Appeal agreed with the Planning and Environment Court and found that the *Sustainable Planning Regulation 2009* did not confer jurisdiction upon the Council acting as a concurrence agency to assess the application against the Traditional building character (demolition) overlay code.

Court confirmed that a preliminary approval from the Council was required before a development permit could be issued by the private certifier

The Applicant private certifier further argued that even if a development approval was required to be granted by the Council, that development approval was not a condition precedent to the issuing of a development permit by the private certifier.

The Court of Appeal confirmed the Planning and Environment Court's reasons, specifically that where the assessment against the Traditional building character (demolition) overlay code had not been carried out by the Council, the private certifier could not issue a development permit because it could not properly authorise the assessable development to take place.

By reference to the Planning and Environment Court's reasons, the Court of Appeal found that in that case, there would be another necessary approval for the purposes of section 83(1)(b) of the *Building Act 1975*, being a development approval by the Council, which would prevent the private certifier from granting a development permit.

The Court of Appeal refused the application for leave to appeal and awarded costs in favour of the Council.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court approves the demolition of a pre-1946 house within the Traditional building character (demolition) overlay code

Daniel Tweedale | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Tong Town Planning & Development Services Pty Ltd v Brisbane City Council* [2017] QPEC 70 heard before Everson DCJ

July 2018

In brief

The Planning and Environment Court decision of *Tong Town Planning & Development Services Pty Ltd v Brisbane City Council* [2017] QPEC 70 concerned an Applicant appeal against the decision of the Brisbane City Council to refuse a development application for the demolition of a pre-1946 house at Milton Road in Auchenflower.

Finding in favour of the Applicant and allowing the appeal, the Court held that although the demolition of the pre-1946 house would result in a loss of traditional character, the pre-1946 house did not make a positive contribution to the visual amenity of Milton Road.

Location of the pre-1946 house

The pre-1946 house is located atop an elevated section of Milton Road, approximately seven metres above street level. It sits atop a near vertical rock retaining wall, the base of which is separated from the roadway.

Above the retaining wall is a 1.2 metre fence which, with the aid of dense vegetation, obscures the pre-1946 house from view, save for a select few vantage points, which cannot be readily perceived by motorists travelling along Milton Road.

Issue in dispute

The issue in dispute was whether the development application was in conflict with various provisions in the Traditional building character (demolition) overlay code in the *Brisbane City Plan 2014*.

It was uncontentious that the house expressed traditional building character as a pre-1946 residential building.

It was also uncontentious that the presentation of the pre-1946 house to Sawtell Lane was not relevant, and that the source of the alleged conflict with the Traditional building character (demolition) overlay code arose from the presentation of the pre-1946 house to Milton Road.

Traditional building character

The parties relied on evidence from their respective experts to establish the nature and extent of the traditional building character of the pre-1946 house.

The Court favoured a combination of the views expressed by the experts. It held that while parts of Milton Road contain easily identified buildings that display traditional building character, the subject pre-1946 house, as a consequence of its vertical separation from Milton Road, did not make a contribution of any great significance to the traditional building character of the precinct.

The Court also endorsed the view that the pre-1946 house was an "*abstraction*" and, apart from an aerial perspective, lacked coherent presentation due to the fact that it can "*only be glimpsed to a limited extent from a few select vantage points ...* [and is] *not readily perceived by motorists travelling along Milton Road*" (at [6]).

Traditional building character (demolition) overlay code

The pre-1946 house is located on land within the Traditional building character (demolition) overlay code of the *Brisbane City Plan 2014*. The Traditional building character (demolition) overlay code therefore applied to the assessment of the development application.

The purpose of the Traditional building character (demolition) overlay code provides as follows:

> *The purpose of the code will be achieved through the following overall outcomes:*
>
> *(a) Development protects residential buildings constructed in 1946 or earlier that give the areas in the Traditional building character overlay their traditional character and traditional building character.*
>
> *...*
>
> *(d) Development protects a building constructed in 1946 or earlier where it forms an important part of a streetscape established in 1946 or earlier.*

The Court held that on the facts before it, the only applicable performance outcome was Performance Outcome 5 (**PO5**), which relevantly states as follows:

> *development involves a building which … does not contribute positively to the visual character of the street.*

Acceptable Outcome 5 (**AO5**) relevantly provides, among other things, the following:

> *development involves a building which if demolished will not result in the loss of traditional building character or is in a street that has no traditional character.*

In respect of AO5, the Court was satisfied that it could not be said that Milton Road is a street that has no traditional character. The Court accepted that traditional building character is present in the part of Milton Road where the pre-1946 house is situated. Equally, despite the limited contribution which the pre-1946 house makes to the traditional building character of Milton Road, the Court observed that it could not be said that demolition of the pre-1946 house would not result in the loss of traditional character.

Notwithstanding, the Court held that it was not sufficient for the house to contribute to the visual character of Milton Road; rather it must contribute positively.

In this regard, the Court referred to its earlier decision in *Marriott v Brisbane City Council* [2015] QPEC 45, where it relevantly held as follows (at [10]):

> *What is intended by the word "positively" is that there is a contribution which is favourable – that is, it adds to the visual character of the street, as opposed to being neutral (or, for that matter, detracting from it).*

On that basis, the Court held that the contribution that the pre-1946 house made to the visual character of Milton Road was "*extremely limited*" and "[could not] *be described as favourable … indeed its contribution is so minor given its presentation that it does no more than make a neutral contribution*" (at [13]).

The Court therefore allowed the appeal.

Court steps into Council's shoes to grant subdivision certificate in the South West Growth Centre

Todd Neal | Katherine Edwards | Sejuti Kundu

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Clearstate Development Co Pty Ltd v Liverpool City Council* [2018] NSWLEC 1279 heard before Dixon SC

July 2018

In brief

In *Clearstate Development Co Pty Ltd v Liverpool City Council* [2018] NSWLEC 1279, Dixon SC of the NSW Land and Environment Court upheld Clearstate's appeal against Liverpool Council's failure to issue a subdivision certificate for a 48 lot residential subdivision in Austral. The decision provides some timely reminders around development consents for councils and developers.

The case concerned statutory construction with the key question being: what did the development consent approve with respect to sewerage servicing for the site?

The Court found that the development consent was clear on its face, and the Council had granted the consent pursuant to a condition that required sewerage servicing to the satisfaction of Sydney Water (under section 80A(2), now section 4.17(2), of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**)). Consequently, Council did not have any further approval role in this aspect of the development consent.

Clearstate agrees to Interim Operating Procedure with Sydney Water for sewerage services

On 21 June 2016, Clearstate was granted development consent for a 48 lot residential subdivision of 150 Tenth Avenue, Austral. The site is located within the South West Growth Centre, which means this decision may have significant impacts on other greenfield developments in NSW.

There were no specificities of how sewerage servicing of the subdivision was to occur within the development application or the development consent. But, condition 4 of the development consent, under the heading "General Terms of Approval", stated:

> *The development is to demonstrate compliance with all relevant requirements issued by Sydney Water dated 10 June 2016 (Attachment 4).*

"Attachment 4" was a letter from Sydney Water to Council setting out its "revised comments". Notably, that letter made specific reference to a proposed gravity lead-in main to the sewer that had been agreed between Sydney Water and Clearstate at that time.

In 2017, it became apparent that further Sydney Water infrastructure (a lifting station) would be needed to service the site. Consequently, Clearstate agreed to an Interim Operating Procedure (**IOP**) with Sydney Water to provide sewerage services to the site given the lifting station would not be constructed for some time. The IOP was temporary infrastructure comprising an in-ground tank on one of the lots capable of holding sewage for the entire site, which would be pumped out periodically.

Having reached agreement with Sydney Water on the IOP, Clearstate was issued a section 73 certificate under the *Sydney Water Act 1994* (NSW).

Liverpool City Council refuses to issue subdivision certificate

On making an application to Council for a subdivision certificate, Council refused to issue the subdivision certificate because it contended that the development consent, properly construed, only authorised and required the construction of a gravity lead-in main and that there was no contemplation of any form of IOP.

Council also argued, amongst other things, that condition 4 cannot be characterised as a condition imposed under section 80A(2) of the EP&A Act. Its argument was premised on the site being located in the South West Growth Centre (falling under the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* (**SEPP**)) and therefore the provision of public utility infrastructure needs to satisfy the requirements of Council not Sydney Water (see clause 6.1, appendix 8 of the SEPP).

Land and Environment Court upholds Clearstate's appeal and issues subdivision certificate

Dixon SC ultimately upheld the appeal and issued the subdivision certificate, essentially for the reasons articulated by Clearstate. The key findings were:

- *Condition 4 was imposed under section 80A(2) of the EP&A Act* – This allowed for a development consent to be granted subject to a condition that a specified aspect of the development, that is ancillary to the core purpose of the development, is to be carried out to the satisfaction of a third party, specified by the consent authority. Accordingly, condition 4 authorised and required sewerage servicing that needed to satisfy Sydney Water.
- *Sewerage servicing constituted an ancillary activity to the core purpose of the approved development* – Therefore, condition 4 was held to be flexible enough to allow the IOP together with the gravity lead-in main to satisfy the requirements of Sydney Water.
- *Council failed to preserve any further approval role in this aspect* – The Court indicated that if the Council wanted to restrict the manner in which servicing could occur, it could have easily done so. The Council must take the consequences of any conditions to which the consent is subject: *Ryde Municipal Council v Royal Ryde Homes* (1970) 19 LGRA 321.
- *No inconsistency between the IOP and the development consent* – The IOP is simply a form of sewerage servicing that satisfies the requirements of Sydney Water, as evidenced by the section 73 certificate.
- *Exempt development* – While Dixon SC did not need to deal with clause 18A of the SEPP that allows development for public utility undertakings to be carried out without consent in certain circumstances, given the findings above, she made brief comments indicating she was satisfied that the carrying out of the IOP is a public utility undertaking for which separate consent was not required. This finding is significant for other IOPs that may be operating elsewhere, without development consent.

Three implications for councils and developers in regard to development consents

- This case serves as a reminder that development consents cannot fully resolve all aspects of a development with "absolute precision". Therefore, conditions of consent that specify that a "final decision by … some delegate … to whose satisfaction specified work is to be performed" should be given effect in the interests of practicality (*Howarth v Gosford City Council (No. 2)* (2014) 204 LGERA 425 at 189).
- While consent authorities must not impose conditions that change the development "in a fundamental respect" or cause it to be "significantly different" from that which was approved (*Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at 28), this case demonstrates that ancillary conditions pursuant to section 4.17(2) are afforded a "degree of practical flexibility" and councils need to be careful not to unintentionally give away their powers by the operation of this section, if that is not what they intend.
- As a result of this judgment, it is possible some councils might become more prescriptive in the drafting of development consents so that they are not inadvertently relinquishing their rights to be satisfied of certain parts of development that have not been determined at the time the development consent is granted. If this arises, there is the possibility of overlap and duplication between different authorities.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court to allow appeal against the refusal of a proposed demolition of a dwelling house constructed prior to 1947

Anne Hinton | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Klinkert v Brisbane City Council* [2018] QPEC 30 heard before Williamson QC DCJ

August 2018

In brief

The case of *Klinkert v Brisbane City Council* [2018] QPEC 30 involved an appeal to the Planning and Environment Court by the Appellant against the decision of the Brisbane City Council (**Council**) to refuse the Appellant's code assessable development application, for a development approval for building works to authorise the demolition of the pre-1947 dwelling house situated on the Appellant's land in Toowong.

The Appellant argued that the proposed development complied with the relevant assessment benchmarks in force at the time the application was properly made, including the Traditional building character (demolition) overlay code (**Demolition code**), and that section 60(2)(a) of the *Planning Act 2016* (**Planning Act**) was engaged so that the development application must be approved.

The Appellant also argued in the alternative that if section 60(2)(a) of the Planning Act was not engaged, the Court should exercise its discretion under section 60(2)(b) to approve the development application, by giving little or no weight to the amendments made to the *Brisbane City Plan 2014* (**City Plan**) and the Traditional building character planning scheme policy (**PSP**) in December 2017.

In considering the issues, the Court determined as follows:

- the proposed development complied with the assessment benchmarks in force at the date the development application was properly made (including the Demolition code);
- section 60(2)(a) of the Planning Act was engaged and required the development application to be approved;
- not necessary for the Court to exercise its discretion under section 60(2)(b) of the Planning Act because section 60(2)(a) of the Planning Act was engaged; and
- if section 60(2)(a) of the Planning Act was not engaged, the Court would have dismissed the appeal because it was not persuaded that the amendments to the City Plan and the PSP should be given little or no weight.

The Court determined to allow the appeal, and ordered that the Council deliver a draft suite of conditions to the Appellant and that the appeal be listed for further review.

Compliance with Demolition code

The *Sustainable Planning Act 2009* (**SPA**) was in force when the development application was made.

Under the SPA, the development application triggered code assessment under the City Plan and the delegate had to assess and decide the development application in accordance with the relevant codes in the City Plan, namely the Demolition code. The City Plan, including the Demolition code, was amended on 1 December 2017.

The Council submitted that the proposed development did not comply with the Demolition code at the date the development application was properly made.

Central to the issue of whether the proposed development complied with the Demolition code in force at the time the application was properly made, was whether the proposed development involved a building which represents "*traditional building character*".

The Court looked to the PSP for guidance for the definition of "*traditional building character*", and determined that the dwelling house was not of "*traditional building character*".

Accordingly, the Court determined that the proposed development complied with the assessment benchmarks in force at the date the development application was properly made, including the Demolition code.

Application of section 60(2)(a) Planning Act

The Court then had to consider whether section 60(2)(a) of the Planning Act was engaged.

Section 60(2)(a) of the Planning Act relevantly provides that:

> *(2) To the extent the application involves development that requires code assessment, and subject to section 62, the assessment manager, after carrying out the assessment—*
>
> *(a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and*.

The Appellant argued that section 60(2)(a) of the Planning Act was engaged and the development application must be approved.

The Respondent argued that the section was not engaged for the following reasons:

- the section required the Appellant to demonstrate that the proposed development complied with all assessment benchmarks (including those in force at the date of the development application and those that came into force on and from 1 December 2017); and
- the section required the Appellant to demonstrate that the proposed development complied with all assessment benchmarks (including those in force at the date of the development application and those that came into force on and from 1 December 2017).

The Court considered the definitions of "*code assessment*" and "*carrying out*" contained in the Planning Act, and was satisfied that these provisions did not require the development application to be assessed against the amended provisions of the PSP and City Plan.

The Court also considered section 45(7) of the Planning Act in order to determine the relevance of the amended PSP and City Plan in its decision. The Court determined that section 45(7) relates to the weight to be given to the amended statutory instrument and does not reference the notion of "carrying out an assessment".

The Court found that section 60(2)(a) of the Planning Act mandates that the assessment manager must decide to approve an application to the extent the relevant development complies with all of the assessment benchmarks, and does not require the assessment manager to make findings about the weight to be given to the amended PSP and City Plan.

Accordingly, the Court held that section 60(2)(a) of the Planning Act was engaged and the development application must be approved.

Weight to be given to amendments to City Plan and PSP

It was not necessary for the Court to exercise its discretion under section 60(2)(b) of the Planning Act to approve the development application because the Court found that section 60(2)(a) of the Planning Act was engaged.

The Court then considered what weight should be given to the amendments made to the City Plan and the PSP on and from 1 December 2017, if section 60(2)(a) of the Planning Act was not engaged, and whether it would have exercised its discretion under section 60(2)(b) in favour of the Appellant.

Section 60(2)(b) of the Planning Act confers a discretion to approve a development application where a non-compliance with an assessment benchmark is established.

The Court was satisfied that the changes to the PSP have resulted in the dwelling house being regarded as having a traditional building character, and would therefore conflict with the Demolition Code in force on and from 1 December 2017. The Appellant also conceded this point.

The Appellant argued that the amendments should be given no weight were based on the following:

- the proposed development complied with the assessment benchmarks in force at the time the development application was made, and:
  - (but for the amendments), section 60(2)(a) of the Planning Act mandates that the development application must be approved; and
  - the Council delegate's decision was incorrect; and
- it would be unfair to the Appellant.

The Court accepted that the proposed development complied with the assessment benchmarks in force at the time the development application was made, but noted that it was only one of a number of considerations in determining the weight to be given to the amendments.

The Court rejected the submission that the Council delegate's decision was wrong, because the decision making rules under SPA permitted the delegate to refuse the application. The Court noted that section 60(2) of the Planning Act did not apply to the delegate at the time the decision was made.

The Court acknowledged that fairness has a role to play in determining the weight to be given to the amended documents, however, it varied depending on the circumstances of the case and was only one of a number of considerations which the Court had to have regard to.

The Court was not persuaded that the amendments should be given little or no weight, because "*the amendments represent deliberate contemporary planning that is consistent with a long held planning strategy of the Respondent*" (see [137]). The Court went further to state that if the circumstances allowed, it would have given the amendments determinative weight and dismissed the appeal for the following reasons:

- no conditions of approval could be imposed for the proposed development to comply with the amended City Plan;
- "*the demolition of the dwelling house would represent a substantial loss of traditional building character in circumstances where the house forms part of an exceptional setting of traditional houses.*" (see [140]), which the Court considered to be an unsatisfactory planning outcome;
- the amendments to the City Plan and PSP had been advertised before the development application had been properly made;
- the amendments form part of a deliberate planning decision;
- it would be contrary to the Council's deliberate planning policy (to retain buildings of traditional building character), and could impact the adjoining land; and
- the Appellant has other rights of recourse under the Planning Act.

Order

The Court determined that the Appellant had discharged the onus and allowed the appeal. The Court ordered that the Council deliver a draft suite of conditions to the Appellant and that the appeal be listed for review for the purpose of either making final orders or making directions to facilitate the resolution of any dispute between the parties with respect to the suite of conditions of approval.

Another day, another appeal, another refused service station – Amenity impacts strike again

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Parmac Investments Pty Ltd v Brisbane City Council & Ors* [2018] QPEC 32 heard before Kefford DCJ

August 2018

In brief

The case of *Parmac Investments Pty Ltd v Brisbane City Council & Ors* [2018] QPEC 32 concerned an appeal to the Planning and Environment Court by Parmac Investments Pty Ltd against the refusal by the Brisbane City Council (**Council**) of a development application for a branded service station and convenience store in respect of land located at 1562 Old Cleveland Road and Stanbrough Road, Belmont (**subject site**).

The issues in dispute were as follows:

- whether the proposed development is an appropriate use in the zone;
- whether the proposed development will have unacceptable amenity impacts;
- whether the proposed development can achieve an acceptable traffic outcome; and
- the extent to which other relevant matters support approval of the proposed development.

The Court determined that the proposed development did not strike an appropriate balance in terms of other planning considerations, such as respect for the existing and planned character and amenity of the area. The appeal was dismissed.

Consideration of Court of Appeal statements within *Bell v Brisbane City Council* [2018] QPEC 84 results in Court finding that *Bell* was not determinative in this case

The Council submitted that the Court of Appeal's statements in *Bell v Brisbane City Council & Ors* [2018] QCA 84 that the assessment manager should regard the planning scheme as an embodiment which represents the public interest should be applied, and that the statement represents a reduction in the Courts' discretion to approve a proposed development in circumstances where there is conflict found with a relevant planning instrument.

The Court disagreed and determined that as the statutory assessment process under the *Planning Act 2016* differs from that in the *Sustainable Planning Act 2009*, the *ratio decidendi* of the Court of Appeal decision was not determinative in this case.

Proposed development did not satisfy the relevant requirements in overall outcome (4)(g) of Environmental management zone due to its proposed location and impacts

Under the *Brisbane City Plan 2014* (**Planning Scheme**), the proposed development was located in the Environmental management zone. Overall outcome (4)(g) of the Environmental management zone relevantly states as follows:

> *(g) Development for an agricultural supplies store, animal keeping, bulk landscape supplies, emergency services, garden centre, service station, or wholesale nursery:*
>
> *(i) is of a scale which is compatible with the Environmental management zone;*
>
> *(ii) is located on a district road or suburban road (or motorway or arterial road only, if a service station);*
>
> *(iii) supports existing concentrations of centre-type activities;*
>
> *(iv) is not located within an area of high or general ecological significance on the Biodiversity areas overlay map.*

The Court determined that the proposed development did not satisfy subparagraphs (i), (ii) and (iii) for the following reasons:

- The Court concluded that the scale of the proposed development was not compatible with the existing rural residential use of the area because the proposed development would have a high level of activity as it would be operating 24 hours a day, and it would involve over 100 square metres of illuminated signage and branding.
- The Court concluded that the impacts from illumination and traffic generation were greater because the proposed development would be located on the corner of an arterial road and a district road, not on an arterial road as per the requirements of overall outcome (4)(g)(ii).
- The Court concluded that the location for the proposed service station was not sufficiently close to any established centre or concentration of "centre-type activities" and it therefore conflicted with overall outcome (4)(g)(iii).

There was no dispute about overall outcome (4)(g)(iv) as the subject site was not within an area of high or general ecological significance on the Biodiversity areas overlay map.

Court determined that the proposed development would have an unacceptable visual amenity impact as it would be highly visible and in stark contrast to the rural residential surroundings

The Court determined that the proposed development will be "*highly visible*", "*in stark contrast*" with the character of the surrounding rural residential area and "*inconsistent and out of scale with the surrounding rural landscape*" (at [120] - [122]).

The Court accepted the uncontested evidence from the Appellant's expert that there would not be an unacceptable "*adverse acoustic amenity impact*" and was therefore satisfied that the proposed development complies with the relevant Planning Scheme codes (at [152]).

The Court, however, determined that it was not satisfied that the proposed development would not have an unacceptable amenity impact due to the proposed development's 24-hour lighting and the "*dark environment*" which exists at the subject site (at [157]).

Two of the issues relating to traffic outcomes were considered matters for conditions, while the remaining issues were determined to have acceptable traffic outcomes

The following four issues were raised in respect of traffic outcomes:

- Whether access was acceptable given the layout of the relevant intersection that would provide access to the proposed development.
- Whether suitable access would be achieved from the relevant intersection that would provide access to the proposed development with an extended shared cyclist/left turn facility.
- Whether the width of the parking spaces are acceptable.
- Whether the manner in which fuel tankers would access the subject land as part of the proposed development were acceptable.

The conclusions relating to the traffic outcomes were as follows:

- The Court was satisfied that the access to the proposed development was acceptable because the Court accepted the Appellant traffic engineer's opinion that the relevant nearby intersection is not a major intersection.
- After considering the rationality of drivers and the vulnerability associated with cyclists in the relevant proposed cycle lane, the Court determined that the impacts were not so material as to warrant refusal of the proposed development.
- The Court held that the issues relating to parking width and fuel tanker access could be dealt with via conditions on the proposed development, should the Court allow the appeal, and therefore that they did not warrant refusal of the proposed development.

In considering these issues, the Court did not accept the Council's approach being that the safest "option" for the Court was to restrict access to one entry point on Stanbrough Road. The Court stated that "*it is not this Court's role to redesign a particular proposal or conduct an inquiry as to whether a better proposal might possibly be formulated*" (at [162]).

The Court went on to say that the Court is not required to determine whether the proposal ought to be conditioned, instead it is the Council's role is to determine "*whether the Appellant's proposed design is acceptable*" (at [194] and [199]).

Appellant unsuccessfully submitted that there were other relevant matters in support of approval of the proposed development

The Appellant submitted that the following relevant matters supported approval:

- There was a significant gap between service stations around the subject site.
- The subject site represents a logical location to serve the population.
- The proposed development will introduce price competition.
- Car ownership in the primary trade area is higher than average.
- The proposed development would offer 24-hour-a-day access to convenience items.

The Court did not accept the Appellant's submissions and instead found as follows:

- The significant gap was a result of a clearly expressed planning strategy within the Environmental management zone.
- There were many other routes upon which potential customers could access service station facilities.
- The proposed development may assist in increasing competition but will not provide a material impact on fuel prices.
- The proposed development would not be reliant on the primary trade area. Instead, the economic demand for the proposed development would be from population growth in the tertiary trade area, which is located between 10 and 25 kilometres away.
- There is no shortage of 24-hour service station facilities and therefore there is not a material lack of convenience for residents in the primary trade area.

Conclusion

The Court was not persuaded that there was a need for the proposed development and that as it did not strike an appropriate balance in terms of other planning considerations, such as respect for the existing and planned character and amenity of the area, the appeal was dismissed.

Planning and Environment Court finds that there is no conflict with the Brisbane City Plan 2014 for a proposed multiple dwelling development

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ko v Brisbane City Council & Anor* [2018] QPEC 35 heard before Williamson QC DCJ

August 2018

In brief

The case of *Ko v Brisbane City Council & Anor* [2018] QPEC 35 concerned an appeal to the Planning and Environment Court regarding the Brisbane City Council's (**Council**) decision to refuse a development application for a material change of use for a multiple dwelling in respect of land situated at 29 Fairy Street, Moorooka (**Subject Land**).

The development application was refused on 24 February 2017 and the appeal to the Court was commenced under the *Sustainable Planning Act 2009* (**SPA**).

The proposed plans were amended during the course of the appeal. The amended plans were received favourably by the Council, however, the co-respondent by election, who was a submitter, maintained that the development application should be refused.

The submitter contended that the proposed development conflicted with the following provisions of the *Brisbane City Plan 2014* (**City Plan**):

- overall outcome 7(a) of the Low-Medium Density Residential Zone Code (**LMR zone code**);
- overall outcome 5(a) of the LMR zone code;
- overall outcome 5(b) of the LMR zone code;
- performance outcomes 5 and 6 of the Multiple Dwelling Code; and
- overall outcomes 9.3.14.2(e)(i), (h)(v) and (l)(iii) of the Multiple Dwelling Code.

The Court found that the proposed development did not conflict with the City Plan and allowed the appeal.

No conflict with overall outcome 7(a) of the LMR zone code

Overall outcome 7(a) of the LMR zone code states as follows:

> *(a) Development comprises a mix of low-medium rise, low-medium density residential buildings:*
>
> *(i) of no more than 2 storeys, or no more than 3 storeys in height where located within easy walking distance of a public transport node;*
>
> *(ii) located on suitable sites, inaccessible locations, near to public transport and larger centres or key destinations.*

The submitter argued that the proposed development would conflict with overall outcome 7(a) because the proposed development would not be "*… within easy walking distance of a public transport node*" (see [32]).

The Court noted that it has held in previous decisions, namely *Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21, [123] that "*easy walking distance*" is a walk that presents few difficulties for the hypothetical pedestrian and the distance can easily be reached by walking.

The Court held that the proposed development did not conflict with the overall outcome 7(a) because the walk to the Moorooka train station, being the closest transport node, takes only eight minutes and is a flat walk on a footpath. The Court did not accept the submitter's argument that the lack of shade and the difficulty and time required to cross Ipswich Road would detract from the overall convenience and walkability of the route.

No conflict with overall outcome 5(a) LMR zone code

Overall outcome (5)(a) of the LMR zone code states as follows:

> *Development for a residential building is of a height bulk, scale and form which is tailored to its specific location and to the characteristics of the site within the Low-medium density residential zone and the relevant zone precinct.*

The submitter argued that the proposed development conflicted with overall outcome 5(a) because the height of the proposed development was not tailored to its specific location and precinct, on the basis that it was not within easy walking distance of a public transport node. Additionally, the submitter contended that the proposed development was inconsistent with the existing character of the street.

The Court held that this submission relied upon the Appellant failing to comply with overall outcome 7(a) of the LMR zone code.

The Court found that given that overall outcome (7)(a) had been satisfied and that the proposed development was consistent with the height envisaged in the 2 to 3 storey mix zone precinct, the proposed development did not conflict with overall outcome 5(a).

No conflict with overall outcome 5(b) of the LMR zone code

Overall outcome 5(b) of the LMR zone code states as follows:

> *(b) Development provides for a building to have a building height and bulk that responds to:*
>
> *(i) the nature of the adjoining dwellings;*
>
> *(ii) site characteristics, including the shape, frontage, size, orientation, slope, and nature of the adjoining dwellings.*

The submitter argued that the proposed development would conflict with overall outcome 5(b) because it did not properly respond to the nature of the adjoining dwellings, particularly the adjoining dwelling to the south.

The Council's expert stated in the relevant joint report that the proposed development was designed to respond to adjoining development as:

- it is consistent with the general residential height limit for 2 and 3 storey developments;
- there is a large separation distance to the single dwelling to the west;
- the driveway design provided increased building separation and height transition;
- the plans for the dwellings promote privacy;
- the proposed development transitions away from the street frontage from 2 to 3 storeys;
- the third level of the 3 storey development achieves a 3 metre setback to the southern common boundary with the 2 storey multiple dwelling; and
- the use of deep planting provides suitable landscape screening to the building form.

The Court found that the height, bulk, and scale of the proposed development responded favourably to the nature of the adjoining dwellings, and that there was no conflict with overall outcome 5(b).

No conflict with the Multiple Dwelling Code

The submitter also argued that the proposed application would conflict with performance outcomes 5 (**PO5**) and 6 (**PO6**) of the Multiple Dwelling Code. To demonstrate the conflict, the submitter argued that the evidence provided by the Council's experts presumed that the proposed application was within easy walking distance to the Moorooka train station.

The Court rejected the argument on the basis that the submitter failed to address the specific terms of PO5 and PO6 of the Multiple Dwelling Code and rather proceeded on an argument which concerned overall outcome 7(a) of the LMR zone code. The Court held that the proposed development would not conflict with PO5 and PO6.

The submitter also argued that the proposed development would conflict with overall outcomes 9.3.14.2(e)(i), (h)(v), and (l)(iii) of the Multiple Dwelling Code on the same grounds as those relied upon in respect of PO5 and PO6 of the LMR zone code.

The Court found it unnecessary to dwell upon this argument given that it relied on the same submissions concerning PO5 and PO6, which had failed.

Court found sufficient grounds to support the application

The Court considered whether there were sufficient grounds to approve the development application for the proposed development.

The Court, however, noted that there was a change to overall outcome 7(a) of the LMR zone code. In December 2017, overall outcome 7(a) was amended and renumbered as overall outcome 7(b).

The Court found that the amendments made to the previous 7(a) of the LMR zone code removed the "*rigidity of the planning intent*" (see [78]). The Court held that the replacement of the terms "*no more than 2 or 3 storeys*" to "*(i) are of predominantly 2 storeys, or of up to 3 storeys*" promoted flexibility.

The Court found that Fairy Street has a predominance of development that is 1 to 2 storeys in height. The Court provided that a decision to approve the application would not conflict with the amended overall outcome that is renumbered as 7(b), as the predominant height of buildings in Fairy Street would remain unchanged. The Court additionally held that the proposed development did not give rise to unacceptable impacts on amenity.

Finally, the Court held that if there was a conflict, the conflict would not be characterised as a serious or significant conflict.

Court findings

The Court was satisfied that the Appellant had discharged the onus and established that the appeal should be allowed.

Planning and Environment Court allows an appeal concerning a proposed industrial use in the rural zone

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Bilinga Beach Holdings P/L v Western Downs Regional Council & Anor* [2018] QPEC 34 heard before Williamson QC DCJ

August 2018

In brief

The case of *Bilinga Beach Holdings P/L v Western Downs Regional Council & Anor* [2018] QPEC 34 concerned an appeal to the Planning and Environment Court against the Western Downs Regional Council's (**Council**) decision to refuse an impact assessable development application, for a material change of use for a transport terminal and ancillary accommodation on land situated at 38493 Leichardt Highway, Miles.

The Council refused the development application on the basis that the proposed development would conflict with the *Murilla Shire 2006 Planning Scheme* (**2006 Planning Scheme**) and the *Western Downs Planning Scheme 2017* (**2017 Planning Scheme**).

The disputed issues in the appeal were as follows:

- Conflict with the Rural zone code of the 2006 Planning Scheme.
- Unacceptable impacts on the amenity and character of the locality.
- Conflict with the Rural zone code of the 2017 Planning Scheme.

The Court held that the proposed development was not in conflict with the 2006 Planning Scheme or the 2017 Planning Scheme, as the Appellant was able to demonstrate that the development would not have an adverse effect on the rural scale of the land, and it would maintain and enhance the rural character and amenity of the land. The Court therefore allowed the appeal with conditions.

Conflict with the Rural zone code of the 2006 Planning Scheme

The Council argued that the proposed development was in conflict with section 4.1.3.3(5)(d) of the 2006 Planning Scheme because a "Transport terminal" is considered to be an industrial activity under the 2006 Planning Scheme, and the proposed development was to be located within the Rural zone. Section 4.1.3.3(5)(d) of the Rural zone code relevantly states as follows:

> *(5) Within the Rural "Zone", the Rural "Zone" Code allows for:*
>
> *…*
>
> *(d) limited industrial uses where it can be demonstrated those "uses" are associated with rural production and can not reasonably be established in the Industrial "Zone".*

Section 4.1.3.3(5)(d) of the 2006 Planning Scheme contemplates that limited industrial uses may be located in the Rural zone provided the following two matters can be demonstrated:

- the proposed use is associated with rural production; and
- the proposed use cannot reasonably be established in the Industrial zone.

The Court rejected the Council's argument that the proposed development was not a "*limited industrial use*" due to the scale of the development. The Court noted that the provision does not purport to give any direction as to the scale of uses in the Rural zone and that, rather, it was to describe the number of industrial uses within the Rural zone.

The Council also argued that the development did not demonstrate a strong association with rural production. The Court noted that in respect of the term "*associated*" within the provision, it should be given its ordinary meaning, that is, it connotes a connection or relationship between the proposed use and rural production. It was held by the Court that the provision does not describe the strength of the association which is required. The Appellant argued that the proposed development did have an association with rural production as the proposed business would supply plant and equipment to farmers in the Rural zone. The Court concurred with the Appellant's argument and held that the evidence clearly established an association between the proposed use and rural production for the purposes of section 4.1.3.3(5)(d) of the 2006 Planning Scheme.

The Court also considered whether the Appellant could demonstrate that the proposed use could not reasonably be established in the Industrial zone. The Appellant submitted three arguments as to why it would be unreasonable for the proposed development to be located in the Industrial zone. However, the Court found that the most persuasive of those arguments was that the proposed development would be an incompatible use in the Industrial zone due to the accommodation aspect of the development.

The Court noted that residential accommodation uses and industrial uses are incompatible because industrial uses have the potential to adversely impact the amenity of residential accommodation. The Court placed considerable weight upon the Appellant's argument that locating the on-site workers' accommodation within the Rural zone would provide a safe and quiet environment for its employees, and that it would be highly undesirable for the employees to undertake further travel for accommodation purposes. Therefore, the Court was ultimately satisfied that the Appellant had demonstrated that the proposed development did not conflict with the 2006 Planning Scheme.

Unacceptable impacts on the amenity and character of the locality

The Council argued that the proposed development would impact on the rural amenity and character of the Rural zone. The Council made this argument on the premise that the operating hours would be inappropriate for a rural area, and the noise, light, dust, and vehicle movements would cause an adverse impact upon the amenity and character of the area.

The Court considered the joint expert reports with respect to noise and air quality. The experts in each of the reports identified some issues with respect to the noise and the impact upon air quality, which the proposed development may cause. However, the experts had recommended conditions to alleviate those impacts. The Court held that the recommended conditions would appropriately mitigate any adverse impacts. In relation to traffic movements, the Court rejected the Council's traffic expert's report which stated that the proposed development would generate a level of traffic, which is significantly greater than what is reasonably anticipated. The Court rejected this evidence on the basis that the Council's traffic expert did not take into account that the proposed use was a reasonably anticipated use of the land.

The Court held that the Council did not provide sufficient recognition of the purpose of the Rural zone. The Court stated that it should be anticipated that the Rural Zone is not intended to provide a high level of amenity as it is likely to be dusty and influenced by the noise of plant, equipment and trucks utilised for a primary production purpose. In order to alleviate the visual impact of the proposed development, the Court accepted the Appellant's submission that a landscape buffer should be planted around the boundaries of the subject land. On that basis, the Court was satisfied that the proposed development would not have an unacceptable impact on visual amenity and character.

Conflict with the Rural zone code of the 2017 Planning Scheme

The Council argued that the proposed development was in conflict with the 2017 Planning Scheme for a number of reasons. The Council made the same arguments with respect to the 2006 Planning Scheme, along with a further argument that there was no overriding community need for the development. The Court observed that the overriding community need test was a new test which is to be engaged in one of two circumstances. Firstly, where an industrial use is proposed for unproductive rural land. Secondly, where development is not consistent with the purpose and intent of the Rural zone. The Court held that the overriding need test did not alter the policy position that development, such as the proposed development, may be located in the Rural zone, conditional upon the satisfaction of requirements that focus on the characteristics of the use and the location where it is proposed.

The Court noted that as the 2017 Planning Scheme was made under the *Sustainable Planning Act 2009* (**SPA**), the Court must consider what weight, if any, should be given to the 2017 Planning Scheme under section 495(2) of the SPA. Section 495(2) of the SPA relevantly states as follows:

> *(2) However, if the appellant is the applicant or a submitter for a development application, the court—*
>
> *(a) must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate; and*
>
> *(b) must not consider a change to the application on which the decision being appealed was made unless the change is only a minor change.*

The Court observed that the 2017 Planning Scheme was consistent with the superseded 2006 Planning Scheme as it directs industrial land use and development to land designated for industrial purposes within the urban area. Section 6.2.9.2(4) of the 2017 Planning Scheme was also found to be consistent with the purpose of the Rural zone code under section 4.1.3.3(2) of the 2006 Planning Scheme, as it was held by the Court that the 2017 Planning Scheme effectively carried forward the intentions of the 2006 Planning Scheme as noted by the town planning experts' joint report.

Ultimately, the Court held that the proposed development was not in conflict with the 2017 Planning Scheme.

Court allowed the appeal as the Appellant was successful on all grounds of the appeal

The Court held that as the proposed development was not in conflict with the 2006 Planning Scheme or the 2017 Planning scheme and that there were no adverse impacts upon the amenity and character of the Rural zone, the appeal was allowed. The Court ordered that the parties were to formulate an agreed suite of conditions, which was to include a condition with respect to landscaping.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court dismisses Respondents' application for summary judgement

Anne Hinton | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Council of the City of Gold Coast v Ashtrail Pty Ltd & Anor* [2018] QPEC 29 heard before Kefford DCJ

August 2018

In brief

The case of *Council of the City of Gold Coast v Ashtrail Pty Ltd & Anor* [2018] QPEC 29 concerned an application for summary judgement by the Respondents against the Council of the City of Gold Coast (**Council**) in respect of part of the Council's originating application to the Planning and Environment Court.

The Council, in its Originating Application, sought declarations and enforcement orders in relation to the non-compliance of conditions contained in the Respondents' development permit for a material change of use. The conditions related to requirements for the payment of certain infrastructure contributions, the design and construction of roadworks, footpaths and bikeways and a land dedication, all prior to the commencement of the use of the premises.

The Court dismissed the Respondents' application for summary judgement and considered the following issues in making that finding:

- whether the Court had power in the circumstances to grant the Respondents' application for summary judgement under rule 293 of the *Uniform Civil Procedure Rules 1999* (**UCPR**);
- whether the Council had no real prospect of succeeding in respect of part of its originating application, because:
  - uses under the Respondents' development approval had never started and it lapsed; and
  - the claim for moneys (under conditions 5 and 6 of the Respondents' development approval) was barred by section 10 of the *Limitation of Actions Act 1974*;
- whether the Court should exercise its discretion under rule 658 of the UCPR to make an order (which the nature of the case requires), to grant the Respondents' application for summary judgement.

Availability of Summary Judgement

The Court had to determine whether it had power under rule 293 of the UCPR to grant the Respondents' application for summary judgement in respect of part of the Council's originating application.

Rule 293 of the UCPR provides as follows:

> ***293 Summary judgment for defendant***
>
> *(1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.*
>
> *(2) If the court is satisfied—*
>
> *(a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and*
>
> *(b) there is no need for a trial of the claim or the part of the claim;*
>
> *the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate.*

The Respondents argued that rule 3 of the *Planning and Environment Court Rules 2010* applied such that rule 293 of the UCPR "*extends to proceedings in the Planning and Environment Court commenced by way of Originating Application*" (at [14]).

The Council, on the other hand, submitted that:

- rule 293 of the UCPR was not available;
- the operation of rule 293 was "*limited to proceedings commenced by way of claim or ordered to continue as if started by claim.*" (at [15]); and

- as the Respondents had not filed a notice of intention to defend in the proceedings, the procedural requirements for the Court to give summary judgement under rule 293 of the UCPR had not been met.

The Court referred to the cases of *Allingham v Fuller* [2013] QSC 81 and *LPD Holdings (Aust) Pty Ltd v Russells (a firm)* [2017] QSC 45, which made clear that the summary judgement procedure under rule 293 of the UCPR is available only after a defendant has filed a notice of intention to defend.

In following these decisions, the Court determined that it was not satisfied that it had power under rule 293 of the UCPR to grant the Respondents' application for summary judgement.

The Court also had to determine whether it should exercise its discretion under rule 658 of the UCPR to grant the Respondents' application for summary judgement. The Court considered it appropriate to have regard to the principles which are relevant in determining whether to grant summary judgement in accordance with rule 293 of the UCPR.

Test for summary judgement

Under rule 293 of the UCPR, the Court may grant the Respondents' application for summary judgement in respect of part of the Council's originating application if the Respondents can demonstrate that the Council has no real prospect of succeeding in respect of that part of the originating application, and that there is no need for a trial of that part of the originating application.

The Court noted (at [10]) that "*the discretion to order summary judgment should only be exercised with great care and never in circumstances in which there is a real question to be tried*" (see *Fancourt & Anor v Mercantile Credits Limited* [1983] HCA 25) and "*proceedings should be determined summarily only in the clearest of cases*" (see *Deputy Commissioner of Taxation v Salcedo* [2005] QCA 227).

Basis 1 – Uses under the development approval had never started and it lapsed

The Respondents' first basis for obtaining summary judgement was that its development approval had never started and it had lapsed. The Respondents relied on the decision in *Pad-Mac Pty Ltd v Hotel Wickham Investments Pty Ltd* [1995] QCA 300; (1995) 88 LGERA 157 (**Pad-Mac decision**) and submitted that this decision was binding authority.

In the Pad-Mac decision, the Court of Appeal had to decide whether the use of premises at a particular point in time was a lawful use. In this case, a town planning consent had been granted subject to conditions being set out in a council determination. A copy of the determination was not attached to or set out in the judgement.

The only details of the conditions set out in the judgment included category D headed "PRIOR TO COMMENCEMENT OF USE" and category E headed "PRIOR TO COMMENCEMENT OF USE AND THEREAFTER MAINTAINED AT ALL TIMES THAT THE DEVELOPMENT REMAINS IN EXISTENCE".

The Respondents submitted that because the words "*prior to the commencement of the use*" was included in each of conditions 5, 6, 10, 12 and 16 contained in the Respondents' development permit, the Pad-Mac decision was directly applicable in this case.

The Respondents relied on the findings made in the Pad-Mac decision about the consent that "*Its effect at 25 January 1990 has to be determined by the construction of its terms. In my opinion, the effect of the consent - or Council decision - at 25 January 1990 was to suspend the lawful use of the premises as a shop until at least some of the conditions were performed or otherwise complied with. In other words, the consent of 25 January 1990 gave consent to the use of the premises as a shop at such future time as the material conditions were satisfied*" (at [158]).

The Court determined (at [50]) that "*there is an arguable case that this case is distinguishable from Pad-Mac Pty Ltd v Hotel Wickham Investments Pty Ltd on a number of bases*". These included the different legislative regimes applying in each case, and that the approval in this case did not contain the same headings as in the Pad-Mac decision and the conditions need to be construed in the framework of the Respondents' permit.

For these reasons, the Court decided that the matter should not be determined on a summary basis.

The Court noted that it was not necessary for the Court to finally determine the matter when deciding the summary judgement application and that it just had to be satisfied that the Council had no real prospect of succeeding or that there was no need for a trial.

Basis 2 – The claim for moneys is barred by section 10 of the Limitation of Actions Act 1974

The Respondents submitted that the claim in the originating application for orders requiring the payment of monies under conditions 5 and 6 of the Respondents' development approval is a proceeding to recover a sum of money, which is not a penalty or forfeiture and is therefore barred by operation of section 10 of the *Limitation of Actions Act 1974*.

The Court determined that the Respondents' case in relation to this issue was not "*the clearest of cases*" and should not be determined on a summary basis by the Court. It considered that the Council had at least an arguable case and was entitled to a trial in relation to the issues.

Some of the issues identified by the Court in the Respondents' submissions in relation to the second basis included the characterisation of the claim as a proceeding to recover a sum of money, whether there was no identifiable recoverable sum, and whether the Court had a discretion to remedy the commission of the offence by other means.

Conclusion

The Court determined that it was not satisfied that:

- it had power under rule 293 of the UCPR to grant the Respondents' application for summary judgement;
- there was not some real prospect of the Council succeeding at trial; and
- in the circumstances, it should exercise its discretion to grant the Respondents' application for summary judgement under rule 658 of the UCPR.

The Court dismissed the Respondents' application.

Planning and Environment Court refuses proposed minor change to multi-unit dwelling as it would result in a substantially different development

Dee Ardham | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *GBW Investments Pty Ltd v Brisbane City Council* [2018] QPEC 33 heard before Kefford DCJ

August 2018

In brief

The case of *GBW Investments Pty Ltd v Brisbane City Council* [2018] QPEC 33 concerned an appeal to the Planning and Environment Court against the Brisbane City Council's (**Council**) decision to refuse one aspect of a minor change application. The application was in relation to a development approval granted for a 15 storey multi-unit dwelling located at 2 Scott Street, Kangaroo Point.

The Council approved 10 changes identified in the application but refused to approve one change, which related to the extension of the slab of the multi-unit dwelling on the basis that it was not a minor change. Accordingly, the only issue raised in the appeal was in respect of whether the refused change constituted a minor change.

The Court held that the proposed change would result in a substantially different development to what was originally approved. The Court found that the proposed change unacceptably impacted the adjacent heritage building site. Accordingly, the Court confirmed the Council's decision to refuse the proposed change and dismissed the appeal.

Council argued that the proposed change would result in a substantially different development

The multi-unit dwelling is cantilevered from its third level to overhang an adjacent heritage listed building, which is included in both the Queensland Heritage Register and the local heritage register. The proposed change requires the multi-unit dwelling to extend the slab on its western elevation beyond the roof of the heritage building.

The Council relied on the *Brisbane City Plan 2014* (**City Plan**) and the *Development Assessment Rules* (**DAR**) to argue that the proposed change would result in a substantially different development. The Council asserted that the proposed change was not a minor change as it was inconsistent with multiple provisions of the City Plan.

The Council argued that the proposed change would unacceptably compromise the heritage site by increasing the severity of its impacts, and rendering the heritage building less prominent by undermining its cultural heritage significance. Council further argued that the proposed change would result in a dramatic change to the built form of the multi-unit dwelling in respect of scale and bulk.

Court referred to relevant planning instruments to determine whether the proposed change was minor

The change application was made and decided under section 78 and section 81 of the *Planning Act 2016* (**PA**). Under section 81 of the PA, the application must be seeking a minor change to a development approval. Schedule 2 of the PA relevantly provides that a minor change means a change that "*would not result in substantially different development*".

Schedule 1 of the DAR states that a change may be considered to result in a substantially different development "*where the change dramatically changes the built form in terms of scale, bulk and appearance*" or "*introduces new impacts or increases the severity of known impacts*".

The Court acknowledged that there are no stated legislative requirements to consider the provisions in Schedule 1 of the DAR, however, both parties accepted that it was appropriate to do so. The Court clarified that whether the proposed change constitutes a minor change is a matter of fact and, therefore, should be considered broadly and fairly within the context of the PA and DAR.

The Court accepted the view of the Council's expert that matters involving heritage sites warrant careful analysis given the City Plan's clear intent to protect and conserve them. This approach was accepted in the case of *Kirkham v Brisbane City Council* [2007] QPEC 106. The Court held that the City Plan's intent is specific to the site and raises a higher level of scrutiny as a result of this.

Court found that the proposed change increased the severity of impacts on the heritage site

The Court took into account the heritage site's citation in the Queensland Heritage Register. The Court clarified that the specific settings of the heritage site such as curtilage and garden area had no relevance in this issue. Rather, the Court stated that the desirability of an ongoing opportunity to appreciate and understand the heritage site was most relevant. The Court held that the specific impact on this opportunity must be considered when determining the overall impacts on the cultural heritage significance of the heritage site.

The Court reviewed expert evidence submitted by both parties regarding the impacts of the proposed change. The Court rejected the Appellant's expert evidence that the proposed change did not make a significant difference to the heritage site's cultural heritage significance.

The Court accepted the evidence of the Council's expert that the original development was already a generous encroachment into a local heritage place. The Court found that the proposed change increased the severity of the existing impacts to an unacceptable level. The Court stated that extending the multi-unit dwelling's slab would diminish the opportunity to understand and appreciate the heritage site. The Court also found that the proposed change would negatively impact how the heritage site is perceived in the local area. The Court held that these factors resulted in a substantially different development.

Court found that the proposed change did not result in a dramatic change to the development's built form

The Court accepted the evidence of the Council's expert and acknowledged that the proposed change resulted in specific design alterations to the multi-unit dwelling. Expert evidence highlighted numerous individual alterations, including increased elevation, colour variation of the façade and new floor plan allocations.

However, the Court formed the view that these alterations would not result in a dramatic change to the multi-unit dwelling's built form in respect of scale and bulk. The Court held that the alterations were only relevant to the extent that they would increase the severity of existing impacts on the heritage site.

Court confirmed the Council's decision that the proposed change was not minor

The Court concluded that the proposed change was not minor as it would unacceptably affect the heritage site by crowding its surrounding area and hindering the ability to understand and appreciate its cultural heritage significance. The Court reiterated the importance of conserving local heritage sites in accordance with the specific intent of the City Plan.

The Court affirmed the Council's decision to refuse the proposed change and dismissed the appeal on that basis.

Clearing category X vegetation still requires a development approval under a Planning Scheme, even where it is exempt development under the Planning Regulation 2017

Nicholas Lee | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fairmont Group Pty Ltd v Moreton Bay Regional Council* [2018] QPEC 20 heard before Kefford DCJ

August 2018

In brief

The case of *Fairmont Group Pty Ltd v Moreton Bay Regional Council* [2018] QPEC 20 concerned an application to the Planning and Environment Court seeking declarations in relation to the Applicant's right to clear vegetation in the local government area of the Moreton Bay Regional Council (**Council**).

The Applicant commenced appeals in the Court against the Council's decision to refuse development applications for operational work comprising the clearing of vegetation on land in Morayfield.

Relevantly, the vegetation was within a category X area under the *Vegetation Management Act 1999* and the clearing of the vegetation was categorised as follows:

- under the *Moreton Bay Regional Council Planning Scheme 2016* (**Planning Scheme**) – as assessable development requiring a development approval; and
- under the *Planning Regulation 2017* (**Regulation**) – as "*exempt clearing work*", being a form of vegetation clearing which was excluded from what was otherwise assessable development.

The appeals in respect of the refusal of the development applications were held in abeyance pending the determination of an application to the Court for the following declarations:

- that the proposed clearing of vegetation on freehold land within a category X area is categorised as "*accepted development*" under the Regulation and therefore no development permit was required; and
- to the extent that there is an inconsistency between the Regulation and the Planning Scheme, the Regulation must prevail over the Planning Scheme.

The Court dismissed the application on the basis that the proposed clearing was not categorised as "*accepted development*" under the Regulation and that, accordingly, the Planning Scheme was not inconsistent with the Regulation by categorising the proposed clearing as "*assessable development*" requiring a development permit.

Vegetation clearing, which is "exempt clearing work" (including the clearing of vegetation within a category X area), is not categorised as "accepted development" under the Regulation

Schedule 21 of the Regulation identifies the clearing of vegetation on freehold land within a Category X area, as was the case in this instance, as "*exempt clearing work*".

The *Planning Act 2016* (**Planning Act**) identifies three categories of development, being:

- *prohibited development* – development for which a development application may not be made;
- *assessable development* – development for which a development approval is required; and
- *accepted development* – development for which a development approval is not required.

Section 44(6) of the Planning Act further states that if "*no categorising instrument categorises particular development – the development is accepted development*".

The Applicant submitted that Schedule 10 of the Regulation "*carves out*" of assessable development the exempt clearing work and, as such, stipulates what is assessable development and what is not assessable development and is therefore accepted development. The Applicant relied upon the following in support of its submission:

- that the clearing of freehold land within a category X area is "*exempt clearing work*" under Schedule 21 of the Regulation;

- that "*exempt clearing work*" is expressly excluded from the definition of prohibited development and assessable development; and
- that in accordance with section 44(6) of the Planning Act, the development must be accepted development by default.

Relevantly, the Applicant submitted that "*in defining assessable development the Regulation refers to schedules 9 and 10 which (as already discussed) carve out of assessable the exempt clearing work. So the regulation not only tells us what is assessable development it also tells us what is not assessable development*" (see [34]).

The Court rejected the Applicant's submission and stated that the exclusion of exempt clearing work for categorisation of clearing as prohibited or assessable development did not amount to the exempt clearing work being categorised as accepted development. Relevantly, the Court held as follows (see [35]):

> *This submission overstates the position. The "carve out" only tells us what is not assessable development for the purpose of that particular item in that schedule.*

Planning Scheme is not prevented from categorising vegetation clearing as "assessable development" where it is "exempt clearing work" under the Regulation

The Applicant contended that to the extent there was an inconsistency between the Planning Scheme and the Regulation – being that the Planning Scheme categorised the vegetation clearing as "*assessable development*", whereas the Regulation categorised the vegetation clearing as "*exempt clearing work*", which was expressly excluded from being "*assessable development*" – the Regulation must prevail and the proposed clearing should be treated as defaulting to "*accepted development*". The Applicant submitted that this position was supported by the Court's decision in *Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council* [2015] QPEC 49 (**Traspunt Decision**).

The Court differentiated the Traspunt Decision on the basis that it was decided under a different planning regime being the *Sustainable Planning Act 2009*, which specifically included a category of development called "*exempt development*".

The Court confirmed that in accordance with section 43 of the Planning Act, either a Regulation or local categorising instrument, in this instance the Planning Scheme, could categorise development. Given that there was no inconsistency with the Regulation as the "carve out" argument had failed, the Court determined that the proposed clearing was assessable development under the Planning Scheme and would be a development offence under the Planning Act, if undertaken without the relevant development permit.

The Court therefore dismissed the application.

Court of Appeal dismisses appeal against a decision of the Planning and Environment Court regarding an owner's consent for a development application on Crown land

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Bowyer Group Pty Ltd v Cook Shire Council & Anor* [2018] QCA 159 heard before Fraser and Morrison JJA and Bowskill J

August 2018

In brief

The case of *Bowyer Group Pty Ltd v Cook Shire Council & Anor* [2018] QCA 159 concerned an application for leave to appeal a decision of the Planning and Environment Court to the Court of Appeal. The Applicant sought to challenge the decision of the Planning and Environment Court regarding the approval of a development application for a material change of use of land for extractive purposes.

The Court acknowledged that the case involved important issues concerning the proper interpretation of the application of the *Sustainable Planning Act 2009* (**SPA**). As such, the Court granted leave, however, ultimately dismissed the appeal.

Subject land

The land the subject of the development application is described as Wolverton Station. The development application was for a development permit for a material change of use for sand and gravel screening and extraction.

The land is the subject of a rolling term lease for pastoral purposes granted under the *Land Act 1994*. The rolling term lease was originally set to expire on 31 March 2022 but was extended by an additional 23 years and 9 months.

Relevantly, the Second Respondent holds a mining lease over part of the land and a sales permit under the *Forestry Act 1959*, which allows for obtaining quarry materials located on part of the land.

Prior decision of the Planning and Environment Court

The Appellant was Bowyer Group Pty Ltd, an owner of adjoining land.

The Second Respondent, David Oriel Industries Pty Ltd, had applied to the Cook Shire Council for a development permit for a material change of use of land, and the Council subsequently issued the development approval subject to conditions.

The Appellant raised the following two preliminary issues in the appeal:

- the development application was not properly made as it was not accompanied by the consent of the holders of the relevant Crown lease; and
- the development application was not properly notified.

The Planning and Environment Court determined both preliminary issues in favour of the Second Respondent and dismissed the appeal.

Grounds of appeal

The Applicant sought leave to appeal against the decision of the Planning and Environment Court on the basis that the Planning and Environment Court had erred in its finding that the development application was properly made.

Relevantly, the Applicant argued that:

- the development was not properly made as it required the consent of the Crown lessees; and
- the phrase "*owner of the land the subject of an application*" under section 263(1) of the SPA is capable of referring to more than one class of owner; or

- alternatively, if the definition of "owner" is to be construed to one class of owner then the Crown lessees ought to be regarded as the owner, because their interests would more likely be affected by the approval of the development application.

In relation to the first issue, the Court found that the development application was properly made because the consent of the Crown lessees was not required as they were not the "owners" of the land but merely held an interest in the land.

Proper construction of the Sustainable Planning Act 2009

In relation to the second issue, the Court of Appeal held that the natural and ordinary meaning of the word "owner" should be applied, being the person (or entity) who is currently entitled to receive rent for the land or who would be entitled to receive the rent for the land if it were to be let to a tenant to rent.

The Court of Appeal found that the Crown lessees were entitled to receive the rent for the land from the lessees under the rolling term lease. However, the Court of Appeal disagreed with the Applicant's argument that sub-lessees would also be classified as owners of the land as they were also entitled to receive rent from the land.

The Court of Appeal relied upon the following definition of "owner" as stated in *BMG Resources Ltd v Pine Rivers Shire Council* [1989] 2 Qd R (at paragraph [51]):

> *The person other than Her Majesty who for the time being is entitled to receive the rent of any land or who, if the same were let to a tenant at a rack rent would be entitled to receive the rent thereof.*

The Court of Appeal held that there was no logical reason why "owner", for the purposes of section 263(1) of the SPA, should be interpreted in an expansive way and why a lessee, or sub-lessee, should have a right to veto the making of a development application in respect of land they have a limited interest in. The Court of Appeal found that the proper construction of "owner" is the person or entity who is principally entitled to receive the rent for the land and therefore holds the right to veto a development application. With respect to the other parties who have an interest in the land, the Court of Appeal held that they are able to submit an objection to the development proposal, but do not hold the right to veto the making of the development application.

Court dismissed the appeal

The Court of Appeal granted the Applicant leave to appeal but ultimately dismissed the appeal with costs, and held that the Planning and Environment Court was correct in finding that the development application was properly made.

Draft planning scheme held to be a light weight

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Nerinda Pty Ltd v Redland City Council & Ors* [2018] QCA 146 heard before Fraser and Morrison JJA and Bowskill J

August 2018

In brief

The case of *Nerinda Pty Ltd v Redland City Council & Ors* [2018] QCA 146 concerned an appeal by Nerinda Pty Ltd (**Nerinda**) to the Queensland Court of Appeal against a decision of the Planning and Environment Court to allow a submitter appeal and refuse a development application for a development permit to reconfigure a lot, and for preliminary approval for a material change of use for a mixed development in respect of land located at Boundary Road and Panorama Road, Thornlands.

The decision by the Planning and Environment Court in the first instance was *Lipoma Pty Ltd & Ors v Redland City Council & Nerinda Pty Ltd* [2017] QPEC 53 (**Lipoma Decision**) and concerned a submitter appeal against the Redland City Council's (**Council**) decision to approve Nerinda's development application. The Planning and Environment Court allowed the appeal and refused the development application.

In the Court of Appeal, the Appellant argued that the Planning and Environment Court erred in law, in that the Planning and Environment Court:

- should not have applied significant weight to the draft *Redlands City Plan 2015* (**Draft Planning Scheme**);
- failed to consider relevant considerations;
- failed to properly apply the decision rules in SPA;
- provided a decision that lacked a rational foundation; and
- erred by failing to consider an alternative order of partial approval.

The Court of Appeal held that, by proceeding on the basis that section 495(2) of the *Sustainable Planning Act 2009* (**SPA**) or the common law principle in *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117 allowed the Planning and Environment Court to apply weight to the Draft Planning Scheme, the Planning and Environment Court erred in law and therefore held that the matter be remitted back to the Planning and Environment Court for a further hearing.

Background

The Appellant's development application was submitted when the *Redlands Planning Scheme 2006* was in force. However, by the time the Council approved the development application, the Draft Planning Scheme had been made publicly available for inspection.

Planning and Environment Court erred in law by applying weight to the Draft Planning Scheme

Firstly, the Court of Appeal considered the operation of section 495(2)(a) of the SPA, which provides that a development application must be considered against the law applying at the time the development application was made, but that a Court "*may give weight to any new laws and policies the court considers appropriate*". The Court of Appeal noted that the Draft Planning Scheme was not a new law, merely a draft proposed law and therefore weight could not be applied to it under section 495(2)(a) of SPA.

The Court of Appeal then turned its attention to the decision in *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117, which established the principle that a Court may give weight to planning decisions that are embedded within a draft planning scheme but do not yet have the force of law (**Coty principle**).

However, the Court of Appeal observed that in *Lewiac Pty Ltd v Gold Coast City Council* [1994] QCA 2; [1996] 2 Qd R 266, the Court of Appeal established that it is possible to give too much weight to the planning considerations within a draft planning scheme.

The Court of Appeal considered that the Planning and Environment Court had acted on the wrong principle by giving too much weight to the Draft Planning Scheme. The Court of Appeal found that in effect the Draft Planning Scheme "*was given a status it does not have under the legislation*" and (at [17] and [29]):

> *…in circumstances where [the Draft Planning Scheme] replicated the planning scheme provisions in force, …, it is difficult to see why the draft scheme would be of much significance at all.*

Court of Appeal agreed with the Appellant that the Planning and Environment Court's role includes addressing deficiencies in the Planning Scheme

The Planning and Environment Court stated that "*it is a matter for the council to address perceived deficiencies in its scheme*" (at [121] of the Lipoma Decision). However, the Appellant argued in its submissions to the Court of Appeal that the Planning and Environment Court was failing to perform its role under section 326 and section 329 of SPA, which requires the Court to stand in the place of the Council. The Court of Appeal agreed and stated as follows (at [26]):

> *Those provisions [sections 326 and 329 of SPA] permit the assessment manager – in this case the Court – to make a decision (approving an application or part of it) which conflicts with a planning scheme. Those provisions therefore permit both the Council, and the Planning and Environment Court standing in its shoes as assessment manager, to address deficiencies in a planning scheme.*

In doing so, the Court of Appeal distinguished the case of *Elan Capital Corporation Pty Ltd v Brisbane City Council* [1990] QPLR 209 on the grounds that there was no equivalent to section 495(2) of SPA and that the circumstances of that case were different.

Court of Appeal considers the application of the SPA decision rules relating to a preliminary approval and determines it is unclear whether the Planning and Environment Court applied the SPA decision rules

The Appellant argued that its development application should not be considered against the parts of the Planning Scheme which it sought to vary via a preliminary approval. The Court of Appeal considered the decision rules of SPA and concluded that the Appellant's argument did not accord with the proper construction of the SPA decision rules.

However, in considering the Planning and Environment Court's determination of the SPA decision rules, the Court of Appeal found as follows (at [53]):

> *On the basis of the exposed reasoning in the [Planning and Environment Court] Decision, I consider that there has been a failure to properly apply the decision rules, because it is not possible to discern, from the Decision, how those rules have been applied.*

Further arguments submitted by the Appellant do not find favour with the Court of Appeal

The Appellant further submitted that the Planning and Environment Court decision:

- failed to consider relevant considerations;
- lacked a rational foundation possibly due to the 11 month delay between the hearing and the decision publication; and
- the Court failed to ask itself if it should approve the development application in part.

The Appellant submitted that the Planning and Environment Court failed to take into account relevant considerations. However, the Court of Appeal noted that the Planning and Environment Court did consider the relevant considerations and that an expectation that a different outcome would occur is not a "*relevant considerations argument*" (at [35]).

The Court of Appeal determined that any ambiguities in the Planning and Environment Court decision were a consequence of a human proofreading error and did not result from a delay. The Court of Appeal also determined that it was a requirement of the parties to have adverted to the Court the possibility of a part approval and any potential orders, and therefore the Planning and Environment Court did not err in failing to ask if approval in part was appropriate.

Conclusion

The Court of Appeal held that, by proceeding on the basis that section 495(2) of SPA or the Coty principle allowed the Planning and Environment Court to apply weight to the Draft Planning Scheme, the Planning and Environment Court erred in law, and therefore held that the matter be remitted back to the Planning and Environment Court for a further hearing.

State of Queensland found liable for erosion damage to neighbouring land caused, in part, by under-rail culverts initially installed in 1884

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *State of Queensland v Baker Superannuation Fund Pty Ltd & Anor; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd & Anor* [2018] QCA 168 heard before Morrison and McMurdo JJA and Jackson J

September 2018

In brief

The joint appeals of *State of Queensland v Baker Superannuation Fund Pty Ltd & Anor; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd & Anor* [2018] QCA 168 concerned appeals to the Queensland Court of Appeal against the decision by the Supreme Court of Queensland to award damages for a nuisance in respect of land located adjacent to a now disused railway line at Sandy Creek (**Lot 3**).

In the first appeal, being Appeal No. 3654 of 2017, the State of Queensland (**State**) was the Appellant and Michael Vincent Baker Superannuation Fund Pty Ltd (**Baker**) and Aurizon Operations Limited were the Respondents.

In the second appeal, being Appeal No. 3650 of 2017, Aurizon Operations Limited (**Aurizon**) was the Appellant, and Michael Vincent Baker Superannuation Fund Pty Ltd and the State were the Respondents.

The issues before the Court of Appeal were the following:

- Whether the payment of compensation to the original landowner in 1884 encompasses "injurious affection" to the land, such as to foreclose any action for damages for a nuisance based on the culverts?
- Whether, having paid compensation to the landowner, Aurizon and the State were protected by a statutory immunity under the legislation from time to time?
- Whether the Supreme Court adequately considered the issue of causation?
- Whether the laws of negligence were correctly applied by the Supreme Court?
- Whether the legislation relevant over the time provided for a statutory immunity?
- Whether Baker failed to take adequate steps to mitigate the damage?

The Court of Appeal dismissed Appeal No. 3654 of 2017 because the culverts contributed to the erosion of Baker's land and the State had prior knowledge of the damage caused by the culverts. The Court of Appeal also awarded costs to Baker and Aurizon.

The Court of Appeal allowed Appeal No. 3650 of 2017 because it held that Aurizon could not be expected to repair the damage to Baker's land. The Court of Appeal ordered that the Supreme Court's order that damages for nuisance be paid by Aurizon be set aside and awarded costs to Aurizon.

Background

This case concerns the Brisbane Valley Railway Line (**railway line**) and the prevention measures that were built in 1884, next to Lot 3, to combat its impact on the natural flow of surface water, including the installation of two wooden box culverts running through the embankment under the railway line. The wooden box culverts were replaced in 1956 with concrete box culverts.

The railway line impacts the natural flow of surface water as the embankment channels water into the culverts, which resulted, over long periods of time, in severe erosion to the neighbouring land.

Baker commenced proceedings against the current and previous owners of the railway line seeking damages for nuisance due to the erosion caused to Lot 3 by the box culverts. Baker has owned Lot 3 since 1995.

Both the State and Aurizon commenced an appeal to challenge Baker's successful result in the Queensland Supreme Court (*Michael Vincent Baker Superannuation Fund Pty Ltd v Aurizon Operations Limited & Anor* [2017] QSC 26).

Payment of compensation to the original landowner was not considered to be compensation for injurious affection and thus did not foreclose action for damages for nuisance

The State had previously paid compensation for the resumption of the original landowner's land under section 46 of the *Railway Act 1864* in the sum of £40. Additional compensation in the sum of £3.5.0 was also paid to the original landowner. The Queensland Supreme Court held that the additional compensation was not payment for injurious affection.

Before the Court of Appeal, the State and Aurizon jointly argued that the additional compensation was for "injurious affection" to the land. Baker argued that the conclusion of the Queensland Supreme Court was correct.

The Court of Appeal held that the additional compensation of £3.5.0 was to compensate for the resumption under section 46 of the *Railway Act 1864* for an additional "one acre and one perch" identified in the summary file note. Furthermore, the Court of Appeal concluded that the legislative intent within the *Railway Act 1864* was that the compensation paid under section 46 for the land was not intended to be for injurious affection and, therefore, the total compensation of £43.5.0 did not contain a component for injurious affection.

Payment of compensation did not result in a statutory immunity, nor was a statutory immunity available under the relevant legislation in force from time to time

Both Aurizon and the State argued that the terms of the legislation that were in force in 1885 (when the wooden box culverts were installed) and 1956 (when the concrete culverts were installed) created a statutory immunity against the recent erosion damage.

The Court of Appeal reviewed the operation of the relevant legislation in force from time to time and concluded that, whilst the legislation provided immunity in certain circumstances for the maintenance of the railway, the State still had an obligation to conduct maintenance on the culverts.

Furthermore, the Court of Appeal also found that the legislation that was in force from time to time did not provide, in and of itself, any form of a statutory immunity to Aurizon and the State.

Culverts were considered to be, in part, the cause of the damage under the applicable laws of negligence, which were correctly applied by the Supreme Court

Both Aurizon and the State argued that the Supreme Court did not correctly apply the law and that instead of requiring the Appellant to prove that an actionable nuisance occurred, the Supreme Court focused on when a lawful act becomes actionable. Baker argued that the Supreme Court's findings were correct.

The Court of Appeal considered the requirements of the High Court's decision in *March v Stramare (E & HM) Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12 and held that the Supreme Court had adequately addressed the issue of causation by finding that the box culverts contributed to the erosion by concentrating the water flow across Lot 3.

The Court of Appeal also held that the Supreme Court had considered and correctly applied the law of negligence, where applicable, to the relevant circumstances.

Baker was found to have adequately discharged his duty to undertake mitigating steps, despite not undertaking any physical action to stop the erosion, as no reasonable steps could be taken

All the parties agreed that the sum total of the mitigating steps that Baker undertook was to request that the State and Aurizon remove the culverts and repair the damage. Aurizon and the State argued that additional mitigating steps should have been taken, but did not provide any adequate suggestions as to what those steps would be.

The Court of Appeal determined that the Supreme Court's conclusions on this issue were unimpeachable and held that this ground failed. The Court of Appeal also noted that simply stating that additional mitigating steps should be taken, without providing adequate provable suggestions about those steps, was a sort of "*Delphic statement*" that was unlikely to satisfy the relevant onus (at [185]).

Conclusions

The Court of Appeal unanimously agreed that in the relevant circumstances, being the expense in removing the culverts and repairing the land, Aurizon should not be held liable for abating the nuisance, and therefore the claim against them should be dismissed.

His Honour Justice Morrison and His Honour Justice McMurdo were both in agreement that the State was liable for the damage caused by the culverts concentrating water over Lot 3, as the State was aware of the damage and there was no reasonable justification for not abating the nuisance.

His Honour Justice Jackson was in dissent regarding the liability of the State. His Honour Justice Jackson stated, after reviewing the relevant common law, that the use of the land as a railway was a natural use and, therefore, the State was not liable for failing to abate the nuisance.

Appeal No. 3654 of 2017 was dismissed as the Court of Appeal found that Aurizon was not liable in nuisance for the damage caused to Lot 3.

Appeal No. 3650 of 2017 was allowed as the Court of Appeal found that the State was liable in nuisance for the damage caused to Lot 3.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court decides that the public interest in the approval of a solar farm overrides the need to protect Good Quality Agricultural Land

Claire Pekol-Smith | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mirani Solar Farm Pty Ltd v Mackay Regional Council & Anor* [2018] QPEC 38 heard before RS Jones DCJ

September 2018

In brief

The case of *Mirani Solar Farm Pty Ltd v Mackay Regional Council & Anor* [2018] QPEC 38 concerned an appeal to the Planning and Environment Court against the decision by the Mackay Regional Council (**Council**) to refuse development applications to facilitate a solar farm on land 2.5km north-west of the Mirani township area (**subject land**). Mackay Sugar Limited elected to be a Co-respondent in the appeal.

The Council assessed the solar farm against the Mirani Shire Plan (**Mirani Plan**). However, the reasons for refusal relied upon relevant provisions of the Mackay Regional Planning Scheme (**Mackay Plan**).

The Court considered the following issues in the appeal:

- Issue one – Whether the solar farm was in conflict with the planning schemes.
- Issue two – Whether the solar farm would have an adverse impact on the sugar industry.
- Issue three – Whether there were other relevant matters to justify approval of the proposed development.

The Court held that the subject land was good quality agricultural land (**GQAL**) and that there was not a suitable alternative site.

The Court held that although the solar farm was in conflict with the planning schemes, the benefits of renewable energy were an "other relevant matter" sufficient to support the approval of the solar farm. The Court therefore allowed the appeal.

Issue one – Whether the proposed development was in conflict with the relevant planning schemes

The Court was required to consider if the solar farm relevantly conflicts with the following planning schemes:

- Under the Mirani Plan:

  Specific Outcome 1 – GQAL is protected for agriculture or other forms of primary production and that GQAL is protected from incompatible development.

  Specific Outcome 3 – Productive capacity of GQAL should not be fragmented, alienated or diminished by a development.

- Under the Mackay Plan:

  Performance Outcome 1 – Productive capacity of GQAL should be maintained and protected during development, unless there is an overriding public interest or no alternative site.

  Performance Outcome 3 – After temporary use of GQAL, the land should be rehabilitated to previous condition.

Firstly, the Court considered whether the development of a solar farm for 40 years diminished or restricted the agricultural capacity of the GQAL, or resulted in irreversible harm. The Court decided a proposed development of 40 years did not maintain GQAL for an agricultural purpose. Where the land could produce sugar cane and beef, the proposed development would diminish and restrict the agricultural industry to sheep grazing, solely to maintain grass. Moreover, sheep grazing was not the primary industry of the solar farm project. However, the Court accepted evidence that the proposed development would not create irreversible harm.

Secondly, the Court considered whether the solar farm would result in the alienation or fragmentation of GQAL. The Appellant argued that because the solar farm was for a fixed-term and allowed for agricultural uses, being sheep grazing, it did not alienate GQAL.

The Court rejected these arguments and held that 40 years was a significant period for GQAL to be taken out of agricultural use. The Court concluded that the solar farm would alienate GQAL for an extensive period from its agricultural purpose and would divert it to a public utility and low order agricultural uses. Thus, there was a material conflict with the planning schemes.

Issue two – The proposed development would have an adverse impact on the sugar industry

The Co-respondent argued that the solar farm would have an adverse impact on the sugar industry, which is a major part of the Mackay economy.

The Co-respondent submitted that the solar farm would reduce the available land for sugar cane production in the Mackay local government area by 0.08%. The Court held that this loss would not have a significant impact on the viability of the sugar cane industry in Mackay, even over a 40-year period.

However, the Court accepted the Co-respondent's "thin edge of the wedge" argument that the industry will be adversely impacted over time if the incremental erosion of GQAL is permissible.

The Court held that the preferred test for determining whether there would be an adverse impact is to consider the extent of the alienation and fragmentation caused by the proposed development and not the loss of physical area.

The Court held that the land would be alienated as a result of the proposed development in conflict with the relevant planning schemes. Therefore, the Co-respondent's argument succeeded in this respect.

Issue three – Whether there were other relevant matters to justify approval of the proposed development

The Court considered whether, under section 45(5) of the *Planning Act 2016* (Qld), there were any other relevant matters that justified approving the proposed development.

The Court concluded that there was policy support at a State, regional and local level for the protection of GQAL. The Court also concluded that the need for renewables is not currently addressed by the solar power industry, and that approval of the solar farm would have long-term benefits and no negative amenity impacts.

In weighing up the competing conclusions, the Court held that the long-term benefits of protecting GQAL were finely balanced with the benefits that would result from the solar farm. The Court found that the solar farm would benefit the Mackay local government area through 100 jobs created over the 12-month period of establishment. The Court also placed weight on the wider community benefits of increased efficiency and reliability of electricity supply and distribution: the maximised use of Mackay's existing electricity grid's capacity, the contribution to the local region's electricity demands, cost-effective electricity supply, and the desirability of meeting national and state renewable energy targets.

The Court concluded that the solar farm would make a meaningful and positive contribution to electricity supply and price reduction. Thus, the Court held that the Co-respondent's "thin edge of the wedge" argument only went so far given the overwhelming positives of the solar farm, where there was only a minor impact to the Mackay sugar industry.

Conclusion

The Court found that the balance lay in favour of approving the solar farm, as the need for the solar farm overrode the need to protect GQAL where no alternative site was available. The Court held that the benefits of the solar farm would outweigh the temporary loss of GQAL, even if the loss was for 40 years, as there was an overriding need in the public interest and no alternative site was available.

COLIN BIGGERS & PAISLEY LAWYERS

Supreme Court dismisses application for judicial review regarding a refusal to amend an environmental overlay map

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Trask Development Corporation (No. 2) v Moreton Bay Regional Council* [2018] QSC 170 heard before Ryan J

September 2018

In brief

The case of *Trask Development Corporation (No. 2) v Moreton Bay Regional Council* [2018] QSC 170 concerned an application for a statutory order of a review of the decision of Moreton Bay Regional Council (**Council**) to refuse an amendment to an environmental overlay map in a planning scheme. The Council subsequently applied to have the application summarily dismissed under rule 16 of the *Uniform Civil Procedure Rules 1999* (**UCPR**) and section 48 of the *Judicial Review Act 1991* (**JRA**).

The Court found that the "decision" was not a "decision" under the JRA and, in particular, did not affect the Respondent's rights. The Court therefore allowed the strike out application.

Background

The subject land, which is owned by the Respondent, is located within the Council's local government area and is subject to the Council's planning scheme.

The Respondent had cleared vegetation from the subject land and the Council had issued an enforcement notice.

The Council subsequently rescinded the enforcement notice and the Respondent then requested that the Council's "Environmental Areas overlay mapping" be removed from the subject land, as the area no longer contained vegetation.

The Council refused the request and the Respondent made an application for judicial review of the refusal in respect of which the Council applied for the application to be dismissed.

Grounds for dismissal

The Council sought a declaration that the application for judicial review had not been properly started and an order that the application be set aside or permanently stayed under rule 16 of the UCPR.

Relevantly, the Council argued as follows (at [23]):

- the letter sent by Council refusing the mapping amendment request did not constitute or reveal any decision for the purposes of the JRA; or
- alternatively, if the refusal of the mapping amendment request did constitute a decision under the JRA, then it was not a decision made under an enactment; and
- the application for a statutory order of review does not comply with section 25(b) of the JRA as it does not appropriately outline the grounds and, therefore, should be struck out.

In considering the Council's third submission, the Court found that although the Respondent's application for a statutory order of review was "*an unsatisfactory document*" that "*required amendment before any final hearing could take place*", it had met the requirements of section 25(b) of the JRA by providing sufficient information in the application.

Substance of the Respondent's application

In relation to the first issue, the Council submitted that the refusal did not constitute a decision to which the JRA applied because it was not final or operative and determinative. The Council relied upon the decision of the High Court in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; [1990] HCA 33, which sets out the criteria for a reviewable decision being as follows (at [64]):

> *A reviewable 'decision' is one for which provision is made by or under a statute. That will generally, but not always entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact calling for consideration.*

The Council submitted that as the refusal was an initial decision in a multi-step process, which could potentially result in an amendment to the planning scheme, it was therefore not final or operative and determinative.

The Court disagreed with the Council and held that the refusal did in fact decide that there would be no further process. The Court applied a practical approach to the issue and found that the refusal determined whether the mapping amendment would be made and, therefore, was final and binding.

Was the decision made "under an enactment"?

Section 4 of the JRA relevantly provides that a decision for the purposes of the Act means as follows:

> *(a) a decision of an administrative character made, proposed to be made or required to be made, under an enactment (whether or not in the exercise of a discretion); or*
>
> *(b) a decision of an administrative character made or proposed to be made by an officer or employee of the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained*
>
> *(i) out of amounts appropriated by Parliament; or*
>
> *(ii) from a tax, charge, fee or levy authorised by or under an enactment.*

To establish whether the decision was made under an enactment, the Court relied on the two criteria test set out in *Griffith University v Tang* (2005) 221 CLR 99; [2005] HCA 7, in which the decision must be expressly or impliedly required or authorised by the enactment and, secondly, that the decision must alter or affect the individual's legal rights.

In relation to the first criteria, the Respondent argued that the refusal was authorised by section 262(2) of the *Local Government Act 2009* and therefore the decision was made under an enactment. The Court rejected the Respondent's submission and held that the authorisation contained in the *Local Government Act 2009* was too general to constitute an enactment for the purposes of a decision.

In respect of whether the decision altered or affected the Respondent's legal rights, the Court found that the decision to refuse the mapping amendment did not affect the Respondent's legal rights. Therefore, the decision was not one to which the JRA applied.

The Court disagreed with the Respondent's argument that the refusal affected its legal right in relation to the use and development of its land. The Court held that the Respondent did not have a right to develop the land, even if the request for the mapping amendment had been approved, and therefore the refusal did not infringe on its legal rights.

The Court granted the dismissal of the application for a statutory order of review of the refusal and held that the decision made by the Council was not one where the JRA applied.

Carpark cannot be saved by special interest group without the requisite level of special interest

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Save Surfers Paradise Inc v Gold Coast City Council* [2018] QSC 181 heard before Boddice J

September 2018

In brief

The case of *Save Surfers Paradise Inc v Gold Coast City Council* [2018] QSC 181 concerned an originating application by the Applicant to the Supreme Court of Queensland for declaratory relief and an injunction, in respect of decisions made by the Gold Coast City Council (**Council**) in relation to the sale of the subject land comprising the Surfers Paradise Transit Centre and Bruce Bishop Car Park. The Applicant challenged the Council's decision to sell the subject land on the grounds that the decision was:

- in breach of public, private, or statutory trust;
- in breach of a statutory obligation not to engage in misleading or deceptive conduct;
- so unreasonable that no person in the position of the Respondent could have made the decision; or
- made for an improper purpose or ulterior motive and not for good government or any other relevant purpose.

The Council argued that the originating application should be set aside under rule 16 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) on the basis that the Applicant did not have the requisite standing to challenge its decision.

The Court considered whether the Applicant had a sufficient special interest which would entitle it to have standing to maintain the proceeding.

The Court held that the Applicant did not possess the requisite special interest needed to entitle it to maintain the proceeding, as it could not establish an interest greater than that of the general public. The Court, therefore, set aside the Applicant's originating application.

An originating process will be set aside if the party lacks a special interest

The Court noted that the relevant case law establishes that members of the general public or private organisations may only seek declaratory or injunctive relief, in respect of alleged public rights and duties, if they can establish that the decision would interfere with their private rights or that they have a special interest in the subject matter of the action. The Court also noted that it will not allow standing if only some members of the relevant entity have a special interest in the matter, or where the entity merely has objects or purposes related to the subject matter of the dispute.

The Court also noted that in order for a party to demonstrate that they have a special interest in a matter, they must establish that they would be specifically affected by the decision to a substantially greater degree or in a significantly different manner to a member of the public.

Applicant argued that it had a special interest as it acted for the Surfers Paradise business community who would have been be impacted by the proposed re-development

The Applicant was formed after the Council made its decision to sell the subject land.

The Applicant argued that it is acting in the interests of the Surfers Paradise business community in order to retain public assets constructed using public contributions and funding. The Applicant submitted that it had a special interest sufficient to maintain standing for the following reasons:

- it voiced the interest of the Surfers Paradise business community;
- it had pursued submissions and representations opposing the sale; and
- it had actively pursued the interests of its members and supporting organisations.

The Court agreed with the Applicant's argument that the sale of the car park would result in a reduction of available and convenient parking for local residents and businesses, and that the proposed re-development would result in only 640 publicly available car spaces and 100 spaces for clubs, community groups and volunteers.

Court held that the Applicant did not demonstrate that it possessed a special interest greater than the ordinary public

Although the Court agreed with the Applicant about the loss of car spaces, it held that the Applicant did not satisfy the requisite special interest required for standing. The Court noted as follows:

- the Applicant did not own any property which would be adversely affected by the decision made by the Council;
- the Applicant did not have an interest of its own, but instead had an indirect interest due to the interests of some of its members; and
- that there was no evidence to suggest that all members of the Applicant displayed a special interest, as some only have an emotional or intellectual interest in the retention of public car parking.

Further, the Court noted that the Applicant did not sufficiently demonstrate that it was a "peak" organisation recognised by the Council, because the Court observed that "peak" organisation status is not obtained by merely gaining a public profile from attempts to overturn the decision of the Council and being invited to Council workshops regarding the re-development.

The Court held that even though the decision by the Council will impact on the availability of public car parking spaces in Surfers Paradise, therefore affecting the commercial interests of some of the members of the Applicant, the Applicant as an entity did not have a sufficient special interest which founded an entitlement to enforce public rights or duties. The Court also decided that the Applicant would not gain a benefit or advantage greater than the benefit or advantage conferred upon an ordinary member of the public if it was successful.

Therefore, the Court held that the Applicant did not possess the requisite standing and dismissed the originating process.

Body Corporate successfully forces the hand of Noosa Council to decide whether to approve a bushfire information kit previously overlooked

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Body Corporate for Elandra Settlers v Noosa Council* [2018] QPEC 37 heard before Long SC DCJ

September 2018

In brief

The case of *Body Corporate for Elandra Settlers v Noosa Council* [2018] QPEC 37 concerned an originating application in the Planning and Environment Court (**Court**) regarding the approval of a bushfire information kit. The Applicant is the Body Corporate of a high density residential development located at Serenity Cove, Noosa Heads. Relevantly, two development approvals had been issued being a material change of use approval granted on 17 April 2007 (**MCU approval**) and a reconfiguring of a lot approval (**ROL approval**). The originating application concerned condition 55 of the MCU approval and condition 70 of the ROL approval, which required the Applicant to provide a bushfire information kit to the Noosa Council (**Council**) as part of a Fire Management Plan.

At the time of providing the Fire Management Plan to the Council, the Applicant did not include a bushfire information kit for the Council to approve. The Applicant, however, at a later date provided a bushfire information kit to the Council, which the Council refused to review.

The originating application sought a declaration from the Court that the bushfire information kit is a bushfire information kit for the purposes of condition 55 of the MCU approval and condition 70 of the ROL approval. Additionally, the Applicant sought a declaration under section 246(1)(a) of the *Sustainable Planning Act 2009* (**SPA**) that the bushfire information kit provided is consistent with the MCU approval and ROL approval. Lastly, the Applicant sought an order under section 465(8) of the SPA that the Council assess and decide whether the bushfire information kit provided ought to be approved under condition 55 of the MCU approval and condition 70 of the ROL approval.

The Applicant argued that the relief would provide certainty as to the obligations imposed by the development approvals with respect to bushfire management works.

The Council contended as follows:

- the Applicant's bushfire information kit was in fact not a bushfire information kit;
- there was no longer a requirement for the submission or approval of a bushfire information kit; and
- the document submitted by the Applicant did not contain or acknowledge the requirement for consent to be obtained under the Environmental Covenant, which was detailed in conditions 17 - 19 of the MCU approval.

The Court held that it has the power under section 456(a) and (e) of the SPA to declare whether or not the Council could approve a bushfire information kit. In light of this, the Court concluded that the Council does have the discretion to approve the bushfire information kit submitted by the Applicant, where such a discretion "*would not invalidate a bushfire management kit which did not include provisions which may derogate from a requirement of subsequent approvals as may be required under condition 19 of the development approval*" (at [39]).

Fire Management Plan

In respect of condition 14 of the MCU approval, the Applicant devised a Fire Management Plan, which was approved by the Council. The Fire Management Plan addressed fire management bushfire control within the site. Additionally, condition 55 of the MCU approval stated that the Applicant was to provide a bushfire information kit to the purchasers of the allotments on the site, which was to be submitted to the Council for approval as part of the Fire Management Plan.

The Council contended, and the Court relevantly agreed, that the Applicant did not provide a bushfire information kit with the Fire Management Plan.

The Court found, however, that the Council's position to refuse the current bushfire information kit was a pre-emptive decision.

The Court concluded that even though the bushfire information kit did not accompany the Fire Management Plan, the Council has the ability to approve the bushfire management kit so as to allow compliance with condition 55 of the MCU approval. The Court based this conclusion on the following reasons (at [29]):

- Condition 55 required that the Applicant supply the Body Corporate manager with a bushfire information kit and that the bushfire information kit was to be submitted to the Council for approval as part of the Fire Management Plan.
- There was no express requirement that a bushfire information kit had to be submitted contemporaneously with the Fire Management Plan.
- It could not be consistent with section 245 of the SPA to deny a successor in title an ability to obtain effective compliance with the condition.
- The condition is capable of an interpretation that does not exclude the submission by another entity in order to have it approved as part of the Fire Management Plan.

The Court found that it would be improper or unreasonable for the Council to refuse the document to be considered as a bushfire information kit. The Court concluded that the Council possessed an unfettered discretion in respect of any approval of a bushfire information kit under condition 55 of the MCU approval.

Environmental Covenant and Private Open Space for Conservation (POSC) area

Condition 17 of the MCU approval provided that the area defined as the POSC area was to be registered as an environmental covenant in favour of the Council. Condition 18 of the MCU approval provided that the covenant is to cater for the requirements of the conditions of the MCU approval protecting vegetation described as the "Retained and Enhanced Vegetation".

Condition 19.7 of the MCU approval related to the POSC area and prescribed that the POSC area shall be protected so that native trees and vegetation are not removed, pruned, lopped, damaged or adversely affected, without the prior written approval from the Council's Manager - Environmental Services.

The Court found that the Council correctly pointed out that the Applicant was bound by the relevant covenant, and the Court lacked jurisdiction in the proceeding to make a binding ruling as to the interpretation or effect of the covenant (at [32]). The Court, however, held that it did have a power to interpret condition 19.7 of the MCU approval.

The Court concluded that there was no indication that condition 19.7 of the MCU approval should operate other than as it appeared. The Court found that condition 19.7 of the MCU approval created an overarching obligation for the Applicant, and a responsibility for the Council, which was separate to the covenant and the bushfire information kit.

Conclusion

The Court held that the Council retained the ability to exercise its discretion to approve the bushfire information kit under condition 55 of the MCU approval and condition 70 of the ROL approval.

Court of Appeal confirms the correct time limitation period for the recovery of overdue and unpaid rates

Dee Ardham | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Amos v Brisbane City Council* [2018] QCA 11 heard before Fraser and Philippides JJA and Dalton J

September 2018

In brief

The case of *Amos v Brisbane City Council* [2018] QCA 11 concerned an appeal to the Court of Appeal against a decision of the Supreme Court of Queensland in respect of proceedings commenced by the Brisbane City Council (**Council**) for the recovery of unpaid rates levied upon the Appellant's land over a period of more than 12 years.

The first question in the appeal was whether the Council's claim for the unpaid rates was statutorily barred because the Council had commenced proceedings too late. The question was whether the correct time limitation period for the recovery of unpaid rates is six years or 12 years under the *Limitation of Actions Act 1974* (**LAA**).

The second question in the appeal was whether the Appellant is liable for utility charges levied by the Council on a different property owned by the Appellant at the time the charges were levied.

With respect to the first question, the Court held that the primary judge made an error in finding that the correct time limitation period is 12 years. The Court confirmed that the correct time limitation period is six years. As a result, the Court held that any claims for unpaid rates that fall outside the six year time period cannot be pursued. The Court reiterated that the intention of time limits is to restrict the scope for legal action in favour of the debtor.

With respect to the second question, the Court accepted the primary judge's findings that the Appellant is liable for the utility charges on the land as the Appellant implicitly asked the Council for the supply of the relevant services.

Council argued that the relevant time limitation period for the recovery of overdue and unpaid rates and charges is 12 years under the LAA

The Council commenced proceedings in the Supreme Court of Queensland for the recovery of overdue and unpaid rates levied upon the subject land between April 1999 and January 2012. The Council argued that the relevant time limitation period for recovering unpaid rates is 12 years under section 26(1) of the LAA. This section provides that a claim to recover a principal sum of money secured by a mortgage or other charge on property cannot be brought after a period of 12 years from the date on which the cause of action arose.

The Council argued that section 97 of the *City of Brisbane Act 2010* (**CBA**) allows the Council to register overdue rates and charges as a charge on the subject land in accordance with section 26(1) of the LAA. The primary judge accepted the Council's argument and held that the relevant time limitation period was 12 years. As a result, the primary judge ordered the Appellant to pay the full cost of unpaid rates levied on the subject land.

Appellant argued that the relevant time limitation period for the recovery of overdue and unpaid rates and charges is six years under the LAA

The Appellant appealed the primary judge's decision to the Court and argued that the relevant time limitation period is six years under sections 10(1)(d) and 26(5) of the LAA. Section 10(1)(d) of the LAA provides that claims to recover sums recoverable under legislation cannot be brought after a period of six years from the date on which the cause of action arose. The Appellant argued that the circumstances of this case better fits the description of section 10(1)(d) of the LAA. The Court did not discuss the effect of section 26(5) of the LAA in this appeal.

Court found that both section 26(1) and section 10(1)(d) of the LAA are applicable

The Court considered section 66(1) of the *City of Brisbane (Finance, Plans and Reporting) Regulation 2010* (**CB Regulation**) to determine the relevant time limitation period to recover the unpaid rates. This section provides that the Council may recover overdue rates by bringing court proceedings for a debt against the liable person.

The Court found that the Council's argument under section 26(1) of the LAA clearly falls within the description of section 66(1) of the CB Regulation. However, the Appellant argued that section 66(1) of the CB Regulation does not allow the Council to recover overdue rates as a "principal sum of money" under section 26(1) of the LAA. The Court considered relevant legislation and cases to reject this argument and held that the unpaid rates are a "principal sum of money". Therefore, the Court was satisfied that section 26(1) of the LAA was applicable to the Council's recovery of overdue and unpaid rates levied upon the subject land.

The Court found that section 10(1)(d) of the LAA also falls within the description of section 66(1) of the CB Regulation. Section 66(1) of the CB Regulation is the legislative provision that allows the Council to recover unpaid rates from the liable person in accordance with the requirement found in section 10(1)(d) of the LAA. The Court held that, in these circumstances, sections 26(1) and (10)(1)(d) are both applicable. This raised the question as to whether the 12 year time limitation period under section 26(1) of the LAA or the six year time limitation period under section 10(1)(d) of the LAA is the correct time limitation period for the Council's recovery of the unpaid rates.

Court considered relevant case law to determine the correct time limitation period

The Court considered the cases of *Sutton v Sutton* (1882) 22 CH D 511 (**Sutton decision**) and *Barnes v Glenton* [1899] 1 QB 885 (**Barnes decision**) to determine the correct time limitation period. In the Sutton decision, a claim for breaching a deed was brought to court more than 12 years after the breach. The Court was required to decide which of the 12 year time limitation period and the 20 year time limitation period found in separate legislation was applicable. In the Barnes decision, a claim to recover money lent to the defendants was brought to court more than six years later. The Court was required to decide which of the six year time limitation period and the 12 year time limitation period found in separate legislation was applicable.

In the Sutton decision and the Barnes decision, the shorter time limitation period was applied when an action fell within the description of two different provisions. The Court acknowledged that these decisions recognise that the objective of limitation periods is to place restrictions on legal action for the benefit of the debtor. Therefore, when the shorter time limitation period ends, the debtor obtains the right to defend themselves against the legal action.

The Court held that the approach used in the Sutton decision and the Barnes decision is the approach to be favoured in this case. Accordingly, the Court confirmed that the shorter time limitation period of six years under section 10(1)(d) of the LAA is the correct time limitation period. The Court reinforced that the intention of time limitation periods is to limit, not expand, the scope for legal action in favour of the debtor.

Court held that the Council can recover some, but not all, of the unpaid rates under the LAA

The Court held that the primary judge made an error by concluding that the 12 year time limitation period under section 26(1) of the LAA is the correct time limitation period. The Court found that the six year time limitation period under section 10(1)(d) of the LAA is the correct time limitation period. Accordingly, the Court held that the Council can only claim unpaid rates within six years from the date the cause of action arose. As a result, the Council could recover some, but not all, of the unpaid rates levied upon the subject land between April 1999 and January 2012.

Appellant argued that he is not liable for utility charges levied by the Council

In regard to the second ground of appeal, the Appellant argued that he is not liable for utility charges owed to the Council. The Appellant was the registered owner of a rental property located in Sandgate between October 2000 to April 2015. During this time, water and sewerage services stayed connected to the property. The Council levied utility charges on the property for the consumption of these services by tenants.

The Appellant argued that section 59(1)(b) of the CB Regulation clearly requires that water and sewerage services must be "asked for". The Appellant argued that he did not explicitly ask for these services. The primary judge rejected the Appellant's argument and held that the services can be implicitly requested to satisfy the requirements of section 59(1)(b) of the CB Regulation. Further, the primary judge held that the Appellant implicitly asked for the services because the property was occupied by rent-paying tenants and the services were being used by these tenants. The Court accepted the primary judge's findings and dismissed the second ground of appeal in this case.

Supreme Court dismisses an application for a statement of reasons concerning the financial assurance for the Blair Athol mine

Russell Buckley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Lock the Gate Alliance Ltd v Chief Executive under the Environmental Protection Act 1994* [2018] QSC 22 heard before Bowskill J

September 2018

In brief

The case of *Lock the Gate Alliance Ltd v Chief Executive under the Environmental Protection Act 1994* [2018] QSC 22 concerned an application to the Supreme Court of Queensland under section 38 of the *Judicial Review Act 1991* (Qld) (**JR Act**) for an order that the Respondent provide a statement of reasons relating to its decision under section 295 of the *Environmental Protection Act 1994* (**EP Act**), concerning the amount and form of financial assurance required for the Blair Athol coal mine in the Bowen Basin of Queensland.

Respondent imposed a condition requiring the payment of a financial assurance as security for compliance with an environmental authority

Orion Mining Pty Ltd (**Applicant**) became the holder of a mining lease and related environmental authority, which allowed it to operate the Blair Athol coal mine. The Respondent imposed a condition on the environmental authority in accordance with section 292 of the EP Act, which required the Applicant to pay a financial assurance as security for compliance.

Section 295 of the EP Act required the Respondent to have regard to the following when determining the amount of financial assurance to be paid:

- any relevant regulatory requirements; and
- any criteria stated in a guideline made by the chief executive and prescribed under regulation.

The Respondent was relevantly prohibited under section 295(4) of the EP Act from conditioning a financial assurance that was more than the amount that in its opinion represented the total likely costs and expenses of carrying out necessary rehabilitation work.

In this instance an appointed delegate for the Respondent decided that Orion was to pay in cash a financial assurance of $74,579,309.53. The Applicant's application sought a statement of reasons in respect of this decision.

Court considered whether the Applicant's interests were adversely affected by the Respondent's decision

The Court identified that the key issue to be determined was whether the Applicant was a person (or entity) "*whose interests are adversely affected by the decision*" within the meaning of section 20(1) of the JR Act.

To determine this question the Court adopted its reasoning in *Lock the Gate Alliance Ltd v The Minister for Natural Resources and Mines* [2018] QSC 21 and found that it was necessary to consider the legal effect and practical operation of the decision and then to determine if it resulted in an adverse effect on the Applicant's identified interests.

The Court held that a person or entity claiming to be aggrieved by the decision must prove that the practical effect of the decision on its identified interest was beyond the effect had on the general public. To do this the Applicant had to demonstrate a special interest in the subject matter of the decision.

Applicant claimed to have a special interest in the subject matter of the decision and to be aggrieved by its effect

The Applicant claimed to be aggrieved by the Respondent's decision for the following reasons:

- at all material times it was an Australian company limited by guarantee whose objects included protection of the natural environment from mining; and
- it had a special interest in the protection of the Queensland environment that was greater than the community at large.

Applicant submitted that it was a significant organisation focused on environmental protection in the public's interest

In response to the Court's request, the Applicant defined its interests as follows:

> *[Lock that Gate's] interest, consistent with the objects of its Constitution, concern the protection and conservation of Australia's environment, including education, promotion and acting as advocate for members of the Australian public.*

The affidavit of a consultant described as the coordinator of the Applicant's mine rehabilitation reform campaign described the Applicant as a significant organisation that had been recognised in Queensland government discussion papers with 103,000 supporters nationally, 20,500 within Queensland and 30 within the locality of the mine.

The consultant's affidavit also confirmed that the Applicant had undertaken a number of activities in pursuit of its key interest after first becoming concerned that the sale of the Blair Athol coal mine may result in rehabilitation obligations under the environmental authority not being met. Examples of these activities included the following:

- meetings with the local community and the directors of both the Department of Natural Resources and Mines and the Department of Environmental and Heritage Protection;
- writing to the State Minister for the Environment and Minister for Natural Resources and Mines; and
- making submissions to the State on the Queensland *Environmental Protection (Chain of Responsibility) Amendment Bill 2016* and the deficiencies of the Queensland Government's Mining Financial Assurance calculator.

The Respondent argued that the Applicant's interests were at best those of the general public and were not adversely affected by the decision given the speculative and hypothetical nature of the concerns raised.

Court found that the Applicant was not an aggrieved person with a special interest in the relevant decision

The Court referred to the following statement from His Honour Judge Stephen in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 to support its finding that the Applicant had not shown that it had a special interest in the subject matter of the decision or that it had a grievance that it would suffer beyond any ordinary member of the public:

> *An individual does not suffer damage as gives rise to standing to sue merely because he voices a particular concern and regards the actions of another as injurious to the object of that concern.*

The Court held that meeting with relevant decision makers and expending money on a particular concern did not automatically translate into the existence of the requisite special interest.

The Court ultimately found that the following findings in *Lock the Gate Alliance Ltd v The Minister for Natural Resources and Mines* [2018] QSC 21 applied to the present application with equal force:

- the Applicant had not shown that it was specifically affected by the decision in comparison to the general public;
- the interests of the Applicant were that of the public; and
- the Applicant had not demonstrated that its involvement in judicial review would confer on it a benefit or relieve it of a disadvantage to an extent greater than a member of the ordinary community.

Given the above findings, the Court found that the Applicant was not entitled to a statement of reasons for the decision and dismissed the application.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court dismisses an appeal against the Council's decision to refuse the partial demolition of a pre-1947 dwelling

Dee Ardham | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Beauchamp v Brisbane City Council* [2018] QPEC 43 heard before Rackemann DCJ

October 2018

In brief

The case of *Beauchamp v Brisbane City Council* [2018] QPEC 43 concerned an appeal to the Planning and Environment Court against a decision of the Brisbane City Council (**Council**) to refuse a development application for the partial demolition of a pre-1947 dwelling.

The pre-1947 dwelling is an inter-war bungalow style house which is situated in an area within the Traditional Building Character Overlay. The dwelling straddles two lots on the subject site located in Kedron. The proposal intended to demolish a sleepout attached to one side of the dwelling to ensure that it is only located on one of the two lots.

The issue in question was whether the Council made an error by refusing the partial demolition of the pre-1947 dwelling. The Court held that the proposed demolition did not comply with the assessment benchmarks identified in the Traditional Building Character (Demolition) Overlay Code (**Demolition Code**) and Character Residential Zone Code (**Character Zone Code**) in the Council's *City Plan 2014* (**City Plan**). The Court further held that compliance cannot be achieved by imposing development conditions. On this basis, the Court upheld the Council's decision to refuse the proposed development and dismissed the appeal.

Court considered the correct approach to determine whether the development should be allowed

The *Planning Act 2016* (**PA**) requires code assessable development to be assessed only against assessment benchmarks identified in a categorising instrument. A categorising instrument relevantly includes the City Plan.

The Council's decision to refuse the development application was based on alleged conflicts with certain acceptable outcomes, performance outcomes and overall outcomes in the Demolition Code and the Character Zone Code. The Court identified these alleged conflicts as the issues to be determined in this appeal.

Acceptable Outcome AO1.1 of the Demolition Code

Acceptable Outcome AO1.1 provides that development should ensure the building does not lose integral components which contribute to its streetscape character. The Council argued that a sleepout is analogous to a side verandah, which the City Plan provides as an example of an integral component. This was supported by expert evidence which regarded the two terms as interchangeable. However, the Council acknowledged that the analogy is not determinative.

The Court accepted that the sleepout contributed to the building's streetscape character. However, the issue to be resolved by the Court was whether the demolition of the sleepout would amount to the loss of an integral component of the building. The Court turned to the dictionary definition of the term to define it as a component that is necessary for the completeness of the entire building.

The Appellant argued that the sleepout is not integral as it is not necessary for completeness. Expert evidence from the Appellant supported the view that, although a sleepout in an inter-war bungalow is a well-recognised feature, narrower bungalows without the feature are also commonly available. The Appellant also highlighted that the proposed development would be similar to the style of other dwellings in the same catchment.

The Court acknowledged that some inter-war bungalows did come in narrower versions. However, the Court held that the subject dwelling was built as a wide version which incorporated the sleepout. The Court held that the proposed demolition would result in the loss of this integral component which contributes to its traditional character and confirmed the alleged conflict with Acceptable Outcome AO1.1.

Acceptable Outcome AO1.2 of the Demolition Code

Acceptable Outcome AO1.2 provides that development should not result in a narrow building which has a width-to-height proportion out of character with other pre-1947 buildings in the streetscape. The Council acknowledged that there are two houses originally constructed in 1946 or earlier that have been the subject of partial demolition. However, the Council contended that these should not be considered as they were moved to the locality from other locations. The Court rejected the Council's argument and clarified that Acceptable Outcome AO1.2 requires consideration of dwelling houses constructed in 1946 or earlier that are in the streetscape. Therefore, the dwellings in consideration met that description and their relocation was not relevant.

The Appellant cited the Traditional Building Character Planning Scheme Policy (**PSP**) which provides guidance on the elements that comprise traditional character including the element of traditional scale. The Appellant contended that the proposed development respects the traditional scale by conforming to the sub-division pattern of the streetscape.

The Court reiterated that the question is whether the proposed demolition would result in a width-to-height proportion which is out of character with the other pre-1947 dwellings in the streetscape. The Court accepted expert evidence that the main character of the street is influenced by 14 larger traditional houses, each developed on two allotments, which are prevalent from where the subject dwelling is situated. Accordingly, the Court held that the proposed development would be out of character and did not comply with Acceptable Outcome AO1.2.

Performance Outcome PO1 of the Demolition Code

Performance Outcome PO1 provides that development involving demolition of traditional elements, detailing and materials constructed pre-1947 should not diminish traditional building form and roof styles. The Court accepted that the proposed development requires demolition of traditional building elements, detailing and pre-1947 materials. However, the issue raised was whether it would diminish traditional building form and roof style.

The Appellant argued that the proposed demolition did not diminish the traditional building form; rather, it altered the traditional building character from one form to another. It was highlighted that the City Plan did not promote one form over another. The Council argued that the demolition would have a considerable impact on the dwelling and would clearly diminish its traditional building form.

The Court rejected the Appellant's argument and held that simply because an altered building form is acceptable, it does not follow that the dwelling's current form would not be diminished by the demolition. The Court accepted the Council's argument and held that the proposed development would diminish the dwelling's traditional building form to a degree which is meaningful and significant.

Performance Outcome PO5 and Acceptable Outcome AO5 of the Demolition Code

Performance Outcome PO5 provides that, where demolition results in the loss of integral components, assessment is required against section B of the Demolition Code. The Code distinguishes between partial demolition and demolition or removal of a building, which is dealt with in section B of the Code. Acceptable Outcome AO5 provides that development involves a building which, if demolished, should not result in the loss of traditional building character.

The Court held that the loss should be meaningful and significant and that traditional building form is an element of traditional building character. For these same reasons, the Court held that the proposed development would diminish the traditional building form and, therefore, the traditional building character to a degree which is meaningful and significant.

Overall Outcomes 2(a) and 2(d) of the Demolition Code

Overall Outcome 2(a) provides that development should protect pre-1947 buildings that contribute to the traditional character and traditional building character of areas in the Traditional building character overlay. Overall Outcome 2(d) provides that development should protect entire, or parts of, pre-1947 buildings where they form an important part of the streetscape.

The Court accepted that Overall Outcome 2(a) does not prevent partial demolition where appropriate. However, the Court held that the proposed development does not adequately protect the building. The Court also found that the sleepout is an integral component of the building that is an important feature of the streetscape and the proposed demolition does not protect that part of the building.

Overall Outcomes 5(c) and 6(a) of the Character Zone Code

Overall Outcome 5(c) provides that development should protect and retain pre-1947 buildings on land within the Traditional building character overlay in accordance with the relevant overlay code. Overall Outcome 6(a) provides that development should retain a pre-1947 dwelling house.

With regard to Overall Outcome 5(c), the Court held that the party which is successful in respect of the Demolition Code will also be successful here. In response to Overall Outcome 6(a), the Court held that there is no conflict with this provision as the proposed development would retain the dwelling.

Conclusion

The Court held that the proposed partial demolition of an inter-war bungalow-style dwelling does not comply with the relevant assessment benchmarks. The Court found that compliance cannot be achieved by imposing development conditions. The Court accepted the Council's refusal of the Appellant's development application and dismissed the appeal.

Planning and Environment Court dismisses an appeal for a development approval to partially demolish a pre-1911 dwelling house

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Delta Contractors (Aust) Pty Ltd v Brisbane City Council* [2018] QPEC 41 heard before Kefford DCJ

October 2018

In brief

The case of *Delta Contractors (Aust) Pty Ltd v Brisbane City Council* [2018] QPEC 41 concerned an application to the Planning and Environment Court against the Brisbane City Council's (**Council**) decision to refuse a development application to facilitate a partial demolition of a pre-1911 house and relocate the remaining narrow house to one lot to vacate the current lot. The Applicant had also applied for a preliminary approval for building work to enable extensions to the house and a development permit for a material change of use.

The Court dismissed the appeal in relation to the preliminary approval for building work to facilitate the partial demolition. However, as the Council had indicated in its final submissions that it did not seek to advance a case alleging non-compliance with any of the applicable assessment benchmarks for the preliminary approval for building work associated with the proposed extensions to the dwelling or the material change of use, the Court approved the application to that extent.

Issues in the appeal

The issues in the appeal were as follows:

- The nature and extent to which the proposed development conflicted with the Traditional building character (demolition) overlay code (**Demolition Code**) having regard to the following provisions:
  - Acceptable Outcomes AO1.1 and AO5(c);
  - Performance Outcomes PO1, PO2 and if it applies, Performance Outcome PO5;
  - Overall Outcomes 2(a), (b), (d) and (h).
- Whether the Court should exercise its residual discretion under section 60(2)(b) of the *Planning Act 2016* to approve the development application even if the development does not comply with some of the assessment benchmarks.

Conflict with the Demolition Code

Acceptable Outcome AO1.1 of the Demolition Code relevantly provides that a development must ensure that the subject building does not lose integral components which contribute to its streetscape character.

The Applicant submitted that although the proposed development would alter the dwelling, there would be no loss to any integral component to such an extent that there would be a noticeable incongruity to its streetscape character. In particular, the Applicant noted that the proposal would revive the traditional tin roof by expressing a medium pitched hipped roof form and that the left side additions were not necessary in order for the subject building to express itself as a complete and whole building as it originally appeared.

The Court rejected the Applicant's first submission and held that the proposal to alter the shape of the roof changed the streetscape character of the building. The Court found that Acceptable Outcome AO1.1 focused on the retention of the subject house's streetscape character rather than creating a streetscape character that was consistent with traditional building character of the time.

In relation to the removal of the left side verandah of the building, the Court held that the width of the core of the house is material to the house's streetscape character and that the proposed demolition of the house would result in a building that had a disproportionate front pediment.

With respect to Acceptable Outcome AO5(c), the Applicant argued that it was not applicable as the provision was cast in terms of complete demolition rather than partial demolition. The Court disagreed and held that the provision was engaged when reading the Demolition Code as a whole.

The Court also dismissed the Applicant's submissions regarding Performance Outcomes PO1, PO2 and PO5 on the basis that they had not complied with the provisions and could not subsequently be conditioned to comply.

Compliance with the relevant Overall Outcomes of the Demolition Code

In the Court's consideration of Overall Outcome (2)(a) of the Demolition Code, the Court relied on the decision in *Klinkert v Brisbane City Council* [2018] QPEC 30 for the analysis of "*traditional character*" and "*traditional building character*" and found that "*traditional character*" related to a streetscape or locality while "*traditional building character*" related to a building. In applying this, the Court found that the partial demolition would not protect the traditional building character of the dwelling as it would result in the loss of integral components of the house which materially contributed to its traditional building character.

With respect to Overall Outcome (2)(b) of the Demolition Code, the Applicant argued that the provision had been complied with as the proposed development would allow the subject building to continue to express a "*federation-era character*", but conceded that it would not necessarily maintain its current "*federation-era character*". The Court disagreed and held that the focus of the provision was relevant to the protection of the building itself rather than to ensure that a building of "*federation-era character*" was constructed on the land in place of an existing structure.

Given its finding in respect of Overall Outcome (2)(b), the Court rejected the Applicant's argument that the development would protect its traditional building character through expressing a new building character that was within the stylistic norm of its type. The Court held that the main focus of the provision was relevant to the protection of the building where it forms an important part of a streetscape that had been established in 1946 or earlier, and that the provision could not be met by simply replacing the integral components with another that was typical of the time.

The Applicant further submitted that the development had complied with Overall Outcome (2)(h) as the proposed partial demolition would retain the subject building and would continue to make a positive contribution to the traditional character of the precinct. The Court accepted the submission and found that although the proposed development would materially diminish the traditional building character of the subject house, it could not equate to a failure to complement the remaining buildings that were constructed in 1946 or earlier within the precinct.

Residual discretion

In determining whether the Court should exercise its residual discretion to approve the development application, it relied on the approach outlined in *Klinkert v Brisbane City Council* [2018] QPEC 30 (at [102]) where:

> *The discretion is expressed in permissive ("may") and broad terms. It is subject to an important constraint namely the constraint expressed in s 59(3) of the Planning Act requiring the decision to be based on the assessment carried out pursuant to an earlier provision of the Act, which in this case includes, inter alia, s 45.*

The Applicant relevantly identified three reasons to justify a decision to approve the proposed development despite the development application not complying with some of the assessment benchmarks. Firstly, the Applicant submitted that the proposal complied with the broad policy intent of the Council's *City Plan 2014* as it protected the building's traditional character by retaining and enhancing it. Secondly, that the subject building's current "*unattractive*" appearance did not promote public appreciation of the building's traditional character and finally, that the proposal would return the subject building's "*lost traditional character for the benefit of the public*".

In regards to the first submission, the Court found that the extent to which the proposed development materially diminished the traditional building character was not proportionate to the benefits of the proposal to such an extent where it was sufficient to justify the losses.

The Court also found that the current "*unattractive appearance*" did not reduce the public's appreciation of the subject building's traditional character or its traditional building character. Furthermore, the Court held that the Applicant's second submission was unpersuasive given that the purpose of the planning outcomes is to protect and preserve the traditional building character of a house even if the house is not aesthetically pleasing.

In considering the Applicant's last submission, the Court decided that the loss of the roof and left side verandah would not outweigh the benefits of the proposed development. The Court noted that the end product would result in a pediment that would appear out of scale and cause a loss of visual harmony with its present relationship between the houses in the streetscape.

Conclusion

The Court therefore dismissed the appeal in relation to the preliminary approval to facilitate the partial demolition of the dwelling, however allowed the appeal for the material change of use and proposed extensions to the subject house.

Let's talk: The Land Court orders parties to mediate CHMP

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *AV Jennings Properties Limited v McCarthy & Ors on behalf of the Yuggera Ugarapul People* [2018] QLC 28 heard before FY Kingham

October 2018

In brief

The case of *AV Jennings Properties Limited v McCarthy & Ors on behalf of the Yuggera Ugarapul People* [2018] QLC 28 concerned an application to the Land Court of Queensland for a mediation to facilitate the development of a Cultural Heritage Management Plan (**CHMP**) under the *Aboriginal Cultural Heritage Act 2003* (**ACH Act**).

The Applicant was developing a mixed residential and commercial development at Deebing Heights in Ipswich. The Respondents have an existing Native Title claim over an area that includes the development land. In accordance with section 23 of the ACH Act, the applicant developed a CHMP.

The Respondents identified areas of high cultural significance, namely the Deebing Creek Cemetery and Mission. The Applicant, in order to avoid disturbance to the culturally significant areas, proposed that it would not develop without further investigation (at [3]).

A dispute arose between the parties concerning the development of the CHMP. The Respondents proposed a consultation process regarding the CHMP which involved a meeting between the Applicants and the indigenous elders. However the Applicant expressed concern over the process advanced by the Respondents due to the large number of people who may attend the initial meeting and the associated costs.

Ultimately, the Court held that the parties participate in a Court supervised mediation before the Judicial Registrar of the Court.

Contentions made by the Respondents

The Respondent's contentions were as follows:

- the application was an abuse of process; and
- a mediation would be premature as there may be a change to the applicants for the Native Title claim.

Contention One: Abuse of process

The Respondents argued that the Applicant failed to properly consult and negotiate the CHMP. The Respondents further argued that the Applicant failed to consider the consultation process that the Respondents had suggested.

The Court noted that the Applicant proposed alternative options to that of the Respondents and also sought to minimise costs. The Court found that such conduct by the Applicant was not an abuse of process and, rather, the Applicant had a "*focus on timeliness and efficacy*" (at [13]). The Court further held that the fact that the Applicant did not agree to the Respondents' process did not mean that the request for mediation was an abuse of process.

Contention Two: Potential change to applicants for the Native Title claim

Each applicant for a Native Title claim must be named. The Respondents argued that there was a potential change regarding the composition of the Native Title claim group and, if the change eventuates, the applicant for the Native Title claim may change. As such the Respondents argued that any CHMP that is agreed to now may not be authorised for approval by the newly composed applicant for the Native Title claim.

To support this contention, the Respondents relied on advice given by the Principal Advisor Cultural Heritage of Department of Aboriginal and Torres Strait Islander Partnerships. The advice relevantly stated that if an Aboriginal party lost its status prior to the Chief Executive approving a CHMP, the CHMP cannot be approved per section 107(3) of the ACH Act.

The Court found that the advice did not correlate to the circumstances of this matter as it referred to the loss of status. The Court found that a change in composition of a Native Title party was not a loss of status, and further held that this was not a reason to defer mediation.

Conclusion

The Court found that there was a dispute between the parties warranting the application to the Court. The Court held that the nature of the dispute was suitable for mediation due to the failure of the parties to successfully arrange a meeting. The Court ordered that the parties and their representatives participate in, and act reasonably and genuinely in, a Court supervised mediation.

Double jeopardy relevant consideration for the Planning and Environment Court in application for strike-out

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Director, Fisheries Queensland, Department of Agriculture and Fisheries v Archer Operations Pty Ltd* [2018] QPEC 39 heard before Kefford DCJ

October 2018

In brief

The case of *Director, Fisheries Queensland, Department of Agriculture and Fisheries v Archer Operations Pty Ltd* [2018] QPEC 39 before the Planning and Environment Court concerned an application by the Respondent requesting that the Applicant's originating application concerning declarations and an enforcement order against the Respondents destruction of marine plants on land in Toogoom be struck out or stayed.

The Respondent submitted the following arguments in support of striking out the originating application:

- There is no power to grant an enforcement order under section 180 of the *Planning Act 2016* (**Planning Act**) in respect of the alleged development offence as there had been no prosecution for the development offence and the time limit for doing so had expired.
- The proceedings are an abuse of process as there had been no prosecution for the development offence and the Respondent had already been punished for unlawful marine plant destruction.
- The originating application is a charge relating to an offence for which the Respondent had already been tried and convicted.
- The making of the enforcement order would constitute a second punishment for the same act or omission.

The Court held that there was no merit to the Respondent's arguments and that the originating application was not an abuse of process or a charge for which the Respondent had already been tried and convicted. The Respondent's request that the originating application be struck-out or stayed was denied by the Court.

Background

The Respondent added fill to a property in Toogoom between June 2015 and July 2016 which resulted in the damage, destruction or removal of marine plants.

These actions formed the basis of an offence under section 123 of the *Fisheries Act 1994* for which the Respondent was convicted and sentenced.

They also formed the foundation of these proceedings in which the Applicant sought a declaration that the Respondent had committed a development offence, namely the carrying out of operational work without a permit, and an enforcement order directing the Respondent to remedy the damage to the marine plants.

There was no dispute between the parties that the Applicant had not brought a charge for the development offence under the Planning Act.

The Respondent sought to have the originating application struck out.

Court held that it had the power to grant an enforcement order and that a delay in commencing the proceedings was not an abuse of process

The Applicant, by its originating application, sought an enforcement order under section 180 of the Planning Act, which is further clarified by section 181 of the Planning Act.

The Respondent argued that the Planning Act imposes time limits which statutorily limit the timeframe for commencing proceedings to one year after the offence is committed and six months after the offence comes to the complainant's knowledge.

The Respondent further argued that before the Court can enliven section 181 of the Planning Act, the Court must be satisfied that the offence can be prosecuted as a development offence. The Court disagreed and stated that it need only be satisfied that the relevant development offence had been committed and that the time limit for prosecuting the development offence was irrelevant. The Court considered that it had the power to grant an enforcement order as the time limit in respect of prosecuting the development offence was irrelevant to the timing for commencing the proceedings for an enforcement order.

The Court determined that any unfairness that resulted from the Applicant's delay in commencing the substantive proceedings would be relevant to the Court's discretion to make an enforcement order, but did not bar the proceedings and was not an abuse of process.

Court determined that there was no abuse of process under the Criminal Code

As the Respondent had been convicted and sentenced for unlawful marine plant destruction on the same facts, the Respondent argued that the originating application was an abuse of process under section 17 of the *Criminal Code Act 1899* (**Criminal Code**).

Section 17 of the Criminal Code provides a defence to a "charge" of any offence, however the Court after considering the definition of "charge" within the *Acts Interpretation Act 1954*, determined that the originating application was not commencing a charge but seeking declarations and orders such that they are not "charges" for the purpose of section 17 of the Criminal Code.

Court determined that the Respondent was not twice punished

Section 16 of the Criminal Code provides that a person is not to be twice punished for the same offence.

As the Court had determined that the relief sought in the substantive proceedings were remedial in nature and not punishment, the Respondent's argument that they would be twice punished within the meaning of section 16 of the Criminal Code failed.

The Court noted however, that where the Applicant has already been awarded costs, such as investigation costs under section 61(1) of the Planning Act, the previous awarding of such costs will be relevant to the subsequent exercise of the Court's discretion in determining any future costs.

Conclusion

The Court held that there was no merit to the Respondent's arguments and that the originating application was not an abuse of process, or a charge for which the Respondent had already been tried and convicted.

The Court denied the Respondent's request that the originating application be struck-out or stayed.

Planning and Environment Court dismisses an interlocutory application made by a Co-respondent who argued that a Co-respondent by election had no standing in the appeal because the Appellants were not obliged to serve the Co-respondent by election with the notice of appeal

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ayre & Anor v Brisbane City Council & Ors* [2018] QPEC 17 heard before Kefford DCJ

October 2018

In brief

The case of *Ayre & Anor v Brisbane City Council & Ors* [2018] QPEC 17 concerned an appeal by submitters to the Planning and Environment Court against the decision of the Brisbane City Council (**Council**) to approve a development application made by the Co-respondent, Penfold Acres Pty Ltd. The development application sought a development permit for a material change of use for multiple dwellings and reconfiguring a lot.

The Appellants filed a notice of appeal against the Council's decision and served a copy of the notice of appeal on Mr Heers who also submitted a properly made submission to the development application. Mr Heers filed a notice of election to co-respond in the appeal.

The Co-respondent filed an interlocutory application which sought a declaration under section 11(1)(a) of the *Planning and Environment Court Act 2016* that section 230(3)(e) of the *Planning Act 2016* (**Planning Act**) does not require the Appellants to serve a copy of the notice of appeal for the subject proceeding on Mr Heers and that he be removed as a party to the appeal.

The Court in order to make its determination considered the following issues:

- Does the Planning Act require a submitter appellant to serve all eligible submitters with a notice of appeal?
- Was Mr Heers required to be served with the Notice of Appeal and did he have a right to elect to co-respond?
- Should Mr Heers be removed as a party to the proceedings?

Ultimately, the Court held in favour of the Appellants and concluded that the Appellants were required to serve Mr Heers with the Notice of Appeal and Mr Heers had a right to elect to co-respond. Therefore, the interlocutory application was dismissed.

Does the Planning Act require a submitter appellant to serve all eligible submitters with a notice of appeal?

The Co-respondent submitted that under the plain meaning of section 230(3)(e) of the Planning Act, the Appellants were not required to serve a copy of the Notice of Appeal on Mr Heers. Section 230(3)(e) of the Planning Act relevantly states as follows:

> *(3) The appellant or, for an appeal to a tribunal, the registrar, must, within the service period, give a copy of the notice of appeal to -*
>
> *...*
>
> *(e) each person who may elect to become a co-respondent for the appeal, other than an eligible submitter who is not a principal submitter in an appeal under paragraph (c) or (d) ... .*

Section 230(3)(c) of the Planning Act relevantly states that a copy of a notice of appeal must be served on each principal submitter for a development application. Section 230(3)(d) of the Planning Act provides that a copy of the notice of appeal must be served on each principal submitter for a change application.

The Co-respondent argued that Mr Heers was an eligible submitter but not a principal submitter in the appeal under section 230(3)(c) or (d) of the Planning Act, and therefore was not a person who was required to be served with the Notice of Appeal. The Appellants submitted that section 230(3)(e) of the Planning Act placed an obligation on an appellant to serve each person identified as a potential co-respondent by election in schedule 1 of the Planning Act and that where there had been service on a principal submitter under section 230(3)(c) or section 230(3)(d) of the Planning Act, there is no need for each of the eligible submitters to also be served.

The Court considered the principles regarding statutory construction stated in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 and in particular the following (at [69]):

> *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.*

The Co-respondent submitted the following arguments:

- Section 230 of the Planning Act is the leading provision and section 229 of the Planning Act, which concerns prescribing appeal rights and rights of persons to be a party to an appeal, is the subordinate provision.
- For an appeal brought by an eligible submitter, the right to elect to co-respond is limited to eligible submitters who have been served with a copy of the notice of appeal.
- The only circumstance when another eligible submitter would be entitled to service of the notice of appeal and therefore elect to co-respond is when the submitter has been served under either section 230(3)(c) or section 230(3)(d) of the Planning Act.

The Court did not find the Co-respondent's submission convincing and found the following submissions by the Appellants more compelling:

- Section 229 of the Planning Act is the leading provision and section 230 of the Planning Act is the subordinate provision for an eligible submitter appeal.
- For an appeal commenced by an eligible submitter the right to service of the notice of appeal and the right to elect to co-respond extends to all persons referred to under schedule 1, table 2, item 2, column 4 of the Planning Act.
- For an appeal commenced by an applicant, section 230(3)(c) and (d) of the Planning Act requires service on the principal submitter and section 230(3)(e) of the Planning Act exempts the applicant from having to serve eligible submitters other than the principal submitter.

The Court found the Appellants submission more compelling as their statutory construction of the relevant legislation:

- gave primacy to the provision that confers the right for a person to appeal and become a party to an appeal;
- did not require additional words which do not appear in the legislation to be read into schedule 1, table 2, item 2, column 4 of the Planning Act;
- did not allow the meaning of section 230 of the Planning Act to alter the meaning of section 229 of the Planning Act; and
- gave the full meaning to all the words in the relevant provisions, and respected the grammatical construction of the whole of section 230 of the Planning Act.

The Court ultimately held that for an appeal commenced by an eligible submitter, all eligible submitters are required to be served.

Was Mr Heers required to be served with the Notice of Appeal and did he have a right to elect to co-respond?

As Mr Heers had not withdrawn his submission before the development application was decided by the Council or had given the Council a notice stating that he would not be appealing, the Court held that the Appellants, as eligible submitters, were required to serve the Notice of Appeal on Mr Heers. Therefore, the Court held that Mr Heers had a right to elect to co-respond.

Should Mr Heers be removed as a party?

The Court held that because the Appellants were obliged to serve Mr Heers with the notice of appeal, Mr Heers therefore could not be removed as a party to the appeal.

Court dismissed the interlocutory application

The Court therefore dismissed the interlocutory application. The Court held that the Appellants were required to serve Mr Heers with the notice of appeal and that Mr Heers had a right to elect to co-respond.

Court of Appeal overturns a declaration regarding the effect of certain provisions in the Springfield Structure Plan and transitional provisions under the Sustainable Planning Act 2009

Andrew Magoffin | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Springfield Land Corporation Pty Limited v Cherish Enterprises Pty Ltd & Anor* [2018] QCA 266 heard before Fraser and Gotterson JJA and Burns J

October 2018

In brief

The case of *Springfield Land Corporation Pty Limited v Cherish Enterprises Pty Ltd & Anor* [2018] QCA 266 concerned an application for leave to appeal to the Queensland Court of Appeal against a decision of the Planning and Environment Court. In *Cherish Enterprises Pty Ltd v Ipswich City Council & Anor* [2017] QPEC 38, the Planning and Environment Court had declared that Cherish Enterprises Pty Ltd (**Cherish**) was entitled to have its development application assessed and decided, and that it may carry out development on the land to the extent authorised by any approval, even though apparent pre-conditions outlined in the Springfield Structure Plan (**SSP**) had not been satisfied.

The Court of Appeal considered the following issues:

- *Issue one* – the construction and application of sections 857(5) and (7) of the *Sustainable Planning Act 2009* (**SPA**);
- *Issue two* – the provisions of the SSP as they relate to area development plans;
- *Issue three* – the provisions of the SSP as they relate to precinct plans; and
- *Issue four* – arguments made by Cherish that:
  - there is no inconsistency between the provisions of Chapter 6 of the SPA, under which the development application was made, and the approval process under the SSP; and
  - section 857 of the SPA "*did nothing to take away from Cherish's entitlement to make an application for preliminary approval under section 242 of the SPA to vary the effect of the planning instrument so as to dispense with [the apparent pre-conditions]*" (at [58]).

The Court of Appeal set aside the declaration made by the Planning and Environment Court and held that, unlike a precinct plan, the approval of an area development plan under the SSP is a necessary pre-condition to the assessment and approval of the development application made by Cherish. It also held that any alleged entitlement under section 242 to dispense with the requirement for an area development plan is "trumped" by section 857(7) of the SPA.

Background

In January 1997, the Springfield Development Control Plan (**1997 Springfield DCP**) was approved and became part of Ipswich City Council's (**Council**) planning scheme. It was made under section 2.5 of the *Local Government (Planning and Environment) Act 1990* (**LGPE Act**) which stated certain requirements of development control plans, including a requirement to set out criteria for the implementation of a plan. Relevantly, amongst other things, the 1997 Springfield DCP stipulated the following:

- "*Prior to development being approved on any land within [a relevant designation] a Precinct Plan must be approved by Council for the precinct within which the land is situated …*" (at section 2.2.3.1);
- "*Prior to any development being carried out on the land … an application must be made to the Council for approval of an Area Development Plan which includes the land to be developed*" (at section 2.2.4.3); and
- "*[D]evelopment of any land included in the Structure Plan area cannot take place … unless there is an Area Development Plan over the land … and the development is shown on or consistent with the approved Area Development Plan*" (at section 2.2.4.1).

Upon the commencement of the *Integrated Planning Act 1997* (**IPA**) and the repeal of the LGPE Act, the 1997 Springfield DCP remained a valid planning control by application of section 6.1.45A of the IPA's transitional provisions.

In February 1999, Council approved a new planning scheme. The 1999 planning scheme contained an amended version of the 1997 Springfield DCP as a development control plan entitled "Springfield Structure Plan". The SSP became part of each of the Council's subsequent planning schemes, including the current planning scheme which came into effect in January 2006.

When the SPA commenced on 18 December 2009, the current planning scheme continued to have effect under section 778 of the SPA's transitional provisions.

In March 2016, Cherish lodged with the Council a development application over approximately 249 hectares of land in Springfield. The land the subject of the development application formed part of land included in the SSP area. At all relevant times, Council had not yet approved a precinct plan or an area development plan for the land.

On 27 July 2016, Cherish sought declaratory relief from the Planning and Environment Court. Cherish submitted that its development application was properly made and Council must assess and decide it in accordance with Chapter 6 of the SPA, notwithstanding that no precinct plan or area development plan had yet been approved. The Council submitted that Cherish may make a development application at the same time it seeks approval of an area development plan, but that the development application could only be assessed after approval of the area development plan. Springfield Land Corporation Pty Limited (**SLC**) submitted that the approval of a precinct plan and an area development plan are necessary pre-conditions to the assessment and approval of Cherish's development application.

On 14 July 2017, the Planning and Environment Court declared in favour of Cherish's submission and on 22 August 2017, SLC filed an application to the Queensland Court of Appeal seeking leave to appeal from the decision of the Planning and Environment Court.

Issue one – sections 857(5) and (7) of the SPA validate particular requirements under the SSP as mandatory

The Planning and Environment Court formed the view that the approval of a precinct plan and an area development plan under the SSP are not rightly characterised as pre-conditions to development; but rather are merely approval paths available to Cherish at its election. The Planning and Environment Court reached this conclusion via a perceived tension between sections 2.2.3 and 2.2.4 and section 2.4 of the SSP, and for related reasons. In relation to area development plans, the Court of Appeal did not accept this reasoning.

Section 857(5) of the SPA, which applies to a development control plan made under the LGPE Act, provides as follows:

> *To the extent the development control plan includes a process for making and approving plans, however called, with which development must comply in addition to, or instead of, the planning scheme …*
>
> *(a) the development control plan is, and always has been, valid; and*
>
> *(b) development under the development control plan must comply with the plans in the way stated in the development control plan … .*

Section 857(7) of the SPA relevantly states that "*[s]ubsection (5) applies even if the process mentioned in the subsection is inconsistent with chapter 6 …*" (chapter 6 being the Integrated development assessment system (**IDAS**)).

The Court of Appeal considered sections 857(5) and (7) to be unambiguous and "expressed in grammatically clear language." The Court of Appeal held that sections 857 (5) and (7) are not merely permissive; but rather imperative by nature such that Cherish was required to take particular actions before Council must assess and decide its development application. In relation to the perceived tension between particular provisions of the SSP, the Court of Appeal described this as "*an impermissible starting point given the express terms of s 857(7) in according primacy to s 857(5) over Chapter 6 [of IDAS]*" (at [50]).

Issue two – an area development plan is a mandatory pre-condition under section 2.2.4 of the SSP

Section 2.2.4 of the SSP relates to area development plans and covers matters such as their role, their nature, and detailed provisions regarding applications for approval of an area development plan. Crucially, section 2.2.4.1 of the SSP states that "*development of any land included in the Structure Plan area cannot take place … unless there is an Area Development Plan over the land … and the development is shown on or consistent with the approved Area Development Plan*".

The Court of Appeal held that the SSP does include a process for making and approving plans (area development plans) and is therefore a development control plan of the type contemplated by section 857(5) of the SPA. Section 857(5)(b) relevantly states that "*development under the development control plan must comply with the plans in the way stated in the development control plan*". In applying these provisions, and acknowledging the primacy which section 857(5) is afforded by section 857(7), the Court ruled that an area development plan is a necessary pre-condition to the assessment and approval of Cherish's development application, and one which it had not satisfied.

Issue three – a precinct plan is not a mandatory pre-condition under section 2.2.3 of the SSP

Section 2.2.3 of the SSP relates to precinct plans and covers matters such as the role of precinct plans, the nature of precinct plans and the requirements of precinct plans. However, unlike the provisions relating to area development plans under section 2.2.4 of the SSP, section 2.2.3 of the SSP does not detail a process for the making and approval of precinct plans with which development is required to comply. Also, section 2.2.3 of the SSP does not expressly prevent development from taking place unless there is a precinct plan approved over the land (in contrast to section 2.2.4.1 of the SSP as it relates to area development plans).

Accordingly, the Court of Appeal held that section 857(5) of the SPA does not apply to precinct plans in the way it does for area development plans, with the corollary being that a precinct plan is not a necessary pre-condition to the assessment and approval of a development application over the land.

Issue four – Chapter 6 of the SPA affords no substitute that can stand with sections 857(5) and (7) of the SPA

Chapter 6 of the SPA details the IDAS, a system for assessment and approval processes for development. Cherish argued that there is no inconsistency between the provisions of Chapter 6 of the SPA, under which its development application was made, and the approval process for an area development plan under the SSP. It further argued that section 857 of the SPA "*did nothing to take away from Cherish's entitlement to make an application for preliminary approval under s 242 of the SPA to vary the effect of the planning instrument so as to dispense with [the relevant requirements of the SSP]*" (at [58]).

The Court of Appeal did not accept these arguments, other than to accept that section 242 of the SPA is available for varying the requirement for a precinct plan only (given its finding that section 857(5) of the SPA does not apply to precinct plans). In the main, the Court's reasoning was that, unlike the case with Chapter 6 of the SPA, "*the requirement in the SSP for an area development plan to be in existence before any development can "take place" … is something "with which development must comply" within the meaning of s 857(5) of the SPA*" (at [59]). To allow for a development application under Chapter 6 of the SPA to substitute for the requirement for an area development plan in accordance with the SSP would offend section 857(5) of the SPA.

By similar reasoning, section 857(7) of the SPA renders section 242 of the SPA inoperable, so far as it might purportedly be used to dispense with the requirement for an area development plan to be approved before development can take place. Section 242 of the SPA is, however, available for varying the requirement for a precinct plan to be approved by Council.

COLIN BIGGERS & PAISLEY LAWYERS

Queensland Court of Appeal reverses a Queensland Supreme Court decision and holds that a local government's water utility charges are in fact valid and comply with the Local Government Regulation 2012 and the Local Government Act 2009

Ella Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Mount Isa City Council v The Mount Isa Irish Association Friendly Society Ltd* [2018] QCA 222 heard before Sofronoff P and Gotterson and Philippides JJA

November 2018

In brief

The case of *Mount Isa City Council v The Mount Isa Irish Association Friendly Society Ltd* [2018] QCA 222 concerned an appeal against the decision of the Queensland Supreme Court in the matter of *Mount Isa Irish Association Friendly Society Ltd v Mount Isa City Council* [2017] QSC 316. The Supreme Court held in 2017 that the Mount Isa City Council (**Council**) had not complied with requirements regarding working out utility charges for water services under section 101 of the *Local Government Regulation 2012* (**LGR**). The Supreme Court further determined that the Council failed to exercise its powers to levy utility charges for water services contrary to section 4 of the *Local Government Act 2009* (**LGA**). On this basis the Supreme Court held that the Council's utility charges for water services were invalid.

The Council appealed to the Court of Appeal which found that the Supreme Court had erred at law in respect of its interpretation of sections 101(1) and 101(2) of the LGR and incorrectly assumed that compliance with section 4(2)(a) of the LGA required the Council in its Revenue Statement to offer a range of charging options along with providing reasons for the chosen charging option. The Court of Appeal additionally found that if non-compliance with section 4(2)(a) of the LGA occurred it would not result in the invalidity of the relevant water charges. The Court consequently allowed the appeal.

Council's grounds of appeal

The Council appealed to the Court of Appeal on seven grounds:

- The Supreme Court erred in law by holding that there is an apparent conflict between section 101(1)(a) and section 101(2)(b)(ii) of the LGR.
- The Supreme Court erred in law by holding that section 101(2)(b)(ii) of the LGR states a basis for making water utility charges which only apply if the local government is using a 2-part charges system referred to in section 101(1)(b).
- The water utility charges were worked out on the basis stated in section 101(2)(b) of the LGR and on the proper construction of section 101(1)(a).
- The Supreme Court erred in law by holding that the Council did not comply with section 101 of the LGR.
- The Supreme Court erred in law by holding that the validity of the water utility charges was not reserved by section 101(3) of the LGR.
- The Council did not fail to comply with section 94 of the LGA by failing to comply with section 4 of the LGA.
- The Council did not fail to comply with section 4 of the LGA, where section 4 of the LGA is not a prerequisite to the validity of the water utility charges.

Grounds 1 to 4

The Court of Appeal considered grounds 1 to 4 as interrelated. The Respondent submitted that there was a tension between section 101(1)(a) of the LGR and section 101(2) of the LGR, which the Supreme Court had accepted. On this basis, the Court of Appeal considered the language of section 101(1)(a) of the LGR.

Section 101(1)(a) stated that water utility charges for a water service must be charged "*wholly according to the water used*". The Court interpreted the words "*according to the water used*" to signify a "*relationship between the quantum of the charge and the volume of the water used*" (at [40]) and does not prescribe the permissible way in which charges for water are to be worked out. The Court of Appeal held that section 101(2) provides the mechanism for how water utility charges are worked out and, rather than conflicting with section 101(1) of the LGR, section 101(2) is intended to complement section 101(1) of the LGR by specifying how utility charges are to be levied. The Court of Appeal concluded that there was no conflict between sections 101(1) and 101(2) of the LGR.

The Court of Appeal additionally rejected the finding of the Supreme Court which found that the ability to work out charges in accordance with section 101(2)(b)(ii) of the LGR was only available in circumstances where the Council had adopted a 2-part charge. The Court of Appeal held that section 101(2)(b)(ii) of the LGR is a fixed charge for water usage and does not reflect a 2-part charge.

The Court of Appeal decided that, other than in the case of a 2-part charge, utility charges are to be charged wholly according to the water used and worked out by one of the methods specified in section 101(2)(b)(ii) of the LGR.

The Court of Appeal on this basis accepted that the Council had correctly worked out the water utility charges on the basis of section 101(2) of the LGR, and that the Supreme Court had erred in law in holding that the Council did not comply with section 101 of the LGR.

Based on the above reasons, the Court held that the water utility charges as levied complied with section 101 of the LGR and upheld grounds 1 to 4.

Ground 5

The Court of Appeal found that as the water utility charges as levied complied with section 101 of the LGR, it was unnecessary for the Council to rely on section 101(3) of the LGR.

Grounds 6 and 7

Grounds 6 and 7 concerned the finding by the Supreme Court that the Council was non-compliant with section 94 of the LGA due to the failure to comply with the *Local Government Principles* under section 4 of the LGA. The Court of Appeal found that the Supreme Court inferred that the Council failed to perform their duties under section 4(2) of the LGA due to the Council failing to "*provide an explanation of the chosen method for determining utility charges for water and did not give consideration to the charging of water used by the ratepayer*" (at [58]).

The Court of Appeal found this criticism unwarranted as it assumed that the Council's per unit charge of $202.00 was not in respect of water usage as permitted under section 101(2) of the LGR.

The Court of Appeal held that there was no implied or express requirement for the Council in its Revenue Statement to articulate a range of charging options and reasons for the Council's final choice; and to do so would also go beyond the matters which are to be included in a Revenue Statement under section 172(2) of the LGR.

The Court of Appeal found that the Council did demonstrate the required transparency in accordance with section 4(2)(a) of the LGA, and therefore complied with section 94 of the LGA.

Conclusion

The Court found that on the basis that grounds 1 to 4, 6, and 7 were made out, the appeal was allowed.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court has dismissed an appeal against a local government's decision to refuse a development application for a material change of use to establish a multi-storey dwelling overlooking a golf course

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *WOL Projects Pty Ltd v Gold Coast City Council* [2018] QPEC 48 heard before Everson DCJ

November 2018

In brief

The case of *WOL Projects Pty Ltd v Gold Coast City Council* [2018] QPEC 48 concerned an application to the Planning and Environment Court under the *Planning Act 2016* to appeal the decision of the Gold Coast City Council (**Council**) to refuse a development application for a development permit for a material change of use to establish four multiple dwellings.

The Court dismissed the appeal on the basis that the proposed development was in conflict with the *Gold Coast City Plan 2016* (**City Plan**) and that there were no relevant matters to justify the approval.

Issues in dispute

The issues in the appeal were as follows:

- whether the proposed development was an appropriate land use for the location;
- whether the development would contribute to and enhance the planned character of the locality; and
- whether there were relevant matters to justify the approval of the proposed development even though it did not comply with the applicable assessment benchmarks.

Appropriate land use

In relation to the first issue, the Applicant Appellant submitted that the Low Density Residential Zone Code (**Code**) in the City Plan expressly provided for development which included multiple dwellings and therefore the proposed development did not conflict with the Code. The Applicant further submitted that in the event that a conflict was found then the provision would be inconsistent with Specific Outcome 3.3.3.1(5) of the City Plan.

Specific Outcome 3.3.3.1(5) relevantly provides as follows:

> *low intensity, low-rise small lot housing, dual occupancy and multiple dwellings occur in suburban neighbourhoods in low concentrations where they achieve a dispersed or gentle-scattering effect. These dwellings are limited to the following lots where they do not adjoin existing or approved small lot housing, dual occupancy or multiple dwellings.*

The Applicant subsequently argued that as there was a direct inconsistency between the two provisions, Specific Outcome 3.3.3.1(5) of the Strategic Framework in the City Plan should prevail having regard to the hierarchy of assessment outlined in the City Plan. In response to the Applicant's submissions, the Council contended that the City Plan should be read as a whole and that no such inconsistency arose when doing so.

The Court held that the City Plan should be read as a whole instrument rather than separate provisions and found no inconsistency between the provisions.

In relation to the locational criteria listed in Specific Outcome 3.3.3.1(5) of the City Plan, the Applicant relied upon the preceding sentence of the Specific Outcome and submitted that it was only limited to such lots that "*do not adjoin existing or approved small lot housing, dual occupancy or multiple dwellings*".

The Court acknowledged that the Applicant's argument was appealing, however held that it did not accord with the principles of statutory construction as applied in *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QPELR 686; QCA 147 in which a planning scheme must be construed on the "*prima facie basis*" and read as a whole so that "*its provisions give a harmonious goal as intended*" (at [52]). The Court therefore found that the correct approach to interpreting the sentence in question was to view it as an additional limitation on the opportunity to develop multiple dwellings in the area rather than an additional opportunity to do so.

Compatibility with the planned character of the locality

With three of the four proposed dwellings exceeding the maximum height of 9 metres above ground level, the Council submitted that the proposed development did not comply with provision 3.3.3.1 of the Strategic Framework, Performance Outcome 3 and Acceptable Outcome 3.1 of the Code in the City Plan and therefore should not be approved.

In contrast, the Applicant's architect expert witness who gave evidence on visual amenity relevantly submitted that despite the existence of penetrations of part of the building that were above the 9 metre height restriction, the penetrations were very minimal and would have "*very little to no impact on the outlook of the adjoining residences and units*" (at [23]). The Council's architect expert witness also conceded that although the building height exceeded the height limit of a low-rise building it did generally appear as a low-rise development.

The Court agreed with the expert witnesses and found that the height exceedances of the three proposed dwellings did not constitute a meaningful inconsistency with the City Plan. The Court also accepted the evidence put forth by the town planning experts and held that the proposed development would result in a low density outcome for the site. However, the Court acknowledged that the proposed dwellings would add the character of four multiple dwellings to the streetscape rather than four discrete dwelling houses.

In assessing the proposed development against Specific Outcome 3.3.3.1(5) of the City Plan, the Court was satisfied that the development would achieve a "*dispersed or gentle scattering effect*" within the site but concluded that it would reinforce the opposite outcome in the locality and would add to the already high number of pre-existing multiple dwellings. In consideration of this, the Court held that even though the proposed development accorded with the existing pattern of development in the area, it did not comply with the planned character of the locality under the City Plan.

Relevant matters to justify approval despite conflict with the City Plan

To consider whether there were relevant matters which justified the approval of the proposed development despite the conflicts with the City Plan, the Court firstly considered the approach taken in *Bell v Brisbane City Council & Ors* [2018] QCA 84 at [66] where it stated as follows:

> *A planning scheme must be accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land.*

The Applicant asserted that despite the identified conflicts with the City Plan, the proposed development should be approved as it is an appropriate use of the site and would continue to retain and enhance the local character and amenity. Furthermore, it was submitted that the area already contained numerous multiple dwellings which did not comply with the character intended for the locality as defined under the City Plan, and the development of the site at an intensity less than that of the proposed development, would not be a desirable planning outcome or an efficient use of the site.

In relation to the Applicant's first submission, the Court found that the development did not accord with the planned character for the site regardless of whether there were existing buildings of the same character in the locality. In addition to the conflict, the Court also held that there was no public interest in demonstrating compliance with former planning controls. With regards to the Applicant's last submission, the Court was unpersuaded and held that there was no merit to the submission as the City Plan has provided a comprehensive definition of what was appropriate for the site.

Conclusion

The Court therefore dismissed the appeal on the basis that there were no reasonable justifications to depart from the clear planning intent for the site as stated in the City Plan.

Planning and Environment Court is not persuaded to allow a local government to change its position to grant a preliminary approval with conditions

Cara Hooper | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Waterman & Ors v Logan City Council & Anor* [2018] QPEC 44 heard before Kefford DCJ

November 2018

In brief

The case of *Waterman & Ors v Logan City Council & Anor* [2018] QPEC 44 concerned an application in pending proceeding to the Planning and Environment Court brought by the Logan City Council (**Council**) seeking an order to identify further issues in dispute by reference to a document titled "*Respondent's Issues in Dispute*" (**Issues Document**) which included a change to the Council's original position.

The case concerned the Council's decision to grant a preliminary approval with conditions in respect of the Appellants' development application for a development permit for a material change of use and reconfiguring a lot. The Appellants' appealed to the Planning and Environment Court against the conditions.

The Council subsequently brought the application in pending proceeding, seeking an order to identify further issues in dispute, as provided for in the Issues Document, which included the allegation that "*[a]ll aspects of the development application should be refused*" (at [1]) despite the Council's original decision to approve the development application.

The Appellants contended that the Court should deny the relief sought by the application in pending proceeding for the following reasons:

- the Court does not have jurisdiction to grant the order sought as the further issues identified are outside the Court's jurisdiction; and
- the Court should not exercise its discretion as the Council did not provide an adequate explanation for its change of position and the Appellants would suffer prejudice if the relief was granted.

Ultimately, the Court dismissed the Council's application in pending proceeding on the basis that, although the Court had jurisdiction to make the order, the Court was not persuaded to exercise its discretion to do so.

Court determined that it did have jurisdiction to make the order sought by the Council

The Court considered a range of provisions within the relevant planning legislation to determine if the Court had jurisdiction to decide the matter. The Court noted that the appeal was by way of hearing under section 43 of the *Planning and Environment Court Act 2016* (**P&E Court Act**). The Court also considered the decision of *Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21, in which the Court noted at paragraph [54] that there is clear legislative intent within the P&E Court Act that the Court is to exercise an original jurisdiction.

The Court held that, under section 65 and section 66 of the *Planning Act 2016* (**Planning Act**), the Court had jurisdiction to hear an appeal about a development application to the extent that the appeal relevantly concerned a decision to give a preliminary approval.

The Court also noted that it had jurisdiction to hear an eligible submitter appeal to the extent the appeal is relevantly against the decision to approve the application or a provision of the development approval.

Further, the Court stated that the Court had jurisdiction to confirm, change, or set aside the Council's decision under section 47 of the P&E Court Act.

Lastly, the Court considered rule 20(5) of the *Planning and Environment Court Rules 2018*, which provides that the Court is permitted to make an order about the conduct of a proceeding, including an order or direction concerning issues in dispute.

The Court therefore concluded that it did have jurisdiction to make the orders sought, as the appeal was within the jurisdiction of the Court as it was an applicant appeal and an eligible submitter appeal against a decision to give the preliminary approval and the relevant conditions.

Court determined not to exercise its discretion to make an order to include the Issues Document as further issues in dispute as the Court was unpersuaded by the Council's arguments

The Court had a discretion to consider whether the Council should have been permitted to change its position and defend the appeal by contending that the development application should have been refused. The Council alleged the following six reasons to justify why the Court should have exercised its discretion in the Council's favour:

- The issues in dispute were important and the Court would have been in an unenviable position if the Court retained issues in dispute that did not refer to any parts of the relevant planning scheme.
- The Council's experts would be precluded from complying with the expert's duty to the Court under rule 428(3)(b) and (d) of the *Uniform Civil Procedure Rules 1999* (**UCPR**), as the experts could not confirm if they made all the appropriate enquires or referenced all matters which they deemed significant in the relevant expert reports.
- The grounds of refusal are not new as the basis for refusal can be extracted from the preliminary approval conditions.
- The new grounds of refusal would not cause unjustifiable delay in the proceeding.
- The Appellants cannot point to any prejudice which would arise as a consequence of the addition of the new issues.
- The issues should be litigated as it is in the public interest.

The Court observed that the only explanation provided by the Council for the change in position was by way of an affidavit of the solicitor for the Council. The Court held that the contents of the affidavit did not provide an adequate explanation for the Council's change in position as the affidavit did not attach the advice of the external experts and did not disclose whether the relevant Council officer had delegated authority, if the Council officer's view was supported by any relevant Councillors, or if the Council officer's decision was passed by a Council resolution.

Firstly, the Court was not persuaded that the additional issues were important as they did not allege conflict which is material or unacceptable or could not be adequately addressed by additional conditions. Further, in regard to the relevant planning scheme provisions, the Court held that although they were beneficial, they were not necessary, as a party can tender relevant planning scheme provisions as part of the evidence.

Secondly, the Court was not satisfied that the Council's experts would be precluded from complying with their duty to the Court under rule 428(3)(b) and (d) of the UCPR. Additionally, the Court noted that the Council had not put the relevant opinions of the experts before the Court and there was no evidence which suggested that the experts sought to refer to matters which were inadmissible.

The Court noted that, thirdly, the Appellants accepted that the grounds of refusal were not new as they relate to the subject matter of the disputed conditions. The Court observed that the Council did identify three issues which were unrelated to the contested conditions; however the Court noted that those three issues could have been adequately dealt with by way of conditions.

The Court was not satisfied with the Council's fourth argument, as although they intended to raise these grounds at an early stage, they failed to provide an explanation as to why they were not identified before the original decision.

With respect to the Council's fifth argument, the Court was not satisfied that the new grounds of refusal would not cause prejudice to the Appellants or delay the proceeding. The Court noted that the identification of these issues would have increased the length of the proceeding and increased the associated costs.

With respect to the final ground, the Court held that it is not in the public interest for the Council to conduct a collateral attack on its own decision as the purpose of the Planning Act is to establish an efficient, transparent and accountable system of development assessment. Permitting such an attack, in the Court's view, would undermine public confidence in the development assessment process.

Conclusion

The Court was not persuaded by the Council's arguments to exercise its discretion and therefore dismissed the application in pending proceeding.

COLIN BIGGERS & PAISLEY LAWYERS

Planning and Environment Court denies Appellant's request for orders which relate to conduct and decisions anterior to the decision to approve a development application approval

Anne Hinton | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2018] QPEC 46 heard before Kefford DCJ

November 2018

In brief

The case of *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2018] QPEC 46 involved an appeal to the Planning and Environment Court by the Appellant for a determination of issues related to conduct and decisions anterior to the decision of the Rockhampton Regional Council (**Council**) to approve a development application made by the Applicant Co-Respondent which sought a development permit for the making of a material change of use for extractive industry. The parties sought to have the allegations related to the anterior decisions determined separately from the issues in the appeal, which the Appellant had previously commenced against the decision of the Council to approve the development application.

The Appellant sought the following orders:

- the appeal be allowed;
- the Council's decision to approve the development application be set aside; and
- the development application be returned to the Council to properly follow the development application process.

To support the order that the appeal be allowed, the Appellant alleged the following (**Allegations**) (at [32]):

- The existing extractive industry use on the subject land was not an existing lawful use.
- The Development Application was not properly made having regard to existing lawful use rights and the description of the proposed development in the development application.
- There was a failure to comply with provisions of the *Sustainable Planning Act 2009* (**SPA**) relating to the giving of public notice for the proposed development.

In considering the issues, the Court determined as follows:

- The *Planning Act 2016* (**Planning Act**) does not provide an appeal right against anterior decisions or conduct during the development assessment process and therefore this appeal was "*the wrong vehicle for the Appellant's allegations*" (at [65]).
- The Court was not willing to make an order or direction about the conduct of a proceeding under section 14 of the *Planning and Environment Court Act 2016* (**P & E Court Act**) (at [67]).
- There had not been a loss of existing lawful use rights over the whole of the land (at [181]).
- The Court did not accept that the development application was not properly made (at [183]).
- It did not accept that there had been a failure to properly publicly notify the development application (at [193]).

The Court determined that "*there is no proper foundation to the allegations relied on by the Appellant to found the relief it seeks*" (at [204]) and denied the Appellant's request.

Threshold issues

The Applicant Co-Respondent submitted that the allegations "*involve the Appellant advancing a collateral challenge to a decision made by the Council during the development assessment process in circumstances where the legislation provides no appeal right with respect to such decisions*" (at [31]).

The Appellant submitted that was no reason why issues raised in an appeal could not include "*concerns about the validity of the steps taken in the development assessment process*" and that "*such matters can be legitimately raised and determined as part of the "hearing anew" of the appeal*"(at [33]).

The Court considered section 229 of the Planning Act which states the matters that may be appealed to the Court and determined as follows (at [41] and [42]):

> *…the court has jurisdiction to hear an appeal by the Appellant against the decision to approve the application" and that "[t]he Appellant's challenge to the validity of the application cannot properly be characterised as an appeal against the decision to approve the application. Rather, it is a collateral attack on the Council's decision, under s 261 of the Sustainable Planning Act 2009, that the development application was a properly made application.*

The Court also determined that the allegation made by the Appellant that the giving of public notice was non-compliant with the SPA could not be characterised as an appeal against the decision to approve the application.

The Court determined that the broader legislative context of the Planning Act and the P & E Court Act support a legislative intent that appeal rights relating to a development application are limited to the right to appeal against an assessment manager's decision to approve the application or a provision of the development approval or a failure to include a provision in the development approval (at [45]).

The Court held as follows (at [65]):

> *in this case, the Appellant's right to appeal was triggered by the Council's decision to approve the application. The subject appeal is an appeal against that decision. The Planning Act does not provide an appeal right against anterior decisions or conduct during the development assessment process. As such, this appeal is the wrong vehicle for the Appellant's allegations.*

The Court was not prepared to make an order or direction about the conduct of a proceeding under section 14 of the P & E Court Act as requested by the Appellant in the event the Court determined the issues could not be dealt with in the appeal. The reasons were as follows:

- The only basis for challenge was by way of declaratory proceedings, akin to judicial review, however, the Appellant:
  - had not obtained a statement of reasons from Council in respect of the decision made;
  - had not disclosed a proper basis for challenging the Council's decision in its identified issues;
  - did not identify jurisdictional error; and
  - was unable to demonstrate if, and how, the decision maker may have misdirected itself (at [69]).
- The Appellant would fail on its central contention about existing lawful use rights (at [70]).
- In the Court's view the development application was not misleading (at [71]).

Existing lawful use

The Appellant submitted that the use of the land for extractive industry was not lawful at the time the development application was made.

The Appellant alleged the Applicant Co-Respondent did not have the benefit of existing lawful use rights with respect to the whole of the land for the following reasons (at [180]):

> *(a) upon the commencement of the 1986 Planning Scheme, any existing lawful use rights were confined to that part of the land included in the Extractive Industry Zone;*
>
> *(b) the Co-Respondent lost all existing lawful use rights by exercising its rights under the Judgement of the Planning and Environment Court given in April 2000; and*
>
> *(c) upon the introduction of the Integrated Planning Act 1997 and the commencement of Rockhampton City Plan 2005, any existing lawful use rights that existed at that time were preserved only to the extent of the actual, physical use that was being undertaken at the time.*

The Court detailed the history of the use of the subject land and the historical background of the provisions relevant to lawful use of land as contained in the *Local Government Act 1936* (including as amended by the *Local Government Act Amendment Act 1975* and *Local Government Act Amendment Act 1977*), the *Local Government (Planning and Environment) Act 1990*, the *Integrated Planning Act 1997* and SPA, along with the relevant planning schemes.

The Court determined that it was satisfied that there had not been a loss of existing lawful use rights over the whole of the land by reason of any of the matters alleged by the Appellant.

Properly made application

The Appellant submitted that the development application was not properly made for the following reasons:

- it did not include all information required under a mandatory requirements part of an approved form (at [12]);
- it was not accompanied by all supporting information the approved form states is mandatory supporting information for the development application (at [12]); and

- the references in the development application to an extractive industry use and of the description of development contained in the development application was erroneous (at [182]).

The Court did not accept that the development application was not properly made for the following reasons:

- The evidence established that the Council decided to accept the development application as a properly made application and there had been no effective challenge to the legitimacy of the Council's decision (at [184]).
- The Court was not satisfied that the Applicant Co-Respondent did not have the benefit of existing lawful use rights (at [185]).
- It did not necessarily follow in the event there was no existing lawful use that the development application was not properly made (at [186]).

Public notice for the proposed development

The Appellant alleged that there was a failure to comply with the requirements of the SPA in relation to the giving of public notice for the proposed development, namely due to the description of the proposed development contained in the public notice. The Appellant's case was based on the allegation that there was not an existing lawful extractive industry use.

The Court held (at [28]) that "*the allegation of lapse during the notification stage is without proper foundation*" and that it did not accept that there had been a failure to properly publicly notify the development application for the following reasons (at [193]):

- There was no allegation of a failure to comply with a requirement of the SPA with respect to public notification (at [194]).
- The Court was not satisfied that the Applicant Co-Respondent did not have the benefit of existing lawful use rights (at [195]).
- The Court did not regard the public notification as misleading (at [196]).

Order

The Court ordered that the Appellant's request for orders be denied.

Planning and Environment Court determines company operating vehicle dismantling business had unlawfully used the subject land without the necessary permits, and had caused an environmental nuisance and found the CEO also liable under the executive provisions

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gold Coast City Council v Adrian's Metal Management Pty Ltd & Ors* [2018] QPEC 45 heard before RS Jones DCJ

November 2018

In brief

The case of *Gold Coast City Council v Adrian's Metal Management Pty Ltd & Ors* [2018] QPEC 45 concerned an application by the Gold Coast City Council (**Council**) to the Planning and Environment Court for declaratory relief and orders in respect of the Respondent's alleged use of land at Molendinar for vehicle recycling without a permit.

The key issues considered by the Court were as follows:

- Were the Respondents carrying out assessable development on the subject land without the necessary permits and approvals?
- Were the Respondents unlawfully causing an environmental nuisance?

The Council sought the following orders:

- *Pursuant to section 11 of the Planning and Environment Court Act 2016* (**PEC Act**) – a declaration that the development permit issued in July 2001 over part of the subject land had lapsed or been abandoned.
- *Pursuant to section 180 of the Planning Act 2016* (**Planning Act**) – an enforcement order against the First and Second Respondents, being the company operating the vehicle recycling business and the sole CEO of that company.
- *Pursuant to section 505 of the Environmental Protection Act 1994* (**EP Act**) – an order that the First and Second Respondents be restrained from committing the offence of unlawfully causing an environmental nuisance.

The Court held the following:

- *Pursuant to section 11 of the PEC Act* – that the relevant development permit had not lapsed and was not abandoned by the Respondents.
- *Pursuant to section 180 of the Planning Act* – that the First Respondent's unlawful use of the subject land without the necessary permits and approvals was a development offence and further, because the Second Respondent knew or ought to have known of the First Respondent's actions, the Second Respondent was also committing a development offence.
- *Pursuant to section 505 of the EP Act* – that the First Respondent was committing the offence of unlawfully causing an environmental nuisance due to the excessive noise generated from the vehicle recycling activities and the Second Respondent was also committing the offence of unlawfully causing an environmental nuisance because the Second Respondent knew, or ought to have known of the First Respondent's actions.

Background

The First Respondent was the company conducting the business on the subject land, the Second Respondent was the sole CEO of the First Respondent and the Third Respondent was the owner of the subject land.

Collectively the First and Second Respondents were involved in a vehicle recycling business which included the deconstruction and crushing of vehicles, a use relevantly described as Medium Impact Use (Scrap Metal Yard). The business was located across both Lot 83 and 84 of the subject land and within the Low Impact Industry zone of Council's planning scheme but was situated within 250 metres of a nearby residential development. The business had increased in intensity over its lifespan on the subject land.

Previously, the Council had approved a development application with conditions over Lot 83 of the subject land in July 2001. No prior development approval existed for Lot 84 of the subject land, a fact noted by the Court.

Court concluded that the development permit had not lapsed or been abandoned by the Respondents despite finding non-compliance with conditions

The Court concluded that there had been significant non-compliance with a number of the conditions of the July 2001 development approval. The Council contended that the development permit had lapsed, or in the alternative had been abandoned, because of the Respondent's non-compliance with material conditions of the development permit.

However, the Court noted that the relevant development permit was issued under the *Integrated Planning Act 1997* which does not require compliance with development conditions as a condition precedent before the approval takes effect. The Court was therefore not satisfied that the development permit had lapsed or been abandoned.

Court concluded that the First and Second Respondents had committed the development offence of unlawful use of the premises

The Respondents did not have a development permit for Lot 84 of the subject land. Furthermore, the Court found that the use on Lot 83 of the subject land (being subject to the July 2001 development permit) was a different use and was a material and unlawful intensification of the use which might have otherwise been approved.

The Court therefore concluded that the First Respondent was committing a development offence by carrying out an unlawful use of the subject land under section 165 of the Planning Act.

In addition, the Council submitted that the Second Respondent also committed a development offence under section 227 of the Planning Act which deals with executive liability. Although the Court did not accept the Council's full argument, the Court agreed that the Second Respondent knew or ought to have known of the offending conduct of the First Respondent and was therefore also committing a development offence.

Court determined based on the expert evidence that the noise generated from the subject land was causing an environmental nuisance

The relevant joint expert report of the sound engineers, whose evidence the Court accepted, identified an unreasonable level of noise emanating from the subject land. After reviewing the mitigating steps undertaken by the First and Second Respondents, the Court concluded that the First Respondent was guilty of an environmental offence under section 505 of the EP Act, and consequentially the Second Respondent was also guilty under section 493 of the EP Act for failing to ensure the First Respondent did not produce an environmental nuisance.

Conclusion

The Court therefore ordered that the Council prepare the relevant orders and adjourned the proceeding.

Setting aside subpoenas in the context of notices to provide information and records: Port Macquarie-Hastings Council v Mansfield

Todd Neal | Katherine Edwards

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Port Macquarie-Hastings Council v Mansfield* [2018] NSWLEC 107 heard before Sheahan J

November 2018

In brief

The *Mansfield* decision, if upheld, will mean that subpoenas in criminal proceedings which are issued based on knowledge gained from a section 9.22 notice may be at risk of being set aside.

The full version of this article originally appeared in the LexisNexis *Local Government Reporter* – Volume 17 Number 8.

Declaration of interest: Colin Biggers & Paisley acted for the defendant in the case discussed in this article.

In *Port Macquarie-Hastings Council v Mansfield* [2018] NSWLEC 107 (**Mansfield**), the defendant successfully challenged the validity of two subpoenas issued to third parties by the prosecutor, on grounds which are less commonly raised.

The principal challenge concerned the prosecutor's use of information obtained as a result of a notice issued pursuant to (the former) section 119J of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) as the basis for serving the subpoenas. The defendant argued that the section 119J notice issued by the council was not issued for a proper purpose, that is, an "investigation purpose" under the EPA Act. Rather, the defendant submitted it was issued for the substantial purpose of enabling a criminal prosecution, amounting to an abuse of process.

The reasoning behind this argument arises because, on the defendant's case, a council is restricted to issuing a section 119J notice for the purpose of exercising its functions under the EPA Act. A criminal prosecution is not a function of a council under the EPA Act since that function is set out in the *Criminal Procedure Act 1986* (NSW) and the *Local Government Act 1993* (NSW), as confirmed by the Chief Judge in *Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10, [64] (**Zhang**).

Ultimately this ground was sufficient in itself to lead the Court to set aside the subpoenas avoiding the need to analyse the more common grounds such as whether the subpoenas were too broad, or were in the nature of discovery.

What will be the implications for use of section 119J or section 9.22 notices if the Mansfield decision is upheld?

If the decision is upheld in the Court of Criminal Appeal, the decision will have implications for the use of section 119J notices (or section 9.22 notices as they are now) in circumstances where a criminal prosecution is a possibility. The decision suggests that if a criminal prosecution is possible at the time of a section 119J notice, then any information obtained pursuant to that notice should not be used to formulate subpoenas issued within criminal proceedings. To do otherwise would blur the council's investigation powers with its criminal enforcement powers.

In this regard, the decision reaffirms and builds upon the Chief Judge's reasoning in *Zhang* by applying to circumstances where criminal proceedings have not yet occurred.

The decision in *Mansfield* highlights some broader and less well-known parameters controlling the legitimacy of subpoenas particularly in the context of criminal proceedings in a local government context. The concepts of "fishing", "discovery", breadth and the legitimacy of the forensic purpose are well-known, but the abuse of process ground successfully ran in *Mansfield* serves as a useful reminder of this more obscure ground.

If the appeal in the *Mansfield* decision is upheld by the Court of Criminal Appeal, subpoenas in criminal proceedings which are issued based on knowledge gained from (now) a section 9.22 notice will be at risk of being set aside. Specifically, where a subpoena is issued in criminal proceedings on the basis of third party documents obtained during or before those proceedings through a section 9.22 notice, a risk arises that the subpoena will be set aside.

The decision in *Mansfield* has much broader application than simply the law of subpoenas, since the contention in the case overlaps with issues that could equally arise in the context of tendering such documents at trial, challenging the admissibility of documents tendered, and the probative value of any such documents that are admitted – something acknowledged by Sheahan J (at [19]).

Moreover, the decision will have important impacts on the deployment of section 9.22 notices in certain circumstances and the type of proceedings, if any, commenced after the issue of such a notice.

Court of Appeal upholds the Supreme Court's decision requiring a purchaser to pay $5 million in damages for a breach of contract

Rebecca Tang | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Albion Mill FCP Pty Ltd v FKP Commercial Developments Pty Ltd* [2018] QCA 229 heard before Sofronoff P and Philippides JA and Henry J

December 2018

In brief

The case of *Albion Mill FCP Pty Ltd v FKP Commercial Developments Pty Ltd* [2018] QCA 229 concerned an appeal to the Court of Appeal against a decision of the Supreme Court to award damages for a breach of contract as a result of the First Appellant's rescission of a sales contract. The First Appellant additionally appealed the Supreme Court's assessment of damages.

The Court of Appeal held that the contents of the Appellant's due diligence report, which included a "Remediation Action Plan", demonstrated an understanding of the notification of contaminated land. The Court of Appeal also held that the Supreme Court's assessment of damages was correct.

The Court of Appeal therefore dismissed the appeal by the First Appellant.

Background

The First Appellant was Albion Mill FCP Pty Ltd; a corporate entity that was related to Fridcorp Projects Pty Ltd (**Fridcorp**) in that the same individual held all shares in both entities. The development director of Fridcorp was also the sole director of the First Appellant at the time the contract was executed.

The Second Appellant was the director of Fridcorp.

The land, the subject of the appeal is located at 60 Hudson Road, Albion. The Respondent had obtained a preliminary approval to develop the land for a variety of uses with a height restriction of 20 storeys.

The Respondent entered into initial negotiations for the sale of land with Fridcorp. The Second Appellant offered $25 million for the land on the basis that requested documents pertaining to certain matters which included "Environmental Site Assessment and Hazardous Material Reports" were provided.

Fridcorp subsequently proposed a due diligence process and suggested that the files be shared through a Dropbox folder. In the documents provided, a report prepared for the Respondent stated that three of the 12 lots comprising the site were contaminated and that a site management plan would need to be developed and approved under the *Environmental Protection Act 1994* (**EPA**). A certificate of approval of a site management plan issued under the EPA and the written results of a search of the Environmental Management Register and the Contaminated Land Register showing that each of the relevant lots had been registered were also provided.

A due diligence report was prepared prior to the execution of the contract. The report included a paragraph titled "contamination", with specific detail of the nature of the contamination and attached a Feasibility Study which provided an estimate of the cost of "remediation".

The Second Appellant ultimately entered into the "put and call" option contract with the Respondent on 17 July 2015, as it was nominated to be the buyer by Fridcorp's lawyers. Pursuant to a variation in the contract, the Second Appellant was required to pay five percent of the purchase price by a certain date but failed to do so. The Respondent subsequently gave notice of the default and, upon the failure to pay persisting, terminated the contract.

The First Appellant relied on section 421(3) of the EPA to rescind the contract and claimed that the Respondent had not given proper notice that the land was registered in the Contaminated Land Register maintained under the EPA. The Respondent contended that it gave such a notice.

The prior decision of the Supreme Court

In the Supreme Court proceedings, the Respondent made a claim for damages for a breach of contract in the order of $5 million.

The First Appellant argued non-compliance with section 421 of the EPA on five grounds. It further argued that it had the right to rescind the contract pursuant to section 421(3) of the EPA due to the non-compliance.

The Supreme Court found that sufficient notice had been given as required under section 421(3) of the EPA and dismissed the appeal on all grounds. The Supreme Court awarded damages for a breach of contract to the Respondent in the sum of $5,459,640.41.

Issues in dispute

The First Appellant appealed to the Court of Appeal against the orders made by the Supreme Court on the basis that the Supreme Court had erred in its finding that notice had been given pursuant to section 421 of the EPA, and challenged the Supreme Court's decision to award damages.

Relevantly, the First Appellant contended as follows:

- the disclosed documents did not constitute sufficient notification that the particulars of the land were on the Contaminated Land Register but merely stated an historical fact;
- the disclosed documents could only be used to support an inference that the land was on the Contaminated Land Register;
- the inclusion of a "no responsibility" clause in the due diligence contract created the inference that the contents of the due diligence material should not be relied upon or, in the alternative, if the disclosed documents were capable of constituting statutory notice, the documents were not given to the First Appellant but rather a related corporate entity; and
- the Supreme Court erred in its assessment of damages.

The Court of Appeal considered the grounds of the appeal and held that the grounds could not be sustained.

Proper construction of section 421 of the EPA

The Court of Appeal held that "notice" for the purpose of section 421(2) of the EPA must have the following five characteristics:

- it must be in writing;
- it must notify "*that the particulars have been recorded in the Register*";
- if the land is subject to a site management plan, it must notify the "*details of the plan*";
- the owner must "give" the notice to the "buyer"; and
- the notice must be given "*before agreeing to dispose of the land*".

The Court of Appeal found that there was no formality required for a notice under section 421 of the EPA. The notice need only be in writing and communicate the particulars of the land that has been placed on the Contaminated Land Register, and the details of any site management plans. The Court of Appeal also held that the form of written communication is immaterial and the essential matter is whether the writing reaches the attention of the buyer and informs them of the contamination.

The Court of Appeal acknowledged that the First Appellant's submissions may have been more persuasive if it had made a case where those that had read the documents did not understand what they signified. The Court of Appeal however held that, in the circumstances, the actions of the First Appellant had constituted an understanding of the essential terms and therefore the argument could not be made.

In its defence, the First Appellant admitted that an assistant had accessed the Dropbox folder and had downloaded the data. The First Appellant further admitted that it "*had the benefit of and received the disclosure provided by the plaintiff* [Respondent] *through the Data Room and the documents downloaded therefrom before entering into*" the contract and specifically stated that it had access to the Environmental Management Register and the Contaminated Land Register.

The Court of Appeal found that the First Appellant had received notice and had understood the essential terms which therefore constituted sufficient notification under the EPA.

The Court of Appeal additionally dismissed the First Appellant's argument that the inclusion of a "no responsibility" clause diminished the documents reliability and held that the proposed "no responsibility" clause was not in the final version of the contract and could not constitute an improper notification.

In relation to the First Appellant's submission that no notice of the essential facts were given to the actual purchaser nominated by Fridcorp, the Court of Appeal rejected this submission on the basis that at the time that the contract was signed, the First Appellant and Fridcorp had the same director and therefore had the relevant corporate mind for the purposes of the project.

Calculation of damages

The First Appellant asserted that the Supreme Court had erred in its assessment of damages and submitted that the damages should be measured by the difference between the contract price of $25 million and the market value at two alternative dates being the settlement date and the relevant date of valuation. In support of the argument, the First Appellant submitted that the Supreme Court was wrong in accepting the valuation report tendered by the Respondent, without calling any contrary evidence, and based its argument upon an attack of the Respondent's valuer.

The Court of Appeal disagreed with the First Appellant and held that the submissions were misconceived and that the Supreme Court was correct in its approach to the assessment of damages.

The Court of Appeal therefore dismissed the appeal with costs.

COLIN BIGGERS & PAISLEY LAWYERS

Land Appeal Court dismisses an appeal against the categorisation of land for rating purposes

Dee Ardham | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Appeal Court of Queensland in the matter of *Moreton Bay Regional Council v White & Anor* [2018] QLAC 4 heard before Dalton J, WL Cochrane, Member of the Land Court and PG Stilgoe, Member of the Land Court

December 2018

In brief

The case of *Moreton Bay Regional Council v White & Anor* [2018] QLAC 4 concerned an appeal to the Land Appeal Court against a decision of the Land Court regarding Moreton Bay Regional Council's (**Council**) objection to the categorisation of land for rating purposes.

The Respondents own a residential parcel of land which is 3,000m^2 and located in the Council's local government area. There are two separate residential dwellings located on the land. The second dwelling is considerably smaller than the primary dwelling.

For rating purposes, the Respondents contended that the land should be categorised as a R1 category property. Council rejected this argument and contended that the land should be categorised as a F2 category property. The issue on appeal was whether the Land Court correctly determined that the property does not fit the requirements of either rating category.

The Land Appeal Court confirmed the Land Court's decision and held that the land did not fit the requirements of either rating category. The Court further held that the Council's rating resolution did not adequately define the F2 category. As a result, the Court accepted that the subject land fits the requirements of the O1 category and dismissed the appeal.

Council introduced a series of new rating categories on 3 June 2016

The Council resolved to adopt 255 rating categories for its local government area at a special general meeting. These categories included the R1, F2 and O1 categories.

The Respondents argued that the land should be categorised as a R1 category property. The R1 category is a residential category for land which contains a single residential dwelling, not part of a community titles scheme, and is used by the property owner or at least one of the property owners as their principal place of residence. This category has a minimal general rate of $890.

The Council argued that the land should be categorised as a F2 category property. The F2 category is a residential category for land which contains multi-residential dwellings where the number of flats on the physical land parcel is equal to two. A "flat" is defined as land that is subject to one rate assessment and contains more than one residential dwelling. This category has a minimum general rate of $2,2260.

Land Court rejected both arguments and held that the land should be categorised as a O1 property

The Land Court rejected the Respondent's argument as the land could not be categorised as a R1 property because the subject land does not contain a single residential dwelling as required.

The Land Court also rejected the Council's argument and held that the land could not be categorised as a F2 property. The Court found that the description was ambiguous and did not clearly define the type of residential dwellings that the Council intends to rate in this category. The Court held that ambiguity can be resolved by applying the ordinary meaning of "flat" to the term "residential dwelling". The Court found that the subject land is not a property with two flats, whether the term "flat" is used in its ordinary meaning, or as defined in the resolution.

On this basis, the Land Court determined that the correct category for the land is the O1 category. The O1 category is a category for land not contained in any other differential rating category and the rateable value of the land is less than $1,000,000. This category has a minimal general rate of $890.

Land Appeal Court confirmed the Land Court's decision that the land is a O1 category property

The Land Appeal Court accepted the Land Court's view as the land could not be categorised as a R1 property because it does not contain a single residential dwelling as required.

The Land Appeal Court held that Council's rating resolution is not consistent with its submission that the land is a F2 property. The Land Appeal Court found that Council's explanation of the F2 rating category was unhelpful in interpreting it.

The Land Appeal Court rejected the Council's reliance on the decision of *Myer Queenstown Garden Plaza Pty Ltd v City Port of Adelaide* (1975) 33 LGERA 70 to argue that Council's resolution should not be construed in an overly pedantic way.

The Court distinguished the decision by finding that the Council's rating categories are not a "spur of the moment" formulation and, rather are stated in a technical document introduced as a resolution in a general meeting. For this reason the Land Appeal Court found it necessary to look at the words the Council chose to use.

The Land Appeal Court further held that the resolution's purpose is to impose rates upon residents, and is not to be construed in the favour of the Council where it does not abide by its terms. The Land Appeal Court found that the land did not clearly fall within the words "multi-residential" because it is not a property with two flats when the term "flat" is used in its ordinary meaning or as defined in the resolution. Therefore, it could not be categorised as a F2 property.

Conclusion

The Court therefore concluded that the Land Court correctly identified the subject land as an O1 category property and dismissed the appeal.

COLIN BIGGERS & PAISLEY LAWYERS

Land Court looks closely at impacts of mining lease to determine compensation

Austyn Campbell | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Valantine v Henry* [2018] QLC 21 heard before PA Smith

December 2018

In brief

The case of *Valantine v Henry* [2018] QLC 21 concerned an application to the Queensland Land Court for compensation to the relevant landowner for the grant of a mining lease.

The land in question, known colloquially as 'Flat Creek Station', is located approximately 28km south, south-west of Georgetown. The property is 13,800 hectares and is predominantly used for grazing, cattle breeding and fattening, and eco-tourism. The mining lease is located on the land over a total area of 58.16 hectares. It was sought for a period of 20 years.

The Court considered the following when determining the amount of compensation payable to the landowner:

- the value of the land;
- the total area of the mining lease;
- the changes to the Respondent's access to the land and overall land use; and
- the Respondent's right of entry and access to the mining lease area and whether that right may be excluded by the mining lease.

The Applicant argued that compensation should be paid over only a limited area of the mining lease area. However, the Applicant's submissions included an offer of compensation for the whole mining lease area, payable per hectare. The Court noted inconsistencies in the Applicant's position.

The Court stated that, but for the submissions of the Applicant, a lower payment of compensation may have been awarded to the Respondent. Subsequently, the Court determined compensation payable in the amount of $20,000, by way of yearly instalments of $1,000 over the 20 year term of the mining lease.

Consideration of principles under the Mineral Resources Act 1989

The Court had regard to sections 281(3) and 281(4) of the *Mineral Resources Act 1989* (**MRA**) which state the relevant issues to be considered. Under these sections, the Court relevantly considered the deprivation of the Respondent's possession of the surface of the land constituting the mining lease area, diminution in the value of the Respondent's land and any loss and expense arising as a result of the mining lease.

The Court made note that while the MRA sets out such matters to be considered, it fails to define any method of assessment. The Court therefore applied the overriding principle of equivalence, as stated in the case of *Richardson v Barrett* [2001] QLRT 89, which seeks to ensure that, so far as money can do it, landholders are to be placed in the same position as if the mining lease was not granted.

Submissions regarding compensation

The Applicant submitted that only five hectares of the Respondent's land would be disturbed at any one time, even though the relevant Environmental Authority allowed for disturbance over 10 hectares. On this basis, it was submitted that the Respondent would have access to 99.9959% of the total land for grazing and other business activities. Other relevant submissions included the rehabilitation of the mining lease land and evidence that the value of the land had increased as a result of past mining activities.

The Applicant's Compensation Statement proposed a total payment of $14,141.60 for the term of the mining lease; payable in equal annual instalments. The submission contemplated 20 years of compensation at $707.08 per year. This total included a payment of $11.45 per hectare plus 10% pursuant to an assessment under section 281(4)(e) of the MRA.

However, the proposed order also sought to pay the total payment of $14,141.60 in equal yearly instalments once mining commenced. The Court found this to be inconsistent with the Compensation Statement which would allow, if mining did not commence for 10 years, for the yearly payment to be $1,414.16.

The Respondent submitted that the impacts on cattle grazing, farm infrastructure and the diminution in value of the land, amongst other considerations, were relevant to the award of compensation. The Compensation Statement calculated the total amount of compensation payable to be $38,451.60. This was based off a higher base rate per hectare of the mining lease, as well as an additional charge for access to and from the mining lease area.

The Applicant's right to exclude the Respondent from the mining lease area

The Court considered sections 235 and 403 of the MRA which had been the subject of a number of similar judicial decisions. Section 235 relates to the general entitlements of the holder of a mining lease while section 403 provides for offences regarding land subject to a mining claim or mining lease. The right to exclusion was deemed relevant in the circumstances of this case.

In determining the applicability of the relevant sections, the Court relied on observations from President MacDonald in *Barrett v Weir and Gregcarbil Pty Ltd* [2009] QLC 182 (at [26]) who relevantly found as follows:

> *the lessee is entitled to go on to and remain on the mining lease area for purposes connected with mining only. The mining lessee is not given a right to exclusive possession of the lease area.*

In this case, compensation was determined having regard to the fact that the Respondent's cattle could continue to graze on the undisturbed area of the mining lease area. The Court determined that the Applicant's entitlement to compensation was in respect of the loss of carrying capacity or agistment for the whole of the mining lease area.

The Court relied upon sections 235 and 403 of the MRA to conclude that the mining lease would not grant the Applicant a right of exclusive possession. The Court concluded that the Respondent would only be awarded compensation for nuisance as a result of the mining activities on under 20% of the total mining lease area, the "blot on title" and diminution in the value of the land.

Determination of compensation

The Court noted the discrepancy between the Applicant's intention to compensate for a limited area of the mining lease area and its submission that compensation was payable for the whole area. The Court determined that the Respondent is entitled to compensation from the date of the grant of the mining lease.

In conclusion, the Court applied the principles of *ERO v Henry* [2015] QLC 22 and applied an amount of $17 per hectare for compensation for the area capable of being significantly disturbed by the mining lease. For the remaining area under the mining lease, the Court accepted the Applicant's submission that compensation be calculated based on $11.45 per hectare. It was noted that, but for the submissions of the Applicant, a determination less than $11.45 per hectare may have been awarded.

Conclusion

The Court therefore ordered that compensation in the total amount of $20,000 be paid in equal yearly instalments for a period of 20 years, with the first instalment payable within one month of the grant of the mining lease.

Extension for lapsed development permit garners no opposition

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Shannen Jane Bielby v Moreton Bay Regional Council* [2018] QPEC 50 heard before Long SC DCJ

December 2018

In brief

The case of *Shannen Jane Bielby v Moreton Bay Regional Council* [2018] QPEC 50 concerned an originating application to the Planning and Environment Court seeking orders relating to a development permit for a material change of use for multiple dwellings in relation to land located in Redcliffe (**Development Approval**).

The orders were not opposed by the Moreton Bay Regional Council (**Council**).

The Applicant relevantly sought the following orders under section 37(1) (Discretion to deal with noncompliance) of the *Planning and Environment Court Act 2016* (**P&E Court Act**):

- that the Development Approval be revived; and
- that the currency period for the Development Approval be extended for a period of 6 months.

The Court made orders that the Development Approval be revived and that the currency period be extended to allow the Applicant time to make an extension application. The Court also ordered that each party bear their own costs.

Statutory background

The Development Approval and an initial application for an extension were both made by the Applicant under the now repealed *Sustainable Planning Act 2009* (**SPA**). The *Planning Act 2016* (**Planning Act**) replaced the SPA in July 2017.

The transitional provisions of the Planning Act state that a development approval under SPA is taken to be a development approval under the Planning Act. The Court noted that, under the Planning Act, if the Development Approval had not lapsed then the Applicant could have used section 86 (Extension applications) of the Planning Act to extend the currency period applicable for the Development Approval.

Section 86 of the Planning Act was not available to the Applicant because the Development Approval had lapsed.

The Court agreed with the Applicant that section 37 of the P&E Court Act could be utilised to excuse the Applicant's non-compliance with section 86 of the Planning Act. The Court's excusal of the relevant non-compliance would effectively revive the Development Approval thereby allowing the Applicant the opportunity to make an extension application under section 86 of the Planning Act.

Discretionary matters

Having determined that the Court could revive the Development Approval using its discretion under section 37 of the P&E Court Act, the Court then considered why it should do so.

The Applicant had failed to make an extension application within the required timeframe for the following reasons:

- the Applicant had experienced a delay in receiving high-quality architectural plans from the original architect;
- the Applicant had experienced significant delays in receiving the structural engineering work from the engineering consultants; and
- the death of the Applicant's original architect and the subsequent transfer of the management of the development application passing to the Applicant's husband, who was in ill health, and who ultimately overlooked that the Development Approval had lapsed.

Furthermore, the Court noted the following:

- the Applicant otherwise demonstrated a desire and willingness to pursue the proposed development;
- the application to the Court was supported by uncontested evidence from a town planning expert which supported the Development Approval being revived and extended; and
- the Council also supported the Development Approval being revived.

Conclusion

The Court decided to exercise its discretion under section 37 of the P&E Court Act and held that the non-compliance be excused, the Development Approval revived and that the currency period be extended to 21 December 2018.

Court of Appeal considers whether the Peaceful Assembly Act 1992 grants immunity for breaches of a local law

Larissa Zeil-Rolfe | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Hemelaar v Brisbane City Council* [2017] QCA 241 heard before Morrison JA and Boddice and Flanagan JJ

December 2018

In brief

The case of *Hemelaar v Brisbane City Council* [2017] QCA 241 concerned an application by the Applicant to the Court of Appeal seeking leave to appeal the District Court's decision that the Magistrate Court had not erred in finding that there was no conflict between the *Peaceful Assembly Act 1992* (**Peaceful Assembly Act**) and the *Public Land and Council Assets Local Law 2014* (**Local Law**).

The issue before the Court of Appeal was whether the provisions of the Peaceful Assembly Act provided legal immunity to the Applicant for the relevant breaches of the Local Law.

The Applicant argued that the District Court had erred in finding that "*an authorised assembly under the* [Peaceful Assembly Act] *was subject to the constraints contained in section 5(4) of the Peaceful Assembly Act*" (at [30]).

The Court of Appeal held that the District Court had not erred in its finding, granted leave to the Applicant to appeal and dismissed the appeal.

Background

The Applicant was a member of Operation 513: an organisation that attempts to spread the message of the Bible by engaging in public activities. In 2016, the Applicant undertook activities in Brisbane's Queen Street Mall and was convicted of eight breaches of the Local Law.

The Applicant gave several notices pursuant to the Peaceful Assembly Act to the Brisbane City Council (Council) and Queensland Police, which noted an intention to hold a public assembly. The Council "*did not challenge the applicant's intention to hold a public assembly in the Queen Street Mall in accordance with those notices*" (at [8]). The Council however, advised the Applicant of the following requirements:

- the Applicant needed to apply in writing for Council's "*consent in relation to the use of an amplifier and other materials as part of the holding of the foreshadowed assembly in the Mall*" (at [8]); and
- the application was subject to an application fee.

The Applicant was relevantly charged with the following breaches of the Local Law:

- advertising, distributing written material and using an amplifying device without the Council's consent;
- failing to remove an advertisement sign, despite the direction to do so, from an authorised officer; and
- failure to comply with two compliance notices.

Peaceful Assembly Act and the Local Law

The issue in the appeal was whether the Peaceful Assembly Act provisions prevailed over the Local Law, such that the Applicant's activities would not be subject to the Local Law.

Section 2 of the Peaceful Assembly Act states its objects which relevantly includes the right of peaceful assembly, subject to such restrictions as are necessary and reasonable in a democratic society in the interests of public safety, public order or the protection of the rights and freedoms of other persons. The Peaceful Assembly Act balances the right to participate in a peaceful assembly with the right to enjoy the natural environment and carry on business.

Section 5 of the Peaceful Assembly Act provides that a person has the right to assemble peacefully with others in a public place. Section 5(4) of the Peaceful Assembly Act qualifies this, stating that the local authority's power to regulate pedestrian malls is not limited by section 5.

Section 7 of the Peaceful Assembly Act states that a public assembly is an authorised public assembly if the appropriate notice is issued. Section 6 of the Peaceful Assembly Act provides that where an assembly is an authorised public assembly, a person who participates in the assembly is immune from civil or criminal liability because of the obstruction of a public place. The Court of Appeal observed that the legal immunity is not unlimited, given it applies exclusively to the obstruction of a public place and that conduct outside of this must be accounted for. The Court of Appeal held that because of the nuanced object of the Peaceful Assembly Act, section 5 and section 7 are not inconsistent.

The purpose of the Local Law, which is outlined in section 15 of the Local Law, is to regulate pedestrian malls in order to preserve the right to natural enjoyment and to carry on business. The Court of Appeal held that the power to regulate a pedestrian mall conferred by the Local Law is consistent with the legal immunity granted by section 6 of the Peaceful Assembly Act, given that the legal immunity is limited. In contrast, if the immunity had been general there would be an inconsistency.

The Court of Appeal held that section 5 and section 7 of the Peaceful Assembly Act are complimentary provisions. The Court of Appeal held that "*an authorised public assembly held in a pedestrian mall must still comply with the requirements of the relevant local authority*" where it is reasonable and necessary (at [41]). The Court of Appeal also observed that the "*requirements that permission first be obtained for specified regulated activities, including the distribution of written material and the operation of amplifying equipment, are necessary and reasonable requirements*", given that these activities impact directly on a person's ability to enjoy the natural environment and carry on business within a pedestrian mall (at [43]).

Fee to participate in a public assembly

Section 2 of the Peaceful Assembly Act relevantly states that "*the right of a person to participate in public assemblies may be exercised without payment of a fee*" (at [45]). The Court of Appeal held that the activities regulated by the Local Law did not inhibit a person's right to participate in a public assembly in the Queen Street Mall given the Local Law did not impose a fee.

Conclusion

The Court of Appeal therefore dismissed the appeal on the basis that, despite being an authorised public assembly under the Peaceful Assembly Act, an assembly in a pedestrian mall is still subject to the Local Law. The Applicant therefore did not have legal immunity for the convicted breaches.

COLIN BIGGERS & PAISLEY LAWYERS

Human Rights Bill for Queensland: How the Bill will impact local governments

Sara McRostie | Megan Kavanagh

This article discusses the impact of the *Human Rights Bill 2018* on local governments in Queensland

December 2018

In brief

Local governments will be affected by the *Human Rights Bill 2018* (**Bill**) and should provide information to councillors and employees about their legal obligations and have appropriate complaints handling procedures to deal with human rights complaints.

The Bill was introduced into the Queensland Parliament on 31 October 2018. While the Bill is broadly consistent with the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the ACT *Human Rights Act 2004*, if passed the law will go further with additional rights for Queenslanders including the right to health and education and the introduction of a complaints mechanism allowing people to complain about human rights issues.

For local governments, the Bill will have particular ramifications and local governments should start considering the human rights triggers in local laws, community engagement practices, service delivery protocols, administrative decision-making and appeals processes and complaints mechanisms in preparation for the new laws.

Who will it affect?

The obligations imposed by the Bill apply to the Queensland Parliament, courts and tribunals and public entities. The entities include local governments, councillors and local government employees.

Other entities the Bill will extend to include:

- public universities and vocational education providers;
- hospital and health services;
- government owned corporations;
- registered NDIS providers when they are performing functions of a public nature in Queensland;
- private companies engaged to deliver services to the public on behalf of the government such as public transport, housing and corrective services.

What human rights are to be protected?

The human rights protected by the Bill are:

1. Recognition
2. Right to life
3. Protection from torture and cruel, inhuman or degrading treatment
4. Freedom from forced work
5. Freedom of movement
6. Freedom of thought, conscience, religion and belief
7. Freedom of expression
8. Peaceful assembly and freedom of association
9. Taking part in public life
10. Property rights
11. Privacy and reputation
12. Protection of families and children
13. Cultural rights – generally
14. Cultural rights – Aboriginal people and Torres Strait Islanders
15. Right to liberty and security of person
16. Humane treatment when deprived of liberty
17. Fair hearing
18. Rights in criminal proceedings
19. Children in the criminal process
20. Right not to be tried or punished more than once
21. Retrospective criminal laws
22. Right to education
23. Right to health services

How will it impact local governments?

For local governments, the human rights that are likely to be of most impact include:

Right protected	Explanation
Recognition and equality before the law	Every person has the right to recognition as a person before the law and the right to enjoy their human rights without discrimination. Every person is equal before the law and is entitled to equal protection of the law without discrimination. Every person is entitled to equal and effective protection against discrimination.
Freedom of movement	Every person lawfully within Qld has the right to move freely within, enter or leave Qld and choose where to live.
Freedom of thought, conscience, religion and belief	Every person has the right to think and believe what they want and to have or adopt a religion, free from external influence. This includes the freedom to demonstrate a religion individually or as part of a group, in public or in private.
Freedom of expression	Every person has the right to hold and express an opinion, through speech, art, writing (or other forms of expression) and to seek out and receive the expression of others' options.
Peaceful assembly and freedom of association	Every person has the right to join or form a group and to assemble. The right to assembly is limited to peaceful assemblies.
Taking part in public life	Every person in Qld has the right and opportunity without discrimination to take part in public life. Every eligible person has the right to vote, be elected and have access on general terms of equality to the public service and office.
Property rights	All persons have the right to own property alone or in association with others. A person must not be arbitrarily deprived of their property.
Privacy and reputation	A person's privacy, family, home and correspondence must not be unlawfully or arbitrarily interfered with. A person has the right not to have their reputation unlawfully attacked.
Cultural rights – generally	All persons with particular cultural, religious, racial and linguistic backgrounds have a right to enjoy their culture, declare and practise their religion, and use their language, in community with other persons of that background.

If passed, the Bill will have an impact on the day-to-day work of local governments. In practice this means that local governments, councillors and local government employees must:

- Make, interpret and apply local laws consistently with human rights.
- Give proper consideration to human rights when making decisions.
- Ensure service delivery is compatible with human rights.
- Ensure local government employees go about their work in a way that respects human rights.
- Handle complaints from members of the community about alleged breaches of human rights.

The Bill recognises that human rights are not absolute and may be subject to limits set by laws that are reasonable and justified.

Human rights are required to be balanced against the rights of others and public policy issues of significant importance.

The test for deciding whether a human right limitation under a law is reasonable is if it can be demonstrably justified in a free and democratic society based on will, human dignity, equality and freedom. The onus is on the local government seeking to limit a human right to demonstrate that the limit is reasonably justified in the circumstances. There are a number of factors outlined in the Bill that are intended to provide a guide.

A good example is the use of CCTV systems in public spaces and on local council owned property such as libraries, swimming pools and waste transfer stations. Local governments will need to consider whether the restriction on the human right to privacy and reputation by the use of CCTV in public spaces is demonstrably justified.

Preparing procedures to handle human rights complaints

The Bill includes a complaints mechanism for human rights issues. The new Queensland Human Rights Commission (**QHRC**) will have broad powers to compel parties to attend mediation, publish the outcome of complaints and make recommendations about complaints.

The Bill requires a person making a complaint against a local government to satisfy the following requirements before making a complaint to the QHRC:

- the person has first made a complaint about the alleged contravention to the local government;
- at least 45 business days have elapsed since the complaint was made;
- the person has not received a response to the complaint, or has received a response but considers it to be an inadequate response.

This will require preparation by local governments to be fully equipped to attend to human rights complaints. This is likely to require additional resourcing, training of employees, a revised complaints strategy and ensuring the complaints process is available in various communication preferences to be consistent with the right to equality before the law.

The QHRC will be able to refuse to deal with a complaint that is frivolous, trivial, vexatious, misconceived or lacking in substance.

In our experience, such power is rarely exercised before the respondent party has expended significant time and energy in dealing with the issue through internal and external processes. We recommend that local governments proceed on the basis that in most cases the QHRC will attempt to conciliate and resolve the complaints received.

Legal claims and compensation

Monetary damages are not available for a contravention of a person's human rights and there is no stand-alone legal remedy for a contravention. However, if a person has a separate cause of action against a local government (for example, a judicial review application) a claim under the Bill can be added to the existing claim.

We understand submissions have been received in support of a change to the provision to allow for economic remedies for breaches of rights.

Next steps

The Bill is being reviewed by the Parliamentary Legal Affairs and Community Safety Committee for inquiry and report by 4 February 2019. The Committee will be considering written submissions that were submitted by 26 November 2018.

In preparation, local governments should conduct an audit of public policies, plans, procedures, contracts and local laws to assess whether any parts limit or interfere with human rights and, in the instance that they do, consider whether the limitation is reasonably justified. This process will minimise the risk of breaching human rights and reduce the potential number of contravention complaints.

Where there is uncertainty as to whether a restriction on a protected right is reasonable and justifiable, advice should be sought to avoid the risk of breaching the protected right.

Providing training to local government employees on the human rights obligations in the delivery of council services will also be important to ensure employees perform their work and deliver local government services in a way which respects human rights.

Finally, local governments should ensure they have appropriate complaints handling procedures to deal with human rights complaints and are able to resolve them promptly where possible.

The year in review: A look at the NSW waste industry in 2018

Todd Neal | Katherine Edwards

This article discusses the changes and firsts of the New South Wales waste industry in 2018

December 2018

In brief

2018 has been a year of change and firsts for the NSW waste industry which will continue to have impacts into the new year.

A snapshot of the key regulatory events that occurred in 2018 is below:

What will 2019 bring?

The NSW Government and regulatory authorities have continued to demonstrate a strong regulatory presence in particular areas of the waste industry with increased penalties, close scrutiny of waste operator's using their powers under the *Protection of the Environment Operations Act 1997* (NSW), and some high profile prosecutions. However, the decision in *Grafil* may impact the number of prosecutions commenced by the EPA next year.

Key areas of interest for 2019 for NSW waste industry are likely to be:

- The market's response to the introduction of a waste levy in Queensland and seeing whether it kerbs the interstate transport of waste.
- The continued governmental response to China's National Sword Policy and the assistance that is afforded to (or taken away from) from waste operators.

The impact of the above on the "cost of doing business" for waste operators in NSW has probably already been forecasted by most operators. But what increase (or decrease) may be passed onto generators, is still unknown.

The year in review: A look at NSW planning in 2018

Todd Neal | Mollie Matthews

This article discusses the changes to New South Wales planning laws and significant cases in 2018

December 2018

In brief – A snapshot of the changes to NSW planning laws and significant cases in 2018

In 2018 there were a significant number of regulatory changes (both qualitative and quantitative), Land and Environment Court and Court of Appeal decisions (also both qualitative and quantitative) and policy changes.

One of the biggest changes now sees Panels (rather the Councillors) determining the most significant development applications around the State.

We set out below some of the other important developments over the last year.

Land and Environment Court statistics

The Land and Environment Court Annual Review for the financial year ended 30 June 2018 is available at http://www.lec.justice.nsw.gov.au/Documents/Annual%20Reviews/2017%20Annual%20Review.pdf.

In short, the industry is seeing longer lead times for section 34 conciliation conferences, which in turn holds up the hearing of matters in Court which do not settle at the section 34 conferences. There was a sharp increase in appeals in 2017 (97% increase over 4 years), and 2018 does not appeared to have been significantly different with Class 1 merit appeal registrations sitting at 782 for the year back in October 2018 (compared to 1021 for the 2017 year). Part of the reason for this is the many deemed refusals of development applications leading to appeals given the cost involved in playing the "waiting game" with councils.

Overhaul of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)

2018 began with the largest number of changes to the EP&A Act since it commenced almost 40 years ago. Our article from earlier this year summarised the main changes. The changes were implemented in stages, with some changes postponed for commencement until next year.

Interim occupation certificates

The change to the regime surrounding planning certificates has caused some industry consternation.

However, developers can continue to apply for interim occupation certificates until 1 September 2019, which is when the changes to Part 6 of the EP&A Act will commence under the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017*.

Despite these changes, developers will still be able to obtain an "occupation certificate" that authorises occupation or use of **part of a new building**, or to commence a new use of **part of a** building resulting from a **change of building use for an existing building**.

Building and Development Certifiers Bill 2018

The *Building and Development Certifiers Bill 2018* was passed on 31 October 2018, which includes amendments to Part 6 of the new EP&A Act. This amends the EP&A Act to insert section 6.6(4A), which introduces the ability to prescribe an alternative appointment process for principal certifying authorities in the purported hope of supporting certifier independence.

The alternative appointment process is yet to be finalised. Based on the Improving Certifier Independence: Options Paper, it appears that three options are being considered:

Option 1: The rotation scheme	Option 2: The cab rank scheme	Option 3: The time limit scheme
Establishment of an eligibility list where the certifier is appointed in a randomised order.	Establishment of an eligibility list where the next available certifier on the list is allocated to the job.	Requiring a certifier to take a two-year break after working for the same client after a certain period of time.

The Options Paper also describes potential thresholds, that if met would mean that the alternative appointment process would apply, such as if a development is a Class 2-9 building above 3 storeys with a total floor area greater than 2,000m^2 valued at $5 million or more.

This will raise a number of significant implications for certifiers and those appointing them.

Enforceable undertakings

Under section 9.5 of the EP&A Act, the Secretary of the Department is responsible for accepting enforceable undertakings on behalf of the Department and NSW Councils.

The first two enforceable undertakings have been entered into. One was accepted by the Secretary on behalf of the Department of Planning and Environment. The other was accepted by the Secretary on behalf of a council (North Sydney Council). They are published on the Department's website.

It will be interesting to see how extensively these are used across NSW, which councils are willing to use them, and if there is any consistent pattern as to when and in what circumstances they are used.

Those considering entering into an enforceable undertaking should understand the repercussions for breach of a term of the undertaking under section 9.5(4) of the EP&A Act, given the Court can make compensatory and monetary benefit orders (among others) where there is a breach.

Review of the Environmental Planning and Assessment Regulation 2000 (Regulations)

The Department has recently commenced a review of Regulations, following the changes to the EP&A Act earlier this year. The Issues Paper for the Review of the Regulations is available at https://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/~/media/626ED337A8BC4129BFCABB66ED33BD5E.ashx. The draft amendments to the Regulations have not yet been released.

Changes to the Standard Instrument Local Environmental Plan and Codes SEPP

Reinforcing a widely considered view within the industry that an LEP becomes redundant the day it is gazetted, numerous changes have been made to the Standard Instrument LEP for retail, including new definitions for 'artisan food and drink industry', 'garden centre', 'local distribution premises', 'neighbourhood supermarket' and 'specialised retail premises'. These changes have the obvious intention of catching the planning system up to new consumer trends.

There have also been recent changes proposed to introduce exempt and complying development pathways that enable Short Term Rental Accommodation (**STRA**) to catch up with the rise of suppliers of STRA like Airbnb. Our Property team has recently published an article on the impact of peer-to-peer accommodation (such as Airbnb) on hoteliers, and the new regulatory framework for short-term letting platforms under the *Fair Trading Amendment (Short-term Rental Accommodation) Act 2018* (NSW).

The State Environmental Planning Policy Infrastructure 2007 has also been amended, in another interesting example of the planning system catching up to new technology and consumer behaviour. It now allows for the installation of electric car chargers in car parks, depots and other vehicle related facilities, without planning approval.

Low Rise Medium Density Code

One of the most controversial policy changes in 2018 relates to the Low Rise Medium Density Housing Code, which allows one and two storey dual occupancies, manor houses and terraces to be carried out under a fast track complying development approval for medium density zones. A complying development approval can be issued within 20 days if the proposal complies with all the relevant requirements in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**Codes SEPP**).

The implementation of this code was however deferred for 50 councils until 1 July 2019.

Western Sydney Aerotropolis

Planning for the Badgerys Creek airport and surround lands has well and truly begun. The Stage 1 Land Use and Infrastructure Implementation Plan (**LUIIP**) for the Aerotropolis provides an overview of proposed land uses and the sequence of development that will deliver the Aerotropolis around Badgerys Creek. The LUIIP was on exhibition between 21 August to 2 November 2018.

SEPP 70 changes

One of the final reforms currently being proposed, which could have a significant impact on any development in NSW, is the proposed amendments to State Environmental Planning Policy No. 70 – Affordable Housing (Revised Schemes) (**SEPP 70**). SEPP 70 allows councils named in it to prepare affordable housing contribution schemes within their local government area. If additional local government areas are added, it would add yet another form of contributions that councils could collect.

Court of Appeal judgments

The last year has seen a number of Court of Appeal judgments that have sprung from the Land and Environment Court.

One such judgment that has gained notoriety is *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245. That case has already impacted the way Commissioners now prepare their decisions in cases where a section 34 agreement is entered, as well as the way these agreements are now prepared. The decision will also have implications on the types of scenarios where development is held to be "in relation to" other land, as well as the use of the "slip rule".

Another interesting case was *Mailey v Sutherland Shire Council* [2017] NSWCA 343, where the appellants appealed an order issued under item 21 of the Table to section 124 of the *Local Government Act 1993* (NSW) requiring the appellants to do certain things specified in the order to place the land in a safe condition. The matter involved retaining walls in the rear yard which were considered to be at risk of failure. The Court of Appeal upheld the primary judge's decision that the order was not outside of power, not void for uncertainty, and not issued for an improper purpose. What was also interesting was that the Appellants made a claim for damages for the expenses they incurred in complying with the order issued by the Council. Obviously it was not necessary to determine this aspect of the appeal given the findings above.

Land and Environment Court judgments

We have seen the start of litigation on strata renewals under Part 10 of the *Strata Schemes Development Act 2015* (NSW) and Part 6 of the *Strata Schemes Development Regulation 2016*. At least five interlocutory judgments explaining some of the process issues have now been handed down.

Also in the Class 3 jurisdiction, the height of the WestConnex acquisition matters has subsided. But 2019 will see a return of Carlewie v RMS after the Court of Appeal's decision in *Carlewie Pty Ltd v Roads and Maritime Services* [2018] NSWCA 181, which overturned the first instance decision in the Land and Environment Court due to the Commissioner's adjudicatory role in that decision which was held to render the judgment invalid.

A number of interesting land access appeals under section 40 of the *Land and Environment Court Act 1979* (NSW) have also been handed down. In *Acorp Developments Pty Ltd v HWR Pty Ltd* [2018] NSWLEC 68 it was held that a right of carriageway was not reasonably necessary and as such the easement was not ordered. But in *A.T.B. Morton Pty Ltd v Community Association DP270447 (No. 2)* [2018] NSWLEC 87, a right of carriageway was considered reasonably necessary and the easement was ordered. Both judgments were handed down by Robson J.

In the Class 1 jurisdiction, there have been two interesting decisions where development consents have been held to lapse in circumstances where a deferred commencement condition had not been complied with: *Savellis v Sutherland Shire Council* [2018] NSWLEC 100 and *Dennes v Port Macquarie-Hastings Council* [2018] NSWLEC 95. The careful review and satisfaction of conditions in consents is important to ensure that they are properly commenced.

Probably the most well-known decision handed down in the last year was *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118. Since August 2018 when judgment was delivered by Preston CJ, it has been cited in 17 other decisions. The decision has relevance to anyone preparing clause 4.6 requests to vary development standards.

In the Class 4 jurisdiction, and in one of the longer judgments of the year (close to 900 paragraphs), Molesworth AJ considered a large scale designated development at the Martins Creek Quarry in Dungog (*Dungog Shire Council v Hunter Industrial Rental Equipment Pty Ltd (No. 2)* [2018] NSWLEC 153). The development activity was held to be unlawful, but the judgment provides useful commentary on the characterisation of existing uses.

Finally, we have written previously about the *Mansfield* decision in the Class 5 jurisdiction of the Court. The Court of Criminal Appeal's decision in this matter is yet to be handed down, but will have a bearing on how councils go about investigations of alleged unlawful activity.

Looking ahead to next year

With changing property market conditions in NSW, two elections next year, and changing lending conditions, the impact of NSW's planning and environment system also forms an important part of this landscape that regulators and those involved with developing property need to be aware of.

OUR LEADERS

Ben Caldwell
Partner
+61 7 3002 8734
0427 553 098
ben.caldwell@cbp.com.au

Todd Neal
Partner
+61 2 8281 4522
0411 267 530
todd.neal@cbp.com.au

David Passarella
Partner
+61 3 8624 2011
0402 029 743
david.passarella@cbp.com.au

Ian Wright
Senior Partner
+61 7 3002 8735
0438 481 683
ian.wright@cbp.com.au

BRISBANE

Level 35, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
Australia

law@cbp.com.au
T 61 7 3002 8700
F 61 7 3221 3068

MELBOURNE

Level 23
181 William Street
Melbourne VIC 3000
Australia

law@cbp.com.au
T 61 3 8624 2000
F 61 3 8624 4567

SYDNEY

Level 42
2 Park Street
Sydney NSW 2000
Australia

law@cbp.com.au
T 61 2 8281 4555
F 61 2 8281 2031