Lead, Simplify and Win with Integrity

COLIN BIGGERS & PAISLEY LAWYERS

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PLANNING GOVERNMENT INFRASTRUCTURE AND ENVIRONMENT GROUP

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

COLIN BIGGERS & PAISLEY LAWYERS

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.

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

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

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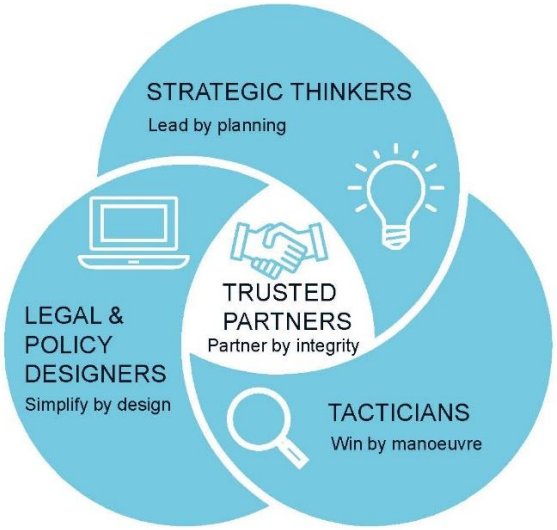

Lead, Simplify and Win with Integrity

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.

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Proposed use as a McDonald's restaurant is contemplated by the Planning Scheme and therefore approved

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Fort Street Real Estate Capital Pty Ltd v Redland City Council* [2020] QPEC 59 heard before Everson DCJ

February 2021

In brief

The case of *Fort Street Real Estate Capital Pty Ltd v Redland City Council* [2020] QPEC 59 concerned an appeal to the Planning and Environment Court (**Court**) against the decision of the Redland City Council (**Council**) to refuse a development application for a development permit for a material change of use and for reconfiguring a lot to create an access easement and subdivision by lease, in order to redevelop a part of a car park located within a shopping centre precinct to include a McDonald's restaurant with a drive-through (**Proposed Development**).

The parties agreed that the Court's assessment of the development application for reconfiguring a lot would follow the outcome of the Court's assessment with respect to the development application for the development permit for the material change of use.

The Court considered the following issues in assessing the Development Application under section 45(3) of the *Planning Act 2016*, and section 43, section 45, and section 46 of the *Planning and Environment Court Act 2016*:

- *Issue 1* – whether the proposed building, drive-through facility, and retaining wall complied with the relevant overall and performance outcomes of the District Centre Zone Code of the *Redland City Plan 2018* (version 3) (**Planning Scheme**).
- *Issue 2* – whether the Proposed Development complied with the relevant overall outcomes of the District Centre Zone Code and the Landscape Code of the Planning Scheme.

The Court assessed the appropriateness of the Proposed Development against the assessment benchmarks in the Planning Scheme, having regard to the setting and context of the Proposed Development. The Court stated that it is the acceptability of the use of the subject land, rather than a concept of the best possible use for the subject land, which is to guide an assessment of appropriateness.

The Court was satisfied that the Proposed Development complied with each of the relevant, "*generally worded*" assessment benchmarks, and held that even if it were wrong about compliance, any non-compliance would not justify refusal because the use proposed is expressly contemplated by the Planning Scheme and the Proposed Development, including the proposed landscaping, is appropriately designed.

The Court held that the use of the subject land as a McDonald's restaurant was uncontroversial under the Planning Scheme and ordered that that appeal be allowed and the Proposed Development be approved subject to the imposition of a condition with respect to the material and design of the retaining wall.

Subject land and Proposed Development

The subject land is located within the Birkdale Fair Shopping Centre at Birkdale (**Shopping Centre**), which is anchored by a Woolworths supermarket and a range of other commercial and specialty shops.

The area surrounding the subject land includes a wide variety of commercial, retail, residential and open space land.

The Proposed Development was proposed on the south-eastern corner of the Shopping Centre car park, with landscaping to be used to soften the built-form of the McDonald's restaurant. The current ingress and egress points to the subject land were proposed to be reconfigured to allow for drive-through access to the McDonald's restaurant, with a retaining wall to be built to screen the drive-through facility and associated traffic.

The Proposed Development also included the reconfiguration of car parking to the east and north of the subject land and a 10-year lease to enable the McDonald's business to operate.

Issue 1 – The proposed building, drive-through, and retaining wall of the Proposed Development complied with the District Centre Zone Code

Section 5.3.3(4) of the Planning Scheme states that code assessable development that complies with the purpose and overall outcomes of a code, complies with that code.

The purpose of the District Centre Zone Code included the creation of district centres, "*which contain a diverse mix of residential accommodation, businesses, services and facilities to meet the weekly needs of a district population in the order of 15,000 people*".

The following overall and performance outcomes of the District Centre Zone Code were relevant to the Court's decision that the building, drive-through, and retaining wall of the Proposed Development complied with the District Centre Zone Code:

- *Overall outcomes 2(f) and 2(g) and performance outcomes 11, 12 and 14* – The Court held that the Proposed Development would have three frontages with facades to face two main roads and the main car park, would use a satisfactory design and building materials, and that the perpendicular-angled built form of the Proposed Development would not dominate the locality, but would rather break up the rigid built form of the existing Shopping Centre.
- *Overall outcomes 2(f), 2(g), 2(i), and 2(j) and performance outcome 14* – The Court held that the drive-through satisfied the general words of the District Centre Zone Code of the Planning Scheme because the proposed retaining wall and vegetation would provide sufficient concealment and screening, the proposed design minimised vehicle access as far as possible for the intended use, provided safe and integrated pedestrian access, and the car parking was located behind or beside the building as required by the Planning Scheme.
- *Overall outcomes 2(f), 2(g), and 2(i), performance outcome 11 and overall outcomes 2(a) and (b) and performance outcome 1, 3, and 4 of the Landscaping Code* – The Court held that the retaining wall complied with the Planning Scheme, however, to soften the edge between the boundary and built form of the Proposed Development, the Court held that a condition ought to be imposed requiring the retaining wall to be painted or clad with attractive materials.

The Court noted in respect of Issue 1 that a drive-through is not what is contemplated by the requirement in performance outcome 11 of the District Centre Zone Code of the Planning Scheme to "*[minimise] non-active elements such as vehicle access*". In the event the Court was wrong in its interpretation, it was satisfied that the architectural design of the drive-through minimised vehicle access to an adequate extent given that a drive-through is an integral part of the use.

Issue 2 – The Proposed Development positively contributes to the surrounding streetscape and complied with the Landscaping Code

The purpose of the Landscaping Code is relevantly to ensure landscaping of a high standard, which contributes to Redlands' image, local character, and remains fit for purpose in the long-term.

The Court observed that the vicinity surrounding the subject land has an eclectic range of landscaping and that the Proposed Development would result in the removal and replacement of five unremarkable trees.

The Council submitted that the Appellant would not be permitted to plant on the Council-owned road reserve verge area as proposed in the Appellant's design drawings.

The Court acknowledged its inability to lawfully condition the planting on the road reserve, but noted that the Council's position would render the proposed retaining wall more visible from Mary Pleasant Drive than pursuant to the design drawings, and would restrict the Council from taking the position that the retaining wall and landscaping are non-compliant with the Planning Scheme due to a lack of planting on the road reserve.

The Court held that the proposed landscaping was superior to that existing on other corners and frontages of the District Centre and accepted evidence that the landscaping was "*appropriate for a prominent corner of a shopping centre, where higher levels of screening would conflict with commercial imperatives and [crime prevention through environmental design] principles*".

Conclusion

The Court held that the Proposed Development was appropriate having regard to the setting and context of the Proposed Development and its compliance with the relevant assessment benchmarks in the Planning Scheme.

Planning and Environment Court of Queensland excuses a non-compliant decision notice and determines that Council does not need to look behind an ostensibly valid owner's consent form

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Danseur Pty Ltd v Cairns Regional Council & Ors* [2020] QPEC 64 heard before Morzone QC DCJ

February 2021

In brief

The case of *Danseur Pty Ltd v Cairns Regional Council & Ors* [2020] QPEC 64 concerned an application to the Planning and Environment Court seeking declarations in respect of a minor change application approved by the Cairns Regional Council (**Council**) for a minor change to a historical development permit for the Aquarius Building located at 107-113 Esplanade, Cairns (**Minor Change Application**).

The Minor Change Application was submitted by the owner of Lot 83 (**Second Respondent**), who has an apartment in the Aquarius Building, and was for the following approved changes (summarised by the Court at paragraph [2]):

> *(1) to convert an exclusive use area attached to Lot 83 from a roof top garden area to a "covered and partially enclosed patio area and associated lift"; and*
>
> *(2) to reconcile the approved 15 storeys building of 81 units with the certificate of classification and the physical as-constructed building of 16 stories (excluding the effect of the changed roof top garden*.

The Applicant, who owned another lot in the Aquarius Building, alleged that the Council's decision notice for the Minor Change Application was void as:

- the Minor Change Application was not properly made without the lawful consent of the Body Corporate of the Aquarius Building (**Body Corporate**); and
- the Council's decision notice for the Minor Change Application did not comply with the formal requirements of the *Planning Act 2016* (Qld) (**Planning Act**).

The Second Respondent and the Council opposed the application to the Court.

The Court held that the Council properly treated the Minor Change Application as being properly made and excused the matters of non-compliance with the formal requirements of the Planning Act.

Council was satisfied that the Minor Change Application was accompanied by the owner's consent and the Court did not look behind that decision

Section 79(1A) of the Planning Act requires that a change application be accompanied by the written consent of the owner of the premises the subject of the change application. Section 79(2)(a) and (b) of the Planning Act require that in assessing the change application the Council must form a judgement about whether it is satisfied that an application complies with section 79(1A) of the Planning Act.

The Applicant alleged that there was no lawful meeting of the Body Corporate and therefore no lawful consent by the Body Corporate to the Minor Change Application. In particular, the Applicant alleged that the Body Corporate committee resolution did not comply with the relevant requirements of the *Body Corporate and Community Management (Standard Model) Regulation 2008* (Qld) and the *Body Corporate and Community Management Act 1997* (Qld) (**Body Corporate Act**).

The Second Respondent and Council argued that:

- The Court, under the *Planning and Environment Court Act 2016* (Qld) (**P&E Court Act**), is limited to making a declaration about a matter done, or that should have been done, for the P&E Court Act or the Planning Act, and is therefore not at liberty to go behind the ostensibly valid form of consent.

- The Body Corporate's decision to give consent to the Minor Change Application:
  - was not on a "*restricted issue*" as defined in the Body Corporate Act; and
  - ought to be treated as valid under section 100 of the Body Corporate Act.

The Court agreed with the Second Respondent's and Council's arguments, and made the following observations:

- The Court must consider whether there is sufficient evidence for the Council to justify the requisite degree of satisfaction required by section 79(2)(a) and (b) of the Planning Act.
- The Council's delegate stated that the consent form contained sufficient information to satisfy the Council's delegate that the requirement in section 79 of the Planning Act had been met.

The Court therefore held that the Council's satisfaction with the consent was reasonable and justifiable as ostensibly the form contained a valid consent from the Body Corporate.

Decision notice held to be non-compliant with the formal requirements of the Planning Act, however, the Court excused the non-compliance

Section 81A and section 83 of the Planning Act state the formal requirements that a decision notice for a change application must comply with, which relevantly include that the decision notice must:

- state the day when the change application was made (section 83(3)(a));
- be accompanied by a copy of the development approval showing the change, including any extra development conditions (section 83(4)(b));
- state a description of any assessment benchmarks applying for assessing the change application (section 83(9)(b)); and
- state the reasons for the responsible entity's decision (section 83(9)(d)).

The Applicant alleged that the decision notice given in relation to the Minor Change Application did not comply. The Second Respondent and the Council relevantly argued that any non-compliance did not render the decision notice invalid and in any event ought to be excused by the Court.

The Court considered the decision notice given by the Council and concluded that:

- *No stated day when the change application was made (section 83(3)(a))* – The Court found that the decision notice did not comply with this requirement, however, the Court considered sufficient detail was provided to enable an interested party to ascertain the relevant date and determined that the non-compliances were a matter of technicality and form and ought to be excused.
- *Not accompanied by copy of the development approval showing the change, including conditions (section 83(4)(b))* – The Court found that the decision notice was accompanied by the 1980 Consent development approval, but that the changes were separately described by reference to extra development conditions. The Court agreed with the statements of the Council's delegate that due to the age of the development approval it was reasonable to incorporate the changes by reference and therefore held that any non-compliance ought be excused.
- *No description of any assessment benchmarks (section 83(9)(b))* – The Court found that the decision notice sufficiently described the relevant Council planning scheme, and that to the extent further particularisation of the assessment benchmarks was required, any non-compliance ought be excused.
- *No stated reasons for the decision (section 83(9)(d))* – The Court noted that there is no statutory requirement for the reasons to be adequate, lengthy, or elaborate, but ought to have been sufficient to identify the decision maker and allow affected parties to exercise any consequential rights. After considering the reasons stated in the decision notice, the Court held that the decision notice contained sufficient reasons as the decision notice (see paragraph [51]):
  - identified the decision maker and their relevant delegated authority;
  - stated the date of the decision;
  - identified the evidence the delegate took into account, including that no evidence was rejected or less credible;
  - stated the delegate's findings on material questions of fact;
  - expressed the reasons for the decision;
  - stated contact details for a person who was familiar with the decision; and
  - provided information on any appeal or review rights regarding the decision.

The Court noted, in paragraph [54] of the judgment, that "*[t]he preferred approach to determining validity is by asking whether it was a purpose of the legislation that an act done in breach of the provision should be invalid*", and that section 37 of the P&E Court Act gave the Court the discretion to deal with the matter of non-compliance in the way it considered appropriate.

The Court ultimately found that as there was no claimed injustice caused by the non-compliances; the integrity of the Planning Act was being upheld; the public interest was being served; and the strict non-compliance with the formal requirements for a decision notice stated in sections 83(3)(a), 83(4)(b) and 83(9)(b) of the Planning Act ought to be excused.

Conclusion

The Court held that the Council properly treated the Minor Change Application as being properly made after the Council was satisfied that the Minor Change Application was accompanied by the owner's consent and ordered that the non-compliances in the decision notice for the Minor Change Application ought to be excused.

District Court dismisses claim for nuisance arising from the concentrated flow of water over the plaintiffs' property

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland District Court in the matter of *Turner v Kubiak* [2020] QDC 223 heard before Rosengren DCJ

February 2021

In brief

The case of *Turner v Kubiak* [2020] QDC 223 concerned a claim in the tort of nuisance arising from a dispute between neighbours. The plaintiffs asserted that a gravel pit for stormwater runoff was inadequate to hold the volume of stormwater being directed into it and that the concentration of water flowing from the gravel pit onto the plaintiffs' property was causing damage. The plaintiffs also claimed that the defendant's husband had entered into an oral agreement to pay for the works to rectify the damage caused.

The District Court of Queensland dismissed the plaintiffs' claims for the following reasons:

- The evidence did not support the allegation that the defendant's husband acknowledged that the source of the excess water was from the gravel pit.
- The evidence did not support a finding that the water flowing from the gravel pit to the plaintiffs' property constituted a substantial and unreasonable interference with the use and enjoyment of the plaintiffs' property.

Background facts

The eastern boundary of the plaintiffs' property adjoins the defendant's property. The defendant's property slopes towards the plaintiffs' property and it is estimated that 75% of the defendant's property has a flow path towards the plaintiffs' property.

The plaintiffs purchased the property in 2012, demolished the existing house and erected a new single storey residence. After the residence was constructed, the plaintiffs built a chicken coop near the boundary with the defendant's property and noticed that after it was built, the ground around the chicken coop was boggy.

The gravel pit at the centre of the dispute was built by the previous owner of the defendant's property and was located in the vicinity of the boundary with the plaintiffs' property. The purpose of the gravel pit was to collect stormwater discharged off a shed built on the defendant's property. In 2018, the defendant also installed a pair of identical water tanks which had a capacity of 10,000L.

Dispute

In 2017, a bobcat that was being used on the plaintiffs' property got bogged. An exploratory trench was dug in the vicinity of the chicken coop and it was observed that the trench filled with water.

The male plaintiff requested that the defendant's husband meet him at the boundary fence to discuss the excess water. It was undisputed that the male plaintiff said he thought the excess water was from the gravel pit and that the defendant's husband said he would make enquiries to see if the water from the roof of the shed could be diverted onto the adjoining road.

Remedial works were undertaken to resolve the excess water at a cost to the plaintiffs of about $6,000. The plaintiffs asserted that the defendant's husband had agreed to pay the cost of this work and subsequently requested that those costs be paid by the defendant. The dispute escalated resulting in the claim in nuisance and breach of agreement by the plaintiffs.

There was no oral agreement

The Court concluded that there was no oral agreement because the evidence did not support the allegation that the defendant's husband acknowledged the source of the excess water was from the gravel pit.

The evidence from the male plaintiff was that the defendant's husband "*did not really say anything in response*" (at [45]), and that the defendant and her husband had taken photographs of the excess water on their own property in the months preceding the event with the belief that this was being caused by the plaintiffs' construction works.

Circumstances did not give rise to an actionable nuisance

The Court considered the following relevant principles for an actionable nuisance:

- The plaintiffs had to demonstrate that the excess water was caused by the defendant and resulted in a substantial and unreasonable interference with the use and enjoyment of the plaintiffs' land (at [60] and [65]).
- "*An occupier of property does not need to create the nuisance for it to be actionable*" (at [62]).
- "*Where water flows between adjoining properties from a higher property to a lower property, the occupier of the higher property is not liable merely because the water flows naturally on to the lower property. However the occupier of the higher property may be liable in nuisance if the water is caused to flow in a more concentrated form than it naturally would*" (at [64]).

The Court concluded that there was no actionable nuisance and its reasons for that decision included the following:

- The evidence demonstrated it was unlikely that the water from the roof of the shed had been discharging into the gravel pit since the installation of the 10,000L water tanks in 2018.
- The event giving rise to the dispute occurred in 2017 prior to the installation of the water tanks. Despite the tanks being installed and directing water away from the gravel pit, the area around the chicken coop was still wet.
- The evidence demonstrated the likelihood that the gravel pit was actually directing water away from the chicken coop and closer to the road, and that the water flowing over the gravel pit would not be concentrated in a narrow channel.

Conclusion

The Court dismissed the plaintiffs' claim in contract and nuisance and ordered that the plaintiffs file submissions if they were of the view that they ought not to pay the defendant's costs.

Changing a change application for a development approval under the Planning Act 2016

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Ellendale (Qld) Pty Ltd LFT Ellendale (Qld) Unit Trust v Brisbane City Council* [2020] QPEC 68 heard before Williamson QC DCJ

February 2021

In brief

The case of *Ellendale (Qld) Pty Ltd LFT Ellendale (Qld) Unit Trust v Brisbane City Council* [2020] QPEC 68 concerned an appeal to the Planning and Environment Court of Queensland against the Brisbane City Council's (**Council**) decision to refuse an application under section 78 of the *Planning Act 2016* (Qld) (**Planning Act**) to change a development approval for land situated at Canvey Road, Upper Kedron, Queensland.

The appeal raised the issue of whether the Court can approve a change to a development approval that was not originally proposed in the change application made to the Council. In short, the Court concluded as follows:

- The Court can approve a change to a development approval not sought in a change application, provided that the change is the product of the exercise of the conditions power conferred in section 81A(2) of the Planning Act.
- Section 46 of the *Planning and Environment Court Act 2016* (**PEC Act**) does not empower the Court to consider a change to a change application.

Question to be answered

The appeal was against the Council's decision to refuse an application under section 78 of the Planning Act to change a development approval, other than the currency period, after all appeal periods in relation to the development approval had ended (**change application**).

The relevant development approval included a condition requiring the development "*to be carried out generally in accordance with approved drawings and documents*" (at [5]). The change application sought to amend one of the drawings, an approved landscape concept plan, to reinstate four carparks which had been deleted from the plan by the assessment manager.

Prior to the hearing of the appeal, the parties participated in without prejudice discussions and agreed that the change application ought to be approved. The basis for this agreement was that compensatory landscaping would be provided, however, the scope of the landscaping to be provided was different to that proposed in the original change application.

This gave rise to the following question to be answered by the Court: Could the Court approve a change to a development approval that was not sought in the change application made to the responsible entity?

The parties invited the Court to answer this question in the affirmative, on the basis that it either had power under section 81A(2) of the Planning Act, or section 46 of the PEC Act.

Court can approve a change to a development approval not sought in a change application by utilising the conditions power in section 81A(2) of the Planning Act

The Court concluded that it did have power under section 81A(2) of the Planning Act to make the changes proposed by the parties.

The Court was satisfied that the change proposed was a minor change to the development approval. Consequently, the provisions of sections 81 and 81A of the Planning Act applied. Section 81A(2) of the Planning Act relevantly states:

> *(2) After assessing the change application under section 81, the responsible entity must decide to –*
>
> *(a) make the change, with or without imposing or amending development conditions in relation to the change; or*
>
> *(b) refuse to make the change.*

The Court stated that it can approve a change to a development approval not sought in a change application, provided that the change is the product of the exercise of the conditions power provided for in section 81A(2) of the Planning Act.

Critically, the Court stated that the power is constrained by sections 65 and 66 of the Planning Act, and the need for a connection between the exercise of the conditions power and the change approved by the responsible entity. The Court stated that this connection should not be approached narrowly, or in a restrictive way, and that whether a connection was established would depend on the facts and circumstances of each case.

In the facts and circumstances of this case, the Court concluded that there was a sufficient connection between the proposed change, being the reinstatement of the four carparks, and the development conditions relating to the landscaping issues. In order to give effect to the change, it was necessary to amend the development conditions to address the issues concerning compensatory landscaping. The Court therefore had power to amend the development conditions to give effect to the new landscaping requirements.

Section 46 of the PEC Act does not empower the Court to change a change application

The Court concluded that section 46 of the PEC Act did not empower it to make the changes proposed by the parties.

Firstly, it was argued that section 46(3) of the PEC Act empowered the Court to consider a change to a change application. Section 46(3) of the PEC Act states that the Court cannot consider a change to a "*development application unless the change is only a minor change*". This argument was not accepted for the reason that section 46(3) of the PEC Act applies to a development application, and the clear words of the provision and the statutory context did not suggest that the section should apply to a development approval.

Secondly, it was argued that section 46(4) of the PEC Act empowered the Court to consider a change to a change application. Section 46(4) of the PEC Act states that the Court cannot consider a change to a development approval the subject of a change application under section 78 of the Planning Act "*unless the change is only a minor change to the approval*". This argument was not accepted for the following reasons:

- "*The plain words of section 46(4) of the [PEC Act] do not suggest the provision is relevant to a change to a change application. To suggest otherwise requires the provision to be re-drafted in a manner that impermissibly alters its meaning*" (at [29] and [36]).
- "*… if the plain meaning of the provision is to be read as facilitating a change to a change application, this begs the question: What extent of change may be considered by the court before a fresh application is required? Section 46(4) provides no answer to this question*" (at [30]).
- There is no "*immediate, or broader, statutory context that supports re-drafting section 46(4) of the [PEC Act] in the manner contended by Council*" (at [37]-[38], [40]-[45]).
- The submission that construing section 46(4) in this way "*avoids inconvenience and impractical outcomes for parties to a proceeding*" was overstated and not persuasive (at [47]).
- The Court in effect concluded that the appeal ought not to be "*a vehicle to achieve an objective that goes beyond what the change application can achieve*" (at [49]).

The Court also considered its decision in *Catterall & Ors v Moreton Bay Regional Council & Anor* [2020] QPEC 52, which the Council argued supported the argument that section 46(4) of the PEC empowered the Court to consider a change to a change application. The Court rejected that submission, concluding that it misstated the reasoning in Catterall because (at [35]):

> *the point raised for consideration was whether s 46(4) of the [PEC Act], on its face, precluded the court in the exercise of its appellant jurisdiction from considering a change application for other than a minor change. Whilst I accepted that section 46(4), if read in isolation, may be read in this way, I held that such a construction would be absurd. It would render an appeal right conferred by the [Planning Act] a futility …*

Conclusion

The Court concluded that the appeal ought to be allowed on the basis that section 81A of the Planning Act empowers the Court to grant the changes proposed by the parties.

Queensland Planning and Environment Court allows appeal on the basis of the Development Tribunal's failure to consider Part E of the State Planning Policy 2017

Maria Cantrill | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Southern Downs Regional Council v Homeworthy Inspection Services (as Agents for Robert and Cheryl Newman)* [2020] QPEC 61 heard before Kefford DCJ

February 2021

In brief

The case of *Southern Downs Regional Council v Homeworthy Inspection Services (as Agents for Robert and Cheryl Newman)* [2020] QPEC 61 concerned an appeal to the Planning and Environment Court against a decision by the Development Tribunal (**Tribunal**) to set aside a decision by the Southern Downs Regional Council (**Council**) to refuse a development application for a dwelling house on land at Tummaville Road, Leyburn.

The Court allowed the appeal and remitted the development application to the Tribunal for determination. Although the Council asserted seven grounds of appeal, the Court only found error in respect of the first ground, which concerned the Tribunal's failure to consider or give adequate reasons for the proposed development's non-compliance with Part E of the State Planning Policy 2017 (**SPP 2017**).

Brief background

The subject land spans about 4.45 hectares. The proposed development was for the construction of a one-bedroom dwelling house in the north-eastern part of the subject land, approximately 80 metres from the northern boundary and the adjoining Tummaville Road.

Homeworthy Inspection Services, the respondent in the appeal, was the agent for the landowners (**Respondent**). The Respondent lodged a code assessable development application with the Council for a development permit for a material change of use to facilitate the outcome sought by the landowners. That development application was refused by the Council, on the basis that the proposed development did not comply with the Flood Hazard Overlay Code. In particular, the Council concluded that there is no alternative flood free area on the land, and there is no flood free access route if Tummaville Road is flooded.

The Council's decision was appealed to the Tribunal, which set it aside and approved the development application subject to conditions. On appeal to the Court, the Council asserted seven grounds of appeal, but only one ground of appeal was found to have any merit. This successful ground of appeal and the Court's determination of the appropriate relief in the circumstances are considered below.

Tribunal failed to consider or give adequate reasons relating to the proposed development's non-compliance with Part E of the SPP 2017

The Court held that the Tribunal erred in law by failing to assess the proposed development against Part E of the SPP 2017 and that this error materially affected the Tribunal's decision. Further, the Court concluded that if it was wrong about this, the Tribunal erred in law by failing to give adequate reasons for its decision.

The *Planning Act 2016* (Qld) (**Planning Act**) relevantly states as follows:

- "*A code assessment is an assessment that must be carried out only-— (a) against the assessment benchmarks in a categorising instrument for the development; and (b) having regard to any matters prescribed by regulation*" (section 45(3) of the Planning Act).
- "*A categorising instrument is a regulation or local categorising instrument that … sets out the matters (the assessment benchmarks) that an assessment manager must assess assessable development against*" (section 43(1)(c) of the Planning Act).

- "*The assessment manager must assess the development application against or having regard to the statutory instrument, or other document, as in effect when the development application was properly made*" (section 45(6) and (7) of the Planning Act).
- Section 60(2) of the Planning Act makes clear that "*the issue of compliance with each assessment benchmark is a material consideration in any decision following code assessment*" (at [20] of the judgment).

The *Planning Regulation 2017* (Qld) (**Regulation**) is a categorising instrument for the purposes of section 43(1)(c) of the Planning Act. Relevantly, section 26(2)(a)(ii) of the Regulation states that if the prescribed assessment manager is the local government, a code assessment **must** be carried out against the assessment benchmarks stated in "*the State Planning Policy, part E, to the extent part E is not identified in the planning scheme as being appropriately integrated in the planning scheme*".

Pertinently, at the time the development application was lodged, the Council's Planning Scheme did not identify the SPP 2017 as being appropriately integrated, and consequently, it was mandatory for the Tribunal to undertake an assessment against Part E of the SPP 2017 before making a decision under section 60(2) of the Planning Act.

Although the Tribunal was aware that the Council asserted non-compliance with the SPP 2017, its reasons made no reference to the assessment benchmarks in Part E of the SPP 2017 or to the SPP 2017 at all. Additionally, the Court did not accept that the Tribunal assessed the proposed development against a later version of the Council's Planning Scheme, which integrated the SPP 2017.

In the facts and circumstances of this case, the Court concluded that there was no evidence that the Tribunal undertook the necessary assessment against Part E of the SPP 2017.

Court concluded that it was appropriate to remit the development application to the Tribunal

Following the finding of legal error by the Tribunal, there was a dispute as to whether the nature of the appeal was a merits review (by way of rehearing) contingent upon the threshold of legal error being established.

The Court referred to the decision of *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124; [2008] HCA 13 in which the High Court stated that "*an 'appeal' is not a procedure known to the common law, but, rather, always is a creature of statute*" (see [64]). The Court stated (at [66]):

> *In this case, the relevant right of appeal is conferred by s 229 and schedule 1, item 1(4) and table 2, item 1 of the [Planning Act]. It states:*
>
> *An appeal may be made against a decision of a tribunal, other than a decision under s 252, on the ground of –*
>
> *(a) an error or mistake in law on the part of the tribunal; or*
>
> *(b) jurisdictional error.*

Section 47 of the *Planning and Environment Court Act 2016* (Qld) (**PEC Act**) states that in deciding a Planning Act appeal, the Court must decide to confirm or change the decision, or set aside the decision and either make a decision replacing it or return the matter to the entity that made the decision.

The Court noted that section 229 and schedule 1 of the Planning Act confers judicial power to examine the Tribunal's decision for legal or jurisdictional error, and that the exercise of that power arises from the Court exercising its original jurisdiction (as opposed to appellate jurisdiction).

The Court accepted the following propositions posited by the Council:

- "*… it is inappropriate to construe provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words of the grant*" (at [68]).
- "*… the conferral of a court with jurisdiction is intended to include all the procedures of the court unless expressly displaced*" (at [68]).
- "*… the necessity for the Court's power to be exercised judicially tends in favour of the most liberal construction*" (at [68]).

However, the Court stated that the Council's approach to the construction of section 47 of the PEC Act, which asserted that the words of the section and the Explanatory Notes confirmed Parliament's intention for the Court's power to either replace or remit the Tribunal's decision, did not have regard to the broader legislative context of the PEC Act.

Having regard to section 47 of the PEC Act and the broader statutory context, the Court concluded that the appeal was not by way of a merits review contingent only upon the threshold of legal error being established for the following reasons:

- Section 47 of the PEC Act must be construed by reference to the broad range of appeal rights in section 229 and schedule 1 of the Planning Act (at [71]).

- Section 47 of the PEC Act "*does not enlarge the Court's jurisdiction. It confers powers on the Court in aid of the exercise of its jurisdiction in a variety of appeals*" (at [72]).
- Section 47 of the PEC Act confers the Court with broad power to determine an appeal from the Tribunal. For example, the Court may make a decision replacing the Tribunal's decision where the facts and circumstances of the case only permit one conclusion to be reasonably entertained (at [73]).
- "*… there has already been an opportunity to have the decision about the development application considered on its merits*" and this "*supports a legislative intent to narrowly confine the right of appeal with respect to the decision*" of the Tribunal in this case (at [75]).

Conclusion

The Court did not accept the Council's submission that if the appeal did not involve a merits review, the Court could replace the decision with its own given there were no contested facts.

The Court concluded that the legal error relating to the failure to consider or give adequate reasons for the consideration of Part E of the SPP 2017 meant that several factual matters had to be determined. Consequently, the Court allowed the appeal and remitted the matter to the Tribunal for determination.

Planning and Environment Court of Queensland determines orders to secure compliance with the Planning Act 2016 for a three-storey, seventeen-bedroom, dwelling house unlawfully used as an "accommodation building"

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Gavin & Anor* [2020] QPEC 63 heard before Cash QC DCJ

February 2021

In brief

The case of *Sunshine Coast Regional Council v Gavin & Anor* [2020] QPEC 63 concerned an application by the Sunshine Coast Regional Council (**Council**) to the Planning and Environment Court (**Court**) for enforcement orders against the landowner company (**Second Respondent**), and the director of the Second Respondent (**First Respondent**) in respect of a three-storey building located at 9 Fortitude Place, Birtinya (**Premises**).

Relevant features of the Premises

In or around November 2018, the Respondents finished the construction of the Premises, which relevantly contained the following features:

> *In total, across the three storeys, there are 17 rooms that might be properly considered to be bedrooms. … Each bedroom has an ensuite bathroom, individually controlled air conditioning, a built-in wardrobe and lockable, solid core, self-closing doors. Each of these rooms has an individual water and electricity meter. There are soundproofing and fire prevention measures that the council contends are unusual for a domestic dwelling house.* (at paragraph [7])

> *Access between floors is via an internal stairway. The stairway is sealed off from each floor by a solid core, self-closing door. Balconies outside the living areas on the first and second floor have a tap and laundry sink. There is laundry equipment in the garage. There are no toilet or bathroom facilities in what might be considered the common areas of the buildings.* (at paragraph [8])

Although the Premises was used as a "*Dwelling House*" between late 2018 to January 2019, when the First Respondent's family was occupying the Premises, the First Respondent subsequently advertised and rented the rooms in the Premises to individuals between January 2019 and March 2020. During that period the Premises was being used as an "Accommodation building" as defined in the relevant planning scheme.

Respondents admit to committing a development offence under the Planning Act 2016

The Court accepted the evidence of the Council and determined that the lawful use of the Premises was as a "*Dwelling House*" and that the use of the Premises as an "*Accommodation building*" was unlawful. The lawful use of the land was informed by the *Caloundra City Planning Scheme 1996*, which relevantly includes the following definitions (at paragraph [14]):

> *'**Accommodation building**' means premises used or intended for residential use for a boarding house, guest house, hostel, unlicensed residential club, services apartments, services room, and the like.*

> *'**Dwelling House**' means premises used or intended for a single dwelling unit on any one allotment … The term does not include Accommodation Building, Caretakers Residence, Duplex Dwelling or Multiple Dwelling.*

The Respondents ultimately conceded that they had each committed development offences under section 162 (Carrying out prohibited development) and section 165 (Unlawful use of premises) of the *Planning Act 2016* (**Planning Act**). However, the Council and the Respondents disputed the terms of any enforcement orders to be made, and therefore the Court was required to consider the terms of the enforcement orders to secure compliance with the Planning Act.

The Court noted that the issue before the Court was in relation to the intended and subsequent use of the Premises, rather than the Premises itself, which could be lawfully used as a dwelling house without alteration.

Court considered evidence relevant to determining the terms of the enforcement orders

The Court considered the following relevant evidence for the purpose of determining the terms of the enforcement orders:

- The Respondents' conduct in respect of the instructions given for, and the preparation of, the plans for the Premises which:
  - were designed in a manner that makes the Premises suitable for an "*Accommodation building*" use; and
  - masked the features of the plans which alluded to the "*Accommodation building*" use.
- Whether the First Respondent intended to use the Premises as an "*Accommodation building*" despite being aware that an "*Accommodation building*" use was not permitted;
- The adverse amenity impact that the unlawful use of the Premises had caused on the surrounding neighbourhood.

The Court concluded (at paragraph [43]) that much of the First Respondent's conduct suggested that strong terms were required to ensure compliance with the Planning Act and that terms that would make it harder for the Premises to be used as an "*Accommodation building*" were necessary.

The Court noted that although the Respondents "*have enjoyed something of a financial windfall from the unlawful use of the building … the purpose of these proceedings is not to punish the respondents for their wrongdoing, but to ensure it does not happen again in relation to this land*" (at [44]). The Court went on to note that the contravention of an enforcement order may result in a penalty of up to 4,500 units (currently, nearly $600,000) or imprisonment for up to two years.

Court makes orders to ensure compliance with the Planning Act

The Court made orders (numbered 1 to 4), stated in paragraph [56], which restrained the use of the Premises to that of a "*Dwelling House*" and proposed orders (numbered 5 to 7) that required the alteration of the Premises in generally the following ways (**Proposed Orders**):

- the removal of certain doors and the replacement of certain lockable solid-core doors with a form of standard internal domestic door;
- the discontinuance of the use of the kitchen and laundry services on the first and second floors and the permanent capping and decommission of the relevant plumbing;
- the removal of electricity and water sub-meters such that there would be a single water meter and electricity meter for the Premises.

Subsequent application to stay the orders to alter the Premises and an order for costs

The parties were allowed to make submissions on the proposed orders to better reflect the Court's intentions as explained in the decision and make submissions as to costs.

The related case of *Sunshine Coast Regional Council v Gavin & Anor (No. 2)* [2021] QPEC 2 concerned the Court's consideration of the submissions and determination on the issues and also considered applications to stay the final orders pending the finalisation of an appeal to the Queensland Court of Appeal (**Appeal**).

The Court considered the submissions and made minor changes to the Proposed Orders, including an extension of 15 days to comply with the Proposed Orders.

The Respondents made an application to stay the Proposed Orders until 10 business days after the finalisation of the Appeal.

The Court considered the Respondents' application and noted that although the Respondent would suffer a financial detriment should the Appeal succeed, the Respondent did not have promising prospects in the Appeal and the Proposed Orders would not render the Appeal futile. Therefore, the Court refused to grant the Respondents' application to stay the Proposed Orders.

After hearing the submissions of the parties as to costs, the Court made further orders that the Respondents pay the Council's investigation costs and the Council's costs of the proceeding on a standard basis.

Conclusion

The Court noted that the Respondents conceded that they had committed development offences in relation to the use of the Premises as an "*Accommodation building*" and made enforcement orders, which restrained the use of the Premises to that of a "*Dwelling House*" and required alterations to make the Premises less attractive for use as an "*Accommodation building*".

The Court, in a subsequent judgment, amended the enforcement orders to give more time for the Respondents to comply with the alteration requirements. The Court also dismissed an application to stay the orders and awarded costs to the Council.

New land Clearing Code and its implications for landowners in NSW

Annie Dong | Mark Evans | Todd Neal

This article discusses the new Rural Boundary Clearing Code, expected to take effect in early 2021, which will allow rural landowners in New South Wales to clear up to 25 metres of vegetation for hazard reduction without further approvals

February 2021

In brief

The Rural Boundary Clearing Code (**Clearing Code**) is in response to the independent NSW Bushfire Inquiry into the 2019-2020 bushfire season. On 7 October 2020, the Minister for Police and Emergency Services David Elliot in partnership with the NSW Rural Fire Service, issued the following media release:

> *A Code will be developed and will have regard to issues such as **clearing in endangered and threatened species habitat** as well as **clearing for non-bushfire risk mitigation purposes**. The new laws are based on the expert operational advice of the NSW RFS and will ensure that **rural landowners** are able to clear up to **25 metres of vegetation on their property** without facing time consuming approvals* [emphasis added].

On 25 November 2020, the *Bushfires Legislation Amendment Act 2020* (NSW) (**Amendment Act**) commenced and amended the *Rural Fires Act 1997* (NSW) (**RFA**) and its interaction with other legislation, including the *Biodiversity Conservation Act 2016* (NSW), the *National Parks and Wildlife Act 1974* (NSW) and the *Local Land Services Act 2013* (NSW).

The newly introduced provisions of 100RA and 100RB under the amended RFA delineate the functions of the Clearing Code and its requirements for carrying out vegetation clearing work. Once released by the NSW RFS, the Clearing Code will take effect and operate alongside the "10/50 Vegetation Clearing Code" (**10/50 Code**) under section 100Q, which has been in force since 4 September 2015.

What does the Clearing Code mean for landowners?

The Clearing Code will provide rules on:

- which types of vegetation can be cleared, and which are prohibited;
- specifications on the manner in which vegetation can be cleared; and
- whether consent of an owner, occupier or other person is a precondition prior to clearing.

Additionally, special rules will apply to the clearing of vegetation by owners in particular localities.

Under section 100RA(5)(d) of the amended RFA, it is likely that the Clearing Code will specify rules to prohibit vegetation clearing on land containing habitats of "threatened species". This would include any critically endangered, endangered or vulnerable species under Schedule 1 of the *Biodiversity Conservation Act 2016*. Special clearing rules will also apply to riparian corridors and Aboriginal and other cultural heritage sites to ensure the preservation of sensitive localities.

Section 100RB of the amended RFA empowers owners and occupiers to clear vegetation on their property without the need for a licence, approval, consent or other authorisation under the *Biodiversity Conservation Act 2016*, the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) or any other Act or instrument, subject to the vegetation clearing work occurring:

- within 25 metres of their property boundary;
- on a land in a "rural zone" which is exhaustively defined under section 100P of the RFA as land use zones involving Primary Production, Rural Landscape, Forestry, Primary Production Small Lots, Village and Transition;
- with the consent of the owner, or carried out by the owner themselves;
- for the purposes of bushfire hazard reduction; and
- in accordance with the Rural Boundary Clearing Code.

Section 100RB(3) of the amended RFA states that landholders who carry out vegetation clearing work in accordance with the above conditions and the Clearing Code will not be found guilty of an offence under the EP&A Act, *Fisheries Management Act 1994*, *Heritage Act 1977*, Part 5A of the *Local Land Services Act 2013*, *Protection of the Environment Operations Act 1997* or the *Soil Conservation Act 1938*.

The amendments to the *Biodiversity Conservation Act 2016* now also contain a defence to offences under Division 1 of that Act, in relation to vegetation clearing work completed in accordance with the new provisions in the Clearing Code.

Interaction with existing law – duty to prevent bushfire fuels and obligations to protect vegetation and threatened habitat

Sections 63(1) and 63(2) of the RFA impose a duty on all public authorities, owners and occupiers of land to prevent bushfire fuels on public and private lands. These provisions require landholders to take all practicable steps to prevent the occurrence of bushfires on public and private lands, and to minimise the danger of the spread of bushfires from the land.

The current framework requires landholders to go through one of two processes before undertaking vegetation clearing work, through either:

- obtaining a Bush Fire Hazard Reduction Certificate in accordance with the Bush Fire Environmental Assessment Code by submitting an application to the relevant local RFS Fire Control Centre; or
- using the 10/50 Vegetation Clearing Code of Practice, which is a self-assessment method requiring compliance with the 10/50 Code, whereby landholders do not need to seek approval from an authority.

It is currently implied from the Second Reading Speech of the Amendment Act that vegetation clearing work under the Clearing Code will involve a self-assessment process much like under the 10/50 Code, which does not require an application to an authority. However, this will be confirmed following the official release of the Clearing Code, which will likely provide a simplified breakdown of the clearance process for landholders.

Despite the new protections offered by the amendments and the foreshadowed Clearing Code, landholders will not be exempt from existing legal obligations to protect vegetation and threatened habitat. When clearing vegetation under the foreshadowed new 25 metre rule, landholders will still owe a general duty of care not to cause harm and cruelty to protected flora and fauna. Special arrangements such as conservation agreements made under the *National Parks and Wildlife Act 1974* or property vegetation plans under the *Native Vegetation Act 2003* will still need to be observed.

Planning and Environment Court of Queensland considers the current state of jurisprudence for assessing and deciding development applications under the Planning Act 2016 (Qld)

Maria Cantrill | James Nicolson | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Body Corporate For Roydon Community Titles Scheme 1487 & Anor v Cairns Regional Council & Anor* [2020] QPEC 60 heard before Morzone QC DCJ

March 2021

In brief

The case of *Body Corporate For Roydon Community Titles Scheme 1487 & Anor v Cairns Regional Council & Anor* [2020] QPEC 60 concerned an appeal against the Cairns Regional Council's (**Council**) decision to approve a development permit for a material change of use for an F45 training gym. The appeal was brought by the body corporate and onsite manager (**Appellants**) of the residential apartments adjoining the subject land at 2-8 Vasey Esplanade, Trinity Beach (**Subject Land**).

The Court allowed the appeal and refused the development application for the following reasons:

- The proposed development did not comply with the assessment benchmarks for amenity, location of use and community need, and gave rise to unacceptable impacts relating to noise.
- The proposed development did not provide adequate onsite parking and manoeuvring to accommodate the demand generated by the use.
- Although the proposed development would provide for a community need in terms of convenience, accessibility and wellbeing of the local community, this will be limited by the nature and scope of the proposed F45 training gym.

Proposed development

The impact assessable development application sought a material change of use for a type of indoor sport and recreation use on the Subject Land, being an F45 training gym specialising in 45 minute classes involving high intensity, circuit based workouts (**F45 Gym**). The F45 Gym was to operate across three tenancies on the first floor of an existing commercial building.

The Subject Land was located within the Tourist accommodation zone of the *CairnsPlan 2016* (version 1.3) (**Tourist Zone**), which did not contemplate the indoor sport and recreation use proposed by the development application.

The existing carpark was to accommodate the F45 Gym's parking demand, and the operating hours would be from 5.00 am to 10.30 am and 4.00 pm to 7.30 pm on weekdays, 6.30 am to 9.30 am on Saturdays and 7.30 am to 10.00 am on Sundays. Only one class would occur at a time and group classes would be capped at 25 people per class.

Assessment and decision rules under the Planning Act 2016

The Court set out a detailed summary of the assessment and decision rules under the *Planning Act 2016* (Qld) (**Planning Act**) at paragraphs [11] to [33] of the judgment and made a number of key observations regarding the consideration of impact assessable development applications.

The Court noted that in contrast to code assessment, impact assessment "*may*" be carried out "*against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise*" (see section 45(5)(b) of the Planning Act). The Court stated that a "*relevant matter*" could include relevant matters of positive and negative attributes of the proposed development and proceeded to list a number of examples of what may constitute a "*relevant matter*" (at paragraph [16]). The Court stated that the distinction between carrying out the impact assessment "*against*" or "*having regard to*" any other relevant matter was purposeful, and provided the following example (at paragraph [17]):

> *For example, an assessment manager may assess against formulations and measurements of an Australian Standard about architectural acoustics, but have regard to relevant facts and circumstance of acoustic amenity in the locality (since such nebulous matter is not conducive to being 'carried out against'). Of course, the nature and extent of 'other relevant matter' may overlap and blend with each other.*

The Court emphasised the continued importance of the planning scheme and other planning instruments being the "*comprehensive expression of what will constitute, in the public interest, the appropriate development of land*" (at [22]). Importantly, the Court stated that section 45 of the Planning Act demonstrated the continued importance of the assessment benchmarks, in that the section mandated that assessment "*must*" be carried out against such benchmarks, in contrast to the permissive "*may*" in section 45(5)(b) when considering other relevant matters.

The Court also referred to the recent Court of Appeal decision of *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257 as affirming the approach that has been adopted by the Planning and Environment Court in decisions such as *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 (at paragraphs [50] to [54]) and *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46 (at paragraphs [12] to [22]). The Court set out the relevant principles that could be distilled from *Abeleda* at paragraph [28] of the judgment and concluded this analysis with the following:

> *Critically, the Court in Abeleda affirmed the legislative importance of the planning instrument as the legislated embodiment of the overall public interest and the benchmarks as established policy. In this way the new regime preserves the expression of community expectation through legal certainty of the planning instrument.*

Court's assessment of the development application

The Court assessed the development application in accordance with the relevant assessment benchmarks in the *CairnsPlan 2016* (version 1.3) and the *Far North Queensland Regional Plan 2009*. The Court's critical findings were as follows:

- The proposed development would not achieve a "*high level of amenity*" when taking into account noise impacts (see overall outcome s.6.2.23.2(3)(c) of the Tourist Zone code), nor was it located, designed and operated to ensure that any potential adverse or detrimental noise impacts would be avoided (see PO6 of the Tourist Zone code). The noise impacts were said to derive from the "*periodical concertation of arrival and departure of cars and patrons in the morning operating period*" (at paragraph [86]).
- The development application did not include a draft noise management plan and as such "*the assessment process is left wanting*" (at paragraph [86]).
- Although the proposed development would serve tourist needs, such service would be "*very limited and marginal having regard to the nature and type of specific gym use limited to classes only, capped class sizes and membership*" (at paragraphs [97] and [116]).
- When regard was had to "*the existing approval and pro rata allocation of carparks across each of the tenancies in the whole building*" it was apparent that only six carparks were earmarked for the F45 Gym. This would result in a deficit of 17 car parks when the table of minimum rates in the Parking and Access Code was considered (at paragraphs [105] to [106]).
- The Court was "*not satisfied there is a demonstrated unsatisfied economic demand for a class-based gym (or indeed any gym) in this planning area, or that the proposed development is necessary to cater for any demand*" (at paragraph [131]).
- Although the town planners acknowledged that the proposed development would meet community need, the Court stated that "*all three town planners could not point to any planning need for an F45 class-based gym, or any gym, with a commencement time of 5am on weekdays*" (at paragraph [136]).

Conclusion

The Court therefore determined that it was appropriate to allow the appeal and refuse the development application.

Queensland Planning and Environment Court determines whether development conditions restricting vehicle movements ought to be imposed and whether there was an error in the calculation of extra demand

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Woodlands Enterprises Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 67 heard before Williamson QC DCJ

March 2021

In brief

The case of *Woodlands Enterprises Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 67 concerned two appeals to the Queensland Planning and Environment Court which were heard together, one being an appeal against development conditions imposed on a development approval for an '*Intensive animal industry - Poultry Farm*' (**Development Approval**) on land at 119 Pioneer Road, Beerburrum (**Land**), and the other being an appeal against the Council's related decision to give an Infrastructure Charges Notice dated 10 April 2019 (**ICN**) in respect of the Development Approval.

Court granted leave to allow the Appellant to add a new issue in dispute to the conditions appeal

The development conditions the subject of the conditions appeal had been resolved before the hearing. On the second day of the hearing, however, the Appellant successfully added with the Court's leave a new issue in dispute in the appeal being that the following development conditions ought to be imposed on the Development Approval (**Disputed Conditions**):

1. *The purpose of this condition is to regulate vehicle movements associated with the use of the land for a poultry farm to ensure that there is no extra demand placed on trunk infrastructure as a consequence of the approved use.*
2. *The permitted roads for vehicles associated with the use accessing and departing the site are:*

   [list of roads and approved vehicle movements associated with the use]

…

4. *All vehicles … are to be fitted with GPS monitoring. …*

Court was not satisfied that the Disputed Conditions ought to be imposed

The Court held that the Disputed Conditions ought not be imposed on the Development Approval for the following reasons:

- *Absence of an assessment of a relevant code* – The Court found that there was a significant gap in the Appellant's case in that there was no reference to a relevant assessment benchmark in the planning scheme, which includes a transport and parking code. The Court was not directed to any part of that code which required vehicle movements to minimise demand on trunk road infrastructure.
- *Absence of evidence establishing a planning purpose for the imposition of the Disputed Conditions* – The Court accepted the evidence of the Council's town planning expert that there was no planning purpose for the imposition of the Disputed Conditions, and that the only purpose of the Disputed Conditions was to avoid liability for infrastructure contributions.

- *Impractical and unrealistic conditions* – The Court accepted the evidence of the Council's traffic expert that "*a condition seeking to limit the routes of travel for all vehicles to and from the development is unrealistic because there is a genuine likelihood that multi-purpose vehicle trips will occur*" (at paragraph [35]). The Court did not accept the Appellant's contention that no multi-purpose trips were intended and that multi-purpose trips could be controlled by the Disputed Conditions.
- *Difficulty in monitoring and enforcing the Disputed Conditions* – The Court noted that it would be difficult to monitor vehicles using the Council's road network and whether there was compliance with the Disputed Conditions. The Court found that the cumulative effect of potential individual breaches would be significant, and it would result in extra demand being placed on Council's trunk road network.
- *Significant burden on Council to enforce the Disputed Conditions* – The Court noted that the Council's usual practice for enforcement is complaint driven, and that it would be unlikely that the community would be able to identify non-compliances. As a result, the Council would be required to employ a proactive approach, which would require the Council to expend additional resources for the sole purpose of enforcement of the Disputed Conditions.

Court found that an ICN ought to be given for the Development Approval

The Court noted that the starting point in respect of the appeal against the ICN is to consider whether the precondition to giving an ICN in section 119 of the *Planning Act 2016* (**Planning Act**) is satisfied, being "*a development approval has been given and an adopted charge applies to providing trunk infrastructure for the development*". The Court was satisfied that the precondition was met in this case.

The Court then went on to consider section 120(1) of the Planning Act, which states a limitation for a levied charge being that "*a levied charge may be only for extra demand placed on trunk infrastructure that the development will generate*". The Court had regard to the Court of Appeal decision of *Toowoomba Regional Council v Wagner Investments Pty Ltd & Anor* [2020] QCA 191, [78] (**Wagner Decision**), noting that the Wagner Decision related to sections 635(1) and 636(1) of the *Sustainable Planning Act 2009*, which are materially the same as sections 119(1) and 120(1) of the Planning Act respectively, and therefore the Wagner Decision was relevant to this case.

The Court found that an ICN ought to be given for the Development Approval as there was no error in calculating the extra demand under section 120(1) of the Planning Act, after considering the two pre-conditions for levying an infrastructure charge articulated in the Wagner Decision as follows:

- "*Is there demand which links the development with the relevant trunk infrastructure?*" – The Court found that the development would generate extra demand on the Council's trunk road network and trunk public parks as identified in the Council's Adopted Infrastructure Charges Resolution for the following reasons:
  - That the development would generate additional vehicle movement to and from the Land which would generate extra demand on the Council's trunk road network.
  - The Court accepted the evidence of the Council's town planning expert that ad hoc trips would occur from the development to parts of the public parks network as drivers who are delivering supplies to the development may stop at a local park for the purpose of having lunch, a drink of water or to use the amenities such that they would generate extra demand on the Council's trunk public parks network.
- "*Is there additional [extra] demand over and above what the current uses of the subject land generate in respect of road and park trunk infrastructure?*" – The Court found that there would be extra demand over and above the demand generated by the current uses of the Land for the following reasons:
  - With respect to the road network, in circumstances where the Court had determined not to impose the Disputed Conditions, the Court accepted the Appellant's submission that "*if there is no condition on the approval limiting the travel routes, the Court could not exclude the prospect that there would be extra demand on the trunk road network*".
  - With respect to the trunk public parks network, the Court accepted the evidence of the Council's town planning expert in relation to the ad hoc trips generated by the drivers as stated above.

Conclusion

The Court held that the Disputed Conditions ought not be imposed on the Development Approval, and that an ICN ought to be given for the Development Approval.

Queensland Court of Appeal dismissed an appeal in relation to a development approval to regularise the use of a site for, relevantly, "driving instructing"

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Ashtrail Pty Ltd & Anor v Council of the City of Gold Coast* [2020] QCA 82 heard before Morrison and Mullins JJA, and Callaghan J

March 2021

In brief

The case of *Ashtrail Pty Ltd & Anor v Council of the City of Gold Coast* [2020] QCA 82 concerned an appeal by Ashtrail Pty Ltd and Talranch Pty Ltd (**Applicants**) to the Queensland Court of Appeal against the decision of the Planning and Environment Court (**P&E Court**), in relation to enforcement proceedings brought by the Council of the City of Gold Coast (**Council**). The decision of the P&E Court was that:

- the Applicants' development approval for a material change of use for Service Industry Type B (Driver Instructing and Commercial Equipment Hire), Motor Vehicle Repair Station and Environmentally Relevant Activity (ERA 28 – Motor Vehicle Workshop) (**2010 Development Approval**) had not lapsed;
- conditions 5, 6, 10, 12 and 16 of the 2010 Development Approval, which related to the payment of contributions, design and construction of infrastructure, and land dedication, had not been complied with; and
- the Applicants' non-compliance with the conditions of the 2010 Development Approval constituted a development offence under section 164 of the *Planning Act 2016* (Qld) (**Planning Act**).

The Applicants appealed the decision of the P&E Court to the Court of Appeal on the basis that the P&E Court had erred on the grounds discussed below. The Council did not oppose grounds one to five, however, the Council opposed the further grounds.

Ultimately, the Court of Appeal granted leave to appeal in respect of grounds one to five, refused leave to appeal for the further grounds and dismissed the appeal with costs.

Ground 1, that the P&E Court erred in finding that the 2010 Development Approval had not lapsed (non-compliance with conditions), failed as compliance with the conditions requiring payment of infrastructure contributions were not pre-conditions to commencing the use

Section 341(1) of the now repealed *Sustainable Planning Act 2009* (Qld) (**SPA**) relevantly states that an approval for a material change of use lapses if the first change of use under the approval does not start within four years from the date the approval takes effect. The 2010 Development Approval took effect on 15 February 2010.

The Applicants argued that the 2010 Development Approval lapsed because the payment of the infrastructure contributions under conditions 5 and 6 of the 2010 Development Approval was a precondition to the commencement of the use of the premises the subject of the 2010 Development Approval (**Premises**). The Applicants did not pay the infrastructure contributions required by conditions 5 and 6 of the 2010 Development Approval and therefore argued that the use of the Premises did not commence.

The Court of Appeal construed the terms of the 2010 Development Approval including conditions 5 and 6 and considered the contextual circumstances of the Applicants, relevantly that the 2010 Development Approval was made to regularise an unlawful use of the Premises and that a material change of use in respect of the Environmentally Relevant Activity (ERA 28 – Motor Vehicle Workshop) commenced immediately.

The Court of Appeal agreed with the P&E Court and held that the wording of conditions 5 and 6 did not require payment of the infrastructure contributions as a precondition to the commencement of the use under the 2010 Development Approval. Therefore, the 2010 Development Approval did not lapse when the Applicants failed to pay the infrastructure contributions in accordance with the relevant conditions.

Ground 2, that the P&E Court erred in finding that the 2010 Development Approval had not lapsed (departure from approved plans), failed as the departure from the approved plans was not determinative

After considering the "as constructed" development and the approved plans attached to the 2010 Development Approval, the P&E Court concluded that the "as constructed" development departed from the approved plans in a way that was not minor.

The Applicants argued that the 2010 Development Approval had lapsed under section 341(1) of the SPA because the Applicants failed to comply with condition 1 of the 2010 Development Approval, which required the development to be carried out generally in accordance with the approved plans and drawings, and therefore the use of the Premises had not commenced.

The Court of Appeal agreed with the P&E Court that the departure from the approved plans was not determinative of whether an increase in the intensity or scale of the use of the Premises had occurred.

Ground 3, that the P&E Court erred in finding that the Limitation of Actions Act 1974 did not apply, failed as the character of the proceedings was not one for which the Limitation of Actions Act 1974 applied

The Applicants argued that the P&E Court erred by finding that section 10(1)(d) of the *Limitation of Actions Act 1974* (Qld) (**LAA**) did not apply to an application to the P&E Court, which seeks an enforcement order pursuant to section 180 of the Planning Act in circumstances where the application is made more than six years from the date on which the cause of action arose.

Section 10(1)(d) of the LAA provides that an action to recover a sum of money recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action arose.

The Court of Appeal concluded, in agreement with the P&E Court, that the character of the proceedings did not come within section 10(1)(d) of the LAA as the proceedings related to declaratory relief for an enforcement order to compel the correction of a development offence, not the recovery of a sum of money. The Court of Appeal therefore determined that ground 3 failed.

Ground 4, that the P&E Court erred in finding that the Acts Interpretation Act 1954 did not apply, lacked merit as any delay by the Council did not bar the enforcement proceedings and did not result in prejudice to the Applicants

The Applicants argued that the P&E Court erred in finding that section 38(4) of the *Acts Interpretation Act 1954* (Qld) (**AIA**) did not apply to the Council's delay of several years in bringing the application to the P&E Court for enforcement orders.

The Court of Appeal agreed with the P&E Court that section 38(4) of the AIA does not operate as a limitation of or bar to the institution of proceedings, and given that the Applicants' non-compliance constituted a continuing breach of the obligation to pay the contributions stated in the conditions of the 2010 Development Approval, there was no prejudice caused by the Council's delay. The Court therefore determined that ground four lacked any merit.

Ground 5, that the P&E Court erred in construing the term "driving instructing" to include both trucks and plant and equipment, failed as the construction approach submitted by the Applicants was artificial

"*Driving instructing*" was stated in the 2010 Development Approval to be part of the previous use of the Premises. "*Driving instructing*" was not defined in any relevant planning scheme, and was therefore construed by the P&E Court.

The Applicants argued that the P&E Court erred in construing the term "*driving instructing*" to include instruction in all forms of trucks as well as instruction in the operation of plant and equipment. The Applicants also argued that the P&E Court did not give adequate reasons for so constructing the term "*driving instructing*".

The Court of Appeal considered the P&E Court's findings and conclusions and agreed with the P&E Court that the term "*driving instructing*" in the relevant circumstances went beyond trucks to include instruction in plant and equipment. Several reasons were given in support of the Court of Appeal's conclusion, which relevantly included that the separation between trucks and plant and equipment was artificial as the development application for the 2010 Development Approval was made on the basis that the proposed use covered both categories of instruction.

The Court of Appeal also stated that the Applicant's allegation that the P&E Court had to quantitatively determine the level of driver training occurring at the time the 2010 Development Application was given in order to reach a conclusion about whether there was an increase in the intensity or scale was unsupportable. The Court of Appeal went on to state that the assessment of whether an increase of intensity occurred could be done qualitatively. Ground five was therefore also found by the Court of Appeal to fail.

Leave to raise further grounds of error was refused because the errors contended by the Applicant were in respect of findings of fact

The Court of Appeal also considered three further arguments by the Applicants, however, the Court of Appeal held that "*these three proposed grounds amount to an appeal based on challenging factual findings, which is not open on an appeal from the [P&E Court]*" at [121]. The Court of Appeal did not grant leave to raise those grounds.

Conclusion

The Court of Appeal granted leave to the Applicants to appeal in relation to five grounds of appeal and otherwise refused leave to appeal on the remaining proposed grounds of appeal. After considering the relevant grounds of appeal and determining that every ground failed, the Court of Appeal dismissed the appeal with costs.

Land Court of Queensland orders the applicant for a mining lease to pay compensation for the supervision and management obligations of the landowner

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Wallace v O'Shea & Ors; Wallace v O'Shea & Anor* [2021] QLC 6 heard before PG Stilgoe OAM

March 2021

In brief

The case of *Wallace v O'Shea & Ors; Wallace v O'Shea & Anor* [2021] QLC 6 concerned a determination by the Land Court of Queensland (**Land Court**) in respect of compensation payable by an applicant for a mining lease to the landowners of Spring Valley Station in far north Queensland.

The Court held that there was an absence of evidence in relation to the compensation that ought to be paid, but determined that given the facts and circumstances of this case, an amount of $1,500 was payable for the supervision and maintenance obligations that would arise for the landowners with respect to the mining lease, in addition to an uplift fee of $150 pursuant to section 281(4)(e) of the *Mineral Resources Act 1989* (**MRA**).

Brief background

The applicant for a mining lease on land near Almaden in far north Queensland received an in-principle approval for a five year lease. The proposed mine and part of the access track is to be located on Lot 418 of OL47 (**Lot 418**) and the balance of the access track is to be located on Lot 355 of OL428 (**Lot 355**). Lot 418 and Lot 355 are collectively known as Spring Valley Station.

The landowners and the applicant were unable to agree on the quantum of compensation payable by the applicant to the landowners, and the matter was ultimately referred to the Land Court for determination. The landowners did not participate in the Land Court proceedings and the Land Court's determination therefore relied on information provided by the applicant.

Relevant sections of the MRA

Section 281(1) of the MRA relevantly provides as follows:

> *(1) At any time before an agreement is made under section 279 or 280, a person who could be a party to the agreement may apply in writing to the Land Court to have the Land Court determine the amount of compensation.*

Section 281(3)(a) of the MRA relevantly provides as follows:

> *(3) Upon an application made under subsection (1), the Land Court shall settle the amount of compensation an owner of land is entitled to as compensation for—*
>
> *(a) in the case of compensation referred to in section 279—*
>
> *(i) deprivation of possession of the surface of land of the owner;*
>
> *(ii) diminution of the value of the land of the owner or any improvements thereon;*
>
> *…*
>
> *(vi) all loss or expense that arises; …*

Section 281(4)(e) of the MRA relevantly provides as follows:

> *In assessing the amount of compensation payable under subsection (3)—*
>
> *(e) an additional amount shall be determined to reflect the compulsory nature of action taken under this part which amount, together with any amount determined pursuant to paragraph (c), shall be not less than 10% of the aggregate amount determined under subsection (3).*

Land Court's determination regarding the compensation payable by the applicant

In considering the compensation payable by the applicant to the landowners, the Land Court had regard to section 281(3)(a) of the MRA. The Land Court's conclusions are stated below.

Firstly, in relation to the deprivation of possession of the surface of the land (section 281(3)(a)(i) of the MRA), the Land Court accepted that no compensation was payable with respect to the access track, because it already serviced another lease held by the applicant.

In respect of the mine itself, the applicant submitted that the mining lease would consist mainly of recycled tailings from previous mining operations, and would involve minimal onsite infrastructure. The applicant submitted that the mining program was seasonal, and would only operate during the drier months of the year.

he Land Court concluded that although it was satisfied the landowners would suffer intermittent deprivation, there was no basis for quantifying the impact of the proposed mining lease on the value of Spring Valley Station. As such, no compensation was awarded.

Secondly, in relation to the diminution of the value of the land (section 281(3)(a)(ii) of the MRA), the Land Court concluded that it could not award any compensation without any evidence.

Thirdly, in relation to all loss or expense that arises (section 282(3)(a)(vi) of the MRA), the Land Court noted that generally the Court accepts that the presence of a mining lease adds to the supervision and management obligations of the landowner, and that this should be the subject of compensation. In this regard the Court stated as follows:

> *There has been a trend in recent cases for the parties to accept an hourly rate of $100 as the cost of that supervision. As always, the Court prefers that parties provide evidence of the cost, rather than accept a rate adopted in one case. The risk of the latter courses … is that parties adopt a 'going rate' which may have no relationship with the true cost of the item being claimed.*

Despite these comments, the Land Court determined that it had no choice but to adopt a figure of $100 per hour for an additional half hour of supervision per month during the mining season (six months per year) over the course of five years. This equated to an amount of $1,500.

Conclusion

The Land Court ordered that no compensation was payable for Lot 355 and that a sum of $1,500 was payable for Lot 418 in addition to a $150 uplift fee pursuant to section 281(4)(e) of the MRA.

Too little, too late: South Australian Supreme Court dismisses an application to extend a development plan consent, where the consent was not acted upon within 12 months

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Supreme Court of South Australia in the matter of *Paul & Anor v the Corporation of the City of Marion* [2021] SASC 3 heard before The Honourable Justice Parker

March 2021

In brief

The case of *Paul & Anor v the Corporation of the City of Marion* [2021] SASC 3 concerned an appeal to the Land and Valuation Division of the Supreme Court of South Australia (**Supreme Court**) against the dismissal by the Environment, Resources and Development Court of South Australia (**ERD Court**) of an appeal against the refusal by the Corporation of the City of Marion (**Council**) of an application under section 40(3) of the *Development Act 1993* (SA) (**Act**) to extend (**extension application**) the operative period of a development plan consent (**DPC**).

The ERD Court dismissed the appeal because it was not satisfied that the Appellants evidenced the requisite commitment to the DPC, and the changes to the Marion Council Development Plan (***Development Plan***), which came into force five months after the approval of the DPC, meant that a DPC application under the changed *Development Plan* would likely be refused.

The appeal to the Supreme Court was made under section 30(1)(b) of the *Environment, Resources and Development Court Act 1993* (SA) (**ERD Court Act**). Section 30(2) of the ERD Court Act allowed the appeal as of right in respect of each question of law, and required the leave of the Supreme Court in respect of each question of fact.

The discretionary considerations of the Supreme Court in determining whether to allow a question of fact included whether there was an arguable case or a question of principle involved, the significance of the development, the importance of the development to the parties, its impact on the locality, and each party's approach to the issue before the lower Court and planning authority.

The Supreme Court held that leave to appeal a question of fact ought to be granted, where there is an "*identifiable and egregious*" error in that the conclusions drawn are "*glaringly improbable*" or "*contrary to compelling inferences*".

The Appellants alleged a number of errors of law and fact, which can be categorised as *delay grounds; reasonable person grounds; unreasonable assumption grounds; prejudice grounds; miscarry of discretion grounds; finding of fact grounds; and incorrect approach grounds*.

In the appeal, the Supreme Court was limited to a consideration of the specific allegations of error, and did not conduct a merits review of whether the ERD Court afforded appropriate weight to each matter it considered. It was not open to the Supreme Court to allow an appeal because another decision maker may have made a different decision on the facts; the Supreme Court ought not read the EDR Court's reasons "*minutely and finely with an eye keenly attuned to the perception of error*".

The Appellants were required to, in respect of each ground of appeal, satisfy the Supreme Court that the exercise of discretion by the ERD Court resulted in either a process error or an outcome error of the type enunciated by the High Court in *House v the King* (1936) 55 CLR 499.

A process error will be established, where the ERD Court acted upon wrong principle, took into account an irrelevant matter, was mistaken as to a fact, or failed to account for a relevant consideration. An outcome error will be established, where a process error is not identified but the Court is nevertheless satisfied that the ERD Court's decision was so unreasonable or plainly unjust that the Court may infer that there was a failure to properly exercise discretion.

The Supreme Court held that the non-exhaustive discretionary considerations involved in determining whether to grant an extension application include whether there has been a material change in the relevant development plan, planning legislation, or circumstance affecting the grant of the extension; whether the applicant pursued the development with diligence; and any other circumstance, which may have frustrated the pursuit of the development.

The Supreme Court held that a consideration of prejudice to the public interest will only arise, where there has been a change to the relevant planning regime in the 12 months following the grant of a DPC.

The Supreme Court did not find the ERD Court to have erred in law or in fact in respect of any of the grounds of appeal. It was agreed between the parties that the Supreme Court therefore did not need to consider the matters alleged in the Council's notice of alternative contention.

DPC and extension application

The Council granted in March 2019 a DPC for the construction of two two-storey residential flats, with each flat to comprise two dwellings with associated car parking and landscaping (**proposed development**) on land located at South Plympton, South Australia.

Due to alleged market and economic viability concerns, the Appellants had not acted upon the DPC within the 12-month operative period prescribed by regulation 48 of the *Development Regulations 2008* (SA), and nine days prior to the DPC lapsing, made an extension application.

The Council refused the extension application because the Appellants did not submit evidence of their preparation for demolition or division work, or their pursuit within the operative period of the DPC of obtaining a building rules consent (**BRC**) as required under section 33(1) of the Act.

ERD Court's decision to dismiss the appeal

In *Paul & Anor v the Corporation of the City of Marion* [2020] SAERDC 33, the ERD Court held that the relevant factors to be considered in an extension application appeal were the length of, and reasons for, the delay in making the extension application; whether the relevant approval was pursued with due diligence; whether there had been a change to the planning regime; any prejudice that may flow from a decision to allow the extension; and any other appropriate factor.

Too much delay, too little diligence

The ERD Court held that the Appellants did not, due to their own decisions regarding the suitability of the property market and viability of the proposed development, allow sufficient time, which would have been at least four months prior to the expiration of the DPC, to enable a BRC and development approval to be obtained.

The ERD Court considered it reasonable to expect the Appellants, as experienced developers, to be capable of obtaining advice and informing themselves about any uncertainty of gaining an extension, and to have made contact with Council when they decided not to implement the DPC.

The ERD Court held that it was unreasonable for the Appellants to assume that an extension of the DPC would be automatic, particularly given their experience with other property in the Council area.

Amended Development Plan will not prejudice the community or the Council

The *Development Plan* dated 28 April 2016 was in force when the DPC was granted. The *Development Plan* dated 15 August 2019 transferred the Subject Land from the Medium Density Policy Area 12 to the Marion Plains Policy Area 8 of the Marion Residential Zone.

The re-zoning of the Subject Land increased the desired minimum site area for a residential flat from 250m^2 to 350m^2. It was agreed between the parties that the proposed development would be unlikely to be approved, were an application made under the 2019 *Development Plan*.

The ERD Court held that to allow an extension application for development that is at odds with the current planning regime would prejudice the public interest. However, in the circumstances, any prejudice would not be "*of great order*" because the Appellants were willing to commit to an extension period of less than 12 months, and there was an expectation that there would be applications lodged under the prior *Development Plan* still undergoing assessment.

Appropriate factors submitted by the parties do not assist the ERD Court

The ERD Court did not consider relevant in a hearing de novo for an extension application the Council's submission that the DPC was a "*bad consent*" due to the failure of the Appellants to make an application to divide the land, and the Council, at the time of giving the DPC, not having the opportunity to determine whether the Subject Land was suitable for division.

The ERD Court dismissed the Appellants' complaint that they ought to have been notified of the changes to the *Development Plan*, finding that the Appellants were more than the average ratepayer, and in any event, development plans are constantly changed and development applicants, and the community at large, bear the burden of informing themselves about those changes.

The Appellants' lack of diligence and the changes to the *Development Plan* outweighed the ERD Court's consideration of other discretionary factors relevant to the appeal.

Appellants' grounds of appeal to the Supreme Court

The 14 grounds of appeal submitted by the Appellants in the Supreme Court, were reduced to the following 13 grounds in the course of the hearing:

- *Delay: grounds 2 and 3* – The ERD Court erred in law in finding that the making of the extension application was delayed and erred in fact in failing to find any delay short.
- *Reasonable person: grounds 4, 6 and 10* – The ERD Court erred in law in its logic and application of the reasonable person test in finding that the Appellants ought to have known to make an extension application four months before the lapse of the DPC, and by not accepting that it was reasonable in light of the market conditions for the Appellants not to take steps to obtain a BRC and development approval before the lapse of the DPC.
- *Unreasonable assumption: ground 5* – The ERD Court erred in fact or in fact and law in finding that it was unreasonable to assume the DPC would be extended automatically.
- *Prejudice: ground 7* – The ERD Court erred in fact in failing to find that the Appellants would suffer substantial prejudice, should the extension application not be granted.
- *Miscarry of discretion: grounds 8 and 9* – The discretion of the ERD Court miscarried or was legally unreasonable or wrong, and the ERD Court erred in law by effectively "*punishing*" the Appellants for their failure to seek an extension application earlier.
- *Finding of fact: ground 12* – The ERD Court erred in fact in finding that the Appellants had decided that the proposed development was not viable and was unlikely to be viable for the foreseeable future; by speculating about the potential loss to be incurred, should the proposed development proceed; and by failing to find that the development of three or less dwellings on the Subject Land would result in a loss for the Appellants, whereas the proposed development would have a real likelihood of returning a profit, or minimising the loss to be incurred by the Appellants, when compared to other scenarios.
- *Incorrect approach: grounds 13 and 14* – The ERD Court erred in law in requiring the Appellants to demonstrate a requisite commitment to the proposed development and by affording determinative weight to the finding that the Appellants had displayed a lack of diligence or commitment to the proposed development.

Supreme Court's determination

The Supreme Court did not find a process error or an outcome error in respect of any of the grounds of appeal, and held as follows:

- *Delay: grounds 2 and 3* – The ERD Court followed clear judicial authority in finding the extension application was delayed, and made no finding as to the delay being "*short*".
- *Reasonable person: grounds 4, 6 and 10* – The ERD Court did not fail in its reasoning nor impute a high level of technical proficiency and foresight to the reasonable person. It was open to the ERD Court to find unreasonable the steps taken by the Appellants, including the Appellants' evaluation of the property market and the decision by the Appellants not to proceed with the DPC until they thought it was commercially viable to do so.
- *Unreasonable assumption: ground 5* – The ERD Court was correct to find the Appellants unreasonable for assuming an extension would automatically be exercised in their favour.
- *Prejudice: ground 7* – The ERD Court found and gave weight to the fact that the Appellants would be prejudiced in excess of $66,000, should it dismiss the appeal.
- *Miscarry of discretion: grounds 8 and 9* – There was no error in the approach of the ERD Court or suggestion that the ERD Court attempted to punish the Appellants.
- *Finding of fact: ground 12* – The contentions that the ERD Court erred in finding that the proposed development was not viable and would potentially cause the Appellants loss if carried out be rejected. The Supreme Court held that the ERD Court's assessment of prejudice to the Appellants need not specifically refer to the loss to be incurred for other development proposals, and thus there was no error of factual finding, as alleged.
- *Incorrect approach: grounds 13 and 14* – There was no error or inconsistency in the approach of the ERD Court in weighing each discretionary matter it considered, and its decision was not so unreasonable that no reasonable decision maker could have made it.

Conclusion

The Supreme Court was not satisfied that the considerations of the ERD Court in deciding the extension application were the subject of a process error or an outcome error, and dismissed the appeal.

The approach of the South Australian ERD Court can be compared with the approach of the Queensland Planning and Environment Court to an application for the extension of a development approval.

The case of *Room2Move.com Pty Ltd v Western Downs Regional Council* [2019] QPELR 1010 (***Room2Move***) concerned an appeal to the Queensland Planning and Environment Court (**P&E Court**) against the refusal by the Western Downs Regional Council of an application to extend the currency period of a development approval for a development permit for a material change of use of land to establish a non-residential workforce accommodation.

The P&E Court confirmed in *Room2Move* that section 86 and section 87 of the *Planning Act 2016* (Qld) (**PA**) confer a broad discretion on an assessment manager to assess and decide an application for the extension of a development approval.

The P&E Court held the following to be relevant to an extension application made under the PA:

- "*any matter that the assessment manager considers relevant*" (see section 87(1) of the PA), which includes matters irrelevant to the assessment of the development application;
- whether the development the subject of the development approval has commenced;
- whether there is an explanation for development not being commenced before the lapse of the approval, and the explanation provided by the applicant, including where the explanation relates to the private economics or personal circumstances of the applicant;
- whether there is a town planning, community, and economic need for the proposed development;
- whether there is "*a town planning imperative for the development, and its approval to be the subject of a fresh assessment and decision under the PA*";
- a determination of the extension application, which will advance the purpose of the PA.

The P&E Court was satisfied in *Room2Move* that the Applicant's delay in progressing the approval was because of the unfavourable economic conditions, which resulted from a downfall in the demand for workers' accommodation, and was beyond the Applicant's control. There was also an overriding need for the development, and therefore the Court granted the 12 month extension sought.

The approach of both the P&E Court and the ERD Court to an extension application under each State's respective planning legislation to extend the period an approval is in force are similar. The only notable difference in approach is the ERD Court's emphasis on whether an approval was pursued with "*due diligence*". However, both Courts accept that there is a non-exhaustive list of discretionary matters, depending on the circumstances of each case, which may be taken into account in determining an extension application.

Calculating Gross Floor Area contributions and the implications of overpayment in New South Wales

Annie Dong | Zac Mills | Anthony Landro | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Buyozo Pty Limited v Ku-ring-gai Council* [2021] NSWLEC 2 heard before Pepper J

April 2021

In brief

The case of *Buyozo Pty Limited v Ku-ring-gai Council* [2021] NSWLEC 2 concerned an appeal by Buyozo Pty Ltd (**Applicant**) to the New South Wales Land and Environment Court (**Court**) against Ku-ring-gai Council (**Council**) to modify a condition of a development consent and reduce the development contributions payable for the development of a storage shed. The contributions were required under section 7.11 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

The Applicant obtained development consent by way of a conciliation conference conducted pursuant to section 34 of the *Land and Environment Court Act 1979* (NSW) for the consolidation of three existing lots, alterations and additions to the current warehouse premises to create a self-storage facility and separate commercial premises at 3-5 West Street, Pymble NSW (**Development Consent**).

The development consisted of several storage floors of individual lockable storage units, accessible via corridors on each floor that were connected to several carparks with dedicated loading and unloading bays.

Condition 30 of the Development Consent related to the payment of development contributions under section 7.11 of the EP&A Act to the Council in accordance with the *Ku-ring-gai Contributions Plan 2010* (**KCP**). The amount of contributions was based on the "*gross floor area*" (**GFA**) of the development.

As is common in practice, the Applicant lodged a modification application under section 4.55 of the EP&A Act seeking to modify Condition 30 of the Development Consent in order to reduce the amount of development contributions payable under the KCP. No material change to the development was sought. The subject condition in the Development Consent required the payment of contributions in the amount of $987,242.37.

The basis of the Applicant's modification application was that the calculation of the contributions amount was incorrect because the corridor areas of the development were included in the calculation of GFA, when those areas should not have been included, according to the definition of GFA in the relevant environmental planning instrument.

The Applicant lodged a Class 1 appeal in the Court against the deemed refusal of the modification application.

Prior to lodging the modification application with the Council, the Applicant had already paid the contributions to the Council in accordance with the relevant condition. The Applicant had also received an occupation certificate and had commenced use of the premises under the Development Consent.

In determining the case, the Court had to decide on the following issues:

- What statutory interpretation approach should be used in construing "*gross floor area*" as defined in the *Ku-ring-gai Local Environment Plan 2015* (**KLEP**)?
- Should corridor areas be excluded from the calculation of GFA under the KCP?
- Had there been an overpayment of development contributions by the Applicant?

The Court ultimately upheld the appeal and modified Condition 30 of the Development Consent, reducing the GFA from 11,076m^2 to 8,317m^2. Accordingly, the Applicant was provided a "*credit*" of $313,091.32.

Court applied the purposive approach in interpreting the term "gross floor area", and emphasised that it was preferred over a literal construction

The definition of GFA in the KLEP relevantly states as follows [underlining added]:

> *the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor… but excludes -*

…

(h) any space used for the loading or unloading of goods (including access to it). …

The Applicant submitted that the ordinary meaning of the text in the definition of GFA supported a finding that the corridors should be excluded from the GFA calculation. This was because the corridors leading to the entrance of the storage units were spaces used for the purpose of loading or unloading goods.

The Council submitted that the Applicant's construction of the term GFA would give rise to different meanings depending on the particular type of development under construction. Accordingly, the GFA would change depending on the purpose for which the term was being considered.

The Court cited the High Court case of *R v A2; R v Magennis; R v Vaziri* (2019) 373 ALR 214 at [32]-[37], where the High Court identified the correct approach to statutory interpretation. In that case, the High Court emphasised that a statutory construction, which promotes the purpose of a statute is to be preferred over a literal construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable.

Consequently, the Court adopted a purposive construction of "*gross floor area*", and upheld the Applicant's submissions as to the proper construction of paragraph (h) of the definition of GFA. The Court stated that the issue was a matter of law, and that the opinion of the joint expert planners as to the proper construction of "*gross floor area*" was irrelevant.

Corridor areas were exempt from the relevant GFA calculation because they provided access to the spaces where the loading and unloading of goods would occur

The Council submitted that since the loading and unloading of goods occurred in the carpark of the premises, the corridors merely conveyed the already loaded or unloaded goods to the storage units.

The Applicant submitted that the concept of GFA is used in the KCP to measure the demand on public services and amenities against which the contributions are calculated, and to do otherwise would result in excessive contributions being levied, defeating the purpose of the exemptions provided for in the definition of "*gross floor area*".

The Court upheld the Applicant's submission, stating that it was consistent with the purposive approach, as opposed to the Council's literal approach to statutory interpretation.

Whilst there was an overpayment of contributions by the Applicant, the Council was not obliged under the KCP or the Development Consent to refund any credited money

The Court dismissed the Council's submission that Condition 30 of the Development Consent had been "*spent or exhausted*" since the money had already been added to its "*pool*" of contributions, leaving the Applicant with "*nothing left to modify*". The Court referred to its decision in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No. 3)* [2015] NSWLEC 75 at [111]-[119] and reiterated that the concept of a development consent being "*spent*" or "*exhausted*" was not known to law and contrary to established authorities, in citing *Boral Resources (Country) Pty Ltd v Clarence Valley Council & Avard; Cemex Australia Pty Ltd v Clarence Valley Council & Avard* (2009) 167 LGERA 134 at [105]-[106].

The Court observed at [43] that to the extent that there has been an overpayment, the Council must take the overpayment into account prior to the imposition of any condition in respect of any future development application, citing sections 7.11(1), (3), and (6) of the EP&A Act.

Interestingly, the Court also observed in obiter at [43] that the overpayment may give rise to an equitable claim such as that of unjust enrichment, in another court.

Conclusion

This case serves as a useful example of statutory interpretation being applied to planning law concepts. The case demonstrates an application of the purposive approach to statutory construction in the context of the "*gross floor area*" calculations in environmental planning instruments, which accorded with the definition contained in the NSW Standard Instrument.

As the definition of "*gross floor area*" can vary, developers should ensure that the correct definition is being applied at all stages of the development process, including the design stage (to ensure that the correct control is being applied), and assessment by the consent authority (to ensure that development contributions are properly levied). Doing so would help to avoid triggering a credit or some form of equitable claim, and ensure the contributions are levied correctly in the first place.

Editor's Note by Ian Wright and Alexa Brown

Relevancy to Queensland law

In Queensland, the term "*gross floor area*" is an administrative term under the *Planning Regulation 2017* (**Planning Regulation**). Where a local planning scheme adopts the term "*gross floor area*" the local planning scheme must also adopt the relevant definition in schedule 24 of the Planning Regulation (see section 8 and schedule 4 of the Planning Regulation).

Relevantly, the definition in the Planning Regulation of "*gross floor area*" does not include areas used for access between levels or for the parking, loading or manoeuvring of vehicles.

The term "*gross floor area*" is also separately defined in section 30 of the *Planning Act 2016* for the purpose of determining whether a planning change is an adverse planning change.

Planning and Environment Court of Queensland allows inconsistent conditions in two different development approvals over the same premises

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wormell Pty Ltd v Gold Coast City Council & Anor* [2021] QPEC 12 heard before Kent QC DCJ

April 2021

In brief

The case of *Wormell Pty Ltd v Gold Coast City Council & Anor* [2021] QPEC 12 concerned the determination of a preliminary point in an appeal to the Planning and Environment Court (**Court**) of Queensland by Wormell Pty Ltd (**Appellant**) against the Gold Coast City Council's (**Council**) decision to approve the Dance Headquarters Pty Ltd's (**Co-Respondent**) application for a material change of use in relation to premises at 1 Geary Crescent, Molendinar (**Premises**). The Premises is owned under a two-lot scheme by the Appellant and the Co-Respondent.

The preliminary point under consideration by the Court was whether section 66(2) of the *Planning Act 2016* (**Planning Act**) prohibited the imposition of a condition on the proposed development, being a dance studio (**Proposed Dance Studio Development**), where that condition was agreed to be inconsistent with a condition on an earlier development approval for a warehouse (**Earlier Warehouse Approval**).

Ultimately the Court, agreeing with the Co-Respondent and the Council, concluded that the condition could be imposed on the Proposed Development despite the agreed inconsistency.

Inconsistent condition in respect of landscaping plan and revised traffic management plan

Conditions in the Earlier Warehouse Approval required the provision and maintenance of a landscaped garden area of at least three metres in depth adjoining the street frontage of the Premises. However, a proposed condition requiring compliance with a revised traffic management plan in the Proposed Dance Studio Development would require a one-metre-wide concrete pathway to be constructed through the landscaped garden area.

Although the Court in obiter remarked that a footpath may not be mutually exclusive with a landscaped garden area, the Appellant, Council and Co-Respondent agreed that the two conditions were inconsistent.

Planning Act prohibits inconsistent conditions for the development unless certain circumstances are in existence

The prohibition on inconsistent conditions is contained within section 66(2) of the Planning Act, which relevantly states as follows [underlining added]:

> ***66 Prohibited development conditions***
>
> *…*
>
> *(2) A development condition must not be inconsistent with a development condition of an earlier development approval in effect for the development, unless—*
>
> *(a) both conditions are imposed by the same person; and*
>
> *(b) the applicant agrees in writing to the later condition applying; and*
>
> *(c) if the development application for the later development approval was required to be accompanied by the consent of the owner of the premises—the owner of the premises agrees in writing to the later condition applying."*

The Co-Respondent could not obtain owner's consent from the Appellant and therefore the exceptions in section 66(2)(a) to (c) could not be met.

Co-Respondent and Council argued that the prohibition only limited inconsistent conditions between development approvals "for the same development"

The Co-Respondent and the Council relied on the case of *Liquorland (Australia) Pty Ltd v Gold Coast City Council & Anor* [2002] QCA 248 (**Liquorland**) which supported the position that the words "*for the development*" in section 66 of the Planning Act are to be read by reference to the development as a whole, not simply the location of the development.

In Liquorland the Court of Appeal relevantly stated as follows (at [19] to [20] of *Liquorland*) [underlining added]:

> *Mr Lyons QC, for Liquorland, whilst conceding that the phrase 'for the development' means 'for the same development', sought nevertheless to construe it to mean 'with respect to the land the subject of the same development'. In my opinion there is no justification for such an artificial construction.*

In applying the principle in *Liquorland*, the Co-Respondent and the Council noted that the Earlier Warehouse Approval and Proposed Dance Studio Development were for separately defined uses, namely a Warehouse use and an Indoor sports and recreation use, and were therefore for different development despite both developments occurring on the Premises.

The Co-Respondent and the Council also referred to the principle that different development approvals may attach to the same premises and in doing so relied on the Court of Appeal's statements in *Gladstone Regional Council v Homes R Us (Australia) Pty Ltd* [2015] QCA 175.

Appellant argued that the development approvals both attach to the land

The Court did not accept the Appellant's arguments, which included that the Proposed Dance Studio Development would benefit from the Earlier Warehouse Approval and therefore could not avoid the burdens of the Earlier Warehouse Approval, in particular, the development conditions of that approval.

Conclusion

After hearing the arguments from the Co-Respondent, Council and Appellant in relation to the application of section 66 of the Planning Act, the Court agreed with the arguments of the Co-Respondent and the Council that the conditions of the Earlier Warehouse Approval were not in effect for the Proposed Dance Studio Approval.

The Court therefore held that section 66(2) of the Planning Act did not prohibit the condition requiring compliance with the revised traffic management plan being imposed on the Proposed Dance Studio Development.

Regulated waste facility in rural Queensland to proceed in light of planning and economic needs, notwithstanding considerations in a new planning scheme

Liam Hanley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *We Kando Pty Ltd v Maranoa Regional Council* [2021] QPEC 1 heard before Everson DCJ

April 2021

In brief

The case of *We Kando Pty Ltd v Maranoa Regional Council* [2021] QPEC 1 concerned two interrelated proceedings by the Applicant in the Planning and Environment Court. The first was an appeal against the decision of the Maranoa Regional Council (**Council**) to refuse an extension to the relevant currency period. The second was an originating application, being a change application for a minor change to the relevant development approval. The parties agreed that both proceedings be heard and determined, "*such that they would 'rise and fall together'*" (see [14]).

The subject site was located on a remote area within a large parcel of "*unremarkable rural grazing land*". The proposed development was for a high impact industry and environmentally relevant activity for regulated waste storage. The proposed waste facility was intended to facilitate the removal of sewerage sludge and residues (**K130 waste**) from coal seam gas drilling, construction and operational activities, and was proposed to operate as follows:

- K130 waste is to be transported from coal seam gas facilities to the subject site.
- K130 waste is to evaporate in two storage ponds, leaving approximately 10% as sludge.
- The sludge is to be transported for composting at the Applicant's Chinchilla facility.

The Court approved a development application for the proposed waste facility in early January 2015. It was the subject of a change application for a minor change which was resolved with the consent of the parties by an order of the Court on 17 July 2017 (**2017 Order**), which included the insertion of a condition stating a deadline for making further development applications necessary for the approved material change of use to commence (**Condition 4A**).

The Applicant sought to extend the currency period for a further two years from the date of the judgment, and to change the conditions of the development approval to delete Condition 4A, and to allow the processing of additional waste types at the subject site.

The Court ordered that the currency period be extended for a period of two years, allowed the change application for a minor change, and ordered that the parties prepare amended conditions of approval.

Details of the change application for a minor change

The changes sought by the Applicant were to change the storage structure of the proposed waste facility and incorporate a different mix of biodegradable waste. This would involve partitioning the two proposed storage ponds into five smaller ponds, comprising the following:

- Two K130 ponds.
- Two ponds to accept drill muds from well construction.
- One pond to accept oily water from "*mechanical workshops, vehicle wash-down facilities and coal seam gas processing facilities*".

It was submitted that the proposed changes came within the definition of a minor change in the *Planning Act 2016* (**PA**), however, the Court had regard to compliance with the current planning scheme and issues of need, both of which were also relevant to the currency period extension.

Statutory framework

The *Bungil Shire Council Planning Scheme* (**Bungil Scheme**) was in effect when the development application was made. The *Maranoa Regional Council Planning Scheme* (**Maranoa Scheme**) was later adopted on 27 September 2017.

In assessing the change application for a minor change, section 81(4)-(5) of the PA requires that the Court "*must*" consider the Bungil Scheme and "*may give weight*" to the Maranoa Scheme. Section 81(2)(d)(a) of the PA further requires that the Court consider "*all matters [it] would or may assess against or have regard to, if the change application were a development application*". As the development application was impact assessable, this includes "*any other relevant matter, other than a person's personal circumstances, financial or otherwise*" under section 45(5)(b) of the PA.

The appeal in respect of the extension to the currency period was carried out by way of a hearing anew. Section 87(1) of the PA provides that the Court "*may consider any matter [it] considers relevant*". In this case, this included evidence of mental health issues suffered by the Applicant's operations manager who, by mistake, failed to comply with the 2017 Order. A key policy consideration was to avoid the making of a fresh development application where development was ready to commence.

Industrial use on rural land was compliant with the planning instruments

The Applicant argued that there was compliance with the provisions of the Bungil Scheme encouraging economic activity in the Rural Zone without adversely impacting on other rural uses, rural amenity and character. In reply, the Council relied upon non-compliance with the Strategic Framework and Rural Zone Code of the Maranoa Scheme.

No land was mapped in the Industrial Zone under the Bungil Scheme. Discreet areas of land near Roma were mapped in the Industrial Zone under the Maranoa Scheme. It was not contended that there was "*any meaningful policy change*" between the Bungil Scheme and Maranoa Scheme as they related to development in the Rural Zone.

The Court found that there was no sound planning basis for the proposed development to be located on land mapped in the Industrial Zone. In summary, the Court found as follows:

- Notwithstanding that the proposed development was not contemplated in the Rural Zone Code, this did not expressly discourage an industrial use on rural land.
- The potential adverse impacts could be appropriately managed by conditions.
- The proposed site was an isolated area which avoided adverse amenity impacts or environmental harm.
- If developed on land in the Industrial Zone, the proposed development would utilise 51% of the available land due to the requirement for separation of the site, which could result in an inefficient use of the land.

There was a planning and economic need for the proposed development

The Court found there was a planning and economic need for the proposed development for the following reasons:

- The proposed development would provide competition in the industry.
- The proposed location would enhance the efficiency of transport operators.
- There was demand for treatment to occur offsite from coal seam gas operations.
- It was not viable to otherwise carry out the intended operations at the Roma sewerage treatment plant.

The Court also found that the proposed use was consistent with community expectations, and also that it was of no consequence that there was no demonstrated community need for the proposed development.

Conclusion

The Court approved the change application for the minor change and allowed the appeal to extend the currency period.

Planning and Environment Court rules that a pre-1947 house in Brighton, Queensland can be demolished as redevelopment has robbed the street of its traditional character

Liam Hanley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hawke v Brisbane City Council* [2021] QPEC 16 heard before Jones DCJ

April 2021

In brief

The case of *Hawke v Brisbane City Council* [2021] QPEC 16 concerned an appeal to the Planning and Environment Court against the Council's decision to refuse a development approval for the demolition of a pre-1947 house in the suburb of Brighton in Brisbane.

The subject house is located at 478 Flinders Parade, Brighton. The section of the street by which the subject house was assessed (**Street**) comprises 13 dwellings, each of which are contained within the Traditional Building Character Overlay.

Of the 13 dwellings contained in the Street, four dwellings were identified as pre-1947 houses, the age of one house was uncertain, and the remaining eight houses were post-1946 houses. Of the eight post-1946 houses, six were "*very large and of modern construction*" (at [15]). Of note, two pre-1947 houses had been demolished in the Street between 2006 to 2010.

The central issue concerned whether the Street was of traditional character. If this was satisfied, a second issue arose as to whether the subject house contributed to the character of the Street.

The Court found that the Street "*no longer has sufficient character 'to be reasonably described as having traditional character'*" (at [30]). The Court was not required to consider the second issue. The outcome of the appeal was therefore that the house can be demolished.

Statutory framework

The appeal was carried out by way of a hearing anew. The Court had a broad planning discretion to decide the appeal. The now superseded *Brisbane City Plan 2014* version 19-00/2019 was in force at the time of the development application.

The proposed development was contained within the Character Residential Zone, and the Character Residential Zone Code relevantly provided as follows (see section 6.2.1.5(4)):

> *Development location and uses overall outcomes are:*
>
> *(a) Development provides for low density suburban and inner-city living through the development of predominately one or two-storey dwelling houses comprising primarily of existing houses built in 1946 or before and infill housing that incorporates any housing built in 1946 or before…*

The proposed development was assessable against the Traditional Building Character (Demolition) Overlay Code (**Demolition Code**). Of particular relevance was AO5(d) of the Demolition Code, which allows for demolition where "*[d]evelopment involves a building which … is in a section of the street within the Traditional building character overlay that has no traditional character*".

The house was also situated within the Sandgate District Neighbourhood Plan Area (**Neighbourhood Plan**). It was agreed by the parties that the Neighbourhood Plan would be achieved through application of the Traditional Building Character Overlay Code.

Street did not have sufficient character to be reasonably described as having traditional character

The Court had regard to the following in assessing the character of the Street:

- "*The term 'character' is defined as - 'the aggregate of features and traits that form the individual nature of some person or thing'*" and "*the task is to consider the visual character of the street as a whole, not the character of houses or groups of houses in isolation*" (*Leach & Ors v Brisbane City Council* [2011] QPELR 609, [34]-[35]).
- "*What gives an area (or street) 'traditional character' is a combination of traditional building form and roof styles, traditional elements, detailing and materials, traditional scale and traditional setting*" (*Mariott v Brisbane City Council* [2015] QPELR 910, at [75]).
- The traditional character of a street does not have to be "*pristine*" (*Unterweger v Brisbane City Council* [2012] QPELR 335, at [10]).
- The character of a street must not be decided purely from a comparison between the number of pre-1947 houses and post-1946 houses (at [24]).

The Court found that the Street comprised a mixed character. The four pre-1947 houses in the Street were physically isolated from each other and lacked a cohesive presentation. As a result, the presentation of the Street was dominated by large modern houses. Any contribution which the pre-1947 houses made towards the character of the Street was individual.

The Court described the four pre-1947 houses on the Street as "*quite modest*" relative to other nearby examples (at [18]). They contained most of their traditional features. However, three of the four pre-1947 houses displayed "*a number of unsympathetic physical alterations*" (at [23]), and the more dominant structures limited "*the ability to observe*" the pre-1947 houses (at [26]).

The Court found that the setting of the Street had been "*dramatically and invariably changed*" (at [29]). This informed the Court's finding that the Street had "*been robbed of its traditional character by redevelopment*" (at [31]). The Court concluded that AO5(d) of the Demolition Code was therefore satisfied.

Conclusion

The Court allowed the appeal and found that demolition of the house was consistent with the Demolition Code.

Queensland Court of Appeal discusses the principles of statutory construction in a case decided in 2014

Alexa Brown | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* [2014] QCA 147 heard before Margaret McMurdo P and Morrison JA, and Douglas J

April 2021

In brief

The case of *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* [2014] QCA 147 concerned separate but linked appeals to the Queensland Court of Appeal by Zappala Family Co Pty Ltd (**Appellant**) and Brisbane City Council (**Council**) against the judgment of the Planning and Environment Court (**P&E Court**) to allow an appeal by submitters (**Submitters**) against the Council's decision to approve a development application for a material change of use for a Hotel on land situated at 26-30 McDougall Street, Milton (**Premises**). The proposed development for a 14-storey hotel relevantly included 132 hotel rooms, short-term accommodation on levels 2 to 13, and 56 car spaces which included 18 car spaces provided by the utilisation of car stackers (**Proposed Development**).

The Court of Appeal granted leave to appeal. The relevant grounds of appeal before the Court of Appeal were that the P&E Court (see [47]):

- had misconstrued the relevant provisions of the Transport, Access, Parking and Servicing Code (**TAPS Code**) in the now repealed *Brisbane City Plan 2000* (**City Plan**);
- had erred in finding that the Proposed Development was within the use definition of "*Short-Term Accommodation*" and not "*Hotel*", and was therefore in conflict with the TAPS Code; and
- had erred in disregarding the unanimous opinion of three traffic engineers that the Proposed Development would generate demand for between 33 and 44 car spaces.

P&E Court decision to allow the appeal by the Submitters

Section 326 of the now repealed *Sustainable Planning Act 2009* (Qld) (**SPA**) required that the relevant assessment manager's decision not conflict with the City Plan unless there were "*sufficient grounds to justify the decision, despite the conflict*".

The P&E Court's reasoning for allowing the appeal by the Submitters included that there were not sufficient grounds to justify the approval of the Proposed Development due to the significant conflict with the TAPS Code, in particular with Performance Criteria P7.

Court of Appeal considers the principles of statutory construction that apply to the construction of a planning scheme

Initially, the Court of Appeal set out the principles of statutory construction that apply to the construction of a planning scheme. The Court of Appeal stated that "*the same principles which apply to statutory construction apply to the construction of planning documents*" and went on to quote paragraphs [69] to [71] and [78] of the High Court judgment *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28.

The Court of Appeal also referred to the case of *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44 and at [56] went on to state that:

> *The 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.*

Court of Appeal finds that the Proposed Development was for a Hotel use not a Short-Term Accommodation use

The Appellant, through its development application, characterised the Proposed Development as a Hotel use, while the Submitters contented that the Proposed Development ought to be characterised as Short-Term Accommodation. For a number of reasons, the Court of Appeal rejected the Submitters' contention that the relevant use ought to be determined by simply considering the gross floor area of each use. Instead, in noting the intensity of the use, the Court of Appeal determined that the Proposed Development was for a Hotel.

This was in contrast with the conclusion of the P&E Court that the Proposed Development was for Short-Term Accommodation.

Court of Appeal determines that the Hotel use was a non-residential use under the City Plan

The Court of Appeal considered relevant case law and the provisions of the City Plan, and acknowledged that the term "*residential*" has the connotation of a long-term or permanent residence (at [78] to [80]). Therefore, the Court of Appeal held that a Hotel use was a non-residential use.

Court of Appeal determined that the provision of 56 carparking spaces satisfied A7.3, and therefore P7, of the TAPS Code resulting in compliance with the City Plan

The Court of Appeal then went on to apply the relevant statutory principles of interpretation to Performance criteria P7 of the TAPS Code and, in accordance with the findings already outlined above, determined that A7.3 was applicable. Performance criteria P7 of the TAPS Code relevantly requires that "*… the development must achieve adequate provision for on-site vehicle parking …*". A7.3 of the TAPS Code relevantly states the following in relation to an acceptable car-parking rate, "*on-site carparking numbers … do not exceed 1 car space for every 200m^2 of gross floor area*". Relevantly, A7.3 of the TAPS Code does not impose a minimum requirement or make any comment on off-street parking.

The Court of Appeal stated that an error in the P&E Court's application of the TAPS Code was determining that the Proposed Development did not comply with A7.3, resulting in conflict with P7, for the reason that A7.3 was inapplicable as the Proposed Development was a Short-Term Accommodation use.

After considering the P&E Court's conclusions on the applicability of A7.3 and P7 of the TAPS Code, in particular that there was significant conflict with the TAPS Code, the Court of Appeal stated that the P&E Court's conclusion could not be sustained (at [106]).

As the provision of 56 car spaces satisfied the requirements of A7.3, and was therefore not in conflict with P7 of the TAPS Code, the Court of Appeal upheld the ground of appeal that the P&E Court had erred in finding that the Proposed Development was in conflict with the TAPS Code.

Court of Appeal held that the P&E Court ought to have applied the unanimous opinion of three traffic engineers

By failing to acknowledge the unanimous opinion of three traffic engineers that the carparking demand of the Hotel component of the Proposed Development was 33 to 44 carparking spaces, which the traffic engineers considered resulted in compliance with the TAPS Code, the Court of Appeal held that the P&E Court fell into error.

The Court of Appeal therefore upheld the ground of appeal that the P&E Court had erred in disregarding the unanimous opinion of three traffic engineers.

Court of Appeal dismissed further grounds

The Court of Appeal also considered further grounds of appeal made by the Submitters in relation to errors in the P&E Court judgment about amenity and extra evidence. However, after considering those grounds, the Court of Appeal decided that those grounds were not made out.

Conclusion

The Court of Appeal held that the P&E Court erred in relation to the characterisation of the use of the Proposed Development, the resulting application of the TAPS Code, and the failure to adopt the unanimous opinion of the expert traffic engineers, which materially affected the decision of the P&E Court.

The Court of Appeal, therefore, allowed the appeal by the Appellant and the Council, and rejected the grounds of appeal put forward by the Submitters.

South Australian Supreme Court clarifies in relation to an exception or exclusion to a development offence when the reverse onus of proof will be triggered

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Supreme Court of South Australia in the matter of *The Corporation of the City of Unley v Crichton & Anor* [2021] SASC 17 heard before The Honourable Justice Nicholson

April 2021

In brief

The case of *The Corporation of the City of Unley v Crichton & Anor* [2021] SASC 17 concerned an appeal to the Supreme Court of South Australia (**Supreme Court**) against the decision of the Environment, Resources and Development Court of South Australia (**ERD Court**) that each of the respondents had not caused "*tree-damaging activity*" to two regulated trees (**subject trees**), and were therefore not guilty of a development offence under section 44(1) of the *Development Act 1993* (SA) (**Act**).

It was not in dispute before either Court that each of the subject trees were "*regulated trees*" within the meaning of section 4(1) of the Act and regulation 6A of the *Development Regulations 2008* (SA) (**Regulations**), nor was it in dispute that each respondent had caused the subject trees to be pruned without an approval of the Corporation of the City of Unley (**Council**).

The issues considered by the ERD Court in *The Corporation of the City of Unley v Crichton & Ors (No. 2)* [2019] SAEDC 43, which were also the subject of the appeal to the Supreme Court, were relevantly the following:

- ***Issue 1*** – The proper interpretation of the meaning of the word "*crown*" in regulation 6A(8)(a) of the Regulations, and the proper construction of regulation 6A(8) of the Regulations as "*pruning*", which is either excluded from, or a limitation on, the definition of "*tree-damaging activity*" in section 4(1) of the Act.
- ***Issue 2*** – Whether regulation 6A(8) of the Regulations was an exception which triggered the reverse onus of proof in section 56(2) of the *Summary Procedure Act 1921* (SA) (**SP Act**) to place on the respondents the onus of proving, on the balance of probabilities, that the pruning of the subject trees met the requirements of the exception.
- ***Issue 3*** – Whether more than 30% of the crown of each of the subject trees was removed.

In respect of Issue 1, the Supreme Court agreed with the ERD Court's interpretation of the word "*crown*" in regulation 6A(8)(a) of the Regulations as having its ordinary meaning of "*live leaves and branches*", but rejected the ERD Court's construction of regulation 6A(8) of the Regulations as limiting the definition of "*tree-damaging activity*" in section 4(1) of the Act.

In respect of Issue 2, the ERD Court's rejection of the application of the reverse onus of proof in section 56(2) of the SP Act was negated by the ERD Court's error in the construction of regulation 6A(8) of the Regulations when considering Issue 1.

The Supreme Court held that regulation 6A(8) of the Regulations stated a type of "maintenance pruning" which was excluded from the definition of "*tree-damaging activity*" in section 4(1) of the Act, where both (a) and (b) of regulation 6A(8) of the Regulations were satisfied, and thus section 56(2) of the SP Act placed on the respondents the onus of proving that the pruning of the subject trees met the exclusion.

The Supreme Court held that the following factors may lend support to a provision being an "*exception, exemption, proviso, excuse, or qualification*" (a **statutory exception**) capable of triggering section 56(2) of the SP Act:

- the substance and form of the exception and offence provisions, when considered as a whole;
- where the wording of the exception provision is separated from the offence provision;
- where the exception provision assumes the existence of a "*primary prohibition*" (or fact), which is dependent upon the existence of a "*new or different matter from the subject matter of the [primary fact]*";
- where the satisfaction of the exception provision would be difficult for the prosecution to prove, but easy for a defendant to prove on the balance of probabilities.

The Supreme Court found in respect of Issue 3 no error in the ERD Court's preference of the expert evidence of the respondents as to the quantity of the crown of the subject trees which was removed, and reiterated the following principles stated in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 in relation to the admissibility of the evidence of a witness as expert evidence:

- there must be a field of specialised knowledge and an identified aspect of that field in which the witness has demonstrated expertise;
- the opinion must be based on the expert knowledge of the witness, and any facts which have been observed or assumed by the witness must be identified and proved;
- it must be established that the facts on which the opinion of the witness is based form a proper foundation for the opinion.

The Supreme Court also observed in respect of Issue 3 the requirement for the Court to exercise appellate restraint as stated in *Fox v Percy* [2003] HCA 22, which provides that an appellate Court has neither seen nor heard the witnesses before the lower Court, and therefore ought to make due allowances in weighing conflicting evidence and drawing conclusions.

The Supreme Court ultimately agreed with the ERD Court that the pruning of the subject trees was not tree-damaging activity which could make out a development offence under the Act. The Supreme Court, on application by the first respondent, and as agreed by the parties, made a direction under rule 104X(4) of the *Supreme Court Criminal Rules 2014* (SA) that the costs of the appeal be assessed in the ordinary way rather than being limited to the approximate $500 stated in rule 104X(2) of the *Supreme Court Criminal Rules 2014* (SA).

Factual matrix

Each of the subject trees were a Eucalyptus Camaldulensis (or Red River Gum) located on land within the Council's local area, which neighboured the first respondent's property (**subject land**).

The first respondent and another neighbouring landowner (**other owner**), without the agreement of the owner of the subject land, engaged the second respondent to prune the subject trees. The owner of the subject land reported the pruning to the Council.

The respondents and the other owner were subsequently charged on complaint for undertaking development contrary to section 44(1) of the Act. The other owner pleaded guilty to the commission of the offence.

Dispute before the ERD Court

In respect of Issue 1 and Issue 3, the ERD Court rejected the submission of the Council that "*crown*" as defined in regulation 6A(8) of the Regulations ought to extend past its ordinary meaning and include dead and diseased branches. The Council alleged that on its construction, the pruning of the subject trees exceeded 30% of the crown contrary to the Regulations.

The ERD Court declined to admit the evidence of the Council's expert, due to a lack of support for the expert's methodology as to the percentage of the crown of the subject trees that had been removed. The ERD Court was not satisfied that the expert's opinion could assist the Court because the expert did not present to have a "*special acquaintance*" with a body of knowledge or experience that was "*sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience*".

The ERD Court construed regulation 6A(8) of the Regulations as limiting the definition of "*tree-damaging activity*" in section 4(1) of the Act, and resolved Issue 2 in favour of the respondents.

Despite the finding that the respondents did not bear the onus of proof, the ERD Court preferred their evidence that no more than 30% of the live foliage (ie the crown) of each subject tree had been removed. The ERD Court held that each of the respondents were therefore not guilty of an offence under section 44(1) of the Act, and made costs orders in their favour.

Supreme Court reasoning differs but leads to the same result

The Supreme Court agreed in respect of Issue 1 that "*crown*" does not include dead branches or foreign plant and its foliage. The Supreme Court, however, held that the ERD Court erred in its construction of regulation 6A(8) of the Regulations as limiting "*tree-damaging activity*" because the following factors suggested that regulation 6A(8) was a statutory exception:

- the substance of the offence, and the form of the offence as a "*general prohibition with a subset of that general prohibition being characterised as an exception*", which suggested an intention by the legislature that a defendant bring themselves within the exception;
- the wording of regulation 6A(8) was separately and distinctly provided for in the Regulations and not located in sections 32 or 44(1) of the Act (the offence provisions);

- regulation 6A(8) assumed the existence of a fact (namely, pruning) to make out the "*primary prohibition*", but the satisfaction of regulation 6A(8) ultimately depended upon the existence of a "*new or different matter from the subject matter of the rule*", being the pruning of one or more of the following, where the pruning was limited to 30% of the crown of the tree:
  - dead wood, which the Supreme Court held may include wood "*unnecessary to the health and proper appearance of the tree, at risk of failing and falling and therefore dangerous*", or diseased wood, which the Supreme Court held may include wood "*potentially damaging other healthy parts of the tree*";
  - branches that pose a material risk to a building;
  - "*branches to a tree that is located in an area frequently used by people and the branches pose a material risk to such people*";
- it would be difficult for the Council to tender evidence to establish the additional facts required by regulation 6A(8)(a)–(b), but easy for the respondents to because they undertook the pruning of the subject trees.

Given the Supreme Court's construction of regulation 6A(8) of the Regulations as a statutory exception, it held in respect of Issue 2 that the ERD Court erred in rejecting the application of section 56(2) of the SP Act. It was on each of the respondents to prove that the pruning of the subject trees satisfied the exception in regulation 6A(8) of the Regulations.

The Supreme Court did not impugn the conclusions of the ERD Court with respect to the evidence and Issue 3, and accepted that it was open to the ERD Court to find that the pruning of the subject trees met the requirements of the exception in regulation 6A(8) of the Regulations.

Conclusion

The Supreme Court agreed with the ERD Court's decision that the respondents were not guilty of a development offence and dismissed the appeal by the Council.

The approach of the Supreme Court to the question of whether an exception to an offence in a provision of a statute is a statutory exception, which may trigger the reverse onus of proof, followed the decision of the High Court of Australia (**High Court**) in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

The High Court's approach in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 has also been followed by various other States in Australia, including by the Queensland Court of Appeal in *Stevenson v Yasso* [2006] QCA 40, the New South Wales Court of Appeal in *ADI Ltd v Environment Protection Authority* [2000] NSWCCA 333, and the Supreme Court of Victoria in *Director of Public Prosecutions v Esso Australia Pty Ltd (No. 5)* [2001] VSC 103.

Planning certificates and the limits of statutory immunity for New South Wales' councils

Mollie Matthews | Todd Neal

This article discusses the decision of the New South Wales Supreme Court in the matter of *Lorenzato v Burwood Council* [2020] NSWSC 1659 heard before Fagan J

May 2021

In brief

The case of *Lorenzato v Burwood Council* [2020] NSWSC 1659 (**Lorenzato v Burwood**) concerned an action against Burwood Council (**Council**) for negligent misstatement in a planning certificate issued under section 149 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) (**Planning Certificate**). This case was heard by Justice Fagan in the New South Wales Supreme Court.

This case arose following numerous occasions of flooding on the plaintiff's property at 13 Appian Way, Burwood (**Property**) due to a blockage in a Council-owned pipe that had been laid beneath the Property in the 1900s (which was beneath the residence and the pool) (**Pipe**).

The plaintiff purchased the Property in 2011, and the Planning Certificate was attached to the contract. The Planning Certificate did not disclose the existence of the Pipe, or the Council's resolution from 2002 in relation to the flooding.

This article focusses on the claims against the Council (rather than the claims against the vendor, and the vendor's cross-claim against its solicitor). The plaintiff's actions against the Council were for negligent misstatement in the Planning Certificate, and in nuisance for the damage caused by the flooding.

The Court found against the Council in relation to both of those actions, and the Council was unsuccessful (in relation to both actions) in arguing that a statutory immunity applied. The Council was ordered to pay the plaintiff approximately $2 million (including interest) in damages, and the plaintiff's costs in the proceedings against the Council.

Background

The Pipe underneath the plaintiff's home carried stormwater runoff from a 5.2ha catchment.

The Planning Certificate did not disclose that Council had resolved in 2002 to acquire an easement over the pipe and for the later establishment of a drainage easement along the Property's western boundary.

In 2005, Council reconfigured the street drainage in a way that resulted in the stormwater from the catchment area being concentrated in a junction pit out the front of the plaintiff's Property, despite that pit being dependent on the failing Pipe beneath the plaintiff's Property.

After the plaintiff moved into the Property, the Property was flooded by overland flows of stormwater on nine occasions in one year, due to the Pipe becoming blocked, causing stormwater to back up on Appian Way and funnel down the plaintiff's driveway.

Council's duty to provide correct information in a planning certificate

There is a common law duty for councils to provide correct information in a planning certificate, a duty which is owed to potential purchasers of the Property the subject of the certificate.

The plaintiff alleged that the Council had breached its duty of care, as the Planning Certificate contained incorrect and misleading information concerning matters prescribed for the purposes of section 149(4) of EP&A Act. That subsection stated:

> *The regulations may provide that information to be furnished in a planning certificate shall be set out in the prescribed form and manner.*

Council incorrectly answered Question 7 of the Planning Certificate

At the relevant time, schedule 4 of the *Environmental Planning and Assessment Regulation 2000* (NSW) (**EP&A Regulations**) required that a planning certificate under section 149 contain certain information, including "*whether or not the land is affected by a policy adopted by the council … that restricts the development of the land because of the likelihood of … flooding.*" (**Question 7**).

Council's 2002 resolution related to negotiating or compulsorily acquiring an easement over the existing Pipe, and also referred to an easement being created in the future on the side boundary of the Property for drainage purposes. Council argued that this was not a "*policy*" for the purposes of Question 7.

The Court found that the word "*policy*" in Question 7 was not defined in the EP&A Act, and its meaning could not be elucidated by its statutory context. Its meaning must be given its ordinary English meaning, and in that regard, the Council's 2002 resolution was a "*policy*":

> *… in the sense of a broad plan of action with multiple components, some of them contingent upon others or upon the course of events, drawn up to address a significant and persistent stormwater management problem that affected a number of landowners and users of a public road in one part of a local government area.*

The Court also found that the policy did "*restrict the development of land*" as a drainage easement would preclude building any structure over the area affected by it. The restriction on development would be an inherent effect of the creation of the easements pursuant to the Council resolution.

Although the Council attempted to argue that the easements were not imposed "*because of the likelihood of flooding*", the Court was quite critical of the Council portraying the inundation as something other than flooding before the Supreme Court, whilst classifying it as flooding before the Land and Environment Court when opposing the plaintiff's development application.

Everyone (including the Council) who had spoken of the uncontrolled stormwater surface flow at Appian Way for the last 50 years had "*almost invariably referred to the risk associated with the under capacity pipe as a risk of 'flooding'*", including the Council itself in raising contentions in Class 1 proceedings in the Land and Environment Court when opposing the plaintiff's development application.

The Court therefore found that the restriction "*had everything to do with flooding*".

Breach of the duty to exercise reasonable care in issuing the Planning Certificate

In all of the above circumstances, the Council's answer of "No" to Question 7 was therefore found to be incorrect, and the Court held that it had negligently breached its duty to exercise reasonable care in issuing the Planning Certificate.

The Court found that it was not relevant "*whether Council took reasonable steps to maintain accurate records of policies that it had adopted or whether it followed a reasonable procedure for interrogating those records prior to issuing a certificate*", because the circumstances involved Council's own acts and/or decisions. In that regard, the Court stated:

> *The duty of care could not be discharged by the adoption of any system of keeping or searching records if, notwithstanding such system, Council failed to answer question 7 in a s 149 certificate with reasonable accuracy as to the existence of its own policy resolution that lay within its own repository of corporate knowledge.*

The Court held that all of the elements of a cause of action against Council for negligent misstatement in the Planning Certificate were established, ie the plaintiff's reliance upon the Planning Certificate and consequent damage.

No statutory defences available in relation to the negligent misstatement in the Planning Certificate

The Court found that section 43A of the *Civil Liability Act 2002* (NSW) was not applicable here, because the Planning Certificate was not issued in the exercise of a statutory power. Rather, it was issued pursuant to a statutory obligation, being the requirement in section 149(2) of the EP&A Act to issue a planning certificate.

Council also sought (unsuccessfully) to rely upon section 733(1)(a) of the *Local Government Act 1993* (NSW) (**Local Government Act**), which stated:

> *A council does not incur any liability in respect of—*
>
> *(a) any advice furnished in good faith by the council relating to the likelihood of any land being flooded or the nature or extent of any such flooding,*

The Court held that due to the difference in wording between Question 7 and section 733(1)(a) of the Local Government Act, the statutory immunity in section 733(1)(a) did not apply. The answer to Question 7 is advice concerning whether there was **any policy** of the description given by that question, rather than being advice "*relating to the likelihood of [the land] being flooded*".

Private nuisance for stormwater flooding caused by a public authority and the limits of the statutory defence of good faith

The plaintiff claimed that the repeated flooding of her Property by overland stormwater constituted private nuisance by a public authority. It was therefore necessary to consider whether, due to being a public authority, liability was excluded.

In relation to the nuisance claim, the Court found that the Council was liable for instances of overland flows of stormwater on to the plaintiff's Property because:

- The cause of the flooding was blockage of Council's pipe under the Property.
- Council's long delay, until mid-July 2013, in rectifying this blockage was the product of its own indecision and inaction.
- The plaintiff did not deny Council access to her land to repair the pipe.
- The plaintiff did not bear any responsibility for the flooding.

The Council's construction of drainage works on Appian Way in 2005 (which caused the flooding of the plaintiff's Property) were carried out pursuant to section 71 of the *Roads Act 1993* (NSW) and section 59A of the Local Government Act. Those sections do not exclude liability for nuisance.

The statutory defence section 733 of the Local Government Act also did not exclude liability, as the Council failed to prove that it had acted in good faith.

Statutory immunity under section 733 of the Local Government Act not applicable due to a lack of good faith

Council argued that section 733(1)(b) and (3)(e) and (g) of the Local Government Act provided a statutory immunity from liability in the circumstances. The onus is on the Council to prove the application of this statutory immunity.

Those subsections provide immunity from liability incurred in respect of "*anything done or omitted to be done **in good faith** by the council in so far as it relates to the likelihood of land being flooded or the nature or extent of any such flooding*" (emphasis added), including "*carrying out of flood mitigation works*" and "*any other thing done or omitted to be done in the exercise of a council's functions under this or any other Act*".

Justice Fagan held that Council had not discharged its onus of proving the defence in section 733, and Council was held liable to the plaintiff for the flooding damage. This was due to the requirement for good faith not having been met. For example, the Court found:

> *Council adduced no evidence capable of demonstrating good faith in its absurd decision to construct the junction pit in front of No 13 and to feed all stormwater run-off into it, when it knew that the outlet pipe was inadequate in both capacity and condition.*

The Court also found that although there was a necessity to address the drainage problem on Appian Way, Council had been told that its planned works in that regard, even if fully implemented, would still leave the system "*well below adequate capacity and not even sufficient for 1 year ARI rain events*". The Court found in relation to the works that were undertaken that "*Good faith cannot be shown in relation to the partial undertaking of a scheme that would achieve no useful object*".

Conclusion

The Council was found not only to have breached its common law duty to exercise reasonable care in issuing the Planning Certificate, but it was also found to be liable for the nuisance due to the repeated flooding of the plaintiff's Property. Due to its conduct over an extended period of time, the Court found that the Council could not rely on the statutory immunity in the Local Government Act as it had not acted with good faith.

This had significant financial consequences for the Council, which was ordered to pay over $2 million to the plaintiff, as well as the plaintiff's costs of the proceedings against it.

Councils need to be vigilant to ensure that any resolutions made relating to properties are properly recorded in a readily searchable form, in a system that would be interrogated for the purposes of preparing planning certificates. In this case, although the Council's 2002 resolution was not picked up in searches when the Planning Certificate was prepared, as it was the Council's own policy, within its corporate knowledge, the Council could not avoid its liability for negligent misstatement by reliance on its searching protocols.

Queensland decision-making framework under the Planning Act 2016 (Qld) does not assume that it is against the public interest to approve a development that conflicts with a planning scheme

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Wilhelm v Logan City Council & Ors* [2020] QCA 273 heard before Morrison, Philippides, and Mullins JJA

May 2021

In brief

The case of *Wilhelm v Logan City Council & Ors* [2020] QCA 273 concerned an application for leave to appeal under section 63 of the *Planning and Environment Court Act 2016* (Qld) to the Queensland Court of Appeal against a decision of the Planning and Environment Court (**P&E Court**) to dismiss a submitter appeal against the Logan City Council's (**Council**) approval of an impact assessable development application for a service station, shop, and food and drink outlet in Cornubia, Queensland.

Our summary of the judgment at first instance can be read here.

The Court of Appeal refused the application for leave to appeal. In doing so, the Court of Appeal stated that while the change in the decision-making framework under the *Planning Act 2016* (Qld) (**Planning Act**) has not affected the fundamental nature of a planning scheme as the reflection of the public interest in the appropriate development of land, it can no longer be said that approval of a development which conflicts with a planning scheme is, in general, against the public interest.

Proposed development

The subject land is located in the park living precinct of the rural residential zone of the *Logan Planning Scheme 2015* (**Planning Scheme**). The proposed development is for a 7-Eleven service station, shop, and food and drink outlet, which will operate 7 days a week, 24 hours a day, and that was approved by the Council in July 2018. The submitter appellant has a commercial interest in a BP service station located some 200 metres south-west of the subject land.

Proceeding at first instance

The main argument at first instance was that the proposed development does not comply with the centre provisions of the Planning Scheme and ought to be refused. In particular, it was argued that the application was seeking approval to locate centre activities on land included in the rural residential zone, which did not anticipate or encourage such activities. It was suggested that an approval would be contrary to an important forward planning strategy, which was that centre activities are to be located in designated centres.

The strategic intent for centres is set out in section 3.2.4 of the strategic framework as follows:

> *Logan has a hierarchy and network of interrelated centres comprising principal centres, major centres, district centres, neighbourhood centres, and specialised centres. Centres are vibrant, accessible and integrated places.*

Particular attention was given to section 3.5.1 of the Planning Scheme, which contains a description of each of the centre types and what a centre ought to contain. Section 3.5.8.1(1)(a) of the Planning Scheme sets out requirements for centre activities, including that they be located in a centre.

The P&E Court noted that, as a matter of construction, the Planning Scheme permitted uses which are centre activities to be located in out of centre locations. For example, no part of the rural residential zone code requires land uses comprising centre activities in the park living precinct to satisfy section 3.5.8.1 of the Planning Scheme. The P&E Court concluded that section 3.5.8.1 was aimed at new or expanded centres. In any event, the P&E Court concluded that the proposed development was not a "*new centre*".

The P&E Court also dealt with a submission by the submitter appellant that overall outcome 3(e)(i) of the rural residential zone code does not include the uses proposed by the development. However, the P&E Court concluded that "*discouragement*" from the proposed development ought not be assumed as a matter of implication or inference from the absence of encouragement, unless it was assumed that the provision covered the field of uses anticipated by the rural residential zone.

Ultimately, having weighed the relevant factors in favour of or against approval, the P&E Court concluded as follows:

> *Against the background of the above considerations, it is my view the public interest, in a planning sense, is not better served by refusing the development application. To refuse it would represent a triumph of form over substance. The form constitutes textual non-compliance with s.3.5.8.1 of the planning scheme. The substance involves a meritorious proposal.*

Grounds of appeal

On application for leave to appeal to the Court of Appeal, the submitter appellant asserted that the P&E Court erred in law, in the ways set out below.

Centre points

The submitter appellant asserted that the P&E Court erred in determining that the word "*centre*" meant a centre identified in the hierarchy and network of centres in section 3.5.1(1) of the Planning Scheme, and in determining that the proposed development would not constitute a centre for the purposes of section 3.5.8.1 of the Planning Scheme.

The Court of Appeal noted that the interpretation of the word "*centre*" must be construed in the context of all the provisions of the Planning Scheme (*Zappala Family Co Pty Ltd v Brisbane City Council* (2014) 201 LGERA 82; [2014] QCA 147 at [52]-[58]).

The Court of Appeal then proceeded to reject the submitter appellant's grounds of appeal for the following reasons:

- "*There is a consistency in the use of the concept of centre in the Scheme as one of the centres in the centre hierarchy*" (at [55]).
- "*[U]ses which are Centre activities can be undertaken outside of a centre that is in the centre hierarchy in accordance with the relevant zone code*" (at [55]).
- "*The literal meaning of s 3.5.8.1(1)(a)(i) that Centre activities must be located in a centre is displaced by taking into account the heading of s 3.5.8 (which is treated as part of s 3.5.8.1 pursuant to s 35C of the Acts Interpretation Act 1954), the entirety of s 3.5.8.1(1)(a), and considering the whole of s 3.5.8.1 in the context of the Scheme. As the heading indicates, the provision deals with new and expanded centres*" (at [57]).
- "*The word "centre" under the Scheme is therefore properly construed … as a reference to a centre in the centre hierarchy in s 3.5.1(1) or any new centre that is permitted pursuant to s 3.5.8.1, which is subject to the limitation in s 3.5.8.1(2) that no new principal centre or major centre other than shown on the relevant strategic framework map are created*" ([at 58]).

The Court of Appeal also rejected a submission by the submitter appellant that the P&E Court relied on evidence of two town planners to construe the Planning Scheme.

Rural residential zone point

The submitter appellant asserted that the P&E Court erred in concluding that the rural residential code did not discourage the proposed development.

The Court of Appeal rejected this ground of appeal. In so concluding, the Court of Appeal stated as follows (at [73]):

> *It is a compelling aspect of the primary judge's reasoning that non-residential uses, including Centre activities, are expressly contemplated for the [rural residential zone] under the [rural residential] Code and that uses are anticipated (as in PO7) which are not otherwise specified in the Overall Outcomes for the [rural residential zone]. It is also consistent with the structure of the table of assessment for the [rural residential zone] that a use that is not listed in the table is impact assessable against the Scheme …*

Public interest points

The submitter appellant asserted that the P&E Court erred in failing to carry out the assessment required by section 45(5) of the Planning Act on the assumption that an approval of the proposed development was not in the public interest.

The Court of Appeal noted that all of the parties relied on the approach in *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPELR 793; [2019] QPEC 16 to the decision-making required under section 60(3) of the Planning Act. However, the Court noted that there was a "*difference in emphasis*" between the parties as to the weight to be given by the decision-maker to compliance with the Planning Scheme.

The Court of Appeal rejected the submitter appellant's grounds of appeal. In doing so, the Court of Appeal stated as follows:

- The statement in *Gold Coast City Council v K & K (GC) Pty Ltd* (2019) 239 LGERA 409; [2019] QCA 132 at [67] that "*it is, in general, against the public interest to approve a development that conflicts with the Planning Scheme*" cannot be applied to the new regime for decision-making in respect of development applications under the Planning Act without modifying it for the effect of the new regime.
- The assessment required by section 45(5) of the Planning Act is not required to be carried out on the assumption that an approval of the proposed development would be against the public interest.
- Section 45(5) of the Planning Act does not involve "*two steps in the intellectual process that the section contemplates*". Section 45(5) refers to an assessment that is the one assessment that is carried out against the mandatory benchmarks under paragraph (a) and may be carried out having regard to any other relevant matter.
- As explained in *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257 at [43], "*the assessment manager's decision under section 60(3) of the Act based on the assessment carried out under section 45(5) depends on the weight given by the assessment manager to each of the matters that can be taken into account for the purpose of exercising the discretion either to approve all or part of the application … or to refuse the application*".

Conclusion

The Court of Appeal was not satisfied that any of the proposed grounds of appeal would succeed and refused the application for leave to appeal.

Enforcement notices issued to landowners who were alleged to have cleared vegetation on their property to protect against the risk of bushfires have been set aside by the Planning and Environment Court of Queensland

Liam Hanley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Serratore & Anor v Noosa Shire Council* [2021] QPEC 21 heard before Williamson QC DCJ

May 2021

In brief

The case of *Serratore & Anor v Noosa Shire Council* [2021] QPEC 21 concerned an appeal to the Planning and Environment Court against the decision of the Noosa Shire Council (**Council**) to issue enforcement notices to each of the seven Appellants (**Enforcement Notices**) for clearing vegetation on the subject land without a development permit for operational works (**Vegetation Clearing**).

The subject land is 41 hectares in size and forms part of an "*extensive tract of vegetated land*" (at [7]). It contains a dam and livestock and is improved with a dwelling, outbuildings, fences and an animal shelter. Each of the Appellants jointly owned the subject land but only three of the Appellants resided in the dwelling on the subject land.

The Vegetation Clearing involved the clearing of vegetation in 12 separate areas on the subject land. The purpose of the Vegetation Clearing was to "*create a series of bush fire access tracks and firebreaks/fire lines*" (at [9]). The Appellants acted upon recommendations from the local Rural Fire Brigade to establish firebreaks without delay.

The Court was required to determine the following issues:

- Whether the four Appellants who did not reside on the subject land (**Non-resident Owners**) were responsible for or had control over the Vegetation Clearing.
- Whether the Enforcement Notices were defective.
- Whether the Vegetation Clearing was assessable development.

Subject to the making of final orders in the appeal, the Court ruled that the appeal be allowed and each of the Enforcement Notices be set aside. The Court also refused the Council's submission to make orders and directions either varying the Enforcement Notices, or remitting the matter for new enforcement notices to be issued.

Each of the Non-resident Owners did not commit a development offence

Section 168(1) of the *Planning Act 2016* (Qld) (**Planning Act**) permits the Council to issue an enforcement notice to either:

- "*The person*" if the Council "*reasonably believes a person has committed … a development offence*" (section 168(1)(a) of the Planning Act); or
- "*The owner of the premises*" if the Council "*reasonably believes a person has committed … a development offence*" and "*the offence involves premises and the person is not the owner of the premises*" (section 168(1)(b) of the Planning Act).

The Enforcement Notices were drafted in identical terms and alleged that each Appellant "*had committed or are committing an offence pursuant to Section 168 of the Planning Act 2016 and in breach of the Noosa Plan*" (at [16]). The Enforcement Notices did not allege that the Appellants were liable by reason of their ownership of the premises.

The Respondent conceded in the hearing that each Non-resident Owner was not responsible for, nor had control over the Vegetation Clearing as required by section 168(1)(a) of the Planning Act. The Enforcement Notices issued to each of the four Non-resident Owners were set aside on this basis.

Enforcement Notices were defective

The Appellants contended that the Enforcement Notices had two defects. The first was a failure to "*sufficiently describe the nature of the alleged development offence believed to have been committed*". The second defect was a failure to provide "*[sufficient] details of the acts required to comply with the notice*" (at [29]).

Enforcement Notices failed to identify the nature of the alleged development offence

Section 168(3)(a) of the Planning Act required the Council to state "*the nature of the alleged offence*" in the Enforcement Notices. This required the Council to identify the nature of the alleged offence with "*precision*", and to "*identify the elements which constitute the offence*" (at [31] and *Benfer v Sunshine Coast Regional Council* [2019] QPELR 613; [2019] QPEC 6).

The Court found that the elements constituting the offence included both section 163(1) and (2) of the Planning Act, which relevantly state as follows:

> *(1) A person must not carry out assessable development, unless all necessary development permits are in effect for the development.*
>
> *…*
>
> *(2) However, subsection (1) does not apply to development carried out–*
>
> *(a) under section 29(10)(a); or*
>
> *(b) in accordance with an exemption certificate under section 46; or*
>
> *(c) under section 88(3).*

The Court provided three reasons why sections 163(2)(a) to (c) of the Planning Act constituted elements of the offence, rather than being exceptions or defences. The first was that section 163(2) of the Planning Act appears together with section 163(1), rather than as a separate and deemed exemption provision. The second was the Court's finding that section 163(2) of the Planning Act is directed at cases involving lawful development, rather than excusing unlawful development. The third was the Council's knowledge of the matters in section 163(2) of the Planning Act.

The Court found that the Enforcement Notices failed to answer the elements in section 163(2) of the Planning Act. In addition, the Court found that each Enforcement Notice failed to precisely identify the alleged offence, including (at [64]):

- "*When the offence occurred*".
- "*The facts relied upon to allege the offence was still being committed*".
- "*Why the clearing work constituted operational work as defined in the [Planning Act]*".

The Court held that each of these failures constituted defects in the Enforcement Notices.

Insufficient details were provided in relation to how the Appellants were to comply with the Enforcement Notices

The Enforcement Notices stated that each Appellant must:

> *1. Immediately cease clearing vegetation on the property….;*
>
> *2. Suitably stabilise the site to prevent movement of soils from the disturbed areas;*
>
> *3. Lodge an application for a Development Permit for Operational Works to reinstate removed vegetation;*
>
> *4. Undertake rehabilitation of the area cleared of vegetation.*

The Court found that the level of particularity fell well short of the standard required to prove the details of the act (at [69] and section 168(3)(c)(i) of the Planning Act). This was due to the generality in which the terms were drafted, the failure to identify the detail of the acts to be carried out, and the failure to "*identify any objective standard by which compliance can be measured*" (at [68]).

Carrying out Vegetation Clearing without a development permit was a development offence

The Council was required to prove the following for the Appellants to be found liable for committing a development offence (at [62] and [74]):

1. The works carried out was 'development'.
2. The 'development' carried out was 'assessable development'.
3. The 'assessable development' carried out was not authorised by all necessary development permits.

4. Any development permit authorising assessable development to be carried out had not taken effect at the time the development was carried out.
5. The assessable development was not carried out under an exemption certificate under section 46 of the Planning Act.
6. The assessable development was not carried out under section 29(10)(a) of the Planning Act.
7. The assessable development was not carried out under section 88(3) of the Planning Act.

The subject land fell partly under the Environmental Protection Area and partly under the Environmental Enhancement Area of the Biodiversity Overlay in the Noosa Plan (at [19] and [84]).

The Court was required to assess whether each cleared area was "*exempt clearing*", which would constitute accepted development rather than code assessable development under the Biodiversity Overlay Code. This in turn required consideration of "*whether, as an alternative to no clearing, the works significantly reduced the extent of clearing required to achieve the identified purpose/s*" (at [119]).

The Court found that the Vegetation Clearing was not exempt clearing, to the extent that the width of the clearing carried out exceeded what was reasonably necessary (at [132]). This included the width reasonably necessary to, amongst other things, protect fencing, allow access for emergency vehicles, permit access to dams and animal shelters, and protect the dwelling.

The Court ultimately found that the Vegetation Clearing was assessable development which had been carried out without a development permit. Despite the failure of the Appellants to establish this ground of appeal, this was of no consequence due to the Appellants' success in establishing grounds one and two.

Conclusion

Subject to final orders, the Court ruled that each of the Enforcement Notices be set aside. The Court refused to make orders and directions varying the terms of the Enforcement Notices or remitting the matter for new enforcement notices to be issued. It was conceded by the Appellants, with the agreement of the Court, that the Respondent may issue new enforcement notices to each Appellant if it "*holds the belief required by section 168(1) of the [Planning Act]*" (at [140]).

Queensland planning discretion exercised in favour of an impact assessable multiple dwelling development, which was non-compliant with the planning scheme

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Dreamline Development Corporation Pty Ltd v Brisbane City Council & Ors* [2021] QPEC 13 heard before Kefford DCJ

May 2021

In brief

The case of *Dreamline Development Corporation Pty Ltd v Brisbane City Council & Ors* [2021] QPEC 13 concerned an appeal by Dreamline Development Corporation Pty Ltd (**Dreamline**) to the Planning and Environment Court of Queensland (**Court**) against the Brisbane City Council's (**Council**) decision to refuse an impact assessable development application for multiple dwellings on a site located adjacent to a train line at 1 Trudigan Street, Sunnybank (**Site**).

The proposed development comprises the following (**Proposed Development**):

- 42 units comprised of 24 townhouses and an apartment building containing 18 apartments;
- underground basement carpark providing 100 carparks.

After noting the relevant decision framework and planning discretion, as discussed in recent judgments, the Court considered whether the proposed development complied with the *Brisbane City Plan 2014* (**City Plan**) and the relevant matters submitted by Dreamline, and ultimately decided that the appeal against the Council's decision to refuse the development application for the Proposed Development ought to be allowed.

Proposed Development was compliant with significant parts of the City Plan

Before addressing the matters of non-compliance, the Court noted the following aspects of the Proposed Development that were compliant with the City Plan, which were not disputed by Dreamline and the Council:

- The Proposed Development was located on a "*well-located site*" in accordance with Overall outcome (4)(c) of the Low Density Residential Zone Code (**LDRZC**) of the City Plan.
- The Proposed Development complied with various assessment benchmarks of the Multiple Dwelling Code of the City Plan, including site cover, height, dwelling density, communal open space, deep-planting areas, maximum length of a wall, front boundary setback, rear boundary setback for the proposed townhouses, site boundary setback, and building separation to external buildings.

Court agreed with Council's submission that there was non-compliance with the City Plan

The Council argued the Proposed Development was non-compliant with the following parts of the City Plan, which resulted in a development which was too intense for a low-density development:

- Overall outcomes (4)(a) and (b) of the LDRZC, which relate to:
  - the provision of dwelling houses on appropriately sized lots and the maintenance of a low density detached housing suburban identity; and
  - providing other housing types at house scale.
- Overall outcome (5)(a) of the LDRZC, which relates to the distinctive subtropical character of low rise, low density buildings.
- Overall outcomes (2)(e) and (g) of the Multiple Dwelling Code, which relate to the bulk, scale, form, and intensity of development and a lower density form.

- Performance outcome PO52 of the Multiple Dwelling Code, which is concerned with the relationship of the development with the lower intensity residential character of the Low Density Residential Zone.

The Court considered the non-compliance of the Proposed Development and determined that there was non-compliance with the following:

- Overall outcome (4)(b) of the LDRZC, as there was not sufficient evidence that the Proposed Development was at a "*house scale*".
- Overall outcome (5)(a) of the LDRZC and Overall outcomes (2)(e) and (g), and Performance outcome PO52 of the Multiple Dwelling Code, as the Proposed Development did not have a subtropical character of a low rise, low density building.

Dreamline relied on three relevant matters in support of the Proposed Development

Dreamline raised the following three relevant matters in support of the Proposed Development:

1. The high degree of compliance with the quantitative standards of the City Plan.
2. That the Proposed Development would deliver appropriately located infill development.
3. The absence of off-site adverse amenity impacts.

In relation to the first relevant matter relied on by Dreamline, the Court found that the matter was relevant to determining whether the Proposed Development ought to be approved, however, that the compliance with the City Plan was not enough, of itself, to warrant approval of the Proposed Development.

After considering expert evidence, the Court also accepted the second and third relevant matters relied upon by Dreamline as relevant matters which were in support of the Proposed Development.

Court exercised planning discretion in favour of approval

The Court, in exercising its planning discretion, noted the importance of residential density as a planning tool, but went on to state the following (at [89] to [90]):

> *… the subject land is well-located to provide easy access to high frequency transport, schools, essential services, community facilities, employment and goods and services … Although the proposed development is of a density higher than that planned under City Plan, it does not offend the broader planning goals that underpin allocation of land to the Low density residential zone.*

Conclusion

The Court held that the appeal against the decision of the Council to refuse the Proposed Development be allowed as, on balance, the lack of offence to the broader planning goals and the relevant matters justify the approval of the Proposed Development.

Planning and Environment Court of Queensland decides not to grant the declarations sought due to a lack of evidence

Alexa Brown | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Baker v Chief Executive, Department of State Development, Manufacturing, Infrastructure and Planning & Anor* [2021] QPEC 10 heard before Everson DCJ

May 2021

In brief

The case of *Baker v Chief Executive, Department of State Development, Manufacturing, Infrastructure and Planning & Anor* [2021] QPEC 10 concerned an originating application to the Planning and Environment Court (**Court**), which sought declarations and orders that a development application did not trigger or require assessment by the Chief Executive, Department of State Development, Manufacturing, Infrastructure and Planning (**DSDMIP**).

The Applicant submitted to the Bundaberg Regional Council (**Council**) a development application for a material change of use to increase the density of an existing tourist park (**Development Application**) located at 159 Mon Repos Road, Mon Repos (**Site**). The Site is mapped as within a "*wetland protection area*" and adjoins a wetland which is classified as being of high ecological significance under the *Environmental Protection Regulation 2019* (Qld).

The Applicant sought declarations from the Court that DSDMIP was not required to assess the Development Application because the Development Application did not trigger referral agency assessment in respect of a material change of use of premises in a wetland protection area under the *Planning Regulation 2017* (Qld) (**Planning Regulation**).

The Court ultimately determined that the Applicant did not provide sufficient evidence to support the Applicant's contention that the Development Application did not trigger referral agency assessment.

DSDMIP confirmed that it would assess the Development Application under the Planning Regulation 2017 (Qld) and subsequently directed that the Development Application be refused

The Court noted that the Development Application was assessed by DSDMIP under Schedule 10 (Development assessment), Part 20 (Wetland protection area), Division 4 (Referral agency's assessment), Table 3 (Material change of use of premises in wetland protection area), Item 1 (**Table 3**) of the Planning Regulation, which relevantly states as follows (emphasis added):

Table 3—Material change of use of premises in wetland protection area	
Column 1	***Column 2***
1 Development application requiring referral	*Development application for a material change of use that is assessable development under a local categorising instrument, other than a material change of use relating to a domestic housing activity, government supported transport infrastructure or electricity operating works, if—* *(a) all or part of the premises are in a wetland protection area; and* *(b)* ***the material change of use involves operational work that is high impact earthworks in a wetland protection area****.*
2 Referral agency	*The chief executive*

In constructing Table 3 of the Planning Regulation, the Court referred to the definition of "*operational work*" in Schedule 2 (Dictionary) of the *Planning Act 2016* (Qld) and "*high impact earthworks*" in Schedule 24 (Dictionary) of the Planning Regulation, which relevantly states as follows (emphasis added):

> ***operational work*** *means work, other than building work or plumbing or drainage work, in, on, over or under premises that materially affects premises or the use of premises.*
>
> ***high impact earthworks****—(a) means operational work that changes the form of land, or involves placing a structure on land,* ***in a way that diverts water to or from a wetland in a wetland protection area*** *…*

DSDMIP issued a Referral Confirmation Notice to the Applicant stating that DSDMIP would assess the Development Application under Table 3 of the Planning Regulation, and subsequently directed the Council to refuse the Development Application.

Applicant argued that DSDMIP was not entitled to assess the Development Application as the Development Application did not trigger or require assessment by DSDMIP

The issue before the Court was whether the operational work proposed in the Development Application involved the placing of a structure on land, in a way that diverts water to or from the wetland of high ecological significance adjacent to the Site.

Court was not directed to the evidence required to convince the Court to make the requested orders

In the application before the Court, the Applicant carried the onus of proving the matters necessary to the declarations it sought, and of persuading the Court that the declarations and orders should be made (*Kin Kin Community Group Inc v Sunshine Coast Regional Council & Ors* [2010] QPEC 144; [2011] QPELR 349 at 353).

The Court noted the following in respect of the evidence the Applicant provided to the Court to persuade the Court to make the requested orders:

- The Applicant gave "*no comprehensive analysis of the hydrological conditions underlying the site*", but did produce a report concerning bore holes drilled in October 1981 and October 2018, and the rate of percolation for the Site (at [11]).
- The evidence of the Applicant's engineer included the following (at [11]):

  > *Due to the high permeability of the upper sand layer, rain falling in the site will infiltrate directly into the sand rather than run across the surface. It will then move downwards until it reaches the clay layer at depth.*
  >
  > *It is the shape of the clay layer at depth that determines the catchment flowing to the wetland not the surface shape.*

- The Applicant's engineer was unable to identify the extent to which water entering the ground moved either to or from the adjacent wetland (at [12]).

The Court noted that the absence of a hydrological investigation meant that the Court was unable to confirm whether the Development Application would satisfy the definition of High impact earthworks, as there was a lack of evidence demonstrating whether water on the Site would move either towards or away from the protected wetland area should the proposed development the subject of the Development Application proceed.

Conclusion

As the Applicant did not discharge the onus of proving that the proposed orders and declarations sought from the Court ought to be made, being that DSDMIP was not required to assess the Development Application, the Court dismissed the application.

Supreme Court of Queensland dismisses an application for the disclosure of advice prepared by a barrister for his client, which was referred to in correspondence to encourage the other party to the dispute to accept an offer of settlement

Liam Hanley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Habermann v Cook Shire Council* [2021] QSC 101 heard before Henry J

June 2021

In brief

The case of *Habermann v Cook Shire Council* [2021] QSC 101 concerned an application by the Applicant to the Supreme Court of Queensland for an order that the Respondent disclose advice (**Advice**) given by counsel for the Respondent (**Counsel**) to his client, in circumstances where the Respondent's solicitors made reference to the Advice in correspondence with the Applicant (**Correspondence**).

The Correspondence from the Respondent to the Applicant stated as follows (at [5]):

> ***Without Prejudice, Save as to Costs***
>
> *…*
>
> *We have now received advices from Richard Morton of Counsel. Based on that advice, (which is consistent with our views of this claim) the [Applicant] is unlikely to establish that the [Respondent] is liable for her alleged psychiatric injury and even in the unlikely event that liability was established, quantum would not be awarded in the magnitude sought by your client.*
>
> *LGW has made its 'best offer' and will not make any further offers at mediation.*
>
> *[Redacted section, which it is common ground contained the terms of a settlement offer] …*

The application for disclosure was made under rule 223(1)(a) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), on grounds that there were "*special circumstances*" and the "*interests of justice*" required disclosure of the Advice to the Applicant (rule 223(4)(a) of the UCPR). It was agreed between the parties that the Advice was contained in a document (at [8]).

The Court was required to determine the following issues:

- Whether the Advice could be disclosed under rule 223 of the UCPR, in circumstances where the Advice was not directly relevant to an issue in the proceeding.
- Whether the Advice could be disclosed, notwithstanding that the Correspondence was entitled "*Without Prejudice, Save as to Costs*".
- Whether the Respondent waived legal professional privilege by making reference to conclusions contained in the Advice, without disclosing reasons for the conclusions.
- If legal professional privilege was waived, whether disclosure of the Advice was supported by special circumstances and the interests of justice required disclosure.

The Court found that the Advice could be disclosed, notwithstanding that the Advice was not directly relevant to an issue in the proceeding and that the Correspondence was entitled "*Without Prejudice, Save as to Costs*".

However, the Court dismissed the application on the basis that legal professional privilege was not waived in the Correspondence. For the same reasons, the Court also found that disclosure of the Advice was not supported by special circumstances, and disclosure was not required in the interests of justice.

Advice could be disclosed, notwithstanding that it was not directly relevant to an issue in the proceeding

Rule 223 of the UCPR is entitled "*Court orders relating to disclosure*" and relevantly states as follows:

> *(1) The court may order a party to a proceeding to disclose to another party a document or class of documents by–*
>
> *(a) delivering to the other party in accordance with this part a copy of the document, or of each document in the class;*
>
> *…*
>
> *(4) An order mention in subrule (1) … may be made only if–*
>
> *(a) there are special circumstances and the interests of justice require it …*

In contrast, rule 211(1) of the UCPR is entitled "*Duty of disclosure*" and requires disclosure where, amongst other things, a document is "*directly relevant to an allegation in issue in the pleadings*". Rule 211 and rule 223 of the UCPR are both contained within chapter 7 of the UCPR, which is entitled "*Disclosure*".

The Court noted that some provisions contained in chapter 7 of the UCPR required a consideration of whether the duty of disclosure in rule 211 of the UCPR had been complied with. However, the Court found that the wording of rule 223(4)(a) of the UCPR did not require compliance with rule 211 of the UCPR. This outcome was consistent with the objective of rule 5(2) of the UCPR to avoid undue delay in facilitating the resolution of the dispute.

The Court found that disclosure of the Advice "*may inform a decision whether or not to settle the proceeding*" (at [16]). This in turn informed a consideration of whether there were special circumstances and whether the interests of justice required disclosure.

The Court's finding that disclosure of the Advice "*may*" inform a decision by the Applicant to settle the proceedings, was a sufficient nexus for the Court to make an order for disclosure under rule 223 of the UCPR, but did not of itself indicate that special circumstances and the interests of justice had in fact been met.

Advice could be disclosed, notwithstanding that the Correspondence was entitled "Without Prejudice, Save as to Costs"

The Court noted that there was no absolute rule which restricted the disclosure of without prejudice communications (at [18] and footnote 4).

The Court found that the Applicant intended to use the Advice to "*fairly comprehend the force of the [R]espondent's offer to settle*". This was consistent with promoting the settlement of the dispute without breaching confidence, and did not of itself, preclude disclosure of the Advice (at [19] and *Pihiga v Roche* (2011) 278 ALR 209; [2011] FCA 240 [86]).

Respondent did not waive legal professional privilege in the Correspondence

The Applicant contended that "*it is unfair for the [R]espondent to use [C]ounsel's [A]dvice as a persuasive device in support of its settlement offer while depriving the [A]pplicant of access to that [A]dvice*". Rather, the Applicant intended to "*use the full content of the [A]dvice to fairly comprehend the force of the [R]espondent's offer to settle*" (at [17] and [19]).

The Court noted that disclosure of "*the effect of legal advice for forensic or commercial purposes may amount to a waiver of the confidentiality that attracts legal professional privilege*" (at [28] and *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 210 ALR 220; [2004] FCAFC 237).

This in turn required consideration of whether disclosure was "*inconsistent with maintaining the confidentiality the privilege serves to protect*", when viewed in light of the individual circumstances of the case (at [28]), *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66, and *Osland v Secretary, Department of Justice* (2008) 234 CLR 275; [2008] HCA 37).

The Court found that the Correspondence was used to encourage the Applicant to accept the Respondent's offer of settlement (at [31]) and that the Respondent's refusal to disclose the Advice placed the Applicant in a "*position of partial ignorance … in considering the merits of the [R]espondent's offer*" (at [34]). The Court also found that disclosure of the Advice was not inconsistent with maintaining the confidentiality of the Advice (at [37]).

However, the Court found that the Respondent's strategy to use the Advice to encourage settlement of the dispute was not unfair (at [32]). The Applicant's position was indifferent to, and offset by, the Respondent's position in meeting the Applicant's case and making offers of settlement.

The Court noted that a barrister's advice in relation to liability and quantum was premised upon the following considerations, and found that it was not unfair that the Respondent did not inform the Applicant of those matters to properly consider the offer of settlement (at [33]–[34]):

- *The law* – This is known between the parties.
- *The nature of the pleaded cases* – This is known between the parties.
- *The disclosed documents* – This is known between the parties.
- *The strength of the evidence likely to be adduced at trial* – This is a question of fact which ordinarily differs between the parties.

Alternatively in the event there was unfairness, the Court concluded that "*any such unfairness is so trivial that the circumstances fall well short of meeting the [test in rule 223(4)(a) of the UCPR]*" (at [32]).

The Court also found that the Correspondence "*sparsely*" disclosed Counsel's conclusions, which made it implausible that the Correspondence would have "*any material influence on the Applicant [and her legal representatives'] consideration of the offer*" (at [35]–[36]).

For the same reasons, disclosure of the Advice was not supported by special circumstances, nor did the interests of justice require disclosure of the Advice.

Conclusion

The Court dismissed the application on the basis that legal professional privilege was not waived, and disclosure of the Advice was not supported by special circumstances, nor was disclosure of the Advice required in the interests of justice.

Queensland Planning and Environment Court dismisses an appeal against the refusal of a development application to re-start a hard rock and sandstone quarry on the Sunshine Coast

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Barro Group Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 18 heard before Williamson QC DCJ

June 2021

In brief

The case of *Barro Group Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 18 concerned an appeal by Barro Group Pty Ltd (**Appellant**) to the Planning and Environment Court of Queensland (**Court**) against a decision by the Sunshine Coast Regional Council (**Council**) to refuse a development application requiring impact assessment seeking approval for a material change of use to re-start and materially increase the scale and intensity of a use involving the extraction of hard rock and sandstone on land situated at Beerburrum-Woodford Road, Beerburrum.

The Court dismissed the appeal on the basis that the proposed development resulted in unacceptable traffic impacts, amenity impacts and ecological impacts.

Subject land

The subject land holds a valuable extractive resource in the order of 15 million tonnes of high quality quarryable material, including aggregates, road-based materials and sandstone. The site has historically been used for extraction purposes, and there are two identifiable extraction pits on the site; one for gravel and one for sandstone.

The nearest residential dwellings to the site are located approximately 1.2 kilometres to the east and south-east of the site. The site is surrounded by a forestry road network and areas of pine plantation.

Beerburrum-Woodford Road is about 405 metres to the south of the site, and is a State controlled road. Beerburrum-Woodford Road intersects with Beerburrum Road about two kilometres to the east of the site, which is also a State controlled road. Beerburrum Road passes through the Beerburrum township, which was described as a "*very low key village*" (at [29]).

Proposed development

The proposed development was for the extraction of quarryable material. The operational footprint of the proposed development would be approximately 22.8 hectares, and would include facilities associated with these activities, including a site office, an amenities building and a weighbridge.

The extraction would occur in a progressive fashion from west to east, with operating hours from 6.00am to 6.00pm on weekdays, and 7.00am to 1.00pm on Saturdays. The extraction would involve numerous activities, including drilling and blasting exposed underlying rock, transporting extracted raw material, crushing and screening of raw material and stockpiling the final product for transportation off-site. It is proposed that the extraction area be rehabilitated, where practicable.

During the hearing of the appeal, it was accepted by the Appellant that a condition of approval for the proposed development would be to limit the maximum tonnage of quarry material hauled from the site in any rolling 12 month period to one million tonnes.

The Court recognised that the quarry is of "*significant value to the community*" and that "*it is in the community's interest that a proven deposit of quarryable material of high quality be availed of wherever possible*" (at [4]).

Issues in dispute

In addition to contending that there was no need for the proposed development at this time, the Council contended that the Appellant failed to demonstrate that the proposed development could effectively mitigate, or be conditioned to effectively mitigate or manage, the impact of:

- the proposed development on the safe and efficient operation of the road network;

- the proposed haul route on the amenity and character of adjoining development; and
- the proposed development on the ecological values of the site.

Traffic impacts are unacceptable

The Appellant proposed access to the extraction area via an existing unsealed forestry track. The Council contended that the Appellant had not demonstrated that vehicle access to and from this road is safe and adequate. In particular, there was a dispute regarding whether the access would have an appropriate geometry to permit safe operation, and whether a sufficient sight distance would be achieved.

The Court relevantly found as follows:

- The Appellant's traffic expert did not demonstrate a deliverable proof of concept and there were shortcomings with the swept path diagrams, including that the width of the access was too narrow to permit two trucks to simultaneously enter and exit the site.
- The Council's planning scheme required the design of the site access to be "*safe, convenient and legible*". Although the Appellant contended that the design of the access is a matter for conditions, the Court stated that the information provided by the Appellant ought to be sufficient for a judgment to be made about whether the site access will comply, or can be conditioned to comply.
- The access ought to be treated as an intersection as a result of the Appellant having not presented evidence to demonstrate that it ought to be treated as a driveway. Of significance was that the access would need to be constructed to a standard higher than a driveway.
- The Court accepted the Council's traffic expert's evidence in relation to sight distance, and stated that the distance of 248 metres could not be achieved absent considerable earthworks and the clearing of vegetation along the edge of the road reserve.

The Court concluded that the Appellant did not demonstrate that the traffic engineering impacts would be acceptable, and that the application ought to be refused for that reason alone, particularly as they go to matters of public safety.

Haul route will have a significant adverse impact

The Council contended that the haul route for heavy vehicle trucks was unsuitable given the potential for adverse impacts on adjoining development, including the Beerburrum township. The importance of this reason for refusal was confirmed by two strategic outcomes in the Strategic Framework of the Planning Scheme, which required that there be no significant adverse amenity or environmental impacts, and that any adverse amenity impacts can be effectively mitigated.

The proposed haul route would traverse the Beerburrum-Woodford Road and Beerburrum Road, six days per week over 15 hours, and through the main street of the Beerburrum township. The Beerburrum township was described as an "*attractive main street with a high standard of amenity*" that appeals to "*residents, visitors and tourists alike*" (at [120]).

The Court relevantly found as follows:

- Irrespective of significant errors in the calculations used by the Appellant's acoustics expert, which were corrected during the trial, the evidence did not establish that the noise impacts from the use of the haul route would be acceptable having regard to an empirical noise assessment.
- The proposed development would result in one quarry truck every three minutes, assuming one million tonnes per annum is extracted. This could be higher in the event there is a campaign undertaken to meet a short-term spike in demand for hard rock resources.
- The impact would be appreciable and represent an adverse disturbance on the character and sense of place enjoyed in the main street of the Beerburrum township, and the impact cannot be avoided, nor can it be sufficiently mitigated and managed by conditions.

The Court concluded that the evidence established that the increase in truck movements on the road network attributable to the proposed development will have a significant adverse impact on the character and amenity of the main street of the Beerburrum township.

Ecological impacts are unacceptable

The proposed development would result in the clearing of 15.3 hectares of remnant vegetation, which provides habitat resources for a diversity of fauna species, including old growth hollow bearing trees.

The Court gave considerable attention to section 3.7.2.1(c)(ii) of the Strategic Framework of the Planning Scheme, which required the following question to be examined: can the adverse impacts on the ecologically important area be compensated by the provision of a biodiversity offset that results in a net gain and enhancement to the overall habitat values of the Sunshine Coast?

The Court referred to a condition imposed by the concurrence agency that would require environmental offsets. However, the Court was not satisfied that the condition met the requisite test in section 3.7.2.1(c)(ii) of the Strategic Framework. In the Court's view, the ecological evidence established no more than that the assessment of any specific net gain or enhancement could be deferred until after an approval has issued.

In support of this, the Court at [192] quoted evidence from the Council's town planner:

> *… it would be … a leap of faith to say, 'We will offset the loss of the vegetation with some area.' We don't know where, we don't know how much. Is it going to be in the Sunshine Coast area, in the local government area? How much of the land? How can they provide the net gain? What if the offset options they bring forward don't meet the net gain test? Then the approval's worth nothing, isn't it?*

Consequently, the Court was not satisfied that the Appellant had addressed the ecological impacts of the proposed development in a manner that demonstrated compliance with the Planning Scheme.

Conclusion

The Court was not satisfied that the public interest in winning the proven resource should prevail in the face of the adverse amenity, character, and ecological impacts, and the non-compliance with the Planning Scheme that follows by reason of these impacts.

Queensland Planning and Environment Court refuses a proposed childcare centre because of unacceptable traffic impacts, and a lack of need or other relevant matters supporting approval

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Nadi Lane Projects 1 Pty Ltd v Brisbane City Council* [2021] QPEC 5 heard before Everson DCJ

June 2021

In brief

The case of *Nadi Lane Projects 1 Pty Ltd v Brisbane City Council* [2021] QPEC 5 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the deemed refusal by the Brisbane City Council (**Council**) of the Applicant's impact assessable development application for a material change of use for a childcare centre (**Proposed Development**) on land at 1019 to 1021 Waterworks Road, the Gap.

The Court determined the following issues:

- *Traffic and servicing impacts* – Whether the Proposed Development had unacceptable traffic and servicing impacts arising from the location of the access driveway and the proposed refuse collection arrangement.
- *Local community need* – Whether the Applicant demonstrated that there was a local community need for the Proposed Development.
- *Relevant matters* – Whether the location of the Proposed Development, a local community need, a planning need, and the compliance with the applicable assessable benchmarks in the *Brisbane City Plan 2014* (**Planning Scheme**) by way of conditions would justify approval of the Proposed Development.

Court finds that the Proposed Development did not provide safe access and would cause an adverse impact on the efficiency and safety of the transport network

The land the subject of the appeal is located opposite The Gap State High School and has frontages to Waterworks Road and Pammay Street. Access to the Proposed Development was only to be via Pammay Street. Along the Pammay Street frontage is a loading zone, which is a pick up and set down area for students who attend The Gap State High School.

In considering the impact of the traffic likely to be generated by the Proposed Development on the already congested Pammay Street, the Court considered the evidence presented by the parties' experts and accepted the Council's expert who observed that the peak hours in the morning for the Proposed Development were likely to coincide with, or at least considerably overlap, the Gap State High School peak hours and commuters' peak hours.

The Court further accepted the Council's expert's evidence that "*there was 'just no opportunity' for vehicles to turn out of the proposed driveway into Pammay Street towards the intersection with Waterworks Road and that this could lead to a dangerous situation*" (at [20]). The Court noted that egress from the Proposed Development during the peak hours would be problematical given the proximity of the proposed driveway to the traffic signals at the intersection with Waterworks Street. In addition, the loading zone would be shortened by the proposed driveway from 25 metres to 12 metres resulting in a loss of one vehicle space, which the Court found unacceptable.

The Court noted a further impact in the vicinity of the loading zone where eight wheelie bins had been proposed to be collected two to three times a week from the curb adjacent to the loading zone. The Court found that a development condition could not be imposed to ensure that the effectiveness of the loading zone was not further compromised by the regular presence of a number of wheelie bins.

The Court therefore concluded that the Proposed Development did not provide safe access and would cause an adverse impact on the efficiency and safety of the transport network. Further, the regular presence of wheelie bins would diminish amenity by impeding pedestrian access in the congested area, resulting in unacceptable impacts contrary to the relevant provisions of the purpose and relevant performance outcomes of the Transport, Access, Parking and Servicing Code in the Planning Scheme.

Court was not satisfied that there was a local community need for the Proposed Development

The Court noted that in calculating any demand for the Proposed Development, it was necessary to include approved but not yet available childcare centres and that based on the calculation by the Applicant's expert there would be a short supply of childcare places by 35 places in 2031, at which the Proposed Development would be likely to operate.

The Court noted that the demand for the Proposed Development was well less than half of 67 places which was proposed to be provided, and accepted the Council's expert that "*any demand for additional places could be readily accommodated by incrementally increasing numbers at existing [childcare] centres.*" (at [27]).

Accordingly, the Court was not satisfied that there was a local community need for the Proposed Development as required by the relevant provision (section 6.2.1.1.4.k) of the Low Density Residential Zone Code in the Planning Scheme.

Court finds that the relevant matters did not warrant approval of the Proposed Development

The Court noted that any benefits flowing from the location of the Proposed Development were offset by the traffic and servicing impacts on Pammay Street. Also, the Proposed Development could not be conditioned to comply with the relevant assessment benchmarks in the Planning Scheme.

Conclusion

The Court dismissed the appeal.

Applications to modify a development consent in New South Wales cannot be amended prior to determination

Mollie Matthews | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 heard before Meagher and Leeming JJA, and Preston CJ

June 2021

In brief

The case of *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 concerned an appeal to the New South Wales Court of Appeal against a decision of the New South Wales Land and Environment Court (**Land and Environment Court**) to allow the Hunter Thoroughbred Breeders Association to join proceedings relating to an application to modify a development consent for the Dartbrook underground coal mine (**Appeal**).

The issue of joinders has in recent years been considered in a number of decisions of the Land and Environment Court, but this article will focus on the following two points discussed in the Appeal in the judgment of Preston CJ, which will potentially have far-reaching impacts for other modification applications before consent authorities, including the Land and Environment Court:

1. Whether an applicant for a modification application can amend the modification application before it is determined.
2. Whether the grant of a development consent can have the effect of modifying another development consent.

These two points were not decided in the majority judgment of Meagher and Leeming JJA, therefore the judgement of Preston CJ, while relevant and persuasive, is strictly speaking not binding.

1. Can an applicant amend a modification application before it is determined?

Meagher and Leeming JJA found that it was inappropriate to address this question as it had been common ground between the parties, and in the Land and Environment Court below, that the power to amend the modification application did exist.

The Land and Environment Court received incomplete submissions on the point, which was also not fully argued before the Court of Appeal.

Nevertheless, Chief Justice Preston's views on the issue were clearly expressed in his judgment. At [227], his Honour states:

> *I find that, contrary to the assumption of the parties, **there is no power to amend** a request or **an application to modify a development consent** or an approval, so that no question arises as to the scope of the power to allow the amendment of the request to modify the development consent sought by Dartbrook and the Minister.* (emphasis added)

The four reasons provided for his Honour's position are summarised below.

First, there is no express or implied authority in the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) allowing an **applicant** to amend its modification application.

While clause 55 of the *Environmental Planning and Assessment Regulation 2000* (NSW) (**EPA Regulation**) provides the ability to amend a development application prior to determination, there is no equivalent provision for modification applications. His Honour stated at [234]:

> *The nature and extent of the entitlement to apply to modify a development consent or an approval and the constraints on the exercise of the power to modify a development consent or an approval are delineated by the terms in which the statutory provisions create the entitlement and the power … The statutory provisions … are currently ss 4.55 and 4.56 of the EPA Act for development consents granted under Part 4 of the EPA Act.*

An applicant would therefore need to withdraw the modification application and make a new application requesting the different modification now sought.

Furthermore, Preston CJ stated at [239]:

> *The power to modify a development consent or an approval must be exercised in relation to the particular modification sought in the particular application or request that has been made to the relevant decision maker.* ***An exercise of the power will not be valid unless it constitutes a determination of that application*** *or request …* (emphasis added).

Second, there is also no express or implied power in the EPA Act for a **consent authority** to allow a modification application to be amended prior to determining the application.

Third, the Land and Environment Court also has no power to allow an applicant to amend its modification application prior to determination as the Court metaphorically stands in the shoes of the consent authority when determining an appeal against a consent authority's determination of a modification application.

In that regard, the Court has "'*all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal': s 39(2) of the [Land and Environment] Court Act.*" This "*does not give the Court any function or discretion to allow an applicant to amend the application or request to modify the consent or approval.*" (at [256]).

Fourth, for completeness, Preston CJ also considered other potential sources of power to amend a modification application prior to determination. While section 64 of the *Civil Procedure Act 2005* (NSW) and Part 19 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) apply to Class 1 appeals in the Land and Environment Court, "*these provisions do not authorise amendment of documents that are not documents of the kind to which the provisions apply.*" (at [260]).

Section 64 of the *Civil Procedure Act 2005* (NSW) relates to amending documents "*in the proceedings*" (eg originating process, pleadings, subpoenas etc). Preston CJ distinguished an amending document from a modification application, which is a document "*brought into existence before the proceedings are commenced ...*" (at [261]).

Part 19 of the UCPR also does not allow a modification application to be amended. Rather, it authorises specific types of amendments such as an amendment to a statement of claim or adding or removing parties.

Implications for granting leave to amend modification applications

Although Preston CJ's comments were obiter, they raise important questions as to the power of Commissioners to grant leave to amend modification applications.

While Preston CJ disagreed with Craig J's previous statutory interpretation of this point in *Jaimee Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 245, the outcome anticipated by Craig J will nevertheless be the result, unless there is legislative change to address the points raised by Preston CJ. In that regard, in *Jaimee Pty Ltd v Council of the City of Sydney*, Craig J stated the following at [28]:

> *[E]xtraordinary administrative rigidity would be imposed if, upon examination of an application for modification, some apparent error or omission was discovered that was easily rectifiable but, nonetheless could not be rectified by amendment, necessitating the lodgement of an entirely new application.*

It would also significantly constrain the ability to reach agreement at section 34 conciliation conferences, if the proceedings involve a modification application and there was no scope for an applicant to offer to amend its application. As stated by Meagher and Leeming JJA at [27]: "*The legislative purpose of s 34 is, where possible, to avoid the need for litigation.*"

2. Development consent can modify a separate development consent

In explaining that the entitlement of an applicant to amend its modification application prior to determination did not exist, Preston CJ also commented on the possibility that a development can modify a previously granted consent. In that regard, Preston CJ stated the following at [232]–[233]:

> *[T]he grant of another development consent may have the consequence of effecting a modification of the original development consent in two ways. First, the second development consent may be* ***granted subject to a condition requiring the modification or surrender of the original development consent*** *(under originally s 91(7) and later s 80(1)(b) and (5) and currently s 4.17(5) of the EPA Act). Second,* ***even without a condition requiring modification, the terms in which the second development consent is granted and the carrying out of development in accordance with the second development consent may have the consequence of effecting a variation of the original consent****: Gordon & Valich Pty Ltd v City of Sydney Council at [17]; Auburn Municipal Council v Szabo (1971) 67 LGRA 427 at 432-433.*

> *There is nothing to prevent a person having two development consents to carry out development on the same land ...* ***The two development consents applying to development on the same land need to be read together to ascertain the development that is authorised to be carried out on the land****: Pilkington v Secretary of State for the Environment (1973) 26 P&CR 508 at 512-513; [1974] 1 All ER 283 at 287.* (emphasis added).

Relevant parties will need to go through the exercise of reading the "mosaic" of development consents together, which will inevitably cause difficulties in ascertaining how a development is to be carried out and also potentially the conditions that regulate the development, where multiple development consents apply to a single piece of land or there are apparent contradictions between the development consents applying to a single piece of land.

Conclusion

Preston CJ's judgment shines a light on a gap in the legislation for what is widely known to be a facultative power – ie the power to modify a consent.

As mentioned above, we anticipate that Preston CJ's judgment will have significant impacts on the ability of parties to reach an agreement at section 34 conciliation conferences where the appeal relates to modification applications.

Chief Justice Preston's judgment also has the potential to affect modification applications recently approved, if these have included amendments to the application before determination. That would include modifications applications determined by any consent authority, including the Land and Environment Court.

However, we also note that there is a limited window of three months to question the validity of a development consent in any legal proceedings (section 4.59 EPA Act).

Given the above, one would expect to see legislative changes introduced addressing this, possibly introducing an equivalent to clause 55 of the EPA Regulation dealing with modifications.

Federal Court of Australia finds that the water trigger under the EPBC Act applies to the North Galilee Water Scheme Infrastructure Project

Jessica Day | Nadia Czachor | Ian Wright

This article discusses the decision of the Federal Court of Australia in the matter of *Australian Conservation Foundation Incorporated v Minister for the Environment* [2021] FCA 550 heard before Perry J

June 2021

In brief

The case of *Australian Conservation Foundation Incorporated v Minister for the Environment* [2021] FCA 550 concerned an application to the Federal Court of Australia (**Court**) brought by the Australian Conservation Foundation Incorporated (**ACF**) against the Minister for the Environment (Cth) (**Minister**) for judicial review of a decision of the Minister's delegate (**Delegate**) under section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

The Delegate decided under section 75 of the EPBC Act that a proposed action referred by Adani Infrastructure Pty Ltd (**Adani Infrastructure**) comprising the North Galilee Water Scheme Water Infrastructure Project (**Proposed Action**) was a controlled action and that sections 24D and 24E of the EPBC Act, which are called the "water trigger", were not controlling provisions for the purposes of the EPBC Act (**Decision**). The Decision was made on remittal by the Delegate because of an earlier controlled action decision that was set aside by the Court.

The Proposed Action was for the construction and operation of infrastructure to harvest and store up to 12.5 gigalitres of water from the Suttor River in Central Queensland to provide an alternative water supply to the Carmichael Coal Mine and Rail Project, which included approval under the EPBC Act for water to be supplied from the Belyando River flood harvesting structure. The Belyando River is the main tributary of the Suttor River.

The key issue for the Court's determination was whether the Delegate had erred in construing sections 24D and 24E of the EPBC Act in making the Decision, in particular whether:

- the textual and contextual considerations of sections 24D and 24E support a narrow construction so as to exclude the Proposed Action for the purposes of those provisions;
- the penal nature of the provisions supports a narrow construction of sections 24D and 24E;
- in construing sections 24D and 24E, it is relevant that the Minister is able to impose and vary conditions for approval under the EPBC Act.

Ultimately, the Court found that the Delegate had erred in deciding that sections 24D and 24E of the EPBC Act were not controlling provisions in respect of the Proposed Action and so granted the ACF's application for judicial review, set aside the Decision to the extent sections 24D and 24E were determined not to be controlling provisions, and remitted the Decision to the Minister to be remade according to law.

Court finds that the textual and contextual considerations of sections 24D and 24E of the EPBC Act do not support a narrow construction of the provisions

Sections 24D and 24E of the EPBC Act prohibit the taking of an action that involves coal seam gas development or large coal mining development if the action has, will have, or is likely to have a significant impact on a water resource unless, among other things, an approval for the taking of the action is in operation under the EPBC Act.

The Delegate construed, and Adani Infrastructure submitted in support of the Delegate's construction, that the phrase "*action*" that "*involves*" "*coal seam gas development*" or "*large coal mining development*" is limited to an activity that physically extracts "*lumps of coal from the ground*". The Court rejected this construction on the basis that it created artificial distinctions and did not have regard to the language and context of sections 24D and 24E.

The Court held at [92] that the word "*involves*" was intended to convey a looser connection between an action and the specified developments than if the action was, for example, intended by Parliament to "*be part of*" a specified development.

The Court considered the definition of large coal mining development, in particular, the words "*any coal mining activity*", and held at [93] as follows:

> *In line with orthodox principles of statutory construction, all of these words must be given meaning and effect: Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at [71]. In this case, as ACF submits, to confine the phrase "coal mining activity" to "the process of extracting coal from a mine" as construed by the delegate leaves no work for the word "activity" to do. Yet the use of the word "activity", especially when combined with the word "any", is strongly indicative of an intention to capture a broad range of activities within the concept of a large coal mining development and certainly those so closely associated with the mining of coal that mining could not be undertaken without the activity in question.*

The Court held at [94] that a broader construction of sections 24D and 24E was consistent with the purpose of the EPBC Act to "*regulate large coal mining developments and their impacts on water resources*". In so finding, the Court had regard to the Second Reading Speech to the Bill which inserted sections 24D and 24E, and found at [98] that "*the mischief to which ss 24D and 24E are directed does not support a narrow construction of the water trigger controlling provisions adopted by the [D]elegate*".

In considering the consequences of a narrow construction of sections 24D and 24E, the Court held at [103] as follows:

> *[I]f the impact on water resources at the time of the original approval was regarded as a matter of national environmental significance, there is no reason why it would lose that significance merely because the issue arose subsequently in relation to an alternative water source. That would undermine the objects of the EPBC Act in s 3(1) and the purpose of the water trigger controlling provisions as elucidated by the Minister in the 2013 Second Reading Speech.*

Finally, in support of a broad construction of sections 24D and 24E, the Court referred at [105] to the opinions of Barwick CJ, McTiernan, and Menzies JJ in the case of *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (1969) 120 CLR in which their Honours agreed that "*mining operations*" covers "*any work done on a mineral-bearing property in preparation for or as ancillary to the actual winning of the mineral*".

Court finds that it is unnecessary to narrowly construe sections 24D and 24E of the EPBC Act containing civil and criminal penalties

Adani Infrastructure submitted that where there was ambiguity as to the meaning of sections 24D and 24E the provisions should be construed narrowly because sections 24D and 24E attracted potentially significant civil and criminal penalties.

Adani Infrastructure's submission was made in reliance on the observations of Gibbs J (as His Honour then was) in *Beckwith v The Queen* (1976) 135 CLR 569 that relevantly "*[i]n determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous … doubt may be resolved by refusing to extend the category of criminal offences*".

The Court held that it was unnecessary to construe the provisions narrowly because, read in context the meaning of sections 24D and 24E was clear. The Court relevantly observed at [108] as follows:

> *[I]t cannot only be said that the presumption is "slight", as Adani Infrastructure accepts; it loses any real force in the context of the particular legislative scheme created by the EPBC Act. By their very nature, the controlling provisions containing civil penalty and criminal offences will generally, if not inevitably, involve complex and evaluative scientific assessments of environmental impacts. In the case of water impacts from large coal mining developments and coal seam gas extraction, this is reflected in the creation of the Expert Committee and the strict requirements as to the expertise of its members.*

Court finds that general provisions dealing with the variation of conditions of an existing approval under the EPBC Act does not support a narrow construction of sections 24D and 24E of the EPBC Act

Adani Infrastructure submitted that the operation of section 143 of the EPBC Act, which confers a discretion on the Minister to revoke, vary, or add to the conditions attached to an approval under the EPBC Act, supported a narrow construction of sections 24D and 24E.

The Court rejected Adani Infrastructure's submission given the "*compelling textual and contextual considerations*" of sections 24D and 24E.

Conclusion

The Court granted the ACF's application for judicial review and set aside the Decision to the extent sections 24D and 24E were determined not to be controlling provisions in respect of the Proposed Action, and remitted the Decision to the Minister to be remade according to law.

Satisfying credit obligations under the NSW Biodiversity Offset Scheme

Mark Evans

This article considers some of the options available to proponents of development to satisfy biodiversity offset credit obligations under the NSW Biodiversity Offset Scheme

June 2021

In brief

Taking the path of least resistance and paying into the BCT Fund is often the most expedient but might not always be the preferred option for developers. This article considers some of the options available to proponents of development to satisfy biodiversity offset credit obligations.

Under the NSW Biodiversity Offsets Scheme, a consent authority imposes conditions in a development consent creating a biodiversity offset credit obligation on the proponent of the development.

The consent authority will assess the applicant's Biodiversity Assessment Report against the legal and technical requirements of the *Biodiversity Conservation Act 2016* (**BC Act**), *Biodiversity Conservation Regulation 2017* and the Biodiversity Assessment Method and has the discretion to increase or decrease the credit obligation generated by the proponent's Biodiversity Assessment Report.

Once the consent authority has granted the consent including the credit obligation, proponents can satisfy their obligation to offset credits in one of two ways:

- **Find and retire credits** – proponents can identify and purchase the required 'like for like' credits in the market and then retire those credits. For example, credits could be found by using public registers or through a broker; or
- **Pay into the fund** – proponents can use the offsets payment calculator to determine the cost of the credit obligation, and transfer this amount to the Biodiversity Conservation Fund (**Fund**). The Biodiversity Conservation Trust (**BCT**) is then responsible for identifying and securing the credit obligation.

Section 6.30 of the Act provides for "Payment as alternative to retirement of biodiversity credits":

> *A person who is required under this or any other Act (including under an instrument, approval or agreement) to retire biodiversity credits may satisfy that requirement by instead paying an amount into the Biodiversity Conservation Fund determined in accordance with the offsets payment calculator ...*

BCT corresponding obligation to secure offsets

Section 6.31 of the BC Act imposes a "Corresponding obligation to secure required biodiversity offsets" on the BCT:

> *The Biodiversity Conservation Trust is to apply the amount paid into the Biodiversity Conservation Fund under this Division towards securing biodiversity offsets determined in accordance with the regulations in substitution for the relevant number and class of biodiversity credits otherwise required to be retired.*

Why not just pay into the Fund?

It's faster, but more expensive.

The cost of the credit obligation that must be paid by the proponent is determined by the offsets payment calculator. When paying directly into the Fund, the cost of the credit obligation will be increased by a "risk premium" applied to the applicable market credit price. The cost of paying into the Fund will thus always be higher than sourcing and retiring credits at the applicable market price (or other price negotiated with the credit holder). The "risk premium" applied by the BCT represents an amount payable for cost recovery of the BCT in connection with securing offsets as well as a risk management premium to allow for the risk that the BCT cannot find 'like for like' credits.

Satisfying credit obligation

When the proponent has completed these steps for all credits that the proponent is required to retire, they can proceed with their activity in accordance with their approval. The consent authority is responsible for ensuring compliance with credit obligations, and any other conditions of the consent or approval.

South Australian Environment, Resources and Development Court finds in respect of the new planning regime that "misconduct" warranting an award of costs does not include conduct that is open to a party in the provisions of the statute

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Environment Resources and Development Court of South Australia in the matter of *McGregor & Anor v Clare and Gilbert Valleys Council & Anor* [2021] SAERDC 6 heard before Judge Durrant

June 2021

In brief

The case of *McGregor & Anor v Clare and Gilbert Valleys Council & Anor* [2021] SAERDC 6 concerned an application for costs to the Environment, Resources and Development Court of South Australia (**Court**) premised on an allegation that the second respondent (**Respondent**), who was the holder of a development plan consent (**Consent**) granted under the *Development Act 1993* (SA) (**DA Act**) by the Clare and Gilbert Valleys Council (**Council**), had engaged in "*misconduct*" within the meaning of section 29(6a) of the *Environment, Resources and Development Court Act 1993* (SA) (**ERD Court Act**).

Subject to section 29(6b) of the ERD Court Act, which states that "*no order for costs is to be made … unless the Court considers such an order to be necessary in the interests of justice*", section 29(6a) of the ERD Court Act allows the Court to make an order for costs against a party in favour of any other party to proceedings, where the Court considers the first party to have engaged in misconduct.

The Applicants' alleged that the Respondent's conduct in proceedings, which sought a review of the categorisation of the development the subject of the Consent and an appeal against the grant of the Consent (**Planning Appeal**), suggested that the Respondent sought to delay the decisions of the Court until the Respondent had considered its position under the *Planning, Development and Infrastructure Act 2016* (SA) (**PDI Act**), which had repealed the DA Act.

The Court had regard to the nature of the Planning Appeal and the intention of the Parliament in creating the PDI Act. The Court took a liberal approach to the construction of the words of the provisions of the relevant legislation and applied the ordinary dictionary meaning of "*improper conduct or wrong behaviour*" to "*misconduct*" under section 29(6a) of the ERD Court Act.

The Court relevantly held the following and dismissed the application for costs:

- The DA Act and PDI Act both allow an applicant to amend, vary, or bring multiple development applications.
- Seeking to retain or obtain a development approval and pursuing legal rights in respect of a development approval is a proper purpose.
- The Court is inclined to adjourn proceedings:
  - where it is consistent with the achievement of just outcomes;
  - where parties to a proceeding are attempting to achieve a settlement; and
  - to enable an amended, varied, or fresh development application to be made.
- The interlocutory applications made and adjournments sought in the Planning Appeal were legally open to the Respondent, and the Respondent was transparent about its consideration of making a fresh development application under the PDI Act.
- The Respondent's decision to ask the Court to quash the Consent in order to make a fresh development application represents the intention of the Parliament in respect of the future of planning in South Australia.

Factual matrix and parties' positions

The Consent related to an integrated depot facility used for earthmoving, quarrying, and transport activities located at Stanley Flat, South Australia.

Prior to the Planning Appeal trial, the Court quashed the Consent as was requested by the Respondent for the Respondent to pursue a fresh development application under the PDI Act.

The Applicants relevantly submitted the following in respect of the Planning Appeal to support its allegation that the Respondent improperly acted to delay the decision of the Court:

- A court-directed mediation was unsuccessful.
- An adjournment was made for the Respondent to consider its position under the PDI Act.
- The Respondent made in March 2020 interlocutory applications seeking to dismiss the proceedings as an abuse of process or to obtain a summary judgment, which the Court declined to hear until the date of the trial.
- The Respondent made an unsuccessful application to adjourn the trial.
- The Respondent had sought the Court to quash the Consent the subject of the proceedings, approximately one-month prior to the trial.

Pursuing a legitimate legal interest does not amount to "misconduct" under section 29(6a) of the ERD Court Act

The Court's jurisdiction as a creature of statute is limited to that conferred under the ERD Court Act or another Act (at [10] and section 7(1) of the ERD Court Act). Where construing legislation which confers jurisdiction, the Court noted that a liberal approach must be taken and the ordinary meaning of words applied to the provisions of the statute (at [12]).

The Court examined the words of the DA Act and the ERD Court Act and held that both items of legislation envisaged and sought to facilitate the settlement of matters before the Court, including during the course of proceedings, where it was in the interests of justice.

The Court had regard to the Respondent's transparency in the Planning Appeal of its intention to make a fresh development application under the PDI Act, and the legitimacy of seeking to retain or obtain a development approval and to pursue legal rights in that respect.

The Court held that it was open to the Respondent to make the commercial decision to ask the Court to quash the Consent to pursue a development application under the PDI Act, as was contemplated by the DA Act and the Parliament's intention in creating the PDI Act.

Conclusion

In light of the Court's construction of the relevant legislation, and the pursuit by the Respondent of legitimate interests in respect of the Consent which were communicated to the Court and the parties, the Court held that the Respondent did not engage in "*misconduct*" within the meaning of section 29(6a) of the ERD Court Act and dismissed the application for costs.

High Court of Australia orders that New Acland's applications for mining leases and an amended environmental authority be referred back to the Land Court for rehearing

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the High Court of Australia in the matter of *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 heard before Kiefel CJ, Bell, Gageler, Keane, and Edelman JJ

July 2021

In brief

The case of *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 has a protracted litigation history, which culminated in a decision by the High Court of Australia allowing an appeal by Oakey Coal Action Alliance Inc (**OCAA**) against a decision of the Queensland Court of Appeal, and ordering, inter alia, that applications made by New Acland Coal Pty Ltd (**New Acland**) under the *Mineral Resources Act 1989* (Qld) (**MRA**) and the *Environmental Protection Act 1994* (Qld) (**EPA**) be referred back to the Land Court of Queensland for rehearing.

This article discusses the following:

- *Relevant facts and circumstances* – We briefly discuss the relevant facts and circumstances giving rise to New Acland's applications and the proceedings.
- *First Land Court decision and appeal* – We briefly discuss the Land Court's initial decision recommending that New Acland's applications be refused, and the Queensland Supreme Court's decision on appeal to set aside the Land Court's recommendations.
- *Second Land Court decision and appeal* – We briefly discuss the Land Court's second decision to approve the applications, and the concurrent proceedings in the Court of Appeal regarding an appeal against the Supreme Court's decision.
- *High Court's decision* – We discuss the High Court's consideration of the Court of Appeal's decision, and its decision to remit the proceedings back to the Land Court.

Relevant facts and circumstances

New Acland operates an open cut coal mine in Acland, a township near Oakey on the Darling Downs in Queensland which has been operating for almost 20 years. New Acland sought to expand the mine, and applied for additional mining leases (see section 232 of the MRA) (**MRA Application**) and an amendment to an existing environmental authority (see section 232 of the EPA) (**EPA Application**) to facilitate that expansion.

The applications were met with numerous objectors, one of which was from OCAA, which represented a group of farmers and other community members on the Darling Downs.

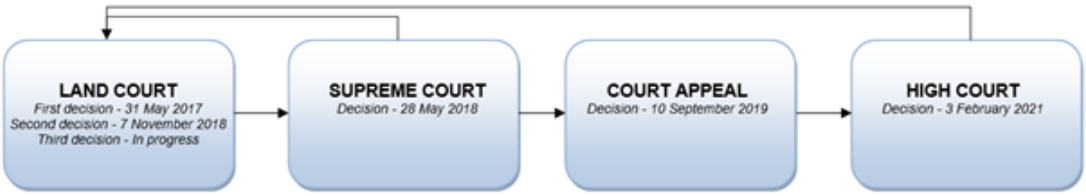
The making of the applications triggered a referral to the Land Court as follows:

- In relation to the MRA Application, to make a recommendation to the Minister for Natural Resources, Mines and Energy about whether the application ought to be granted or rejected in whole or in part (see section 269 of the MRA).
- In relation to the EPA Application, to make a recommendation to the Chief Executive of the Department of Environment and Science (**Chief Executive**) about whether the application ought to be approved with or without conditions, or refused (see section 185 of the EPA).

The statutory regime required the Minister and the Chief Executive to make a decision in respect of the MRA Application and the EPA Application, respectively, upon receiving the Land Court's recommendation (see section 271A of the MRA; section 194 of the EPA).

The progress of the proceedings through the Courts is discussed below, and a summary is set out in Figure 1.

Figure 1 – Litigation history



First Land Court decision and appeal

The proceedings were heard and determined in the Land Court over almost 100 days (**First Land Court Decision**). New Acland and OCAA were parties to each of the proceedings.

The First Land Court Decision is summarised as follows:

- The applications gave rise to numerous issues, including economic need, air quality and dust, noise, transport and roads, climate change, flora and fauna, land values, land use and soils, intergenerational equity, community and the social environment, heritage, groundwater, and surface water.
- The First Land Court Decision made numerous findings in favour of New Acland, including that the mine would likely provide significant economic benefit, and that many of the issues would not result in adverse impacts that could not be appropriately managed (see *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24).
- Despite these favourable findings, the First Land Court Decision recommended that both applications be refused on the basis of unacceptable impacts associated with noise, groundwater, and intergenerational equity.

New Acland applied for judicial review to the Supreme Court, alleging that the First Land Court Decision was affected by apprehended bias and errors of law. Before the judicial review applications were heard, the Chief Executive refused the EPA Application on the basis of the First Land Court Decision.

The Supreme Court concluded as follows (see *New Acland Coal Pty Ltd v Smith (No. 2)* [2018] QSC 119):

- The recommendations made in the First Land Court Decision were not affected by apprehended bias.
- The recommendations were affected by errors of law in respect of the three issues which led the Land Court to make the recommendation to refuse the applications.
- Orders be made setting aside the First Land Court Decision and the refusal by the Chief Executive, and referring the proceedings back to the Land Court.
- The orders referring the proceedings back to the Land Court be qualified by the requirement that "*the parties before the Land Court are bound by, and the Land Court is directed to proceed on the basis of, the findings and conclusions reached*" by Member Smith in the First Land Court Decision, and the factual findings made in respect of noise.

The Supreme Court gave the following reason for the order referred to in the last dot point above (at [37]):

> *It would be entirely inimical to the interests of justice to permit the parties to avoid the binding effect of the findings and conclusions already reached by the Land Court, after a full hearing, which are not tainted in any way by the outcome of this judicial review proceeding.*

Second Land Court decision and appeal

The proceedings were reheard in the Land Court, and the applications were approved subject to conditions concerning noise (**Second Land Court Decision**) (see *New Acland Coal Pty Ltd v Ashman & Ors (No. 7)* [2018] QLC 41). Following the Second Land Court Decision, a delegate of the Chief Executive granted the EPA Application (but no decision had yet been made in respect of the MRA Application).

Shortly before the rehearing commenced, OCAA filed an appeal against the Supreme Court's orders. New Acland cross-appealed, asserting that the Supreme Court had erred in finding that the First Land Court Decision was not affected by apprehended bias. Neither party sought a stay of the Supreme Court's orders pending the outcome of the appeal and cross appeal.

The Court of Appeal concluded as follows (see *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184; (2019) 2 QR 271; (2019) 242 LGERA 309 and *Oakey Coal Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 238; (2019) 2 QR 312):

- The appeal be dismissed and the cross appeal be allowed.

- A fair-minded lay observer might reasonably conclude that the First Land Court Decision was affected by apprehended bias as a result of the comments made by the Member following media reports about delays in the hearing and determining the proceedings.
- The findings of the Supreme Court that the First Land Court Decision was affected by errors of law was correct.
- There would be no utility in setting aside the Supreme Court's orders because the orders had already been dispensed by the Second Land Court Decision and that it was "*not open for this court in this appeal to interfere with the orders made*" in the Second Land Court Decision (at [18]).
- The orders were limited to a declaration that the First Land Court Decision failed to observe procedural fairness, and OCAA pay New Acland's costs of the appeal and cross appeal.

High Court's decision

OCAA applied for special leave to the High Court from the judgment of the Court of Appeal. The key issue to be determined by the High Court was whether the Second Land Court Decision could be regarded as a "*legal nullity*" such that no legal consequences could flow from it.

The issue arose from OCAA's contention that the Second Land Court Decision was affected by the same apprehended bias that the Court of Appeal found affected the First Land Court Decision. New Acland accepted that contention, but argued that the Second Land Court Decision was still binding.

The High Court judged that the Second Land Court Decision was a nullity and did not have legal consequences. In so judging, the High Court stated as follows:

- The source of power for the Supreme Court's orders is section 30(1) of the *Judicial Review Act 1991* (Qld). The discretionary power of this provision is wide, and is intended to "'*allow flexibility in the framing of orders so that the issues properly raised in the review proceedings can be disposed of*' …" (at [40]).
- However, "*the power does not extend to authorise a decision-maker to proceed in a manner inconsistent with the statute that governs the making of the decision referred back for further consideration*"; nor does it authorise the making of an order that is not necessary to do "*justice according to law*" (at [41]).
- The Second Land Court Decision occurred "*in the purported exercise of the statutory jurisdictions conferred on the Land Court under the MRA and the EPA.*" (at [42]).
- "*The force and effect of [the Second Land Court Decision] therefore depend on whether the recommendations comply with the express and implied conditions of the exercise of the statutory jurisdictions conferred on the Land Court under the MRA and the EPA.*" (at [44]).
- The Land Court, having been established by legislation as a court, was bound to observe procedural fairness in the exercise of its jurisdiction (at [47]). Failure to comply with this condition renders any order the Land Court makes in the performance of its function lacking in legal force, irrespective of whether the order is set aside (at [48]).
- Accepting that the Second Land Court Decision was also affected by apprehended bias, it therefore also failed to comply with a condition of the exercise of its jurisdiction, and it was therefore a legal nullity (at [49]).

New Acland asserted that although the Second Land Court Decision was a nullity, "*the mere fact of the existence of [the Second Land Court Decision] is enough to meet the statutory preconditions to the making by the Minister of the ultimate decision to grant or refuse New Acland's applications …*" (at [50]).

In rejecting that assertion, the High Court majority referred to the relevant provisions of the MRA and the EPA and to the following statement of the High Court in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) CLR 510 [our emphasis]:

> *[64] ... When a statute that provides for the disposition of interests in the resources of a State 'prescribes a mode of exercise of the statutory power, that mode must be followed and observed' ... **The statutory conditions regulating the making of a grant must be observed. A grant will be effective if the regime is complied with, but not otherwise** ...*

The High Court majority concluded that an implied statutory condition under both the MRA and EPA for the exercise of power was the observance of procedural fairness. As a result of the decision being affected by apprehended bias, that implied statutory condition could not be said to have been satisfied and therefore the Chief Executive's decision was invalid.

Conclusion

The High Court judged that it was appropriate to make an order setting aside the qualified order of the Supreme Court and substituting it with an order referring the applications back to the Land Court for full reconsideration.

The High Court also judged that the new decision of the Chief Executive, having been based on the recommendations in the Second Land Court Decision, could and should also be set aside.

Queensland Court of Appeal finds that the Planning and Environment Court did not make an error of law in construing the scope of a planning approval granted in 1991, which authorised the use of a private airspace and hangar building

Liam Hanley | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Bucknell & Anor v Townsville City Council & Anor* [2021] QCA 26 heard before Philippides and McMurdo JJA, and Bradley J

July 2021

In brief

The case of *Bucknell & Anor v Townsville City Council & Anor* [2021] QCA 26 concerned an application by the Applicants to the Queensland Court of Appeal (**Court of Appeal**) seeking leave to appeal against the decision of the Planning and Environment Court of Queensland (**P&E Court**) in *Bucknell v Townsville City Council & Anor* [2019] QDC 280 and the hearing of the appeal (**Appeal**).

The originating application in the P&E Court concerned a town planning approval issued in 1991 (**Approval**) by the Townsville City Council (formerly the Thuringowa City Council) (**Council**). The Approval authorised the use of a "*private airspace*" with a "*hangar*" building and toilet block in Woodstock, Townsville (**Property**). The Second Respondent became the registered owner of the Property in 2005.

The Applicants' residence was situated on land adjoining the Property. The Applicants sought declarations and enforcement orders in the P&E Court to restrict the Second Respondent from carrying out the following use and activities on the Property without a development permit:

- "*Air services*" to the extent it exceeded the scale and intensity authorised by the Approval (**Air Services Use**).
- "*Short term accommodation and outdoor sport and recreation, tourist attraction and/or tourist park*" (**Accommodation and Entertainment Activities**).

The P&E Court refused to grant the declarations and enforcement orders sought by the Applicants. The Court of Appeal was required to consider whether the P&E Court made errors of law in construing the scope of the Approval as it related to the Air Services Use and the Accommodation and Entertainment Activities.

The Court of Appeal granted the Applicants leave to appeal. However, a majority of two judges dismissed the Appeal on grounds that the P&E Court did not make an error of law in construing the Air Services Use. The Court of Appeal unanimously agreed that the P&E Court did not make an error of law in construing the Accommodation and Entertainment Activities.

Applicants granted leave to appeal

The Applicants applied for leave to appeal to the Court of Appeal under section 63 of the *Planning and Environment Court Act 2016* (Qld) (**PEC Act**). A single judge of the Court of Appeal has power to grant leave to appeal under section 63(3) of the PEC Act.

The Applicants contended that an error of law materially affected the decision of the P&E Court, and that the error was (at [29]):

- of general importance to the "*proper construction of development approvals*" and the "*orderly enforcement of planning laws and development offences*"; and
- of specific importance to the Applicants who were exposed to adverse impacts of the Air Services Use and Accommodation and Entertainment Activities.

One judge of the Court of Appeal granted leave to appeal for the reasons advanced by the Applicants. This was sufficient to determine the issue.

Of note, one judge found that the error of law in relation to the Air Services Use warranted leave to appeal, but found that the "*isolated nature*" of the Accommodation and Entertainment Activities, which occurred "*some years ago*", did not warrant leave to appeal (at [95]).

Majority of the Court of Appeal found that the P&E Court did not make an error of law in construing the Air Services Use

Since the Approval, the number of hangars on the property had increased from one to five, the size of the hangars had increased in scale, further buildings had been erected, and a second runway had been built and was in use.

Of particular importance, the term "*private air strip*" was defined in the 1988 town planning scheme for the City of Thuringowa as follows (at [20]):

> *Privately owned premises for the landing and departure of aircraft. The terms includes (sic) facilities provided at such premises for the housing, servicing and maintenance of aircraft and for passengers or goods carried by aircraft using the airstrip.*

The Applicants contended that the Air Services Use on the Property had come to "*exceed the scale and intensity*" authorised by the Approval and constituted a "*material increase in the scale and intensity*" of the Approval (at [7] and [79]). As a consequence, the Applicants contended that the Air Services Use went beyond the authority of the Approval.

The P&E Court made the following observations in relation to the Air Services Use (requoted by the Court of Appeal at [89]):

> *[66] … The term 'Private airstrip' … can and should be considered broadly, and as such authorises the use of the land for the airstrip and hangers (sic), as well as other structures associated with such on-site activities.*
>
> *[67] This is even more obviously the case when it is noted that the [Approval] did not place any constraints on the hours of operation, though obviously the airstrip, not having lights, is only able to operate from dawn to dusk, as well there being no constraints on the type of aircraft used, or upon movement and numbers …*

This informed the finding of the P&E Court that (requoted by the Court of Appeal at [89]):

> *[67] … the use currently made of the land is for aircraft related activities, and is entirely consistent with the rights granted by the [Approval].*

The majority of the Court of Appeal (**Majority Judgment**) found that the P&E Court did not make an error of law in determining the scope of the Approval. The key finding of the Majority Judgment was that the definition of "*private airstrip*" was inclusive and "*extended to include the use of the premises for the provision of facilities for aircraft*" (at [60]). Therefore, the Approval imposed no restriction on the number of hangars that could be erected on the Property, nor the portion of the Property which could be used for the private airstrip.

The judgment in dissent (**Dissenting Judgment**) found that the P&E Court made an error of law in determining the scope of the Approval. This was because the Approval did not "*authorise the use of any building or structure apart from the two buildings identified in the relevant documents*" (at [90]). Rather, the scale and intensity of the "*use*" was confined to the structures and runway identified in the Approval.

As a consequence, the Dissenting Judgment was that the P&E Court made an error of law by failing to answer "*whether the use of the land for 'air services' had come to exceed 'the scale and intensity authorised by any existing lawful use rights'*" (at [92] to [93]). The Dissenting Judgment concluded that the matter should be remitted to the P&E Court to answer this question.

Court of Appeal unanimously found that the P&E Court did not make an error of law in construing the Accommodation and Entertainment Activities

The Second Respondent used the Property on two separate occasions in Easter of 2014 and Easter of 2015 for "*fly ins*". The fly ins were publicly advertised events, which involved accommodating passengers who had flown in aircraft to the Property, and included live entertainment and camping.

The Applicants contended that there was no effective permit for the Accommodation and Entertainment Activities as the Approval did not "*refer to and authorise any short term accommodation or outdoor entertainment uses …*" (at [63]).

The extended meaning of "*use*", as it applied to "*premises*" under schedule 3 of the repealed *Sustainable Planning Act 2009* (Qld), included "*any use incidental to and necessarily associated with the use of the premises*".

The P&E Court found that the Accommodation and Entertainment Activities engaged in by the Second Respondent were: "*no more than what [was] contemplated and authorised*" by the Approval, "*limited in the extreme*", and "*clearly contemplated*" by the Approval (requoted by the Court of Appeal at [28]).

The Court of Appeal found no basis to conclude that the Accommodation and Entertainment Activities engaged in by the Second Respondent were "*capable of amounting to a use*", having regard to the infrequency of the activities (at [69] and [95] and in reference to the case of *Moore v Kwiksnax Mobile Industrial and General Caterers Pty Ltd, ex parte Kwiksnax Mobile Industrial and General Caterers Pty Ltd* [1990] QSCFC 32; [1991] 1 Qd R 125, 129).

Conclusion

The Court of Appeal granted the Applicant leave to appeal but dismissed the Appeal on the grounds that the decision of the P&E Court did not make an error of law in identifying the scope of the Approval in relation to the Air Services Use or the Accommodation and Entertainment Use.

Planning and Environment Court of Queensland lacks jurisdiction to hear an appeal against the value of an offset or refund, where the value was adopted and applied using the method prescribed in the local government's charges resolution

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Vanriet Development Pty Ltd v Brisbane City Council* [2021] QPEC 17 heard before Jones DCJ

July 2021

In brief

The case of *Vanriet Development Pty Ltd v Brisbane City Council* [2021] QPEC 17 concerned an application by the Brisbane City Council (**Council**) to the Planning and Environment Court of Queensland (**Court**), which challenged the jurisdiction of the Court to hear an appeal filed by the Applicant in relation to an infrastructure charges notice (**Appeal**).

The Appeal was based on the following two grounds under Schedule 1, Table 1, Item 4 of the *Planning Act 2016* (Qld) (**Planning Act**):

> *(a) [T]he [infrastructure charges] notice involved an error relating to—*
>
> *(iii) an offset or refund;*
>
> *…*
>
> *(d) … [T]he amount of the charge is so unreasonable that no reasonable relevant local government could have imposed the amount.*

The Appeal sought that the Court fix the amended infrastructure charges notice offset amount to $400,000.

The Council submitted that the Court did not have jurisdiction to hear and determine the Appeal because section 229(6)(b)(ii) of the Planning Act stated that "*… an appeal against an infrastructure charges notice must not be about … for a decision about an offset or refund … the cost of infrastructure decided using the method included in the local government charges resolution.*"

The Court held that the Appeal concerned the value of an offset determined using the before and after method stated in the Council's charges resolution for the establishment cost of the dedication of a part of the Applicant's land the subject of a development approval for a high impact industry and warehouse development (**Approval**).

The Court rejected the Applicant's "*bootstrap*" approach, which alleged that the Council must not have applied the before and after method of valuation, because if the Council had, the Council's valuer and the Applicant's valuer would have arrived at the same figure for the offset amount.

The Court held that the fact that valuers may adopt a different rate per square metre does not, of itself, reveal an error relating to an offset or refund.

The Court held that there was no evidence to conclude that the Council's reliance on the valuation of its valuer was affected by error or so unreasonable that no reasonable relevant local government could have imposed the amount.

The Court held that because the Appeal related to an infrastructure charges notice involving a decision about an offset or refund, where the appropriate method prescribed in the Council's charges resolution was adopted and applied, the Court did not have jurisdiction to hear the Appeal.

The Court observed, in obiter, that despite the Court not having jurisdiction to hear an appeal of the kind described in section 229(6)(b)(ii) of the Planning Act, other avenues of challenge **may** be available to an Applicant, including seeking a declaration and consequential orders under section 11 of the *Planning and Environment Court Act 2016* (Qld) or by way of judicial review, where a figure is so unreasonable that no reasonable local government could have adopted it.

Value of the establishment cost of the Land Dedication is in issue

The Appeal concerned a condition of the Approval, which required the provision of trunk infrastructure for the transport network by way of the dedication of a part (1,423m^2) of the land the subject of the Approval (**Land Dedication**).

The Council, using the before and after method of valuation prescribed in its charges resolution, originally assessed the value of the establishment cost of the Land Dedication at $153,696. This figure was revised to $250,000 at the Applicant's request for review, after which the Applicant sought a further review, which Council referred to an independent valuer who assessed the value at $235,000 (at [3]).

The Court held that the controversy before it clearly related to the **value** of the establishment cost of the Land Dedication (at [8]).

Valuers can arrive at different rates per square metre

Relevant to the assertion by the Applicant that there was an error in the Council's valuation was the Applicant's allegation that the valuer engaged by the Council did not properly apply the before and after method of valuation, because if the correct method were applied the figure of the Council's valuer would have also been $400,000.

The Court held (at [13]) that the allegations of the Applicant were "*… in truth, … simply … that the valuation relied on by the Council must be wrong because it doesn't accord with the valuation prepared on behalf of the [Applicant].*"

The Court observed that each valuer, after conducting their relevant investigations, adopted a different rate per square metre, which inevitably resulted in each valuer attributing a different value to the Land Dedication.

The Court described the Applicant's position as a "*bootstrap*" approach, which could not be accepted.

The Court held that the adoption by valuers of different rates per square metre did not, of itself, reveal any error relating to an offset or refund amount. There was no evidence before the Court, which supported a finding of error or the misapplication of the before and after method (at [13]).

Unreasonableness requires more than differing valuations to be satisfied

Addressing the Applicant's allegation of unreasonableness, the Court relevantly held (at [14]):

> *… [T]here can be no basis for concluding that the valuation relied on on behalf of the Council was so unreasonable that the only inference open was that the before and after valuation methodology was either not adopted, or if it was, it was so grossly misused that it could not be properly said to be such a method of valuation. What the [C]ourt has before it is simply a difference of opinion about the valuation of the land based on the adoption of different dollar rates m^2.*

Method in charges resolution used, therefore the Court does not have jurisdiction to hear the Appeal

The Court held that for the purpose of the limitation on its jurisdiction under section 229(6)(b)(ii) of the Planning Act there was no evidence which indicated that the before and after method prescribed in the Council's charges resolution was not adopted and applied, and therefore, the limitation in section 229(6)(b)(ii) of the Planning Act prevented the Court from hearing the Appeal.

Conclusion

The Court held that the Appeal related to an infrastructure charges notice involving a decision about an offset or refund, where the appropriate method prescribed in the Council's charges resolution was adopted and applied. Therefore, because of section 229(6)(b)(ii) of the Planning Act, the Court lacked jurisdiction to hear and determine the Appeal.

In obiter, the Court noted that despite it not having jurisdiction to hear an appeal of the kind in section 229(6)(b)(ii) of the Planning Act, other avenues of challenge **may** be available to an Applicant such as seeking a declaration and consequential orders under section 11 of the *Planning and Environment Court Act 2016* (Qld) or by way of judicial review, where a figure is so unreasonable that no reasonable local government could have adopted it.

South Australian Supreme Court dismisses an appeal by an employer, which alleged an error of the application of the statutory equivalent of vicarious liability for contraventions of mandatory provisions of the Environment Protection (Water Quality) Policy 2003 (SA)

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Supreme Court of South Australia in the matter of *Ashton Valley Fresh Pty Ltd v Dolan* [2021] SASC 44 heard before The Honourable Justice Lovell

July 2021

In brief

The case of *Ashton Valley Fresh Pty Ltd v Dolan* [2021] SASC 44 concerned an appeal to the Supreme Court of South Australia (**Court**) against convictions ordered under section 34(2) of the *Environment Protection Act 1993* (SA) (**EPA**) by the Environment, Resources and Development Court of South Australia (**ERD Court**) in *Dolan v Ashton Valley Fresh Pty Ltd (ACN 129 405 410)* [2020] SAERDC 15 for contraventions of mandatory provisions in the now repealed *Environment Protection (Water Quality) Policy 2003* (SA) (**Water Policy**).

The charges against the Appellant were laid after an officer of the Environmental Protection Authority collected a sample of water from a creek located near the Appellant's fruit juice processing plant (**Juice Plant**) and conducted a test of the sample and further investigations, which revealed that raw wastewater (**Pollutant**) had flowed as part of the Juice Plant business into the creek and caused:

- contrary to clause 12(h) of the Water Policy, an increase in turbidity and sediment levels (**Count 1**); and
- contrary to clause 13(1) of the Water Policy, the relevant water quality criteria stated in Table 1 of Schedule 2 of the Water Policy to exceed the maximum concentration permitted in the creek in respect of biochemical oxygen demand (five-day test), phosphorus (total as phosphorus), and total organic carbon and to decrease below the minimum pH (Ph units) level (**Count 2**).

It was uncontroversial on appeal that the elements of both Count 1 and Count 2 had been satisfied. The following grounds of appeal were argued before the Court:

- ***Ground 1*** – The verdicts of the ERD Court were unreasonable or unsupported by the evidence.
- ***Ground 2*** – The Trial Judge made an error of law in holding that the Appellant had breached clause 13 of the Water Policy because clause 13 required that the taking of the sample of water from the creek by the Environmental Protection Authority be "*measured by a method approved by the Authority.*".
- ***Grounds 3 and 4*** – The Trial Judge erred by not being satisfied that an employee of the Appellant had opened the tap, which had caused the wastewater flow that resulted in the contraventions of the EPA (**Contravening Conduct**), and in finding that the general defence in section 124(1) of the EPA had not been proved because the contraventions of the EPA were not a result of the failure of the Appellant to take "*all reasonable and practicable measures*", but from the intentional act of an employee without authority.

The Court held that the findings made by the Trial Judge were open to his Honour and therefore the Appellant failed in respect of Ground 1.

In respect of Ground 2, the Court held that the correct question to be asked was "*does the intended meaning of the words used by Parliament extend to these circumstances*" and agreed with the Trial Judge that the requirement of measurement by an approved method stated in clause 13(2) of the Water Policy only extended to the testing of the wastewater sample, and not its collection.

The Court relied on the ordinary principles of statutory construction stated by the High Court of Australia in respect of Grounds 3 and 4, and considered the objects of the EPA, the regime relating to the creation of an environmental protection policy, the relevant offence provisions under the EPA and the Water Policy, the general defence in section 124 of the EPA, and the statutory equivalent of vicarious liability enunciated in section 127 of the EPA.

The Court held that an employer will be liable for acts authorised by the employer as well as for acts which the employer has not authorised, where "*the acts are so connected with acts which [the employer] ha[s] authorised that the acts may rightly be regarded as modes – although improper modes – of doing them.*" (at [120]). The Court noted that a mode of doing what an employee is employed to do, even where improper, differs from conduct which is outside of the scope of an employment.

The Court found no error in the lack of persuasion of the Trial Judge to find that the employee of the Appellant had acted on a "*frolic of his own*" and without authorisation. The Court agreed with the ERD Court's construction of the EPA and that the conduct and state of mind of the employee of the Appellant ought to be imputed to the Appellant.

The Court similarly found no error in the Trial Judge's conclusion that the Appellant had not on the balance of probabilities proved the general defence in section 124 of the EPA. The Court held that section 124(1) of the EPA required measures "*designed to prevent the problem, not just minimise the risk*" (at [145]) and that the "*steps required to be taken to prevent harm are all steps that are reasonable and practicable*".

The Court rejected the finding of the Trial Judge that a lack of sufficient training of the Appellant's employee could be used as evidence of a "*reasonable and practicable*" measure that the Appellant did not take. The Court nevertheless accepted that it was open to the Trial Judge on the evidence to find that the design of the location of the tap the subject of the Contravening Conduct could have been altered to prevent the contravention. Such a measure was inferred by the Court to be within the financial resources of the Appellant (see [157]).

The Court held it unnecessary to fully consider a submission of the Respondent alleging that because the Appellant did not call a witness alleged to have unique knowledge of facts relevant to the appeal, a *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 inference (***Jones v Dunkel* Inference**) ought to be drawn to infer that the evidence of that witness would not have assisted the Appellant, but noted that such an inference required exceptional circumstances.

The Court, in obiter, observed that the general rule in criminal cases is that a trier of fact is not entitled to infer that the evidence of a witness, whom an accused did not call, would not have assisted the accused. An exception to the general rule may apply, where an accused has failed to give evidence in their own case and the explanation of the facts is uniquely within the accused's knowledge (at [109] and *Weissensteiner v The Queen* (1993) 178 CLR 217; [1993] HCA 65).

Having considered the reasons of the ERD Court and the evidence before it in respect of the satisfaction of the general defence against an alleged contravention of the EPA in conjunction with statutory equivalent of the general law of vicarious liability and the rules of statutory interpretation, the Court was satisfied that the ERD Court did not err in convicting the Appellant of Count 1 and Count 2 and dismissed the appeal.

Factual matrix

A natural drainage line exposed the creek the subject of the Contravening Conduct to runoff, which flowed from a wastewater treatment plant (**Wastewater Plant**) used to process and treat raw wastewater created as part of the apple-juicing process of the Appellant's Juice Plant business. The raw wastewater ran downhill through a pipe under a roadway from the Juice Plant to the Wastewater Plant. A tap was affixed to the pipe, which enabled raw wastewater to be released from the tap into the Wastewater Plant.

It was common ground between the parties that the tap was required to be turned to a specific position before being turned on to allow the wastewater to enter the Wastewater Plant. Where the tap was turned on and not in the correct position, raw wastewater would instead be directed toward an open drain outside of the Wastewater Plant, which after a period of being filled with raw wastewater, would follow through into the creek.

Although the tap generally remained in the correct position, the evidence before the ERD Court established that the tap may be used to divert the raw wastewater away from the Wastewater Plant to assist with the identification of a blockage stopping the raw wastewater from entering the Wastewater Plant, to sample and test the raw wastewater, and to pump raw wastewater into a tanker, where the Wastewater Plant became inoperable for any reason.

At trial, the Appellant accepted that the Pollutant came from the land occupied by the Appellant but plead not guilty to the offences alleged in Count 1 and Count 2.

The Contravening Conduct occurred in late August 2014 and was alleged to have been done by a then employee acting outside of the scope of their employment. Of relevance to the trial was the lack of an operating procedure, instruction, or document in relation to the use of the Wastewater Plant tap, and the employee having been trained on the job by the managing director and being certified as competent to operate the Wastewater Plant by the manager responsible for training and educating the Appellant's employees.

It was accepted by the ERD Court based on the evidence that the managing director and his son also contributed to the operation of the Wastewater Plant.

The substantive issue for the Court on appeal was whether the Appellant had satisfied the general defence in section 124(1) of the EPA on the basis of its allegation that the Contravening Conduct occurred outside of the scope of what the employee was employed to do.

Appeal principles

The appeal was made to the Court under section 30(4) of the *Environment, Resources and Development Court Act 1993* (SA), which provided in criminal proceedings a right of appeal "*in the same way, and to the same extent, as an appeal … under [section 42 of] the Magistrates Court Act 1991 [(SA)]*".

The appeal was by way of rehearing and the Court had the power to allow further evidence. As an appellate court, the Court was required to "*conduct a real review of the evidence and the judicial officer's findings and reasons*" and "*make due allowance for the advantage held by the judicial officer in seeing and hearing the witnesses*", without excusing itself from "*… the task of weighing conflicting evidence and drawing [its] own inferences and conclusions.*" (at [27]).

Where the Court concluded that the judgment of the lower court was wrong, the Court must overturn the judgment (at [27] and *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22).

Ground 1 – Verdicts of the ERD Court are not unreasonable

The Court held the ERD Court was correct in its findings of the Appellant's guilt in respect of Count 1 and Count 2. The Court, based on its findings in respect of the other grounds of appeal, held that the Appellant also failed to establish Ground 1.

Ground 2 – ERD Court's finding that the Water Policy requires only the testing of a sample, and not its collection, to be measured by an approved method was correct

The Court rejected the Appellant's submission that clause 13 of the Water Policy required the Environmental Protection Agency to have an approved method for collecting and testing samples.

The Court considered the words of clause 13 in their context, including other statutory provisions, and the statute as a whole, which included looking at the mischief the statute was intended to remedy. The Court held that "*a very general purpose may not detract from the meaning*" of the words used in a particular provision (at [39]).

The Court noted that a statutory offence provision is to be construed according to the ordinary principles of statutory construction, and that only in circumstances of ambiguity, after the application of the ordinary rules of construction, ought a provision be resolved in favour of an accused (at [40]).

The Court held that the requirement to "*measure*" a sample under clause 13 of the Water Policy focused on the analysis of the relevant sample and did not extend to the collection of the sample. The Court observed that there is no harm caused by this interpretation because, as was the case in the appeal, a defendant may argue that a method of collection was inadequate and affected the subsequent testing so as to render it unreliable.

Ground 3 and 4 – Appellant unable to satisfy the Court that it was not liable for acts of an employee

The Court considered the following in respect of Grounds 3 and 4:

- ***Issue 1*** – The relationship between section 127 of the EPA, which imputed to a body corporate the conduct and state of mind of an officer, employee, or agent of the body corporate acting within the scope of their actual, usual, or ostensible authority, and section 124 of the EPA, which created a general defence if it was proved that an alleged contravention of the EPA did not result from a failure of a defendant to take "*all reasonable and practicable measures*" to prevent the contravention.
- ***Issue 2*** – The factual basis for the ERD Court's finding that an employee of the Appellant had not on a "*frolic of his own*" engaged in the Contravening Conduct, including whether the Trial Judge sufficiently exposed his Honour's reasoning and whether a *Jones v Dunkel* Inference ought to be drawn against the Appellant for not having called the managing director of the Appellant as a witness.
- ***Issue 3*** – Whether the Appellant took "*all reasonable and practicable measures*" to prevent the contraventions of the EPA.

Issue 1 – Section 124 and section 127 of the EPA are not mutually exclusive

The Court agreed with the ERD Court's construction of the EPA that the imputation of the conduct and state of mind of an officer, employee, or agent in section 127 of the EPA was relevant to the defence in section 124(1) of the EPA. Despite the fact that section 127 of the EPA may make the defence difficult to make out, a defendant is not precluded from attempting to do so (at [67]).

Issue 2 – Trial Judge's conclusions in respect of the evidence are correct

The Court rejected the Appellant's submission that the Trial Judge did not consider all of the evidence in respect of the employee acting outside of the scope of their employment, when they engaged in the Contravening Conduct. The Court held that it is not necessary for a trial judge to resolve every non-substantial issue that arises during the course of a trial.

The evidence before the ERD Court that the employee acted on a "*frolic of his own*" was required "*to make the Trial Judge feel an 'actual persuasion' [on the balance of probabilities] of its occurrence or existence before it could be found*" (at [139]). The Court found no error in the Trial Judge's finding that the employee of the Appellant did not engage in the Contravening Conduct without authorisation. The Court held that the Trial Judge sufficiently exposed his Honour's reasoning process, and that no error had been demonstrated in his Honour's approach.

The Court held that it was unnecessary to fully consider the submission that a *Jones v Dunkel* Inference ought to be drawn, but noted that such an inference required exceptional circumstances (at [111]).

Issue 3 – General defence not satisfied on the balance of probabilities

The Court held that the Appellant was required to prove the following to make out the general defence in section 124 of the EPA:

- "*[T]hat the alleged contravention did not result from any failure [of the Appellant] to take all reasonable and practicable measures to prevent the contravention or contraventions of the same or a similar nature*" (section 124(1)).
- That the Appellant had in place proper systems and procedures for reporting a contravention or a risk of a contravention of the EPA (section 124(3)(a)).
- That the Appellant "*actively and effectively promoted and enforced compliance with [the EPA] and with all such systems and procedures within all relevant areas of the workforce.*" (section 124(3)(b)).

The Court observed that the satisfaction of both limbs of section 124(3) of the EPA did not necessarily mean that section 124(1) of the EPA was also satisfied.

Measures "*designed to prevent the problem, not just minimise the risk*" were held to be required to satisfy section 124(1) of the EPA. The Court agreed with the Trial Judge that a different design for the Wastewater Plant is a measure that the Appellant could have taken.

Conclusion

The Appellant did not satisfy the Court in respect of any of the grounds of appeal. The Court held that the ERD Court was correct in its findings of the Appellant's guilt under section 34(2) of the EPA for breaches of the mandatory provisions in the Water Policy.

The principles of statutory construction and evidence relied upon by the Court were enunciated by the High Court of Australia, and are therefore applicable to criminal proceedings in each Australian State and Territory.

New South Wales Court of Appeal confirms that there does not need to be a "proper planning purpose" for it to grant injunctive relief in its civil enforcement jurisdiction

Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Dincel Construction System Pty Ltd v Penrith City Council* [2021] NSWCA 133 heard before Gleeson JA, Payne JA, and Brereton JA

July 2021

In brief

The case of *Dincel Construction System Pty Ltd v Penrith City Council* [2021] NSWCA 133 concerned an appeal under section 58 of the *Land and Environment Court Act 1979* (NSW) to the New South Wales Court of Appeal (**Court of Appeal**) against the decision of the New South Wales Land and Environment Court (**Land and Environment Court**) made in its Class 4 civil enforcement jurisdiction on application by the Penrith City Council (**Council**) in the case of *Penrith City Council v Dincel Construction System Pty Limited (No. 4)* [2021] NSWLEC 1.

The Land and Environment Court declared that the First Appellant had carried out works in Kemps Creek without a development consent (unlawful works) in breach of section 4.2 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The unlawful works included the importation of approximately 42,000m^3 of fill and the construction of earthworks, including two hardstand areas totalling approximately 33,000m^2. The Land and Environment Court made a number of orders, including that the unlawful works be removed.

The First Appellant and the Second Appellant (who was the owner of the subject land) appealed to the Court of Appeal against the following four orders made by the Land and Environment Court:

> *The Court:*
>
> *…*
>
> *(4) Declares that [the First Appellant] has, by itself, its contractors, servants or agents, carried out development on land at 931 Mamre Road, Kemps Creek otherwise known as Folio 36/258414 by the deposition of fill and construction of an earthen platform in breach of s 4.2 of the EPA Act.*
>
> *…*
>
> *(8) Orders that, by 15 November 2021, [the First Appellant]:*
>
> *…*
>
> *(b) Remove the unlawful works and restore the ground level of the Premises and 931 Mamre Road, Kemps Creek to the ground level that existed prior to the carrying out of the unlawful works; and*
>
> *(c) Dispose of the unlawful fill at a waste facility or site that can lawfully accept the unlawful fill.*
>
> *(9) Orders that the respondents are to pay Council's costs of the proceedings unless an application is made for an alternative costs order within 21 days of the date of this judgment.*

While there were 11 grounds of appeal pressed at the hearing, the main issue was whether the primary judge failed to properly exercise his Honour's discretion when making remedial orders which required the First Appellant to remove the unlawful works. The grounds of appeal were largely directed towards the following:

- The hardship that would be suffered by the First Appellant.
- Whether the primary judge was required to find a "*proper planning purpose*" to grant injunctive relief.
- The findings of the primary judge with respect to the works undertaken on 931 Mamre Road, which was adjacent to the Second Appellant's land at 919-929 Mamre Road.

Ground 1 – Primary judge did not err in the consideration of the hardship that would likely be caused to the First Appellant by making the reinstatement order

The Appellants contended that the primary judge did not make a sufficiently specific finding as to the financial loss the First Appellant would suffer if the First Appellant was required to reinstate the land and remove its products within 28 days. It was argued that the rectification costs would be in excess of $19.5 million and that it was incumbent on the primary judge to make a finding as to whether a reinstatement order would be likely to cause the First Appellant to become insolvent with consequential employee job loss.

The following four reasons were given by the primary judge as to why the evidence of hardship was not persuasive such that injunctive relief should not be ordered:

- The evidence with respect to financial loss was predominantly based upon the premise that the First Appellant had no, or could not acquire, an alternative location to store its product, but the primary judge considered that the First Appellant would be able to secure an alternative storage premise.
- The loss cannot have been an unforeseen risk to the First Appellant as the continued operation of the site was a matter of choice of the Appellants and the losses were, to a large extent, of the First Appellant's own making.
- The First Appellant likely obtained a private financial advantage by purchasing a site without a development consent and then using it for a purpose that was not permissible.
- Given the time the proceedings were on foot, the First Appellant had significant time to anticipate the likely relief that might be ordered and conduct its operations accordingly.

The Court of Appeal rejected Ground 1 and found that the primary judge took into account the potential hardship the reinstatement order would cause the First Appellant and its employees.

Grounds 2, 3 and 4 – Primary judge properly conducted the balancing exercise required to determine the appropriate time for the suspension of the injunctive relief

The Appellants argued that the primary judge's discretion miscarried because significant weight ought to have been given to the fact that the Second Appellant might have been able to "*regularise*" the unlawful works. To allow that to occur, the Appellants had sought a stay of the injunction for 18 months.

The Court of Appeal rejected these grounds and found that one of the difficulties with Ground 2 was that a development consent could not validly have been granted to "*regularise*" the unlawful works that had already taken place. The Court of Appeal found no error in the primary judge's reasoning and held that if the injunctive relief was conditioned by the Appellants **not** obtaining a development consent, it would always be open to the Appellants to argue that the condition had not been fulfilled as a further development application could possibly be made.

Ground 6 – Land and Environment Court was not required to find a "proper planning purpose" when granting injunctive relief

Ground 5, which alleged that there was inconsistency in the orders of the Land and Environment Court, was not pressed at the hearing.

With respect to Ground 6, the Appellants contended that the reinstatement of the land would serve no proper planning purpose because it was likely that the land would be developed as industrial land shortly after it was reinstated, therefore to require reinstatement would be "*Sisyphean*".

The Court of Appeal rejected the Appellants' submission that the primary judge was required to consider whether the reinstatement orders served any proper planning purpose. The Court of Appeal confirmed that the Land and Environment Court was not required to find a "*proper planning purpose*" to grant the injunctive relief and stated that "*[i]t would be corrosive of public trust in the operation and enforcement of the planning laws if blatant, deliberate and serious breaches of those laws were ignored on the basis that a planning purpose needed also to be shown before remediation could be ordered.*" (at [112]).

Ground 7 – Remedying or restraining a breach of the EPA Act is at the heart of the Land and Environment Court's power to grant injunctive relief, which is not the exercise of the functions of a consent authority

The Appellants submitted that the primary judge was required to consider whether any relief would remedy the breach of the EPA Act, which included a consideration of the following:

- what environmental harms were caused by the unlawful works;
- whether the reinstatement orders would in fact remedy those harms; and
- whether those harms could be remedied by less onerous means so that the orders did not go beyond the attainment of their legitimate objects and serve no purpose other than to punish the First Appellant.

For similar reasons to Ground 6, the Court of Appeal rejected Ground 7 and restated that it was the remedying or restraining of a breach of the EPA Act which was at the heart of the Land and Environment Court's power. The Court of Appeal held that the Land and Environment Court was not exercising the functions of a consent authority and to do so would confuse the task before it.

Ground 8 – Reinstatement orders were not out of proportion with the ends sought to be achieved because the admitted breaches were serious and deliberate

The Appellants contended that the reinstatement orders were out of proportion with the ends sought to be achieved by the EPA Act in that they placed an enormous financial burden on the First Appellant without securing any practical remedial benefit. It was submitted that without any remedial justification for the severity of the reinstatement orders, they served no purpose other than to punish the First Appellant for the breach of the EPA Act.

The Court of Appeal rejected Ground 8 and found that the orders made by the primary judge were neither unreasonable nor unjust having regard to all of the relevant factors. The admitted breaches were serious and deliberate, and the law was flouted (at [128]).

Ground 9 – It was not procedurally unfair for the primary judge to allow the Council to seek relief with respect to 931 Mamre Road for the first time in closing submissions

In Ground 9 the Appellants argued that it was procedurally unfair for the primary judge to allow the Council to seek injunctive relief with respect to 931 Mamre Road for the first time in the Council's closing submissions.

The Court of Appeal found that there was no appealable error on the primary judge's part and that the Appellants were not taken by surprise by the Council's request for orders to be made requiring the removal of the unlawful fill from 931 Mamre Road.

Ground 10 – Primary judge's finding that the First Appellant was responsible for constructing the earthen mound on 931 Mamre Road was set aside because there was no evidence that the First Appellant was responsible

There are three parts to Ground 10.

Firstly, the Appellants alleged that the primary judge failed to consider the financial and other impacts of the reinstatement orders to the extent that they relate to 931 Mamre Road. The Court of Appeal rejected this submission because the Appellants never sought an opportunity to adduce evidence as to those matters and so the primary judge could not be criticised for failing to address evidence that was not before his Honour.

In the second and third part of Ground 10, the Appellants successfully challenged the primary judge's findings about the fill placed on 931 Mamre Road and who was responsible for those works. The primary judge found that those works were carried out by the First Appellant, but that the First Appellant's evidence did not contain an admission about its responsibility for creating the earthen mound. Rather, there were admissions about the First Appellant's responsibility for the batters only.

The earthen mound was a separate structure created by dumping fill on to 931 Mamre Road, which was not a part of the Appellants' commercial operation. While there was evidence that the fill was deposited on 931 Mamre Road by the same contractors who deposited fill onto the adjacent land owned by the Second Appellant, it was not established that the First Appellant was responsible for the deposit of the fill on 931 Mamre Road as opposed to the owners of that land.

The Court of Appeal partially allowed Ground 10 and amended orders 4 and 8(b) made by the Land and Environment Court to clarify the extent of the First Appellant's liability and the extent of reinstatement works required.

Ground 11 – No evidence was before the primary judge to allow his Honour to consider the cost of removing the fill from 931 Mamre Road

In Ground 11, the Appellants submitted that the primary judge was required to consider (but did not) the financial and environmental consequences associated with the removal of the fill from 931 Mamre Road.

Having decided to uphold part of Ground 10, the Court of Appeal stated that it was strictly unnecessary to address Ground 11. However, the Court of Appeal stated that Ground 11 would have been rejected because the Appellants did not adduce evidence as to the cost of removing the fill from 931 Mamre Road and should have done so.

Ground 12 – Second Appellant was correctly held to be jointly and severally liable for costs with the First Appellant

The Appellants challenged the primary judge's determination that both of the Appellants should pay the Council's costs of the proceedings. The Court of Appeal found that the Second Appellant as the owner of the land was a necessary party to the proceedings and also took an active part in opposing the relief sought by the Council.

The Court of Appeal rejected the challenge and said that the inescapable conclusion was that "*whatever the occupier did on the Land and in the defence of the proceedings was done with the knowledge and concurrence of the owner of the Land*" and so the Second Appellant was correctly held to also be liable for the costs of the trial (at [169]).

Conclusion

In this case, the Court of Appeal reviewed the way the Land and Environment Court's discretion was applied in civil enforcement proceedings. The grounds of appeal were directed towards relieving the Appellants of the severity of the injunctive and reinstatement orders imposed by the Land and Environment Court.

However, the Court of Appeal found that the discretion of the Land and Environment Court was properly exercised and described the matter as being one where there was a deliberate and serious breach of the EPA Act and a contumelious disregard for the order issued by the Council, which required the remediation of the unlawful works.

The Court of Appeal also confirmed that where granting injunctive relief in Class 4 of its jurisdiction, the Land and Environment Court is not required to find a "*proper planning purpose*". The only justification that is needed by the Land and Environment Court to make a remediation order, is that there has been an admitted or proven breach of the relevant law.

Significant changes proposed to NSW infrastructure contributions systems

Katherine Pickerd | Todd Neal

This article discusses the significant changes to the New South Wales infrastructure contributions system if the proposed *Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021* is enacted

July 2021

In brief

Landowners and developers should be aware that if the NSW Government's *Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021* is enacted, there will be some significant changes to the way the contributions system currently operates under the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

Part of the changes reflect the government's latest attempt at introducing value capture as part of a user pays philosophy to enable the creation or augmentation of new infrastructure.

Much of the finer detail is to be contained in the regulations which are not yet available. But the changes will, if introduced, provide a new and different framework for the imposition of contributions, which in some cases would be triggered at sale rather than upon the activation of a development consent (see comments below on land value contributions).

In addition, new contributions plans and also state environmental planning policies will need to be finalised before the full extent of the changes proposed can be completely known.

As there is a general constitutional principle that taxation can only be imposed by legislation and given the EPA Act is the exclusive source of jurisdiction to impose contributions,* the extent to which the exercise of power under the new framework is supported by the statute will no doubt be tested in the courts in the years to come.

(*See *AIA v The Hills Shire Council* (2013) 196 LGERA 1; *Fairfield City Council v N & S Olivieri Pty Ltd* [2003] NSWCA 41).

Indeed, the debate about whether parts of these contributions even constitute a tax may well be litigated again given different conclusions by different judges on this subject (see *Meriton Aprartments Pty Ltd v Minister for Urban Affairs and Planning* (2000) 107 LGERA 363 and *Baulkham Hills Shire Council v Group Development Services Pty Ltd* [2005] NSWCA 315 on one hand, compared to decisions like *Baulkham Hills Shire Council v Wrights Road Pty Ltd* (2007) 153 LGERA 219 where a tax was defined to include an impost, the High Court in *Cam & Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 256, and the Victorian Court of Appeal in *Maroondah City Council v Fletcher* (2009) 169 LGERA 407).

Nevertheless, in this article we look at the impetus for the change, what the proposed changes are and the potential implications.

Impetus for the Infrastructure Contributions Bill

The Bill arises from the NSW Productivity Commission's '*Review of Infrastructure Contributions in New South Wales*' released in November 2020 (**Review**).

The Review found that infrastructure contributions are not supporting efficient development and that the options to better manage growth include increasing funding from contributions. Recommendations made as a result of the Review include:

- introducing a direct land contribution mechanism;
- increasing the maximum rate for the section 7.12 fixed development consent levies from 1% to 3% for residential development, but keeping the levy for non-residential development at 1%; and
- adopting a regional infrastructure contributions scheme given special infrastructure contributions have been applied inconsistently and unpredictably, adding to investor uncertainty.

The NSW Government has accepted the recommendations subject to some comments set out in its Response document.

Proposed changes and implications

If legislated, the Bill will amend the EPA Act but also other instruments, including the *Conveyancing (Sale of Land) Regulation 2017* and the *Valuation of Land Act 1916 No. 2* (NSW). This highlights the increasing importance and linkages between planning policies, property rights and land values, and therefore the increasing interrelationship between the treasury and planning portfolios within government.

Three important proposed changes are:

- The introduction of "land value contributions". These are effectively a tax that needs to be paid where land is identified in what will be called a "land value contributions area". Land is proposed to be identified as such in a contributions plan where there is a change in planning controls enabling more intensive development and which increases the value of the land. The tax would be triggered either when the land is sold for the first time, or when a "local infrastructure condition" is imposed in a development consent requiring a land value contribution.
- Fixed development consent levies as a percentage of the cost of carrying out the development are proposed to be removed from the EPA Act. The regulations will contain the detail of how this provision allowing the imposition of "local levy conditions" is to be imposed. It remains to be seen whether or not the percentage of the development costs regime will be maintained.
- Repeal of the Special Infrastructure Contributions (**SIC**) scheme—although there are savings and transitional provisions that are proposed to apply for those projects already subject to SICs—and replacing it with a Regional Infrastructure Contributions regime.

Local infrastructure conditions and land value contributions

If implemented, consent authorities will be able to impose a "local infrastructure condition" on a development consent that requires a reasonable contribution towards the provision, extension or augmentation of the public amenities and public services. This is not dissimilar to the existing provision except that the drafting of the new section would mean that local infrastructure conditions can be imposed on consents granted to section 4.55 modification applications.

The more significant change is that consent authorities would be able to also impose a "land value contribution" if the development is on land subject to a requirement for a land value contribution that has not been satisfied. This is where the proposed new form of section 7.11 is re-oriented towards "value capture".

A "land value contribution" is proposed to be defined as a contribution required in relation to land in a "land value contributions area". A "land value contributions area" is to be defined as an area of land identified as such in a contributions plan.

The potential significant impact on land values will mean these plans will be carefully scrutinised.

Imposition of land value contribution in contributions plans

The changes will apply some important limits on the type of land that is able to be identified and included in a contributions plan.

Proposed section 7.18(5) limits the type of land that could be subject to the land value contributions and states:

> *(5) A contributions plan must not identify land for which a land value contribution is required unless—*
>
> *(a) a change to the planning controls that apply to the land **will enable more intensive development of the land and, as a result, increase the value of the land**, and*
>
> *(b) the intensive development will require land to be provided for a public purpose.* (emphasis added)

This will inevitably raise questions from lawyers and valuers as to whether these preconditions exist. The potential significant impact on land values, and the likely quantum of money involved, will lead to careful scrutiny by those who have interests in land included in contribution plans to ensure the preconditions exist.

Further details will also need to be contained with the contributions plan to be published on the NSW Planning Portal, including:

- the identity of the land in the land value contributions area that is required for a public purpose;
- the maximum amount of the land value contribution, including by reference to a maximum percentage of the value of the land; and
- the way in which the owners of land in the land value contributions area will be notified of the land value contribution.

In Class 1 merits appeals, the Court has the power to disallow or amend a local infrastructure condition imposed in a development consent (which includes a condition requiring a land value contribution) because it is unreasonable in the circumstances of the case (a provision which has in the past led to a small number of judgements in the Land and Environment Court).

However, as discussed below, the obligation to pay the land value contribution can be triggered before a development consent is granted and when the land is first sold. Where this occurs, there would be no Class 1 merit appeal right to challenge the reasonableness of the requirement, leaving any problems with the land value contribution to be accepted or addressed by judicial review if there are grounds. Generally speaking, there may be a limited amount of time (3 months) for owners to commence proceedings after the contributions plan is made and so landowners will have to keep a watchful eye on the anticipated changes.

Setting the maximum amount by reference to a percentage value of the land will likely result in disharmonies across different local government areas. It is also likely to generate tensions between the NSW Government and local councils as local political interests (seeking higher percentages) differ to the interests of the state (seeking lower percentages).

Land value contribution to be satisfied on sale

New section 7.16C provides that if land is identified within a land value contributions area, the land value contribution has not been satisfied and has not been sold since it was identified as such, if the land is being sold, the vendor must satisfy the requirement for the land value contribution on or before completion of the sale as it is a charge on the land.

While there are decisions each way as to whether certain types of contributions constitute a tax, this does appear to be a form of a vendor tax that is to be imposed on potential development sites where the value of the land has increased as a result of changes in planning controls.

While the value of the land has to increase in order to trigger the land value contribution requirement, if the tax goes too far it may well disincentivise landowners from selling land thereby entrenching existing uses despite whatever strategic planning has gone on for new greenfield development.

Where land is to be sold, inevitably some vendors will attempt to "pass on" the tax to developers buying the land, who will need to do their feasibility testing to determine the commerciality of such an arrangement. Financiers who have lent money based on the equity in certain land impacted will also need to consider their position, as well as those who have borrowed. Additionally, the changes will fuel debate between economists and planners (and others) about whether this regime inflates house prices in areas subjected to the contribution.

Councils will ultimately be responsible for determining the land value contribution that is required in accordance with the regulations and the contributions plan. Those calculations will need to be carefully examined, given the money at stake. Upon application by vendor or purchaser, the council is to issue a "land value contribution certificate" which identifies, amongst other things, if there is a land value contribution requirement and if it has been satisfied, in full, in part or not satisfied.

From an administrative perspective, and presumably to ensure there is no contribution avoidance, instruments of transfer effecting the sale of land are to be endorsed to indicate that the land value contribution (if required) has been made before the instrument is signed. Instruments of transfer that effect the transfer of land in a land value contributions area cannot be registered unless they are properly endorsed in accordance with the EPA Act. This could lead to risky settlement delays unless the system is efficiently administered by the consent authorities.

Local levy condition

Under proposed section 7.12, a consent authority may impose a local levy condition on a development consent if a local infrastructure condition is not imposed on the development. This section is proposed to replace the existing section that allows consent authorities to impose fixed development consent levies, which is a percentage of the proposed cost of carrying out the development.

The regulations are able to make provisions about local levy conditions, including the maximum amount of levy that may be imposed for specified types of development, the types of development in relation to which a local levy condition may be imposed and the local government areas or land on which a consent authority may impose such a condition.

Given these provisions are to be inserted in the regulations, there is uncertainty about how far these proposed changes will go and whether the percentages (as suggested in the Review) will still be used to identify the amount of levy payable.

Circumstances in which local levy conditions and local infrastructure conditions may be imposed

Proposed section 7.13 identifies the circumstances in which a consent authority may impose a local infrastructure condition or a local levy condition. Those circumstances are where:

- the condition is authorised by a contributions plan;
- it is determined in accordance with the contributions plan; and
- it is also imposed in accordance with the regulations and relevant Ministerial directions.

This is not dissimilar to the existing provision.

The current provision also allows consent authorities (other than a council) to impose a condition under section 7.11 or 7.12 even though it is not authorised (or a kind allowed) by or determined in accordance with a contributions plan, as long as the consent authority has considered any contributions plan that applies to the whole or any part of the area in which the development is to be carried out. This section is largely unchanged meaning that the status quo is proposed to remain. However, it will not apply to a condition that imposes a land value contribution. Therefore, consent authorities must only impose local infrastructure conditions requiring land value contributions if the three circumstances above have been satisfied.

The existing provision that provides the Court with jurisdiction to disallow or amend a local infrastructure condition because it is unreasonable in the particular circumstances of the case is proposed to remain in place. Equally, the existing provision that limits the Court's jurisdiction when it comes to disallowing or amending a local levy condition will also remain.

However, the words "*[t]his subsection does not authorise the Court to disallow or amend the contributions plan or direction*" are proposed to be deleted.

As often occurs with privative clauses – somewhat ironically – litigation will inevitably arise testing the limits of such a provision.

Ministerial direction

If the Bill is passed, new Ministerial directions may be issued as the Minister will be empowered to direct a consent authority on:

- the matters that must be considered when preparing a contributions plan, including matters relating to the efficient design of infrastructure; and
- the circumstances in which a draft contributions plan must accompany a planning proposal prepared under section 3.33 of the EPA Act. One of the Review's recommendations was that contributions plans should be developed concurrently with planning proposals to optimise infrastructure costs.

These are in addition to existing matters that the Minister is presently empowered to make directions about.

We would expect that Planning Proposals will now include complex economic modelling about the settings in a contributions plan. Public exhibition of a Planning Proposal will likely attract not just submissions about the future density, but also submissions about the settings in these contributions plans.

Regional infrastructure contributions

The provisions of the EPA Act relating to SICs and the establishment of a Special Contributions Areas Infrastructure Fund are proposed to be repealed and replaced with a regional infrastructure contributions (**RICs**) scheme. However, there are savings and transitional provisions relating to SICs that are proposed to be put in place.

The purpose of RICs is to facilitate the provision of the following infrastructure or measures which are "regional infrastructure":

- public amenities or public services, including infrastructure that enhances public open space or the public domain;
- affordable housing;
- transport infrastructure;
- regional or state roads;
- measures to conserve or enhance the natural environment.

Some of the above currently rest with councils, which means there will be a shift in responsibilities and also who collects, holds and administers the contributions for these items.

Proposed section 7.23(3) confirms that a state environmental planning policy (**SEPP**) may require a RIC. However, the concurrence of the treasurer will need to be obtained before the SEPP can be made (section 7.26).

RICs can be required *in addition* to local infrastructure conditions or local levy conditions. If a RIC is required by a condition of consent, that condition cannot be modified without the approval of the Minister. Under the EPA Act, there is also no appeal right to the Court for the imposition of a RIC condition.

A RIC could be imposed to provide regional infrastructure outside the region or the state. No connection would be required between the development land to which the RIC relates, and the object of expenditure of money required to be paid.

RICs would generally be paid into the Regional Infrastructure Contributions Fund, which is to be established.

New subsection 7.46(2) would enable local infrastructure contributions and RICs to be recovered as a debt in a court of competent jurisdiction.

Community participation when planning agreement functions are exercised

With the rewriting of Part 7 of the EPA Act, the community participation requirements for planning agreements are proposed to be transferred to Part 2.

The minimum 28-day public exhibition period for planning agreements will remain and be transferred into Schedule 1 of the EPA Act. If a planning agreement is to be amended or revoked, the minimum exhibition period is to be 28 days, or another period specified in the community participation plan, if any.

Reduced time for local strategic planning statements to be reviewed

The EPA Act currently requires councils to prepare and make a local strategic planning statement and review the statement at least every seven years. The Bill proposes to reduce that time to five years, presumably to align local and state timeframes for synchronisation between planning frameworks as recommended in the Review.

Additional requirements for certification

Certifiers may have to add another box to their checklist before issuing certificates under Part 6 of the EPA Act. If a RIC is required to be made before a certificate under Part 6 of the EPA Act or a strata certificate under the *Strata Schemes Development Act 2015* is issued for development, the certificate must not be issued until the contribution is made.

In addition, where a consent authority fails to impose a RIC condition where a SEPP requires it, under the changes the condition will be taken to have been imposed and have effect as if it had been imposed by the consent authority (of certifier for complying development).

Annual reporting requirements

New section 7.10(e) will allow the Regulations to make provision for or with respect to the annual reporting requirements for planning authorities in relation to compliance with, and the effect of, planning agreements.

Impact of proposed changes to infrastructure contributions on landowners and developers

It is difficult to see how the new regime will simplify the contributions regime. There will remain different types of contributions, and different bodies holding onto the contributions collected. The more arbitrary the attempts to extract contributions through the new regime, the more likely we will see litigation arising.

As we have noted, much of the detail is to be contained in the regulations which are yet to be released. The full extent of the proposed changes is currently unknown. However, given there is a 3-month window in which the validity of any procedure required to be followed in the making or approving of a contributions plan can be questioned in Court, landowners who are to be affected by the changes (especially land value contributions), should pay close and prompt attention to the changes or risk being locked out from a challenge.

Regarding land value contributions, once the changes are made, the market will need to decide who "wears" the tax. That is, will developers buying land accept the "tax" being passed onto them and for it to be included in the project feasibility analysis? Or will landowners see a reduction in the value of their land from what it would otherwise have been under the current regime?

Queensland Supreme Court finds that a local government's decision-making process failed to consider the merits of competing expressions of interest for a 99 year lease over land in the Torres Strait Islands

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Supreme Court in the matter of *Ahwang v Torres Strait Island Regional Council* [2021] QSC 147 heard before Henry J

August 2021

In brief

The case of *Ahwang v Torres Strait Island Regional Council* [2021] QSC 147 concerned an application for a statutory order of review (**Review Application**) to the Supreme Court of Queensland (**Court**) under the *Judicial Review Act 1991* (Qld) in respect of a decision by the Torres Strait Island Regional Council (**Council**) under the *Torres Strait Islander Land Act 1991* (Qld) (**TSI Land Act**) to grant a 99 year lease of residential land at St Pauls, Moa Island (**Property**).

The Court concluded that the Council failed to ensure that a meritorious decision was made and as a result, the application for a statutory order of review ought to be allowed and the Council's decision set aside.

Background

The Council is the trustee of the St Pauls Deed of Grant in Trust (**Deed**), which is a grant of land in fee simple that includes the Property. The Deed requires the trustee to "*hold the land in trust for the benefit of Islander inhabitants*".

The Applicant occupied the Property and submitted an expression of interest (**EOI**) to the Council to lease the Property. The son of a previous occupier also submitted an EOI.

The Council's decision in respect of whether or not to lease trust land is guided by Trustee Policy PO19 (**PO19**) (adopted by Council resolution on 15 November 2018) and the Queensland Government's Leasing Torres Strait Island Deed of Grant in Trust Land manual (**Manual**).

The Manual relevantly stated as follows:

> *If an EOI is submitted by a second potential lessee after a correctly made EOI has already been received for an area of land, they should be informed that their EOI cannot be considered until a decision has been made on the existing EOI ...*
>
> *Trustees should make their own policy about how to respond to a second potential lessee, should they lodge an EOI for an area of land that has already had an EOI lodged for it.*

As a result of the unusual circumstances of this case (which involved an EOI from two people in the same extended family), the Council adopted a different method for dealing with the competing EOIs, which involved a private discussion between the family members, a community meeting, and a trustee resolution.

There were over 60 attendees at the community meeting who voted on whether the Applicant or the previous occupier's son ought to be the lessee. The votes were counted in favour of the previous occupier's son. There was no evidence of any submissions made to the Council from members of the public about the actual merits of either EOI.

The Council ultimately resolved to grant a 99 year lease in favour of the previous occupier's son. There was no evidence to suggest that any discussion or debate occurred regarding the merits of the decision proposed in the trustee report when the resolution was put. The Applicant filed the Review Application seeking relief in respect of the Council's decision.

Legislative matrix

Section 85 (Grant of lease by trustee of Torres Strait Island land) of the TSI Land Act relevantly states as follows:

> *(1) The trustee of Torres Strait Islander land may grant a lease over all or a part of the land for not more than 99 years.*

> *(2) Without limiting subsection (1), the trustee of Torres Strait Islander land may grant a lease (a **home ownership lease**) over all or a part of the land for 99 years to any of the following for residential use—*
>
> *(a) a Torres Strait Islander;*
>
> *(b) a person who is not a Torres Strait Islander if—*
>
> *(i) the person is the spouse or former spouse of—*
>
> *(A) a person mentioned in paragraph (a); or*
>
> *(B) a person mentioned in paragraph (a) who is deceased; or*
>
> *(ii) the lease supports another part 8 lease granted to the person.*

Section 135 (Decision-making by trustee) of the TSI Land Act relevantly states as follows:

> *(1) This section applies if this Act provides that the trustee of Torres Strait Islander land is required to make a decision about the land, including, for example, a decision about any of the following—*
>
> *(a) the way in which the trustee will consult about the making of a freehold instrument for the land;*
>
> *(b) whether to grant an interest in the land;*
>
> *(c) whether to consent to the creation of a mining interest in the land;*
>
> *(d) whether to enter into an agreement about the land.*
>
> *(2) The trustee must—*
>
> *(a) have regard to—*
>
> *(i) if the Torres Strait Islanders for whom the trustee holds the land have agreed on a decision-making process for decisions of that kind—the process; or*
>
> *(ii) if subparagraph (i) does not apply—any Island custom, for decisions of that kind, of the Torres Strait Islanders for whom the trustee holds the land; or*
>
> *(b) if there is no decision-making process mentioned in paragraph (a)(i) or relevant Island custom—make the decision under a process of decision-making agreed to and adopted by the trustee for the decision or for decisions of that kind.*

Council's decision-making process had to comply with section 135 of the TSI Land Act

On its own evidence, the Council's decision was made in accordance with section 135 of the TSI Land Act. However, the Council asserted that section 135 of the TSI Land Act did not apply, and as such, the Review Application had to fail. In so asserting, the Council relied on the opening words of section 135(1) of the TSI Land Act which states as follows (emphasis included in [16] of the judgment):

> *This section applies **if this Act provides** that the trustee of Torres Strait Island land **is required** to make a decision about the land.*

The Council asserted that section 135 of the TSI Land Act only applies when the Council is mandated to make a decision about the land. The Council asserted that this was not the case here, because section 85 of the TSI Land Act states that a lease "*may*" be granted (as opposed to "*must*").

The Court rejected that interpretation and concluded that section 135 of the TSI Land Act applied to the Council's decision for the following reasons:

- "*An interpretation, plainly open on the ordinary meaning of the section's language, is that the requirement in s 135(1) goes to the identity of the decision maker, that is, the necessity [sic] it is the trustee which is the entity which makes the decision ('the ordinary meaning interpretation').*" (at [23]).
- "*Section 135's heading, 'Decision-making by trustee', further illustrates the focus of the part is upon the process of decision making. These are powerful contextual indications that s 135 should be read as referring to a situation in which a decision already falls to be made, so that the word 'required' relates not to the need for a decision to be made but to the need for the trustee to be the entity which makes it …*" (at [25]).

Council's decision-making process did not comply with section 135 of the TSI Land Act

The Applicant's grounds of review were twofold.

Firstly, the Applicant asserted that the Council made no enquiry as to whether Torres Strait Islanders, for whom the Council holds the land, have agreed on a decision-making process, and whether any Island custom existed for decisions about whether to grant an interest in land (section 135(2)(a)(i) and (ii) of the TSI Land Act).

The Court referred to uncontradicted affidavit evidence from a Divisional Councillor that there was no pre-existing Island decision-making process or custom. Furthermore, no evidence was advanced to suggest that there existed a relevant decision-making process or custom. On that basis, the Court rejected the first ground of review.

Secondly, the Applicant asserted that the decision-making process adopted by the Council was not a "*decision-making process*" contemplated by section 135(2)(b) of the TSI Land Act. The essence of this complaint was that the Council's decision turned on "*popular opinion*" without an informed consideration of the underlying merit of the proposed decision.

The Court concluded that this ground of review warranted setting aside the Council's decision for the following reasons:

- "*… the decision making process called for by s 135(2)(b) is a process allowing the trustee to make a decision which is sufficiently informed as to its merits to be a decision which is for the benefit of Islander inhabitants, that is to say, in the interests of the Islander inhabitants generally.*" (at [59]).
- "*… matters such as the values attributed to the land by Islanders and their interest in and use of the land would be relevant considerations in the decision making process called for by s 135(2)(b).*" (at [62]).
- "*The trustee report to the Council meeting which made the decision did not analyse the merits of the proposed decision. It merely recited the process which had been followed; a process premised solely upon ascertaining the opinion of some persons in the community.…*" (at [64]).

The Court concluded that the failure to ensure that a meritorious decision was made resulted in an error of law and a concomitant failure by the Council to meet the procedural obligation arising under section 135 of the TSI Land Act.

Council's decision-making process appears not to comply with PO19

Having found that the Council erred at law, the Court commented on a further issue in respect of the decision-making process that was not argued before it.

In particular, the Court referred to the following paragraph in PO19 (emphasis included in [70] of the judgment):

> *DOGIT Trustees are not required under the [TSI Land Act] or Aboriginal Land Act 1991 (Qld) to consult with or notify the community when considering an expression of interest to lease trust land. However, each Divisional Councillor must have* ***comprehensive knowledge*** *about the* ***values*** *of, and* ***appropriate uses*** *for, the DOGIT land,* ***existing interests*** *in the land, and* ***community opinion*** *about proposed leases for that DOGIT.*

The Court noted that the obligation of each Divisional Councillor to have comprehensive knowledge is a significant requirement. The Court further noted that although there was evidence that the councillors whose vote made the decision have some general knowledge of the values of, appropriate uses for, and existing interests in the Property, there was no evidence to support that they had a "*comprehensive knowledge*".

Consequently, although argument was not advanced on this particular issue at the hearing, the Court noted that the Council appears to have not complied with the requirements of decision-making in PO19.

Application for an extension of time ought to be granted

The Court also considered an application to extend the time to file the Review Application as a result of a 7-month delay in filing the Review Application. The reasons given by the Applicant for the delay were predominantly concerned with the remoteness of Moa Island, the Applicant's limited financial capacity, and the COVID-19 pandemic.

The Court accepted that these reasons appeared to be "*genuine and significant challenges*" (at [66]). Furthermore, the Court concluded that given the Review Application had merit, the extension ought to be granted.

Conclusion

The Court ordered that the application for leave to extend the time to file the amended application for a statutory order of review be granted, that the Council's decision be set aside, and that the EOIs ought to be reconsidered.

Planning and Environment Court of Queensland allows the proposed demolition of a pre-1947 house

Min Ko | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Williams v Brisbane City Council* [2021] QPEC 26 heard before Rackemann DCJ

August 2021

In brief

The case of *Williams v Brisbane City Council* [2021] QPEC 26 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the refusal by the Brisbane City Council of the Appellant's development application for a preliminary approval for building work to facilitate the demolition of a house (**Building**), which was built sometime between 1927 and 1930 (**Proposed Development**) on land located at 13 Borva Street, Dutton Park.

The Court considered and determined whether the Appellant had demonstrated compliance with Acceptable Outcome (**AO**) 5(c) of the Traditional Building (Demolition) Overlay Code of the *Brisbane City Plan 2014* (**Planning Scheme**), which relevantly states that "*development involves a building which, if demolished, will not result in the loss of traditional building character*".

Court finds that the proposed demolition of the Building would not result in a loss of traditional building character in any meaningful or significant way

In determining whether the Proposed Development complied with AO5(c) of the Traditional Building (Demolition) Overlay Code of the Planning Scheme, the Court noted that the Building possessed a traditional building character and that it was necessary "*… to examine the relevant part of the street and its characteristics and, in particular, the things which contribute to its traditional building character as well as to assess the subject house and its contribution and the loss, if any, which its demolition would cause*" (at [7]).

The Building is on Borva Street, which runs roughly parallel with the river and is a split-level road with the higher section of Borva Street being further from the river and the lower section of Borva Street being more proximate to the river. Given the separation between the higher section and the lower section of Borva Street, the Court noted that it was relevant to have regard to the five pre-1947 buildings which were situated in the lower section of Borva street where the Building was situated, and the traditional building character of that section of Borva Street to which those pre-1947 buildings contributed.

The Court accepted the experts' evidence that the Building expressed its traditional building character to the river rather than to the street like the other buildings in the street. The Court acknowledged that the side of the Building that faces the street retains some traditional building character elements but does not contribute to the character of the street in any meaningful sense.

The Court further noted that the Building is positioned on top of the sloping street with a greater setback from the street frontage. As a result of the greater setback, any connection that the Building would otherwise have had with the street is reduced, and the Building is only visible from a relevantly short section of Borva Street.

The Court concluded that "*any loss of traditional building character resulting from the demolition of the [Building] would not be one which is meaningful or significant*", and therefore the Court found that the Proposed Development complied with AO5(c) of the Traditional Building Character (Demolition) Overlay Code of the Planning Scheme.

Conclusion

The Court allowed the appeal.

Supreme Court of South Australia finds that the performance by ratepayers of a statutory obligation to pay rates does not create a trust limiting a local government's use of its land

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Supreme Court of South Australia in the matter of *Duke Unley Pty Ltd (ACN 080 195 606) & Ors v The Corporation of the City of Unley* [2020] SASC 224 heard before The Honourable Justice Stanley

August 2021

In brief

The case of *Duke Unley Pty Ltd (ACN 080 195 606) & Ors v The Corporation of the City of Unley* [2020] SASC 224 concerned an application to the Supreme Court of South Australia (**Court**) in respect of a memorial for the creation of a permanent carpark (**Memorial**) presented to, and implemented by, The Corporation of the City of Unley (**Council**) in the early 1970s under the now repealed *Local Government Act 1934* (SA) (**1934 Act**), which sought the following:

- A declaration that the Memorial gave rise to a statutory trust under section 380(b) of the 1934 Act, an express Quistclose trust, or a constructive or charitable trust.
- An injunction to prevent or prohibit the Council from developing the Subject Land for any purpose other than a carpark.

The Court held that because the Subject Land was formed by the amalgamation in 2002 of the land over which the Memorial was given (**Memorial Land**) and land previously used as a post office, the Subject Land could not factually be subject to a trust or dedication as argued by the applicants.

The Court considered whether the Memorial Land was affected by a trust or dedication which, under section 193(1)(b) and section 201(2) of the *Local Government Act 1999* (SA) (**1999 Act**), prevented the Council from excluding the Memorial Land from the classification of "*community land*" and limited the circumstances in which the Council could dispose of the Memorial Land.

The Court held that there must be a clear intention derived from the conduct of the parties to declare a trust, other than a constructive trust which will be imputed where a party is "*bound in conscience to hold the property on trust*" regardless of intention (at [44], [54], [61], [65], and [66]). The performance of a statutory obligation to levy and pay rates was insufficient to satisfy an intention to create a trust (at [84]), and the Court held the following in respect of the trusts and dedication argued by the applicants:

- *Statutory trust* – The legislative scheme supported a finding that there was no trust because of the following:
  - Section 224 of the 1934 Act allowed the Council to abandon the construction of the carpark and credit the special rates received against the next general rate payable (at [37]).
  - "*[P]ermanent works*" under section 383 of the 1934 Act meant works that were intended to last "*indefinitely*" and not "*in perpetuity*" (at [38] and [81]).
  - The Council was not empowered to create a trust on its own land except where the Council was gifted or donated the land for a purpose stated by the donor, which did not occur in this case (at [39] and [54]).
- *Quistclose trust* – The Court rejected the submission that the levying of the special rate satisfied the requirements for a Quistclose trust, which may arise in circumstances where a payment has been made to a person only for the purpose of the satisfaction of a debt to a third-party creditor (see [59] and *Rambaldi (Trustees) v Commissioner of Taxation, in the matter of Alex (Bankrupt)* [2017] FCAFC 217; (2017) 107 ATR 1). The Court observed, in obiter, that even if a Quistclose trust was established, once moneys advanced for the specific purpose were applied, the trust was extinguished (see [62]).
- *Constructive trust or charitable trust* –
  - Although the High Court of Australia (**High Court**) has recognised the creation of a constructive trust in respect of a joint endeavour, the High Court has expressly rejected the application in Australia of a remedial charitable trust (see [71] and *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59; (1998) 195 CLR 566 compared with the United Kingdom position in *Dore v Leicestershire County Council* [2010] EWHC 1387 (Cth)).

- The courts have showed a willingness to find in favour of a constructive trust, where a person by way of joint endeavour has "*contributed to the acquisition, maintenance or renovation of property*", the endeavour has failed through no fault of the parties, and to not impose the trust would be unconscionable (see [65], [66], and *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 538).
- There was no joint endeavour between the Council and the applicants, who were not named on the Memorial, and to suggest that it would be unconscionable for the Council not to hold the property on trust for the applicants' benefit was untenable (at [67]).

- *Dedication of the Memorial Land as a "public place" –*
  - The reasoning of the High Court in *Randwick Municipal Council v Rutledge* [1959] HCA 63; (1959) 102 CLR 54 in respect of the dedication of Crown land ought to also be applicable to a local government, and therefore a local government will not be taken to have dedicated land for a particular purpose and may subsequently use the land for another purpose, unless an intention to create a trust exists (at [74] to [77]).
  - The Memorial Land was not a "*public place*" or a "*thoroughfare*" within the meaning of section 5 of the 1934 Act and the 1934 Act "*did not confer power on the [C]ouncil to dedicate land it already owned*".

The Court held that an object of local government legislation includes the local government's funding of development to service its residents, whose needs may change overtime, and it would therefore be unsound to construe the legislation as requiring the creation of a trust which would prevent or restrict the Council's use of its land (at [53]).

The applicants were not memorialists, but nevertheless had standing in the proceedings by virtue of their special interest "*which [was] more than a mere intellectual or emotional concern*" as they were adjoining landowners and there was potential for the removal of the carpark to impact negatively on their commercial interests (at [93] and [94]).

The Court held that "*the invocation and use of the statutory scheme of undertaking work sought by a memorial of ratepayers and funded by levying a separate rate [could not] impress the [M]emorial [L]and owned by the [C]ouncil with a trust*" and that the Council was able to dispose of the carpark without complying with the requirements of section 194 of the 1999 Act because the Council's removal of the Memorial Land from the classification of "*community land*" was valid.

Factual matrix and party positions

The Memorial as was permitted under section 218 of the 1934 Act was put to the Council in 1971 seeking that the Council construct a permanent public carpark on the Memorial Land.

In 1973, the Council undertook works to create a bituminised carpark at a cost of $10,352.44 and levied a rate of three cents in the dollar for a period of 10 years (**Special Rate**) to recover the cost from ratepayers within the area of the Memorial Land, including those who were not memorialists.

The applicants alleged that the Subject Land was "*community land*" under section 193(1) of the 1999 Act, which relevantly provided the following:

> *(1) All local government land (except roads) that is owned by a council or under a council's care, control and management at the commencement of this section (the commencement date) is taken to have been classified as community land unless—*
>
> *(a) the council resolves to exclude the land from classification as community land within three years after the commencement date; and*
>
> *(b) the land is unaffected by provisions of a reservation, dedication, trust or other instrument that would prevent or restrict its alienation.*

Were the Subject Land classified as "*community land*", the Council was prevented under section 201(2)(a)(ii) of the 1999 Act from disposing of the land, unless the classification was revoked under section 194 of the 1999 Act.

The applicants submitted that the Council's attempt to revoke the classification of the Subject Land was contrary to section 193(1)(b) of the 1999 Act and therefore invalid because the land was affected by a trust or dedication.

The Council denied the creation of a trust over the Subject Land, and submitted that it did not have power under the 1934 Act to declare a trust or dedication for carparking purposes over land it owned.

No trust was declared to prevent the Council's disposal of the Memorial Land

Although the Subject Land could not form part of the applicants' case for want of being subject to the Memorial, the Court considered the applicants' position solely in respect of the Memorial Land.

The Court held that the Memorial did not request a carpark in perpetuity or the creation of a trust (at [80]), nor did the resolution of the Council to levy the Special Rate "*declare a trust or state that the [M]emorial [L]and [had] been dedicated for the purpose of a carpark or any other purpose*" (at [81]).

The resolution of the Council to levy the Special Rate characterised the carpark as permanent works, which meant the carpark was intended to have indefinite existence rather than permanent existence (at [83]).

The Special Rate was levied by the Council according to the applicable statutory scheme under the 1934 Act, and in addition to the Council lacking power to declare a trust or dedicate land it owned, the satisfaction of an obligation to pay rates was held to be insufficient to satisfy an intention to declare a trust or dedicate land (at [39] and [84]).

The Court also held that there was "*no room for equity's intervention by the imposition of [a Quistclose or constructive] trust*", where the position was regulated by statute (at [62] and [67]).

However, the Court noted that had the Council received the Memorial Land as a gift or donation, the Court's decision may have been different (see [39], [50], [51], and section 380 of the 1934 Act).

Conclusion

The Court held that no trust or dedication was established by the performance of obligations under the applicable local government legislation. As such, the Court confirmed the validity of the Council's removal of the Memorial Land from the classification of "*community land*" and its ability to use the land for a purpose other than a carpark, including disposing of the land.

The principles in relation to the declaration of trusts and dedication of land relied upon by the Court were enunciated by the High Court, and are therefore applicable in each Australian State and Territory.

New South Wales Court of Appeal finds there is no power to determine a modification application seeking to reduce development contributions after payment

Annie Dong | Anthony Landro | Mollie Matthews | Todd Neal

This article discusses the decision of the New South Wales Land and Environment Court in the matter of *Buyozo Pty Limited v Ku-ring-gai Council* [2021] NSWLEC 2 heard before Pepper J

August 2021

In brief

The case of *Buyozo Pty Limited v Ku-ring-gai Council* [2021] NSWLEC 2 concerned a decision of Pepper J, which upheld an appeal to the NSW Land and Environment Court (**NSWLEC**) brought by Buyozo to modify a condition of consent to reduce the amount of development contributions payable under section 7.11 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) from $987,242.37 to $674,151.05 on the basis that gross floor area had been calculated incorrectly. Our April 2021 article examined that decision in detail.

Ku-ring-gai Council appealed the decision to the Court of Appeal (**Court**) in the case of *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177 (***Buyozo***). There were six grounds of appeal, falling into the following three categories:

- Whether the primary judge had erred in concluding that a power existed under section 4.55 of the EP&A Act to modify a condition of consent requiring the payment of contributions, where the contributions had already been paid.
- Whether the primary judge had erred by misconstruing the definition of '*gross floor area*' in the *Ku-ring-gai Local Environmental Plan 2015* (**KLEP**) by finding that the area comprising the corridors in the building was an area of access to space used for the loading or unloading of goods.
- Whether the primary judge had erred in concluding that there was utility in modifying the subject condition (**Condition 30**), which required the payment of a monetary contribution.

The Court ultimately upheld the appeal on all three grounds, set aside the judgment of the primary judge, and refused the modification application. The Court also made an order for costs against Buyozo for the appeal proceedings.

We examine the takeaways from the Court's judgment below.

Limits of power to modify development consents under sections 4.55(1A), 4.55(2), and 4.56(1) of the EP&A Act

The Court's judgment contained two important conclusions relating to the power of consent authorities to modify development consents.

Conclusion 1

A condition of consent can never be imposed requiring the doing of something retrospectively. It can only require something to be done prospectively. In this case, as the contributions had already been paid, the condition "*had no further work to do*" and so after the condition had been satisfied (ie after the payment of the contributions), the condition was not capable of being modified (at [46]).

The Court reasoned at [37]-[47] that a modification shares with the grant of a development consent the essential characteristic of only operating prospectively, so as to authorise the doing of something in the future: *Willoughby City Council v Dasco Design and Construction Pty Ltd & Anor* (2000) 111 LGERA 422; [2000] NSWLEC 275.

The Court, by way of example to highlight this principle, drew an interesting distinction in respect of the erection of a building. The Court observed that a development consent cannot be granted to authorise development that has already been carried out, for example the **erection** of a building. Rather, a development consent can only operate prospectively, including for example the **future use** of an already erected building. The Court held at [40] that this essential characteristic of the grant of a development consent flows into the modification of a development consent.

Importantly, this creates a more nuanced and constrained explanation of the modification powers compared to how those powers have in practice been applied following decisions like *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299; [2000] NSWLEC 240 (***Windy Dropdown***).

Windy Dropdown has been cited for the proposition that the power is "*facultative*" and "*the broad construction of s 96 leads to a practical result that enables a consent authority to deal with unexpected contingencies as they arise during the course of construction of development or even subsequently, provided of course that the development to which the consent as modified relates is substantially the same development*" (at [32]). However, as the Court of Appeal noted in *Buyozo*, "*the effect of the modification is to authorise what has already occurred, although the authorisation operates prospectively and not retrospectively*" (at [35]).

Conclusion 2

The Court held that there were four powers to modify a development consent, being section 4.55(1), section 4.55(1A), section 4.55(2), and section 4.56(1) of the EP&A Act, which each vary. Where a modification to a development consent is applied for under section 4.55(1A), section 4.55(2), or section 4.56(1) of the EP&A Act, the Court's judgment requires that **at least** one of the results of the modification application must be a change to the proposed development. In that regard, the Court stated:

> *[55] The constraints on three of the powers, s 4.55(1A), s 4.55(2) and s 4.56(1), indicate that the **modification** of the development consent sought **needs to effect some change to the development** the subject of the development consent, while the constraints on one of the powers, s 4.55(1), indicate to the contrary that no change to the development the subject of the development consent needs to be effected.* (emphasis added)
>
> *"[63] The upshot of this analysis is that the power in s 4.56(1), as with **the powers in s 4.55(1A) and s 4.55(2), can only be exercised to modify** a development consent **if the modification will effect some change** to the development the subject of the development consent. **This need not be the only effect** of the modification but it **must be at least one of the results** of the modification of the development consent."* (emphasis added)

The Court held that the subject development (with its proposed modification to the conditions of consent) would not involve any modification to the development, and concluded that the power to modify was therefore not engaged.

How can applicants avoid the limitations of sections 4.55(1A), 4.55(2), and 4.56(1) of the EP&A Act?

Where no change to a development is proposed, an applicant cannot rely on section 4.55(1A), section 4.55(2), or section 4.56(1) of the EP&A Act to modify the development. The Court explained the following three options would instead be available in those circumstances (at [66]-[71]):

1. An applicant could apply to modify a development consent under section 4.55(1) of the EP&A Act to correct a minor error, misdescription, or miscalculation. There are limited situations in which this will be possible. The Court referred to section 4.55(1) of the EP&A Act as "*a form of 'slip rule' commonly available to correct minor errors in court judgments*", and confirmed that this would not have been available in Buyozo's circumstances.
2. An applicant could appeal the imposition of a condition by commencing Class 1 proceedings under section 8.7 of the EP&A Act. The NSWLEC on appeal could then assess whether a condition imposed under section 7.11 of the EP&A Act was determined in accordance with the relevant contributions plan, or amend the condition if it was unreasonable in the circumstances.

   This option had not been pursued in *Buyozo*. In our experience, applicants often seek to modify a consent (and appeal the refusal of the modification), rather than directly appeal the conditions of consent so as not to potentially jeopardise the entire consent and to prevent the consent ceasing to have effect while it is being appealed (see section 8.13(1) of the EP&A Act).
3. Class 4 judicial review proceedings could be commenced to challenge the validity of a condition, and seek orders to sever it from the development consent (see *Maitland City Council v Anambah Homes Pty Ltd* (2005) 64 NSWLR 695; [2005] NSWCA 455); (see *Rose Consulting Group v Baulkham Hills Shire Council* (2003) 58 NSWLR 159; [2003] NSWCA 266; *Lake Macquarie City Council v Hammersmith Management Pty Ltd* (2003) 132 LGERA 225; [2003] NSWCA 313).

We note that option 3 may be a risky approach given that Class 4 proceedings are not cost-neutral like Class 1 merit proceedings.

We are also already seeing the emergence of a fourth option, which involves an applicant ensuring that a change to a development is proposed when lodging a modification application, as well as a condition. We consider that this would satisfy the requirement arising from the Court's judgment that at least one of the results of the modification of the consent must be that the modification "*will effect some change to the development the subject of the development consent*".

Primary judge errs in finding that the corridors were excluded from the definition of "gross floor area" in the KLEP because the area to be excluded from the definition needs to be ascertained from the use of the building as a whole

The Court held that self-storage areas and the corridors outside them should have been included within the calculation of '*gross floor area*'.

The Court found that the exclusion of corridors from gross floor area was akin to excluding the approved use of the building (at [74]).The Court highlighted that the mere fact that some people have a preference to unload goods in corridors before moving them into a self-storage unit does not mean that "*the corridors, properly characterised and considering their function within the building as a whole, are to be characterised as spaces for the loading and unloading of goods.*" (at [75)]. Rather, the correct inquiry is to identify the areas within a building that have been approved by the development consent to be used for the loading or unloading of goods (at [80]).

No public utility in reducing the quantum of contributions paid under Condition 30 of the development consent

The Court held at [95] that Condition 30 of the development consent revealed nothing on its face about how the required amount of contributions had been calculated. Although the development consent would be a publicly available document, its terms did not specify which areas were included or excluded as part of the gross floor area used to calculate the contributions payable.

The Court concluded that the proposed modification of the consent would not be any more informative about the calculation process for the substituted amount, and the public utility in the modification of Condition 30 was "*non-existent*".

No requirement to take into account overpayments in contributions generally

Contrary to the primary judge's finding, the Court stated at [99] that "*the Council would not be required to take the 'overpayment into account' prior to the imposition of any condition in respect of any future development application.*" This was because a modification to Condition 30 would not cause the difference between the original and proposed amount to cease being a benefit provided as a condition of consent, within the exception identified in section 7.11(6)(a) of the EP&A Act (at [101]).

No right to a refund of contributions paid under a condition of consent, even if a restitution claim was possible, it did not give utility to modifying Condition 30

The Court reaffirmed its decision in *Frevcourt Pty Ltd & Anor v Wingecarribee Shire Council* (2005) 139 LGERA 140; [2005] NSWCA 107, where it concluded that there was no right to a refund of development contributions in circumstances where there had been an overpayment.

The Court cited *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378; [1992] HCA 48 and stated at [105] that although it was not clear which type of restitution claim the primary judge had in mind, Buyozo could not have brought an action for money paid under a mistake of law, as it had voluntarily paid the contributions in order to carry out the development, rather than pay under the mistaken belief that it "*was under a legal obligation*" to do so.

Implications

The judgment of Preston CJ in *Buyozo* was the third significant judgment on the power to modify a development consent in the last few years, the others being the following:

- *Arrage v Inner West Council* [2019] NSWLEC 85 in relation to the test of whether a modification of a development consent is "*substantially the same*".
- *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 (***AQC Dartbrook***).

Since our June 2021 article on *AQC Dartbrook*, the *Environmental Planning and Assessment Regulation 2000* (NSW) has been amended to insert clause 121B, which now allows for modification applications to be amended before determination.

Conclusion

To summarise, the three high-level takeaways from this case are the following:

1. Modification applications are forward-looking, and unless the modification is to correct a minor error or misdescription, at least one of the effects of the modification application needs to be a change to the proposed development.
2. The more expansive application of the 'gross floor area' definition in the KLEP taken by the primary judge has been overturned. As mentioned in our April 2021 article, developers should ensure that the correct definition is being applied at all stages of the development process.
3. There remains little recourse to developers who overpay contributions. If a contribution is suspected to have been calculated incorrectly, steps should be taken to address this before payment occurs. Unfortunately, this often delays the carrying out of the development.

Editor's Note by Ian Wright and Krystal Cunningham-Foran

Relevancy to Queensland law

As stated in our April 2021 article, in Queensland, the term "*gross floor area*" is defined in Schedule 24 of the *Planning Regulation 2017* (Qld) (**Planning Regulation**).

A local government is required under section 8 and schedule 4 of the Planning Regulation to adopt the definition of gross floor area as it is stated in Schedule 24 of the Planning Regulation.

Schedule 24 of the Planning Regulation relevantly excludes areas of a building used for access between levels and the parking, loading, or manoeuvring vehicles from falling within the definition of gross floor area.

The issue of whether the mere use of an area for loading or unloading goods is enough to satisfy exclusion (e) of the definition of gross floor area has not been considered by Queensland Courts. However, should the issue arise, we consider the Court's approach in *Buyozo* to be relevant in that the mere or preferred use of an area for loading or unloading goods would not be enough, on its own, to satisfy the exclusion. What would reasonably be required is a characterisation of the use and function of the area as a whole, in the context of the development approval to which the building is subject.

We note for completeness that "*gross floor area*" in the context of determining whether a planning change is an "*adverse planning change*" is separately defined under section 30 of the *Planning Act 2016*.

We are also of the view that under Queensland law, similar to the Court's approach in *Buyozo*, a condition of a development approval, once complied with, has been completed and cannot be retrospectively altered.

Compensation for the compulsory acquisition of native title rights awarded by New South Wales Courts

Anthony Landro | Todd Neal

This article discusses recent New South Wales Court decisions in respect of native title and provides a brief summary of a draft paper on valuing cultural heritage land by the Valuer-General of NSW

August 2021

In brief

There have been two recent important New South Wales (**NSW**) Court decisions in respect of native title in the context of the compulsory acquisition of land. The emergence of these types of claims will need to be assessed and dealt with by the Courts in the years ahead. In anticipation of an increase of these types of claims, the Valuer-General of NSW has released a draft paper on valuing cultural heritage land (**Draft Paper**) under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**).

This article considers the two cases, and provides a brief summary of the Valuer-General's Draft Paper.

Bandjalang People v Transport for NSW

Early last year in the case of *Bandjalang Aboriginal Corporation Prescribed Body Corporate RNTBC on behalf of the Bandjalang People v Transport for NSW* [2020] NSWLEC 1008, the NSW Land and Environment Court (**LEC**) ordered the payment of $42,000 plus interest as agreed compensation for the compulsory acquisition of native title land, plus an agreed costs in the amount of $35,473.35.

Whilst there was limited information contained in the judgment, the following background was described:

- On 2 December 2013, the Bandjalang People's native title rights over the subject land were recognised by the Federal Court of Australia.
- On 22 January 2016, Transport for NSW compulsorily acquired the subject land, including the land the subject of the Bandjalang People's native title rights.
- On 20 January 2016, the Applicant lodged a claim for compensation under the Just Terms Act.
- On 12 April 2019, Transport for NSW offered the Applicant $9,080 in compensation.
- On 16 July 2019, the Applicant lodged an objection with the LEC.
- The parties entered into a "section 34 agreement" after a conciliation conference in October and December 2019.

The attributes of the subject land were not explored in the judgment given that it arose from a "*section 34 agreement*", which is an agreement reached between parties following a conciliation conference under section 34 of the *Land and Environment Court Act 1979* (NSW) (even following the case of *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, which has led to more details being provided in judgments in respect of section 34 agreements).

What can be ascertained from the judgment is that the subject land was Lot 6 on DP 1204340. Our review of SIX Maps records that the subject land has an area of 464m^2, and is located outside of Broadwater, south of Ballina, in northern NSW. A review of Google maps shows significant road construction on the subject land, and it appears to have been acquired for the Pacific Highway upgrade currently underway.

Non-exclusive native title in favour of the Bandjalang Aboriginal Corporation was determined over the subject land in 2013. We do not know if native title was extinguished as a result of the compulsory acquisition.

It would be difficult to rely on the LEC judgment as a means of quantifying the compensation likely to be awarded for other compulsory acquisitions of native title land given that speculation would be involved. Like any claim for compensation resolved through a section 34 conference, which remains confidential, no one can properly unpick how the compensation was awarded, or more specifically, under what heads of compensation it was provided. All we know is the total amount of compensation, which in this case was $42,000.

Nevertheless, the decision is unique and one where the LEC had to be satisfied that the compensation for the compulsory acquisition of native title land was within power.

Lawson v Minister for Environment & Water (SA)

The second decision was handed down by the NSW Court of Appeal (**Court of Appeal**) early this year in the case of *Lawson v Minister for Environment & Water (SA)* [2021] NSWCA 6.

The case had unusual facts, and concerned a historical compulsory acquisition of land in the NSW Lake Victoria area in 1922 (part of the Murray-Darling Basin) under the *Public Works Act 1912* (NSW) (**Public Works Act**).

The case has a long history, and is still not yet fully resolved. In short, the Applicant sought compensation under the Public Works Act as a descendant of the holder of a possessory or native title asserted to exist at the time of the acquisition close to a century ago.

The subject land was found by the primary judge to have become vested in the South Australian government as an estate in fee simple upon the commencement of the *River Murray Waters Act 1915* (NSW) (**1915 Act**), which ratified an agreement between the Commonwealth and the States of NSW, Victoria, and South Australia. The primary judge went on to find that all native title or possessory title rights were extinguished when the land was vested.

The consequence of the primary judge's findings was that there were no native title rights held at the time of the acquisition in 1922, and therefore, the Applicant was not entitled to compensation under the Public Works Act.

The Court of Appeal allowed the appeal from the NSW Supreme Court and found the following:

- The land did not vest in South Australia as an estate in fee simple on the commencement of the 1915 Act. Rather the 1915 Act provided a mechanism by which South Australia could obtain the fee simple.
- Any pre-existing rights held were not extinguished by the 1915 Act, but rather by the 1922 acquisition under the Public Works Act.
- The acquisition had converted the native title rights into a claim for compensation meaning that the Applicant was entitled to make a claim for compensation under the Public Works Act.

Given the extension granted to make the claim for compensation by Biscoe J in *Lawson v South Australian Minister for Water and the River Murray (No. 2)* [2014] NSWLEC 189, the Applicant will be able to make a claim in Court that will test how one compensates these types of "interests" in land.

Valuer-General's Draft Paper

These are new and emerging cases and we expect further cases and claims to arise in the future following:

- the High Court's decision in *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 (*Timber Creek*);
- new infrastructure projects being proposed and pursued in locations subject to native title claims; and
- the increase in native title determinations.

It appears to us that the NSW Valuer-General also expects the emergence of more compulsory acquisitions involving native title, and to that point has recently released a Draft Paper in June 2021 titled: "*Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition*". The Draft Paper proposes a policy for the determination of compensation for cultural loss following a compulsory acquisition.

The Draft Paper notes that there is no clear process or statutory guidance on the process by which non-economic loss for cultural loss, including native title loss, is to be determined.

The Draft Paper provides some explanation of how the processing of a native title claim fits within the conventional Just Terms Act process for land acquisitions. Of note is a proposed conference between the Valuer-General and a claimant (preferably following invitation to country) prior to the gazettal of the acquisition in order to better understand the nature of the claim.

The Draft Paper includes a non-exhaustive list of over 30 examples of cultural loss falling under the categories of access, residence, activities, practices, ecology, sites, and progressive impairment. If adopted, these categories will go some way towards establishing the threshold issues in the assessment of native title claims under the Just Terms Act and will likely be used to guide valuers when dealing with an acquisition involving native title.

In respect of the issue of quantification, the Draft Paper canvasses a high-level valuation methodology built upon the following three pillars:

1. Identification of the form and number of forms of cultural loss.
2. Identification of the significance of the forms of cultural loss.
3. Intuitive determination of cultural loss having regard to the whole of the evidence.

The Draft Paper concludes with the following comment:

> *For some, it may appear that the Valuer General is attempting to quantify the unquantifiable but, as the [Just Terms] Act requires cultural loss to be quantified as monetary value, the above methodology for the quantification of compensation is considered to be one possible route to a determination of compensation on 'just terms' in accordance with the relevant legislation for the purposes of discussion and community feedback.*

Submissions on the Draft Paper closed on Friday 20 August 2021.

What are the requirements for development on foreshore Crown land and waterways in NSW?

Mollie Matthews | Katherine Pickerd | Todd Neal

This article discusses some key requirements that landowners need to be aware of regarding waterfront structures on Crown waterways in New South Wales

August 2021

In brief

The NSW Department of Planning, Industry and Environment – Crown Lands is currently focussing on addressing unauthorised development (in particular modular and storage pontoons) on foreshore Crown land and waterways.

Owners of waterfront properties who construct or alter structures on Crown waterways need to be vigilant in ensuring all the correct approvals and licences are obtained before doing so.

Landowners and prospective purchasers also need to be aware of possible risks that exist for historical encroachments and development on Crown waterways. Over the last decade, the former Roads and Maritime Services began a process of addressing these types of encroachments on Sydney Harbour, and this approach looks set to be repeated more broadly across the State for development on Crown waterways.

Recently, the NSW Department of Planning, Industry and Environment – Crown Lands (**Department**) has published a request to local councils titled *Working together to address unauthorised development on foreshore Crown land and waterways*.

One of the key approvals generally required to authorise development is a development consent.

Depending on the proposed works, sometimes a complying development certificate will be sufficient to authorise works. Owners of waterfront properties and prospective purchasers should consider whether a development consent already exists, whether it is required for any proposed works, or whether existing use rights might be available.

Owner's consent

Importantly, before consent can be granted to a development application that relates to Crown land, owner's consent must be obtained from the Department.

The requirement to obtain owner's consent prior to the grant of a development consent has been in the spotlight in recent years, as it is a jurisdictional precondition to the grant of consent. This applies in the same way to development on Crown land. Without owner's consent, questions about the validity of the consent will arise.

Licence to occupy foreshore Crown land and waterways

In addition to obtaining development consent (and owner's consent), a domestic waterfront licence issued by the Department is required for the use and occupation of Crown land below the mean high water mark for recreational infrastructure such as jetties, pontoons and boat ramps.

This licence must be in place **before** commencing construction of such a structure.

The Department has raised a concern in its request to councils that many landowners are unaware of this requirement, as conditions of consent often do not include the requirement to obtain a domestic waterfront licence prior to the issue of a construction certificate.

In principle, assuming the Department's request is implemented, this will be similar to development consents that require a landlocked owner to obtain a right of carriageway over the neighbour's property for the access rights they need. In these situations, two options normally eventuate: the application will be refused if the right of access is not secured, or alternatively, the need for the right of access will be conditioned.

Irrespective of whether or not the condition the Department seeks is included in the conditions of these types of development consents involving Crown land, authorisation is required to use Crown land under the *Crown Land Management Act 2016* (NSW) (**CLM Act**). Section 5.21 of the CLM Act provides that this authorisation can be granted by way of a licence. If a licence is not obtained, section 5.26 provides that the Minister can grant a licence unilaterally to authorise the use or occupation of Crown land if that is currently occurring without authority. That licence binds the person even if it is granted without their consent.

Modular or storage pontoons

The Department has raised a specific concern in relation to modular or storage pontoons.

Even if these do not require development consent, the Department's publication notes that it will not consent to the occupation of Crown waterways for this purpose given the negative impacts that these structures can have on public safety, visual amenity, seagrasses, fish habitat and navigation.

Considerations for landowners and purchasers of properties

The process of obtaining the public law (development consents) and private law (licences) rights for these structures can be time consuming and involve costly reports given the interface the structures have with sensitive marine environments. A degree of forward planning may be required to avoid enforcement action.

In order to avoid risking regulatory action and/or prosecution for a breach of the CLM Act, adjoining landowners who occupy Crown land and waterways need to be aware of the requirement for a domestic waterfront licence, and start considering what is needed to obtain such a licence.

Owners and purchasers of properties should be aware that certain types of structures will not be permitted.

Queensland Planning and Environment Court emphasises the importance of experts providing the basis for their opinions when giving expert evidence

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gold Coast Motorsport Training Centre Pty Ltd v Gold Coast City Council & Ors* [2021] QPEC 33 heard before Kefford DCJ

September 2021

In brief

The case of *Gold Coast Motorsport Training Centre Pty Ltd v Gold Coast City Council & Ors* [2021] QPEC 33 concerned an appeal by Gold Coast Motorsport Training Centre Pty Ltd (**Applicant**) to the Queensland Planning and Environment Court (**Court**) against the Gold Coast City Council's (**Council**) refusal of a development application for a material change of use of land in Pimpama for an outdoor sport and recreation use (motor sport and training facility) (**Application**). Three residents of the local area opposed the development and elected to join the appeal.

The Court dismissed the appeal and refused the Application. In doing so, the Court emphasised the importance of experts providing the basis for their opinions when giving expert evidence.

Subject land

The subject land fronts Pimpama Jacobs Well Road, which is a sealed, two-lane road that links to the Pacific Motorway. Pimpama Jacobs Well Road is an arterial road that carries traffic associated with rural activities, extractive industry uses, and commuters from surrounding localities. The subject land is located in the Emerging Communities Domain under the *Gold Coast Planning Scheme 2003* (version 1.2) (**Planning Scheme**).

A motorsport facility has been built on the subject land. To the north and south of the subject land are large rural lots that are predominately used for grazing and sugar cane cultivation. To the west are smaller rural allotments of approximately four to five hectares, and to the immediate east are dwelling houses that front Pimpama Jacobs Well Road.

Application and issues on appeal

The Applicant lodged the Application in December 2014 in response to an enforcement notice which was issued for the unlawful use of the subject land as a kart racing track. The Application was impact assessable, and ultimately refused by the Council in July 2016. The Applicant appealed the Council's decision in August 2016. Three residents who live proximate to the subject land elected to join as co-respondents in the appeal.

Notably, the *Sustainable Planning Act 2009* (Qld) (**SPA**) was still in force at the time the Application was decided and the appeal was filed. As such, the Application had to be assessed and decided in accordance with the decision-making framework under the SPA, which required that the decision not conflict with the Planning Scheme unless there were sufficient grounds to justify the decision, despite the conflict (section 326 of SPA).

The Council ultimately supported the Application at the hearing of the appeal following a change to the proposed development. Consequently, the appeal centred on two key issues: firstly, whether the proposed use was appropriate for the Emerging Communities Domain under the Planning Scheme (**First Issue**), and secondly, whether the proposed use would detract from the amenity of the local area (**Second Issue**).

Approval of the proposed development would conflict with the Planning Scheme

In respect of the First Issue, the parties agreed that a decision to approve the proposed development would conflict with the Planning Scheme as a result of the particular use (outdoor sport and recreation) not being included in the list of appropriate and desirable uses for the Emerging Communities Domain (see [15] and [18]).

In respect of the Second Issue, the co-respondents asserted that the proposed development would conflict with performance criteria 19 of the Emerging Communities Domain Place Code, which states as follows:

> *The proposed use must not detract from the amenity of the local area, having regard, but not limited, to the impact of:*
>
> *a) noise …*

Each of the co-respondents gave evidence in the appeal to the effect that the "*rural living*" amenity of the area had been affected by the kart racing track. Although the co-respondents accepted that the amenity was affected by the traffic noise from Pimpama Jacobs Well Road, the noise created by the kart racing track was longer lasting, and more disruptive.

In contrast, the Applicant and the Council agreed that the noise impacts could be appropriately managed by way of conditions and the implementation of a Noise Management Plan.

The Court concluded that approval of the proposed development would conflict with the planning controls relating to noise impacts for the following reasons:

- The Court rejected a submission by the Council that weight ought not be placed on the co-respondents evidence (see [39]). In doing so, the Court referred to numerous authorities including the decision of *Broad v Brisbane City Council & Anor* [1986] QSCFC 27; [1986] 2 Qd R 317, where the Queensland Supreme Court stated that whilst "*… the ultimate inquiry is an objective one …*" "*… [i]t is inevitable that individual perceptions be received and evaluated in the course of ascertaining what the amenity is in a particular neighbourhood and what effect the relevant proposal will have upon it.*" (see [40]).
- The Planning Scheme indicates a clear planning policy that uses, such as the proposed development, are not to be located in the Emerging Communities Domain. This lends support to the reasonableness of the expectations of the co-respondents that their amenity would not be impacted by the type of noise associated with the proposed development (see [57] to [58]).
- The experts did not identify a noise standard or guideline to support their assumptions about the appropriate noise levels to be achieved at each residence, and their conclusions appear to have been based on the exercise of professional judgement (see [126]). The Court noted that it "*is not bound to accept the professional judgment of the experts about such matters*" (referencing the decision in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305) (see [127] to [128]).
- The Court noted that a trier of fact "*must arrive at an independent assessment of the opinions and their value*" and that "*[t]his cannot be done unless their basis is explained*" (see [129]).
- The Court was unpersuaded about the reliability of the experts' professional judgement that the proposed development would not result in unacceptable noise impacts (see [131]). In particular, the Court concluded that there was "*a lack of transparency about both the level of noise that the experts say should be adopted as an acceptable standard" and "the basis on which the experts conclude that the apparently agreed level is the appropriate standard*" (see [132]).
- The deficiencies in respect of the acceptable level of noise and the experts' basis for their agreed level were material, and the proof of the expertise of the acoustic engineers was insufficient to overcome the deficiencies (see [157]).
- The evidence of the acoustic engineers fell "*seriously short*" of demonstrating compliance with performance criteria 19 of the Emerging Communities Domain Place Code. The Court agreed with the evidence of the co-respondents that the motorsport facility would detract from the amenity of the local area by reason of adverse noise impacts (see [182] to [183]).

No sufficient grounds to warrant approving the proposed development despite the conflict

The Court stated that "*the Planning Scheme is an expression of the public interest*" (at [234]) and that in this case, "*the real question to be decided [was] whether the deviation from the Planning Scheme to approve the proposed development serves the public interest to an extent greater than the public interest in certainty that the terms of the Planning Scheme will be faithfully applied.*" (at [235]).

The Court acknowledged that there was some evidence of a need for, and community benefit deriving from, the proposed development, but that only minor weight ought to be given to that need and benefit (at [219]).

Ultimately, the Court concluded that there were no sufficient grounds to overcome the clear planning strategy with respect to the subject land. The appeal was dismissed and the Application was refused.

Important takeaway

An important takeaway from this decision is that, for expert opinion evidence to be admissible, it must satisfy the following criteria (see *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 [85]):

- It must be agreed or demonstrated that there is a field of specialised knowledge.
- There must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert.
- The opinion proffered must be wholly or substantially based on the witnesses' expert knowledge.
- So far as the opinion is based on facts observed by the expert, those facts must be identified and admissibly proved by the expert.

- So far as the opinion is based on assumed or accepted facts, those facts must be identified and proved in some other way.
- It must be established that the facts on which the opinion is based form a proper foundation for it.
- Finally, the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of specialised knowledge in which the witness is an expert by reason of training, study, or experience, and on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded.

Experts and legal practitioners will need to have regard to the above criteria when preparing (or reviewing) expert reports, affidavits of evidence, giving evidence, or making submissions.

Queensland Planning and Environment Court allows an appeal against the refusal of a development application for an advertising device

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Odna Group Pty Ltd v Logan City Council* [2021] QPEC 41 heard before Rackemann DCJ

September 2021

In brief

The case of *Odna Group Pty Ltd v Logan City Council* [2021] QPEC 41 concerned an appeal by Odna Group Pty Ltd (**Applicant**) to the Planning and Environment Court of Queensland (**Court**) against a decision by the Logan City Council (**Council**) to refuse a code assessable development application for a development permit for operational work to erect an advertising device (**Application**) in Springwood, Queensland.

The Court allowed the appeal, set aside the Council's decision, and approved the Application subject to conditions to be determined at a later hearing.

Background

The Application was for an advertising device, with a single-sided electronic display, on top of an existing three storey commercial building located at 3-5 Westmoreland Boulevard, Springwood. The proposed sign would be 15 metres wide and five metres high, and would be orientated to face southbound traffic on the Pacific Motorway.

The Application was code assessable against the *Logan Planning Scheme 2015* (version 7) (**Planning Scheme**). The key issue on appeal was whether the proposed development complied with the provisions of the Advertising Device Code (**Code**) relating to the safety of the movement network and protection of the visual amenity of the surrounding area.

Advertising device would not affect the safety of the movement network

The Council argued that the advertising device would distract drivers, and therefore did not comply with the following provisions of the Code:

- "*The purpose of the code is to: … b. maintain the safety of the movement network*" (sub-paragraph 1(b) of the statement of purpose of the Code).
- "*An advertising device is designed and located to: … ii. not adversely affect the safe function and operation of the movement network*" (sub-paragraph 2(a)(ii) of the Code).
- "*An advertising device is designed and located … b. to be safe for pedestrians, cyclists and vehicular traffic; c. to not distract motorists so as to cause a traffic hazard*" (PO1(b) and PO1(c) of the Code).

It was common ground that the proposed development did not comply with the acceptable outcomes for PO1 of the Code. Consequently, the issue was whether the proposed development nevertheless complied with the performance outcome or the purpose and overall outcomes of the Code.

The Court ultimately accepted that the advertising device complied with PO1 and the purpose and overall outcomes of the Code. In particular, the Court concluded that approval could impose appropriate conditions to avoid the advertising sign being unduly distracting. The Court gave examples at [19] of conditions which could be imposed on any approval, including for example:

- A condition could be imposed to the effect that there is to be no animation, flashing, motion, or any effect that creates the illusion of movement.
- A condition could be imposed to the effect that there is to be no flashing, blinking, revolving, or intermittent lights and that the sign has a dark display or turn off in case of failure.
- A condition could be imposed to the effect that there is to be no dwell time to limit the number of message changes that drivers are exposed to.
- The advertising device not be shaped or coloured like an official traffic control device.

Advertising device would not adversely impact the visual amenity of the surrounding area

The Council argued that the advertising device would adversely affect the visual amenity of the surrounding area, and therefore did not comply with provisions of the Code, including that the advertising device be "*designed and located … to be compatible and visually integrate with the built form and streetscape …*" (PO1(a) of the Code) and "*not create visual clutter*" (PO2 of the Code).

In describing the visual amenity of the surrounding site, the Court had regard to the joint expert report prepared by the visual amenity experts. In particular, the joint expert report noted that the "*immediate locality is generally dominated by the presence of the Pacific Motorway and the commercial development …*" (see [92]).

The Court ultimately accepted that the proposed development complied with the Code and would not have any material adverse impact on the visual amenity of the motorway or surrounding locality. In particular, the Court accepted evidence to the effect that the advertising sign was compatible with the existing building and streetscape and did not cause visual clutter, because the existing building was relatively plain and did not compete with the advertising sign from a visual perspective.

Court's discretion to approve development despite non-compliance

The Court noted that section 60(2) of the *Planning Act 2016* (Qld) (**Planning Act**) contains a "*discretion to approve a code assessable development application even where it does not comply with all of the relevant assessment benchmarks.*" (at [118]). However, the Court concluded that it was unnecessary to consider the extent of that discretion in this case given its findings in respect of compliance with the Planning Scheme.

The extent of the Court's discretion to approve code assessable development despite non-compliance with the relevant assessment benchmarks has yet to be explored by the Court. Future discussion on the limits of this discretion will likely give weight to the fact that the Planning Scheme is the embodiment of the public interest. Furthermore, it will need to be borne in mind that the exercise of any residual discretion under section 60 of the Planning Act is not an opportunity to effectively turn a code assessment, into an impact assessment, for which there are separate requirements under the Planning Act.

Conclusion

The Court concluded that the proposed development complied with the Code, subject to the imposition of conditions. On that basis, the Court ordered that the Application ought to be approved with the content of the conditions to be determined at a later hearing.

Planning and Environment Court of Queensland allows the revival of a minor change application previously refused

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 15 heard before Long SC DCJ

September 2021

In brief

The case of *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 15 concerned an application to the Planning and Environment Court of Queensland (**Court**) under section 78 of the *Planning Act 2016* (Qld) (**Planning Act**) to change a development approval granted by the Court in 2008 (**Change Application**).

The Subject Land had been subdivided into 53 residential lots. The Change Application concerned the remaining balance lot (**Balance Lot**), which related to Stage 3B of the development approval.

The Change Application was a revival of an earlier change application refused because the Court was not satisfied that the application was for a minor change (**Prior Change Application**) in the case of *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 19.

The main issue considered by the Court was whether the Change Application satisfied the requirements of owner's consent or was "*excluded premises*" under section 79(1A) of the Planning Act.

The Court held on the basis of the principles of statutory interpretation that whether the Subject Land was "*excluded premises*" required a consideration of whether the proposed change would materially affect the premises (or subject land) only to the extent that the premises were so separately owned.

As the Applicant had addressed the concerns of the Court with respect to the Prior Change Application and the Court was satisfied of compliance with section 79(1A) of the Planning Act, the Court allowed the Change Application.

Prior Change Application and Change Application

The Change Application proposed the following:

- The rearrangement of the boundaries and an alteration of the lot sizes within Stage 3B.
- The introduction of sub-staging for the creation of lots under Stage 3B (one lot), Stage 3C (five lots), and Stage 3D (12 lots).
- The dedication of three lots for road access and infrastructure to the Sunshine Coast Regional Council (**Council**) as part of Stage 3B.
- Consequential changes to the development approval and approved plans.

The concerns of the Court in respect of the Prior Change Application were the following:

- The lack of evidence that the proposed change did not introduce or increase the severity of geotechnical impacts.
- That the further sub-staging proposed would not ensure the dedication of land to the Council.

The Court received additional material in support of the Change Application, including a geotechnical assessment and evidence of an infrastructure agreement entered into with the Council, which was not before the Court in respect of the Prior Change Application.

Change Application does not result in "substantially different development"

The Court observed in respect of section 81 of the Planning Act that whether a change application is for a minor change requires an assessment of whether the proposed development will be substantially different to that approved, as was the test for a permissible change application under section 367(1)(a) of the repealed *Sustainable Planning Act 2009* (Qld) (at [11]).

The Court was guided by Schedule 1 of the Development Assessment Rules and stated (at [12] and [15]) that the Change Application would not result in substantially different development because of the following:

- The development had historically been staged and a condition of the development approval required the dedication of land to the Council, where a sub-stage required road access and infrastructure services to be constructed.
- There were no changes to the approved road layout nor the location and size of drainage reserves.
- The lack of significant impact on the traffic and transport network and on vegetation.
- The low-risk of slope instability with respect to the geotechnical concerns raised with the Prior Change Application.
- The lack of concern regarding lot sizes being less than the 2,000m^2 required under the *Maroochy Plan 2000* because the minimum lot size had been reduced to 1,500m^2 under the *Sunshine Coast Planning Scheme 2014*, which the Court was entitled to give weight to under section 81(5)(a) of the Planning Act.

The Court was satisfied that the proposed changes would not result in substantially different development and would not cause any of the matters stated in subsection (ii) of the definition of minor change under schedule 2 of the Planning Act.

"Premises" includes the entirety of the land the subject of the development approval

Despite competing submissions of the Applicant as to what "*premises*" were the subject of the Change Application under section 79(1A) of the Planning Act, the Court held that premises "*encompasse[d] the entirety of the land to which the development approval attache[d] ...*" (at [19] and [30]).

The Court relevantly held that what constituted "*premises*" under section 79(1A) of the Planning Act was not changed because the Change Application was for changes only in respect of the Balance Lot, which was owned by the Applicant.

Consent of the owners of the Subject Land was not required because of impracticability

The Applicant submitted that the Subject Land was "*excluded premises*" under section 79(1A)(c) and schedule 2 of the Planning Act, and therefore did not require the consent of the owners of part of the Subject Land, being the 53 lots, because the Change Application would not materially affect those already developed lots, and it was impractical to obtain the consent of each lot owner. Alternatively, the Applicant submitted that the Court may excuse the non-compliance under section 37 of the *Planning and Environment Court Act 2016* (Qld).

The Court held that to satisfy the definition of "*excluded premises*" it is necessary to establish the impracticality of obtaining consent rather than mere inconvenience or impossibility, and that this will depend on the circumstances of each case (at [25]).

The Court held, on the basis of the principles of statutory interpretation, that whether a change application "*'… does not materially affect the premises' requires attention to the premises only to the extent that they are so separately owned.*" (at [49]).

The Court held that there was no "*material affect*" on each of the separately-owned 53 lots and that to obtain the consent of each owner would be impractical. Therefore, each of the 53 lots were excluded premises (at [53]).

Although the Court was not required to consider the alternative position of the Applicant, the Court held that section 79(2) of the Planning Act was a condition precedent to its power to approve the Change Application, which would limit the application of the Court's discretion under section 37 of the *Planning and Environment Court Act 2016* (Qld) (at [34]).

Conclusion

The Court held that the Change Application was for a minor change.

Land Court of Queensland considers the legal test for a threatened breach of confidence by an expert witness

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Apex Outdoor Pty Ltd v Cross River Rail Delivery Authority* [2021] QLC 5 heard before FY Kingham

September 2021

In brief

The case of *Apex Outdoor Pty Ltd v Cross River Rail Delivery Authority* [2021] QLC 5 concerned an application to the Land Court of Queensland (**Court**) seeking to restrict the Respondent from calling a nominated expert witness (**Expert**) in a proceeding in respect of compensation for a loss of opportunity to erect a digital advertising billboard (**Compensation Proceeding**) because of a concern that the Expert may misuse information alleged to be confidential (**Confidential Information**).

The Court observed that the Court will intervene to restrict a party from calling a witness to give evidence, where there is "*… a threatened breach of confidence if there is a real and sensible risk of the misuse of confidential information.*" (at [5]). The risk of disclosure (or misuse) of confidential information may be either intentional or inadvertent (at [10]).

The Court identified (at [6]) the following matters, which are required to be satisfied for the Court to restrict a party from calling a witness because of a threatened breach of confidence:

- The information alleged to be confidential is identified with specificity.
- The information has the necessary quality of confidence.
- The information was received in circumstances which imported an obligation of confidence.
- There is an actual or threatened misuse of the information without consent.

The Court drew a distinction between the relationship of a solicitor and client, which the Court stated requires a solicitor to use *all* information within the solicitor's knowledge for the client's benefit, to that of an expert witness, who is engaged by a party to give the Court independent evidence based on assumptions which are required to be disclosed to the Court (at [13]).

The Court accepted evidence that the Expert had a lack of exposure to the Confidential Information, which reduced the risk that the Expert might inadvertently misuse the Confidential Information. The Court also accepted that an adequate system was put in place to limit the Expert's access to the Confidential Information.

The Court held that the task before the Court was to "*… weigh the facts and assess the risk in the eye of reality, disregarding theoretical risks …*", and that "*[t]he duty of confidentiality does not extend to avoid a remote possibility of accidental disclosure.*" (at [19]).

The Court held that the risk of inadvertent disclosure of the Confidential Information was a remote possibility, and therefore the Court did not need to address other issues to determine whether there was a threatened breach of confidence. The Court refused the application.

Party positions

Expert witnesses were nominated by the parties in the Compensation Proceeding to prepare joint expert reports in respect of "'*[i]nputs for the discounted cash flow analysis and attributes of the proposed LED advertising sign'.*" (at [2]).

The Applicant objected to the Respondent's nomination of the Expert on the following grounds:

- The Expert was the co-managing director of a company with, and a sibling of, an expert formerly engaged by the Applicant (**Former Expert**) to provide expert evidence in respect of the Compensation Proceeding.
- The company had been in possession of the Confidential Information for approximately two and a half years, the company used common files to store information, and the Expert and Former Expert shared a personal assistant who had access to the common files.
- There were a number of opportunities for daily contact between the Expert and Former Expert.

- The Expert only recently ceased to have access to the Confidential Information.
- The Expert might misuse the Confidential Information, which was provided to the Former Expert.

The Respondent submitted that the elements of the legal test for a risk of a breach of confidence had not been met, including that the Applicant did not establish that the alleged Confidential Information was, in fact, confidential, and that there was no real or sensible risk that the information would be misused.

The Respondent relied on the following evidence from the Expert to support the Respondent's position:

- The Expert did not have knowledge of, nor did he access, the Confidential Information.
- The Expert did not have knowledge of the extent of the Former Expert's relationship with the Applicant, nor did he have knowledge of any conversation had with, or information provided to, the Former Expert.
- The Expert put measures in place to remove his access to the Confidential Information and agreed not to discuss the matter with the Former Expert.
- The Expert had, and will, act on his own knowledge in respect of the Compensation Proceeding.

No real or sensible risk of disclosure

The Court rejected the Applicant's reliance on *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118 (**D & J Constructions**) in respect of the daily contact between the Expert and Former Expert over long periods being supportive of a real and sensible risk of disclosure of the Confidential Information because *D & J Constructions* related to the duty of a solicitor, which the Court distinguished from the duty of an expert witness.

The Court was satisfied that the Expert had not accessed the Confidential Information and that the system established by the Expert, Former Expert, and their personal assistant to limit the Expert's access to the Confidential Information was adequate.

The Court held that there was a remote possibility of accidental disclosure of the Confidential Information, which was not protected by the duty of confidentiality (at [19]).

Obiter comments of the Court

The Court expressed the following opinion which was not essential to the Court's decision:

- The Applicant could have, but did not, direct the Former Expert to destroy the Confidential Information within his possession (at [19]).
- Some of the matters which were described to be the subject of the Confidential Information would likely fall within the Applicant's duty of disclosure in respect of the Compensation Proceeding, including a draft witness statement of an expert prepared by the Applicant's solicitors, which the Court stated could reasonably be assumed to be that of the Former Expert (at [21] to [23]).

Conclusion

The Court refused the application to restrain the Respondent from calling the Expert as a witness.

New South Wales Court of Criminal Appeal finds that admissions made in civil proceedings can be used against defendants in criminal proceedings

Mollie Matthews | Todd Neal

This article discusses the decision of the New South Wales Court of Criminal Appeal in the matter of *Turnbull v Office of Environment and Heritage* [2021] NSWCCA 190 heard before Hoeben CJ, Harrison J, and Button J

September 2021

In brief

The case of *Turnbull v Office of Environment and Heritage* [2021] NSWCCA 190 (***Turnbull v OEH***) concerned an appeal to the New South Wales Court of Criminal Appeal (**Court**) regarding whether a prosecutor could be prevented from using admissions made in civil proceedings in subsequent criminal proceedings. The basis of the Applicant's argument was that the use of the admissions infringed upon the accusatorial principle of our criminal justice system.

The proceedings against the Applicant involved allegations of unlawful clearing of native vegetation in breach of the now repealed *Native Vegetation Act 2003* (NSW).

We have previously written about an example of admissions being held to be inadmissible in Class 5 criminal proceedings in the New South Wales (**NSW**) Land and Environment Court (see: *Recap of investigation powers under the EP&A Act and implications for evidence in criminal proceedings*). However, in contrast to that example, in *Turnbull v OEH*, the admissions were not made under compulsion.

The Court found that the relief sought by the Applicant would radically extend the practical application of the accusatorial principle, and declined to grant that relief. The prosecutor was therefore not precluded from using the admissions on the basis of the accusatorial principle.

Accusatorial principle

The accusatorial principle requires the prosecution to prove its case against an accused person, without compelling that person to assist. The right to silence is the keystone of the principle. As stated by the High Court of Australia (**High Court**) in *X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29 [104]:

> *The accusatorial process of criminal justice and the privilege against self incrimination both reflect and assume the proposition that an **accused person need never make any answer to any allegation of wrong doing**.* (emphasis added)

The High Court stated the importance of the principle in *Lee v The Queen* (2014) 253 CLR 455; [2014] HCA 20 (at [32] to [33]):

> *The principle is **so fundamental that 'no attempt to whittle it down can be entertained'** albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.*
>
> *The companion rule to the fundamental principle is that an accused person cannot be **required** to testify. The prosecution cannot **compel** a person charged with a crime to assist in the discharge of its onus of proof.* (emphasis added)

The Applicant had separately sought to have the admissions excluded from the criminal proceedings under various provisions of the *Evidence Act 1995* (NSW), including section 90. Section 90 relates to the Court's discretion to refuse to admit evidence of an admission, where it would be unfair to a defendant having regard to the circumstances in which the admission was made. However, the question before the Court in this appeal only related to the accusatorial principle.

Admissions made in civil proceedings

In Class 4 civil enforcement proceedings in the NSW Land and Environment Court, an affidavit had been filed in which the Applicant admitted that he had engaged in clearing vegetation, but to a lesser degree than what was alleged by the prosecution. The evidence was apparently given on the advice of counsel.

After the conclusion of the civil proceedings, the NSW Office of Environment and Heritage (**OEH**), relying on the admissions made by the applicant in the civil proceedings, commenced Class 5 criminal proceedings against the Applicant.

No compulsion or invidious choice

The Applicant argued that he would not have made the admissions if he had have known that criminal proceedings would be commenced against him.

The Applicant also argued that he was "*required*" to give the evidence in the civil proceedings to defend himself, and compared the circumstances to those in *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46; [2015] HCA 5 (***AFP v Zhao***). In *AFP v Zhao*, "*Mr Zhao was not compelled – on pain of penal sanction – to defend the pending civil forfeiture application in the same way that a person called to give evidence at an investigatory commission is compelled to give truthful self-incriminating evidence. And yet the High Court granted relief in that case, based upon the principle.*" (see *Turnbull v OEH* at [82]).

However, in *AFP v Zhao*, the relief granted was extremely limited compared to what was sought in *Turnbull v OEH*. In *AFP v Zhao*, to allow the accused to defend himself in the civil proceedings without incriminating himself in the criminal proceedings, the High Court simply ordered that the civil proceedings must proceed after the criminal trial. In *Turnbull v OEH*, not only was that option unavailable (as the civil proceedings had already concluded), but also because the Applicant sought more "*radical*" orders, including an order that the admissions were inadmissible in the criminal proceedings.

Ultimately, the Court held that the Applicant had not faced a choice similar to that in *AFP v Zhao*, ie whether to defend the civil proceedings and potentially incriminate himself in the criminal proceedings. The Court found that no such "*invidious choice*" ever arose, because the criminal proceedings were not commenced until after the civil proceedings had concluded. See [73]:

> *Here, however, the applicant was not given any choice at all – invidious or otherwise – because of an accident of chronology. The fact that the applicant wished to give evidence in the civil proceedings for some perceived forensic benefit does not provide a basis, it was said, for distinguishing AFP v Zhao as an application of principle.*

Conclusion

Whilst the accusatorial principle is of fundamental importance, the Court refused to extend the application of that principle beyond its application in *AFP v Zhou* to render inadmissible in criminal proceedings the admissions made in the Class 4 civil enforcement proceedings. The Court stated the principle "*… has finite limits, it is not absolute, and it must sometimes yield to other principles.*" (at [81]).

The Court also noted that there are other legislative mechanisms to protect a defendant from the unfair use of an admission against them (a pathway that the Applicant had already pursued).

The Court found no issue with the OEH being the plaintiff in the civil proceedings and the prosecutor in the later criminal proceedings. The Court stated that "*that double role is a position consciously adopted by Parliament in the context of alleged environmental wrongdoing that can be both a civil wrong and a criminal offence.*" (at [87]).

Respondents in Class 4 civil proceedings therefore need to give careful consideration to the possibility of criminal proceedings following the civil proceedings before making any admission. An admission enticed by a regulatory authority needs to be carefully evaluated, since the admission may end up being used as evidence in a prosecution.

Prophylactic measures to ring fence the use of an admission should also be considered by respondents in these situations, as indicated in the Court's judgment. For example, there may be a possibility of seeking an undertaking from the plaintiff (and potential future prosecutor) in civil enforcement proceedings that an admission made in the civil proceedings will not be used in any subsequent criminal proceedings. Where an admission is being made under compulsion, consideration needs to be given to objecting on the basis of self-incrimination before making the admission.

It should otherwise be assumed that the respondent or prosecutor may include a voluntary admission in evidence in criminal proceedings, should the decision to prosecute occur after the conclusion of civil proceedings.

Queensland Court of Appeal finds that the nature of the use of land may be considered by a local government when determining a rating category for, and levying, differential general rates

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2021] QCA 19; (2021) 248 LGERA 1 heard before McMurdo JA, Boddice, and Jackson JJ

October 2021

In brief

The case of *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2021] QCA 19; (2021) 248 LGERA 1 concerned an appeal to the Queensland Court of Appeal (**Court of Appeal**) against the dismissal in the case of *Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2020] QSC 145 by the Supreme Court of Queensland (**Supreme Court**) of an application for judicial review (**Judicial Review Proceeding**) of the following decisions of the Gold Coast City Council (**Council**):

- ***First Decision*** – The decisions of the Council that adopted the relevant differential rating categories, namely Category 2T and Category 3T, and levied a minimum general rate within Category 2T and Category 3T.
- ***Second Decision*** – The decisions of the Council to issue rates notices to the Applicant.

Our November 2020 article considered the Judicial Review Proceeding in detail.

In the Judicial Review Proceeding, the Applicant alleged that the First Decision and Second Decision were an improper exercise of the powers to categorise land for differential general rates under section 81 of the *Local Government Regulation 2012* (Qld) (**LGR**) and to levy rates and charges under section 94 the *Local Government Act 2009* (Qld) (**LGA**), because the Council took into account whether an occupier of rateable land was a "*permanent resident*" or "*itinerant*", which the Applicant submitted the Council was not authorised to consider because the "*personal characteristics*" of the occupier was not an "*attribute or characteristic*" of the land.

On appeal to the Court of Appeal, the Applicant alleged that one or both of the following grounds of appeal supported a finding that the Supreme Court erred in failing to find that the Council took into account an irrelevant consideration (at [5]):

- ***First Ground*** – Deciding a differential rating category based on whether an occupier of rateable land was a "*permanent resident*" or "*itinerant*" characterised land solely on the personal characteristics of the occupant.
- ***Second Ground*** – As an alternative to the First Ground, Category 2T and Category 3T "*characterised land based upon the personal characteristics of a person who may occupy the land …*".

The Court of Appeal relevantly held the following in respect of the appeal:

- "*[G]ood governance by a local government in levying differential general rates*" was informed by the specific provisions of the LGA and LGR relating to deciding a rating category and levying differential general rates, as well as the "*broader considerations of context …*" provided by the surrounding provisions of the LGA and LGR (at [36]).
- The case of *Xstrata Coal Qld Pty Ltd & Ors v Council of the Shire of Bowen* [2010] QCA 170 (***Xstrata***) was confirmed in *Ostwald Accommodation Pty Ltd v Western Downs Regional Council* [2015] QSC 210 not to be authority for the capacity of an owner of land to pay a rate being an irrelevant consideration, "*except in the sense that it is the personal capacity of the owner, independent of any quality of the land or its use.*" (at [42]).
- The key principle in *Xstrata* was that a differential rating category must be based on an "*attribute of the land*" and that the local government's resolution must state a description of the rating category, but that does not require the description of the rating category to be an "*attribute of the land*" (at [55]).
- An attribute or characteristic of land as described in *Xstrata* is to be understood as "*some quality of the land or its use*" (at [1]).
- It would be contrary to the context of section 94 and section 96 of the LGA and section 80 and section 81 of the LGR to treat *Xstrata* as authority for a rating category being required to be decided only by reference to an attribute of the land which does not extend to the use of the land (at [65]).

- Section 81(3)(b) of the LGR provides examples of rating categories and their descriptions, five of which relate to the use of land (at [59]).
- The power and duty of a local government to levy general rates is stated in general terms in section 94(1)(a) of the LGA, and section 94(1A) of the LGA permits the categorisation of rateable land and a decision in respect of differential rates for rateable land "*according to whether or not the land is the principal place of residence of the owner.*" (at [57]).
- The amendment on 14 June 2014 of section 94 of the LGA to include subsection (1A) arose after the Supreme Court's decision that the LGA did not permit a local government to categorise land by reference to whether or not it was occupied by the landowner in the case of *Paton & Ors v Mackay Regional Council* [2014] QSC 75, which supported a conclusion that the use of land may form the basis of a rating category (at [57] and [67] to [71]).
- There is a difference in the use of residential land by an owner as an occupier and as an investment property (at [60]), which the Council was entitled to take into account.
- Category 2T applies where residential land is used for rental accommodation by a person as their home on a permanent basis or where the owner does not rent out the land nor live in it as a principal place of residence (at [79] and [84] to [86]), and Category 3T applies where residential land is temporarily rented by a visitor or tourist (at [81]).

Although the Court of Appeal did not consider the issue in detail because it was not argued by the Council in the appeal, the Court of Appeal observed (at [22] and [23]) that a resolution to levy differential general rates under section 94 of the LGA may not be a "*decision of an administrative character*" amenable to judicial review because it is a "*taxing power*" described as being "*quasi legislative*" rather than administrative.

The Court of Appeal also observed (at [50]) that it may have been useful to the appeal had the parties submitted evidence other than the Council's Revenue Statement relevant to the "*economic concepts and theories that may inform a local government's decision making as to the determination of rating categories of rateable land.*"

The Court of Appeal held that the Council had the power to make the First Decision and Second Decision according to the nature of the occupation of the relevant residential land. The appeal was dismissed with costs.

Judicial Review Proceeding

The application in the Judicial Review Proceeding was made under section 20(2)(e) and section 23(a) of the *Judicial Review Act 1991*(Qld).

In the Judicial Review Proceeding, the Applicant sought that the First Decision, and the Second Decision, which related to approximately 70 properties owned by the Applicant for the financial years ending 30 June 2015 to 30 June 2020, be set aside because the Council took into account an irrelevant consideration by considering whether an occupier of rateable land was a "*permanent resident*" or an "*itinerant*".

Category 2T was relevantly described as "*[a] residential lot…used to provide rental accommodation to permanent residents at any time during the financial year …*". A "*permanent resident*" was defined as "*a person who lives in the local government area, as distinct from an itinerant*".

Category 3T was relevantly described as "*[a] residential lot … used to provide rental accommodation to itinerants at any time during the financial year.*". An "*itinerant*" was defined as "*a visitor or tourist, as distinct from a permanent resident*".

The Supreme Court relevantly rejected the Applicant's submission that letting a property to a "*permanent resident*" of the local government area rather than an "*itinerant*" was irrelevant to the Council's setting of differential rating categories and minimum rates, and held that the use of land to provide rental accommodation was an "*attribute*" of the land.

No implied restriction on the use of land forming the description of a rating category

The Court of Appeal rejected the Applicant's submission that the "*general language*" of section 94 and section 96 of the LGA and section 80 and section 81 of the LGR are to be construed as implying a requirement that the description of a rating category under section 81 of the LGR must be to an "*attribute of the land*", and that it would exceed a local government's power to describe a rating category by reference to the use of residential land (see [62]).

In respect of the First Ground, the Court of Appeal held that the use of land was an "*attribute of the land*" (at [1]), and that section 94(1A) of the LGA "*strongly indicate[d]*" that a rating category may turn on the nature of the occupation of residential land (at [66] and [69]).

Category 2T and Category 3T each had a "discernible reasonable purpose"

In respect of the Second Ground, the Applicant's proposed construction of Category 2T and Category 3T was that Category 2T related to the use of residential land as temporary rental accommodation for a visitor or a person living elsewhere in the local government area, and that Category 3T related to the use of residential land as temporary rental accommodation for a person who did not live in the local government area.

The Court of Appeal rejected the Applicant's construction on the basis that there would be "*no apparent purpose*" in distinguishing between Category 2T and Category 3T in that way (at [83]).

The Court of Appeal agreed with the Council's construction that Category 2T applied where residential land was used for rental accommodation by a person who resides on the land on a permanent basis or where the owner of the land does not provide the land for rental accommodation and does not live in it as a principal place of residence, and Category 3T applied where residential land was rented temporarily by a visitor or tourist (at [84] to [85]).

The Court of Appeal held that the Council's construction had a "*discernible reasonable purpose*" because a higher rate would be applied to residential land used by visitors for temporary periods as opposed to a person who lives there, or in circumstances where the land is not rented out nor used as a principal place of residence (at [85]).

Conclusion

The Court of Appeal held that the use by an occupier of land was an "*attribute of the land*" that may form the basis of a rating category and the levying of rates, in particular in respect of residential land categorised by whether or not the residential land is used as a principal place of residence or temporarily by a visitor. The Court of Appeal found no error in the Supreme Court's findings in the Judicial Review Proceeding.

Queensland Court of Appeal finds that the Planning and Environment Court erred in failing to consider the requirements for "local community" under the CairnsPlan 2016

Jessica Day | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95 heard before Philippides, Mullins JJA, and Brown J

October 2021

In brief

The case of *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95 concerned an application brought by Trinity Park Investments Pty Ltd (**TPI**) and an application brought by Dexus Funds Management Limited (**Dexus**) for leave of the Queensland Court of Appeal (**Court of Appeal**) to appeal the decision of the Planning and Environment Court of Queensland (**P&E Court**) in *Fabcot Pty Ltd v Cairns Regional Council & Ors* [2020] QPEC 17 (**Decision**) allowing an appeal brought by Fabcot Pty Ltd (**Fabcot**) for the grant of a development permit for a shopping centre consisting of a supermarket, medical centre, childcare centre, service station, and food and drink outlet on land located in Trinity Beach and dismissing the related submitter appeals brought by TPI and Dexus (**Fabcot Appeals**). A summary of the Decision can be found in our June 2020 article.

The site the subject of the Fabcot Appeals is located, approximately 4 kilometres respectively, between the Smithfield Shopping Centre operated by Dexus, which contains a Coles supermarket and a Woolworths supermarket, and the Clifton Village Shopping Centre, which contains a Coles supermarket (**Fabcot Site**). Fabcot, being Woolworths' development arm, owns the Fabcot Site.

The Fabcot Site was included in the low-medium density residential zone to which the low medium density residential zone code applied (**LMDR Zone Code**) under the *CairnsPlan 2016* (**Planning Scheme**), and identified within the Smithfield Local Plan under the Planning Scheme.

TPI lodged a development application for a shopping centre on land approximately 2 kilometres north of the Smithfield Shopping Centre (**TPI Application**), and no decision in respect of the TPI Application had been made at the time the Fabcot Appeals were heard by the P&E Court (see [9]).

The key questions for the Court of Appeal to determine were the following:

- Whether the P&E Court erred in adopting the meaning for "*local community*" by reference to the Primary Trade Area (PTA) and did not have sufficient regard to the term "*small scale*".
- Whether the P&E Court erred in concluding that the proposed development complied with section 3.3.2.1(10) of the Planning Scheme.
- Whether the P&E Court erred in finding that the proposed development would not unacceptably impact upon the role, function, and economic viability of sub-precinct 3b within the Smithfield Local Plan in consideration of the importance of the hierarchy of centres under the Planning Scheme.
- Whether the P&E Court predetermined the TPI Application.

A grant of leave to apply to the Court of Appeal is relevantly limited to an error or mistake in law under the *Planning and Environment Court Act 2016* (Qld) (see [40]). The Court of Appeal found that the P&E Court erred in its Decision, setting aside the orders made by the P&E Court and remitting the Fabcot Appeals to the P&E Court for determination

The remitted Fabcot Appeals first came before the P&E Court in May 2021, and on 12 August 2021, the P&E Court granted leave to TPI and Dexus to allow limited additional evidence to be adduced at the rehearing of the Fabcot Appeals (see *Fabcot v Cairns Regional Council (No. 2)* [2021] QPEC 40). The rehearing of the Fabcot Appeals is yet to occur.

Court of Appeal found that the P&E Court erred in adopting the meaning for "local community" by reference to the PTA and did not have sufficient regard to the term "small scale"

In considering the function and scale of Fabcot's proposed development, the P&E Court accepted the evidence of the town planning experts that the proposed development was not "*small scale*" and considered the meaning of "*local*" under the Planning Scheme to be "*a flexible concept*" that must refer to an area identified by the economic experts as the PTA, which encompassed the suburbs of Trinity Beach and Kewarra Beach, and so concluded that the proposed development would cater for local residents by providing a supermarket for their weekly needs (see [30]).

Dexus and TPI contended that the proposed development would serve several communities and, in the context of the purpose of non-residential uses in the LMDR Zone Code being "*small scale*", the P&E Court erred in construing the meaning of "*local*" in the LMDR Zone Code (see [64]). Dexus further contended that the proposed development was not in the public interest in accordance with the Planning Scheme (see [55]).

Fabcot contended that Dexus and TPI failed to consider relevant provisions of the Planning Scheme in respect of local centres, which was what Fabcot contended it was proposing (see [70]).

The Court of Appeal held that the resolution of the issue would depend on the statutory construction of "*local*" when used in the LMDR Zone Code in relation to "*local residents*" and "*local community*".

In construing the terms "*local residents*" and "*local community*", the Court of Appeal observed that little assistance would be derived from the ordinary or dictionary meaning of "*local*" (see [72]) and cited the oft-cited case of *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QCA 147; (2014) QPELR 686; (2014) 201 LGERA 82, which established that the ordinary rules of statutory construction apply to planning documents (see [77]).

The Court of Appeal held that the terms "*local residents*" and "*local community*" should be construed consistently by reference to "*small scale*" as the terms are used in the LMDR Zone Code, however, that this is not "*confined to a part of a suburb or even a single suburb*" (see [115] and [116]).

Ultimately, the Court of Appeal found that the size of Fabcot's proposed development, namely its supermarket and PTA with an estimated population of 13,130 by 2022, extended beyond what could be regarded as serving the "*local community*", and that the P&E Court asked the wrong question in adopting the meaning of "*local community*" by reference to the PTA and did not have sufficient regard to the term "*small scale*" used in connection with catering for the local residents' needs in the LMDR Zone Code (see [117] to [119]).

Court of Appeal found that the P&E Court did not err in concluding that the proposed development complied with section 3.3.2.1(10) of the Planning Scheme

Dexus contended that as a result of the P&E Court's error in adopting the meaning for "*local community*" by reference to the PTA, the P&E Court erred in concluding that the proposed development complied with section 3.3.2.1(10) of the Planning Scheme and construed the provisions of section 3.3.2.1(10) in isolation and without regard to other aspects of the Planning Scheme (see [56] and [121]).

Section 3.3.2.1 of the Planning Scheme is contained in the Strategic Framework and provides the specific outcomes for a centre and centre activities. The Strategic Framework prevails over all other provisions of the Planning Scheme to the extent of any inconsistency (see [13]). Section 3.3.2.1(10) of the Planning Scheme, which provides for the establishment of new centres "*out of centre*", states the following (see [20] and [140] to [141]):

> *(10) New centres are only established where it is demonstrated that:*
>
> *(a) there is a need for the development;*
>
> *(b) the development is of a scale that is required to service the surrounding catchment;*
>
> *(c) the development is highly accessible within the catchment it serves and not located on the periphery;*
>
> *(d) the development does not compromise the character and amenity of adjoining premises and surrounding areas.*

Dexus further contended that the language of section 3.3.2.1(10) of the Planning Scheme did not warrant allowing the grant of the development permit on the basis of the economic evidence, and in treating the proposed development as constituting a new "*Local centre*" in the Planning Scheme hierarchy, the P&E Court failed to recognise that the Planning Scheme did not expressly contemplate full-line supermarkets within local centres (see [124]).

The Court of Appeal found that it was plain from the reading of the reasons of the P&E Court that the impact of the proposed development on the existing and ongoing hierarchy of centres was considered and in that regard the P&E Court stated that the proposed development would maintain the hierarchy of centres under the Strategic Framework (see [142]).

The Court of Appeal found that the P&E Court did not approach the application of section 3.3.2.1(10) in isolation and that the P&E Court correctly identified that the extent of any non compliance with the Planning Scheme is to be considered in the exercise of the P&E Court's discretion under the *Planning Act 2016* (Qld) (see [143] and [145]).

Court of Appeal finds that the P&E Court did not err in finding that the proposed development would not unacceptably impact upon the role, function, and economic viability of sub-precinct 3b in consideration of the importance of the hierarchy of centres under the Planning Scheme

TPI contended that in finding that the proposed development would not unacceptably impact upon the role, function, and economic viability of sub-precinct 3b in the Smithfield Plan, the P&E Court failed to give effect to the specific planned role and function of sub-precinct 3b, which it alleged should have been found to be part of the planned hierarchy of centres, and so argued that the P&E Court misconstrued the precise designation of the TPI land which was within sub precinct 3b (see [48]).

Dexus also contended that the P&E Court "*erred in dismissing sub-precinct 3b as an obstacle in the path of the approval of the Fabcot application*" (see [150]).

The Court of Appeal found that while TPI "*contends that sub-precinct 3b effectively has the function of a centre, and forms part of the retail and centre activities network, that is contrary to the express terms*" of the Planning Scheme (see [155]) and that having regard to section 3.3.2.1(1) and the nature of sub-precinct 3b, the Decision "*did not cut across the planning intentions of the [Planning] [S]cheme and intrude upon the integrity of sub-precinct 3b*" (see [165]).

Court of Appeal finds that there was no denial of natural justice or predetermination of the TPI Application

Finally, TPI and Dexus contended that the P&E Court erred in prejudging the TPI Application, which at the time of the hearing of the Fabcot Appeals remained pending a decision, and that this was apparent in the P&E Court's finding that the TPI Application was "*seriously wanting in several respects*" (see [51] and [61]).

The Court of Appeal found that it was apparent from the P&E Court's reasons that "*his Honour was conscious of not determining which was the better site*" (see [169]), and that while the "*determination of the primary judge in favour of Fabcot's proposal may practically mean it was not in TPI's interest to pursue developing a supermarket is an effect of the decision, it does not follow that his Honour's comments and findings were a predetermination or prejudgment of its application*" (see [213]).

Conclusion

The Court of Appeal granted leave on the basis that the P&E Court erred in law in failing to consider the question of non-compliance with the requirements of a "*local community*" in the LMDR Zone Code and ordered that the Decision be set aside and remitted to the P&E Court for determination.

Planning and Environment Court of Queensland finds that proposed development was capable of falling within the defined use and refuses to grant the declaration sought

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Noosa Shire Council v 64 Gateway Drive Pty Ltd* [2021] QPEC 19 heard before Long SC DCJ

October 2021

In brief

The case of *Noosa Shire Council v 64 Gateway Drive Pty Ltd* [2021] QPEC 19 concerned an originating application by the Noosa Shire Council (**Council**) to the Planning and Environment Court of Queensland (**Court**) seeking a declaration under section 11 of the *Planning and Environment Court Act 2016* (Qld) that a development application by 64 Gateway Drive Pty Ltd (**Respondent**) for a development permit for a material change of use for "*16 Ancillary Dwelling Units*" (**MCU Application**) was not for "*ancillary dwelling unit[s]*" as defined in the *Noosa Plan 2006* (**Noosa Plan**).

The MCU Application proposed to convert the upstairs portion of 16 out of 42 industrial units already approved by the Council (**Existing Approval**) into a "*caretaker's residence*" (**Proposed Development**).

The Court did not undertake an assessment of whether the Proposed Development ought to be approved because that was not the Court's function in the declaratory proceeding. An assessment of the Proposed Development was a matter for the appeal by the Respondent against the Council's refusal of the MCU Application, which was already afoot.

The Court held that the issue in this case was whether or not there was a legal impediment to an approval of the MCU Application "*in the sense that the use for which the [MCU Application] ha[d] been made [was] not encompassed by the applicable definition of that use.*" (at [8]).

The Court observed that the fact that the MCU Application was a properly made application under the *Planning Act 2016* (Qld) and that the Council had given similar approvals in the past were "*unnecessary and unhelpful*" to the issue. The Court noted that each case must be considered on its own merits, and that a prior assessment of development does not generally create a precedent for other approvals (at [11]).

The Court held that each of the 16 industrial units were a "*premises*" (or a "*planning unit*"), and that each unit was capable of falling within the definition of "*ancillary dwelling unit*" under the Noosa Plan. The Court observed that whether the Proposed Development satisfied each limb of the definition or fell within some other definition of the Noosa Plan were matters that went to an assessment of the Proposed Development, and were therefore matters for the appeal.

The Court dismissed the originating application.

Background

The Existing Approval was for the development of 42 industrial units arranged in six separated buildings on land properly described as Lot 13 on SP170295 (**Site**).

An "*ancillary dwelling unit*" was defined in section 2.11.5 of the Noosa Plan as follows:

> ***Ancillary dwelling unit*** *means the use of premises for a caretaker's residence or employee residence associated with a non-residential use on the same premises where:*
>
> - *There is no other dwelling unit on the premises, except where the non-residential use is an* ***agricultural use****;*
> - *The gross floor area of the dwelling unit does not exceed 150m^2;*
> - *The dwelling unit is subordinate to the non-residential use;*
> - *The dwelling unit is attached to or within 25m of the non-residential use; and*

- *The dwelling unit is occupied by the owner of the non-residential use or somebody employed in the non-residential use.*

The Council relevantly refused the MCU Application on the basis that the use the subject of the Proposed Development did not fall within the definition of "*ancillary dwelling unit*" for the following reasons:

- "*Premises*" means "*a building or other structure or land whether or not a building or other structure is situated on the land*".
- The MCU Application refers to the Site, and therefore to meet the definition of "*ancillary dwelling unit*" the MCU Application could only be made for one ancillary dwelling unit, where "*premises*" means "*land*", or alternatively, for six ancillary dwelling units, where "*premises*" means a "*building*".
- The definition of "*ancillary dwelling unit*" requires that there be no other unit on the premises, and that the "*ancillary dwelling unit*" be subordinate to the non-residential use, which the Respondent had not satisfied.

The Respondent relevantly submitted the following:

- Each of the 42 units allowed in the Existing Approval were "*premises*", 16 of which were the subject of the MCU Application.
- The Proposed Development is for units that are "*subordinate to the non-residential use*" for reasons including the following:
  - Each unit was proposed to be occupied by only an owner or employee of the industrial business use operating on the lower level of the premises.
  - The use of each unit as a residence is secondary to the industrial business use.
  - The built form of the upper residence level of the unit is to be integrated with the lower industrial level, and the unit is not to function as a residence independent of the industrial use.
  - The proposed gross floor area of the residence level of each unit is less than 65m^2, which is smaller than the area for the industrial use.
  - For some of the Proposed Development, access to the caretaker's residence is to only be through the level used for the industrial use.

Proposed Development was encompassed by the definition of "ancillary dwelling use"

The Court (at [19] and [21] to [22]) rejected the Council's submission that the Proposed Development could not satisfy the requirement that there be "*no other dwelling unit on the premises*" because the MCU Application related to the whole of the Site or, alternatively, to each of the six buildings on the Site in the Existing Approval for the following reasons:

- The inclusion of the street address and the real property description of the Site in the MCU Application did not indicate that the Site was one planning unit.
- Reference to the Site was the only way for the Respondent to describe the "*location of the premises*" in the MCU Application.
- An objective reading of the MCU Application identified the 42 industrial units of the Existing Approval, which were each a "*planning unit*" (or "*premises*").
- The definition of "*ancillary dwelling use*" is capable of being applied to the MCU Application.

The Court also noted that other requirements of the definition of "*ancillary dwelling use*", including that the gross floor area of each unit not exceed 150m^2 or be attached to or within 25 metres of the non-residential use, were satisfied (at [21]).

Assessment of the applicability of other definitions in the Noosa Plan were irrelevant

The Court observed that the following other matters went to the assessment of the Proposed Development and were therefore matters to be considered in the appeal and not the declaratory proceeding:

- Whether the requirements of the definition of "*ancillary dwelling use*", including that an ancillary dwelling be "*subordinate to the non-residential use*" were satisfied.
- Whether the Proposed Development satisfied the definition of "*Multiple Housing*" in the Noosa Plan.

Conclusion

The Court dismissed the application for declaratory relief on the basis that the MCU Application related to 16 separate planning units (or "*premises*"), which were each capable of falling within the definition of an "*ancillary dwelling unit*" under the Noosa Plan.

Planning and Environment Court of Queensland excuses the applicant's non-compliance with a statutory requirement to substantially start demolition within two months of being given a building approval

Maria Cantrill | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Karam Boutique Residential 8 Pty Ltd v Redland City Council* [2021] QPEC 47 heard before Jones DCJ

October 2021

In brief

The case of *Karam Boutique Residential 8 Pty Ltd v Redland City Council* [2021] QPEC 47 concerned an originating application to the Planning and Environment Court of Queensland (**Court**) seeking to excuse the Applicant's non-compliance with section 71 of the *Building Act 1975* (Qld) (**Building Act**), which required demolition works to substantially start within two months of an applicant being given a building approval. The Court ultimately excused the applicant's non-compliance.

Background

In January 2019, the Redland City Council (**Council**) resolved to introduce a major amendment to its planning scheme, which included 509 Main Road, Wellington Point (**Subject Land**) in the Heritage Overlay. The Subject Land was improved with an old Queenslander and a shed. The Queenslander was built in around 1886 and was described as being in "*extremely poor*" condition (see [13]).

On 17 November 2020, a building approval was granted by a building certifier to demolish the Queenslander and the shed. It is understood that this building approval was sought to avoid the ramifications of the proposed heritage listing in respect of the Queenslander.

On 26 November 2020, the Applicant entered into a contract to purchase the Subject Land with the intention of re-developing it in accordance with its medium-density residential zoning. The contract included a special condition requiring the vendor to demolish the existing house and shed at the vendor's expense. That special condition was later deleted with the effect that the purchaser was to undertake the demolition works in exchange for a reduction of the purchase price.

On 6 January 2021, the vendor obtained a quote from a demolition company, which was accepted on 13 January 2021. The demolition company commenced preliminary works with the intention of commencing physical site preparation works by 15 January 2021 and demolition by 18 January 2021.

On 11 January 2021, the Council became aware of the building approval, and the Mayor wrote to the Acting Minister for the Environment and the Great Barrier Reef asking the State to urgently consider the heritage value of the Queenslander and the appropriateness of issuing a stop work order. A stop work order was issued on 13 January 2021 in respect of both the Queenslander and the shed for a period of 60 business days.

On 25 March 2021, the State approved the implementation of a Temporary Local Planning Instrument (**TLPI**), which included the Subject Land in the Heritage Overlay.

Notwithstanding the stop work order, the State resolved that the Subject Land ought not be entered onto the Queensland Heritage Register. At the time of the hearing before the Court, the TLPI remained in force, but the stop work order had lapsed.

The effect of the above events was that the demolition did not substantially start within the statutory time period contained in section 71 of the Building Act and the Applicant had to apply to the Court to excuse the non-compliance.

Section 71 of the Building Act

Section 71 of the Building Act relevantly states the following:

> *(1) This section applies to a building development approval for building work to —*
>
> *(a) demolish or remove a building or structure; or*
>
> *(b) rebuild, after removal, a building or structure.*
>
> *(2) The building work must substantially start within 2 months after the giving of approval.*
>
> *(3) Within 1 year after the giving of the approval—*
>
> *(a) the building work must be completed; …*

Non-compliance ought to be excused

The Court ultimately excused the non-compliance with section 71 of the Building Act. In so concluding, the Court stated the following:

- It is more likely than not that, but for the stop work order, the demolition works would have substantially started by 18 January 2021, which is when the demolition works would have had to substantially start under section 71 of the Building Act (see [38] and [50]).
- The Applicant's evidence "*did not give the impression that the applicant had any intention of carrying out any improvement to this house, let alone incorporating it into any development.*" (at [43]).
- Although the parties' structural engineers agreed that the structural members of the house appeared to be in good condition, the effect of their evidence in cross-examination was that further work would be needed to maintain that structural soundness (at [46]).
- "*As at November 2020, demolition approval was code assessable and was able to be granted by a building certifier …*". The result of the TLPI was that the demolition of the Queenslander was now impact assessable and "*it can be accepted that the introduction of that temporary planning instrument is reflective of the public interest in protecting places with such heritage value.*" (at [56] and [57]).
- The Court had "*grave reservations about the public interest being served by protecting this house in its present condition where there is no obligation on the part of the applicant to carry out any rectification works nor any intention on the part of the [Council] to offer any meaningful financial assistance in that regard.*" (at [66]).
- The stop work order covered the entire Subject Land and therefore prevented the demolition of the shed, which had no heritage value (at [70]).
- "*[W]hen the decision was made to issue the stop order, the Acting Minister did not have sufficient, if any, material before her to make a properly considered decision.*" (at [74]). The result was that the "*applicant was denied the right to demolish or at least start to demolish the shed.*" (at [76]).

Conclusion

The Court was satisfied that the Applicant's non-compliance with the requirement to substantially start the demolition work within two months of the building approval ought to be excused.

New South Wales Land and Environment Court has power to enforce statutory obligations under the Land Acquisition (Just Terms Compensation) Act 1991 (NSW)

Niki Kalimnios | Katherine Pickerd | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Council of the City of Ryde v Azizi* (2021) 248 LGERA 204; [2021] NSWCA 165 heard before Basten JA, Meagher JA, and Payne JA

October 2021

In brief

The case of *Council of the City of Ryde v Azizi* (2021) 248 LGERA 204; [2021] NSWCA 165 concerned an application for leave to appeal made by the Council of the City of Ryde (**Council**) to the New South Wales (**NSW**) Court of Appeal (**Court of Appeal**) against the decision of the NSW Land and Environment Court (**Land and Environment Court**) to order the Council to pay owners dispossessed of their land 90 per cent of the value assessed by the Valuer-General, prior to the Land and Environment Court's determination of the compensation to be paid. The Council alleged that the Land and Environment Court did not have the power to make such an order.

Following an owner-initiated land acquisition process on the basis of hardship, on 24 August 2018, the Council compulsorily acquired three parcels of land (**Subject Land**) in North Ryde under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) from Mr Azizi and Alnox Pty Ltd (the former landowners). The acquisition took place following the rezoning of land used for residential purposes to public recreation, which included the Subject Land.

On 21 December 2018, the Valuer-General issued determinations for the Subject Land. The Council then successfully brought proceedings in the Supreme Court of NSW (**Supreme Court**) seeking judicial review of the Valuer-General's determinations. On 20 November 2019, the Supreme Court ordered in the case of *Council of the City of Ryde v Azizi* [2019] NSWSC 1605 that the determinations of the Valuer-General were void and of no effect.

Further determinations were issued by the Valuer-General on 25 February 2020. The Council then issued compensation notices. However, the notices each contained a final paragraph which stated that the former landowners would receive 90 per cent of the difference between the determination of compensation by the Valuer-General ($3,981,185) and the advance payment previously paid ($2,031,866.30) within 28 days of lodging an objection with the Land and Environment Court. Alnox Pty Ltd received a similar notice calculated on the same basis, with the amount to be paid being $2,651,974.70. The remainder of the monies determined by the Valuer General were to be held in the Council's solicitor's trust account.

The reason for the arrangement was that the Council was concerned that the former landowners would be unable to repay the amount in the event that the Land and Environment Court determined the compensation was less than what the Valuer-General had determined.

The former landowners commenced proceedings in the Land and Environment Court objecting to the amount of compensation determined by the Valuer-General. Notices of motion were filed by the former landowners seeking orders that the Council pay 90 per cent of the compensation offered in the compensation notices to them.

The Land and Environment Court determined the motion and ordered that the Council pay the former landowners the full 90 per cent.

A summons seeking leave to appeal to the Court of Appeal was then filed. While the Court of Appeal granted leave to appeal, ultimately the appeal was dismissed with the Court of Appeal finding that the statutory requirement to pay 90 per cent compensation was not complied with by the payment of part of the money into the trust account of the Council's solicitor. The Court of Appeal also found that the Land and Environment Court had the power to compel the Council to make the payment to the former landowners, and could even have made a freezing order if that application had been made.

Land and Environment Court has the power to enforce statutory obligations under the Just Terms Act

One issue in the appeal was whether the Land and Environment Court had power to enforce statutory obligations under the Just Terms Act or whether such actions could only be sought in the Supreme Court.

The Council argued that if the former landowners sought to enforce an entitlement to payment under section 68(2)(a) of the Just Terms Act, they were obliged to seek mandamus in the Supreme Court as the Land and Environment Court did not have power to make such an order.

The Court of Appeal noted the jurisdiction and powers of the Land and Environment Court and confirmed at [21] that although the Land and Environment Court is declared to be a superior court of record, it is a Court of limited statutory jurisdiction.

Despite this, after considering the legislation, at [34] the Court of Appeal confirmed "*[a]s a matter of principle, legislation should not be read narrowly in such a way as to create a division of jurisdiction between two institutions if an alternative reading allowing for matters to be disposed of in one court only can be adopted.*" Adopting that approach, "*the Land and Environment Court has jurisdiction both to enforce the obligation for payment of a proportion of the compensation offer, on an interlocutory basis, and, in making final orders, to provide for any overpayment that may have been made on an interim basis.*"

Further, the Court of Appeal found at [36] that there is no reason to doubt the power of the Land and Environment Court to make a freezing order as there is no exclusion of that power in the *Uniform Civil Procedure Rules 2005* (NSW).

Acquiring authority's payment into its solicitor's trust account did not comply with the statutory requirement for it to pay 90 per cent of the compensation determined in advance to the former landowners

The motion filed in the Land and Environment Court by the former landowners sought orders that the Council pay 90 per cent of the compensation offered in the compensation notices to them, as the Council had withheld part of the payment and maintained that it was kept in its solicitor's trust account.

The former landowners argued that the payment by the Council into its solicitor's trust account did not constitute payment to *them* and consequently did not comply with section 68(2)(a) of the Just Terms Act.

The Council observed that it was a matter of implication that the advance payment was a payment to the former landowners. Section 68(2)(a) of the Just Terms Act did not expressly state that the payment was to be made to a former owner. The Council then argued the following:

1. There might be a good reason why section 68(2)(a) of the Just Terms Act does not expressly state that the payment is to be made to a former owner. The example of where compensation might be payable to a mortgagee under section 65(2) of the Just Terms Act was cited.
2. Any unpaid rent or other money owed to the acquiring authority might be set off against the compensation payable under section 34(4) of the Just Terms Act.
3. As the payment had been made pursuant to an order of the Land and Environment Court, which was made by consent, the payment had been made on the instruction of the former landowners.
4. The money could be transferred to a controlled money account under the joint control of the solicitors for both parties.

The Court of Appeal found that nothing turned on the first and second arguments of the Council, and the Land and Environment Court was correct to make due allowance for payments which had been made by way of set off and to the mortgagee.

With respect to the third argument, the Court of Appeal determined there was no payment made to the solicitors at the direction of the former landowners, despite the fact that there were consent orders.

In relation to the final argument, the Court of Appeal decided that while an alternative regime might have been imposed if a freezing order had been found to be appropriate to prevent the former landowners from spending the money, none had been proposed by the Council. The Court found that "*what the Council sought was simply a maintenance of the status quo*" (at [42]).

Having displaced the Council's arguments, the appeal was dismissed and the orders of the Land and Environment Court requiring the Council to pay to the former landowners the full 90 per cent remained.

Conclusion

It is apparent from this case that acquiring authorities are required to make the advanced payments to dispossessed landowners (subject to other sections of the Just Terms Act). The payments cannot be withheld on the basis that the acquiring authority is concerned that dispossessed landowners will become impecunious and be unable to repay the money should the Court determine compensation to be a lower amount than what the Valuer-General determined. The proper way to protect the acquiring authority's interest in that case would be to seek a freezing order.

High Court of Australia confirms the Queensland Court of Appeal's decision that the levying of infrastructure charges was to be under the current infrastructure charging regime

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the High Court of Australia in the matter of *Sunland Group Limited v Gold Coast City Council* [2021] HCA 35 heard before Kiefel CJ, Keane, Gordon, Steward, and Gleeson JJ

November 2021

In brief

The case of *Sunland Group Limited v Gold Coast City Council* [2021] HCA 35 concerned an appeal by developers (**Appellants**) to the High Court of Australia (**High Court**) against the decision of the Queensland Court of Appeal (**Court of Appeal**) in the case of *Gold Coast City Council v Sunland Group Limited & Anor* [2020] QCA 89 (**Court of Appeal's Decision**) in respect of the interpretation of conditions relating to infrastructure contributions in a preliminary approval (**Preliminary Approval**) granted under the now repealed *Integrated Planning Act 1997* (Qld) (**IPA**).

Our June 2020 article contains a note in respect of the Court of Appeal's Decision.

The Preliminary Approval was extended under the now repealed *Sustainable Planning Act 2009* (Qld) (**SPA**) and continues to have effect under section 286 of the *Planning Act 2016* (Qld) (**PA**).

With the introduction of the SPA and then the PA, the Parliament had moved away from the infrastructure charging framework under the IPA, which allowed a local government to require a contribution towards the cost of supplying infrastructure under a planning scheme policy about infrastructure, to the current infrastructure charging regime, which requires a local government to give an infrastructure charges notice to levy infrastructure charges.

The High Court held that conditions in a preliminary approval are a "*…'framework' for the issue of future development permits*", which do not create final rights that govern the development of land (at [54]).

The High Court held that the relevant conditions of the Preliminary Approval did not create liability for the payment of infrastructure contributions, which was demonstrated by the future-tense language used in the conditions, and because the date for the payment and the amount of the infrastructure contributions was not included in the conditions (see [3], [24], and [48] to [55]).

The High Court noted that "*[w]here there is an exercise of power for the imposition of a charge, the very nature of the power usually necessitates certainty in the imposition of the charge.*" (at [21], see also [32]).

Conditions of a preliminary approval ought to be construed according to the rules of construction which govern the interpretation of Acts of Parliament and subordinate instruments, and not rules which govern the interpretation of contracts (see [21] and [58] to [59]).

The High Court held that the conditions of the Preliminary Approval were only to put the Appellants on notice that contributions towards infrastructure would be required when a later development permit was issued.

The High Court held that if the Preliminary Approval conditions were to create a liability for the payment by the Appellants of infrastructure contributions, the failure to include a date or time for the making of the contributions would have been an improper exercise of power (at [13] and [60]).

The High Court agreed with the Court of Appeal's Decision that the Preliminary Approval conditions did not require the payment of infrastructure contributions, and any infrastructure contributions sought would be required to be by way of an infrastructure charges notice in accordance with the infrastructure charging regime under the PA.

Litigation history

The Court of Appeal's Decision overturned the decision of the Planning and Environment Court of Queensland (**P&E Court**) in the case of *Sunland Group Limited & Anor v Gold Coast City Council* [2019] QPEC 14.

The P&E Court had held that the Gold Coast City Council (**Council**) had the power to collect from the Appellants infrastructure charges to be calculated in accordance with conditions 13 to 16 of the Preliminary Approval.

The Court of Appeal's Decision overturned the decision of the P&E Court, and held that the conditions ought to be construed according to the current infrastructure charging regime under the PA, which required the Council to issue an infrastructure charges notice to levy a charge in respect of infrastructure.

Parties' positions

The Appellants submitted that the assessment of infrastructure contributions by the Council ought to be in accordance with the conditions of the Preliminary Approval, which created a present obligation on the Appellants to pay infrastructure contributions on a future date. The Appellants' position was therefore that the contributions ought to be calculated under the old infrastructure charging regime under the IPA.

The Council submitted that conditions of the Preliminary Approval did not create a liability on the Appellants to pay infrastructure charges, and therefore, the Council was required to issue an infrastructure charges notice under Chapter 4 of the PA.

Conditions of the Preliminary Approval did not create a liability to pay

The High Court agreed with the Court of Appeal's Decision that the conditions of the Preliminary Approval did not create a present obligation on the Appellants to make a payment contributing towards infrastructure.

The language used in the conditions of the Preliminary Approval lacked sufficient certainty for the High Court to determine that infrastructure charges had been levied under the IPA and therefore ought to continue to be subject to that infrastructure charging regime.

The case of *Ashtrail Pty Ltd & Anor v Council of the City of Gold Coast* [2020] QCA 82; (2020) 4 QR 192; (2019) 242 LGERA 187 (***Ashtrail* case**) provides an example of a condition of a development approval granted under the old infrastructure charges regime under the IPA, which continued to operate under the IPA despite the introduction of the SPA and the PA.

The High Court distinguished the *Ashtrail* case on the basis that the relevant condition was expressed in mandatory language, and had precisely identified the time for the payment of the contribution and the means of calculating the contribution.

The High Court held that the purpose of the conditions of the Preliminary Approval was to ensure that the issue of any development permit in the future would impose consistent infrastructure contribution liabilities. However, at the time later development permits were issued, the IPA had been repealed and the new infrastructure charges regime under the PA was in operation.

Conclusion

The High Court held that there was no present liability in the Preliminary Approval for the payment of infrastructure contributions, and that infrastructure charges were required to be levied by way of an infrastructure charges notice in accordance with the current infrastructure charging regime under the PA.

Queensland Court of Appeal finds that approving development which conflicts with a planning scheme requires evidence of why land that does not have those conflicts is not suitable

Krystal Cunningham-Foran | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Redland City Council v King of Gifts (Qld) and HTC Consulting Pty Ltd & Anor* [2021] QCA 210 heard before Fraser and McMurdo, and Mullins JJA

November 2021

In brief

The case of *Redland City Council v King of Gifts (Qld) and HTC Consulting Pty Ltd & Anor* [2021] QCA 210 concerned an appeal by the Redland City Council (**Council**) to the Queensland Court of Appeal (**Court of Appeal**) against a decision of the Planning and Environment Court of Queensland (**P&E Court**) to approve a development application for a material change of use (**Development Application**) of land located at Alexandra Hills, Queensland for a service station and drive-through restaurant (**2020 Approval**).

The Court of Appeal held that the primary issue for the P&E Court was "*whether there was a need for the development in a location where [version 4 of the Redland City Plan 2018 (Planning Scheme)] provided that it should not occur, as distinct from more generally in the area, or a part of the area, governed by the [P]lanning [S]cheme*" (at [22]).

The Court of Appeal held that a determination that a conflict with a planning scheme ought to prevail requires reasons as to why the terms of the planning scheme ought not to prevail, for example, the development is required in a *particular location* because of the need of the community in that *particular location*. The Court of Appeal held that a determination that a conflict ought to prevail requires more than a conclusion that a conflict with the planning scheme is reduced because the proposed development complies with some aspects of the planning scheme (at [49]).

The Court of Appeal held that the P&E Court's reasons for granting the 2020 Approval did not include that the benefits of the proposed development were exclusive to the subject land, nor that there was no other more suitably zoned land within the relevant area that could meet the perceived need for the proposed development (at [22], [29], [39], [40], and [50]).

The public interest in conformity with the Council's Planning Scheme is more critical than any public interest that would likely be served by the 2020 Approval (at [12]). This finding was supported by the Court of Appeal's decision in the case of *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132; (2020) QPELR 631, which held that the "*need*" for a development is only a starting point that does not override the requirement for compliance with a planning scheme; "*… need should [be] met by a development on a site that does not give rise to a conflict.*" (at [48]).

The Court of Appeal held that the P&E Court erred in fact because the evidence before the P&E Court did not support the finding that there was a need for the proposed development on the subject land that could not be met on other more suitable land. The Court of Appeal set aside the 2020 Approval and dismissed the appeal to the P&E Court.

2020 Approval proceeding

King of Gifts (Qld) and HTC Consulting Pty Ltd (the **First Respondents**) appealed to the P&E Court against the Council's refusal of the Development Application. In 2018, the P&E Court approved the Development Application (**2018 Approval**) subject to conditions (see *King of Gifts (Qld) Pty Ltd v Redland City Council & Anor* [2017] QPEC 64 and our March 2018 article).

The Council appealed to the Court of Appeal against the 2018 Approval. The Court of Appeal allowed the appeal and found that the P&E Court had erred in principle in the application of section 326 of the now repealed *Sustainable Planning Act 2009* (Qld) (**SPA**) because the proposed development conflicted with the Planning Scheme. The Court of Appeal remitted the proceeding to the P&E Court for redetermination (see *Redland City Council v King of Gifts (Qld) Pty Ltd & HTC Consulting Pty Ltd & Anor* [2020] QCA 41; (2020) 3 QR 494 and our August 2020 article).

On redetermination of the Development Application, the P&E Court held that the proposed development was "*… fundamentally different in nature and size … to the types of uses and development …*" that the Planning Scheme envisaged for the subject land (at [82]), but nevertheless granted the 2020 Approval.

The P&E Court held that the following matters established compliance with section 326(1)(b) of the SPA in that there was a greater public interest in approving the Development Application than the public interest in strict compliance with the requirements of the Planning Scheme:

- ***Need for the proposed development*** – There was a strong need for the proposed development on the subject land for the growing community that was not being addressed by existing development.
- ***Improvement of residents' well-being*** – There would be an improvement in the well being of the residents of the relevant trade area because the proposed development would be conveniently located, accessible, and without unacceptable impacts on amenity and environment.
- ***Insufficient provision of centre zones*** – The Planning Scheme did not reflect the public interest because of the following:
  - The Council conceded that the Planning Scheme did not include sufficient land to cater to the needs of the growing population in the centre zones where uses like the proposed development were appropriate.
  - The Council supported the development of a full service supermarket with an associated tavern and service station to the east of the subject land.
- ***No undue conflict*** – The proposed development would not destroy local amenity nor materially compromise the environmental and visual amenity goals in the Planning Scheme.
- ***Upgrade of road network*** – The proposed development would facilitate the upgrade of the road network.

2020 Approval on the particular location was not required

The Court of Appeal relevantly held the following in respect of the matters relied on by the P&E Court for the 2020 Approval:

- ***Need for the proposed development*** – The finding that there was a need for the development on the subject land was not supported by the economic need and town planning reports (**Expert Reports**), which primarily related to need generally in the relevant trade area and not to the particular attributes of the subject land, nor that a different, more suitably zoned location could not fulfil the need (see [22] to [39]).
- ***Improvement of residents' well-being*** – The Expert Reports related generally to the relevant trade area and did not relate to the subject land or its particular characteristics (at [40]).
- ***Insufficient provision of centre zones*** – The lack of suitably zoned land and the Council's support of a full-line supermarket in what was a more urbanised area was not a basis for disregarding the other inconsistencies with the Planning Scheme (at [47]).
- ***No undue conflict*** – The finding that the seriousness of a conflict is reduced by the proposed development otherwise complying with aspects of the Planning Scheme did not establish why the Planning Scheme should not prevail (at [48]).
- ***Upgrade of road network*** – The P&E Court did not find that the upgrade of the road network could not be provided by development on other more suitably zoned land within the relevant trade area, and the upgrade of the road network was not the sole reason for granting the 2020 Approval (at [50]).

The Court of Appeal held that the evidence relied on by the P&E Court did not factually support the matters identified as being supportive of the 2020 Approval. What was required was an explanation as to why the 2020 Approval was necessary on the subject land as opposed to other land within the relevant trade area.

Conclusion

The Court of Appeal allowed the appeal because it was not satisfied that the P&E Court's grant of the 2020 Approval was supported by the evidence, and set aside the P&E Court's final order and dismissed the First Respondents' appeal to the P&E Court.

Planning and Environment Court of Queensland focuses on the proposed primary activity to determine the appropriate use category, and declines to make a declaration that a development application for a brewery is impact assessable rather than code assessable

Maria Cantrill | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cannon Hill Investments Pty Ltd & Anor v Malt Brewing Company Pty Ltd & Ors* [2021] QPEC 30 heard before Everson DCJ

November 2021

In brief

The case of *Cannon Hill Investments Pty Ltd & Anor v Malt Brewing Company Pty Ltd & Ors* [2021] QPEC 30 concerned an originating application to the Planning and Environment Court of Queensland (**Court**) seeking a declaration that a development application lodged with the Brisbane City Council (**Council**) by Malt Brewing Company Pty Ltd (**Malt Brewing**) for a brewery and associated restaurant was impact assessable rather than code assessable.

The Court dismissed the originating application on the basis that the applicant, Cannon Hill Investments Pty Ltd (**CHI Pty Ltd**), had not demonstrated any error in the categorisation of the proposed use.

Background

Malt Brewing lodged a development application for a development permit for a material change of use for High Impact Industry and a Food and Drink Outlet over land located at 82 Colmslie Road, Morningside (**Application**). The subject land is in the Industry Zone (General Industry B Precinct) of the *Brisbane City Plan 2014* (version 20) (**City Plan**).

The Application proposed to repurpose a portion of a State Heritage listed building into a brewery with a gross floor area (**GFA**) of 538m^2 and a restaurant with a GFA of 250m^2.

The Council accepted the Application as properly made and confirmed that public notification was not applicable to the Application. Despite the Application not being publicly notified, CHI Pty Ltd became aware of it and made representations to the Council that the Application ought to be impact assessable. On 18 December 2020, CHI Pty Ltd filed an originating application with the Court seeking a declaration to that effect.

On 23 February 2021, the Council, by its delegate, approved the Application. The development approval contained the following conditions (our underlined emphasis):

- "*Maintain the approved development in accordance with the approved DRAWINGS AND DOCUMENTS, and any other relevant Council approval required by the conditions*" (Condition 1).
- "*Carry out the approved development in accordance with the approved DRAWINGS AND DOCUMENTS*" (Condition 3).
- "*The approved Food and drink outlet must remain less than 250m^2 gross floor area (excluding the unroofed outdoor dining areas shown on the APPROVED DRAWINGS AND DOCUMENTS)*" (Condition 4).

The approved plans included a floor plan which identified in red the "*Area Primarily used for Brewery production purposes*" and the "*Area Primarily used for Food and Beverage Purposes*".

Issue in dispute

The issue for determination by the Court was whether the Application was impact assessable either because the Application was for a Hotel, and not for a Food and Drink Outlet, or because the Food and Drink Outlet was 250m^2 GFA or more.

Requirements under the City Plan

In order to be code assessable under the City Plan, a Food and Drink Outlet had to be "*less than 250m^2 gross floor area*".

The City Plan adopts the following definition of Food and Drink Outlet under the *Planning Regulation 2017* (Qld):

> ***food and drink outlet*** *means the use of premises for—*
>
> *(a) preparing and selling food and drink for consumption on or off the premises; or*
>
> *(b) providing liquor for consumption on the premises, if the use is ancillary to the use in paragraph (a).*

In contrast, Hotel is defined as follows:

> ***hotel—***
>
> *(a) means the use of premises for—*
>
> *(i) selling liquor for consumption on the premises; or*
>
> *(ii) a dining or entertainment activity, or providing accommodation to tourists or travellers, if the use is ancillary to the use in subparagraph (i); but*
>
> *(b) does not include a bar.*

Use was appropriately categorised as code assessable

The Court accepted evidence given by a director of Malt Brewing that the primary activity in the restaurant would be the selling of food and that the sale of alcohol, including products from the co-located brewery, would be a secondary activity. Given that the primary activity was not the sale of alcohol, the Court accepted that the use was correctly classified as a Food and Drink Outlet.

The Court also found that it was always Malt Brewing's intention to conduct a Food and Drink Outlet use of less than 250m^2 GFA.

The Court ultimately declined to make the declaration sought given the finding that it was always intended that the Food and Drink Outlet would operate below the code assessable threshold of 250m^2, the plans submitted with the development application were ambiguous, and the Council conditioned the development approval to ensure that it was not approving a use beyond the code assessable development threshold.

Planning and Environment Court of Queensland approves development of self-storage facility despite non-compliances

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Self Storage Helensvale Holdings Pty Ltd v City of Gold Coast Council* [2021] QPEC 29 heard before Kefford DCJ

November 2021

In brief

The case of *Self Storage Helensvale Holdings Pty Ltd v City of Gold Coast Council* [2021] QPEC 29 concerned an appeal by Self Storage Helensvale Holdings Pty Ltd (**Applicant**) to the Planning and Environment Court of Queensland (**Court**) against the decision of the City of Gold Coast Council (**Council**) to refuse the Applicant's development application for a development permit for a material change of use for a self-storage facility.

The Court allowed the appeal for the following reasons:

- There is a current need for the proposed development.
- The proposed development aligned with the planning goals of the Strategic Framework in the *Gold Coast City Plan* (**City Plan**) when measured against the assessment benchmarks.
- Any non-compliances with the City Plan are only minor and did not create adverse consequences.
- The original planning outcomes had been superseded by the Council's decision to approve development in October 2016.

Proposed development

The subject land is at an intersection in Pimpama. The subject land is zoned for medium density residential development. The development application sought a development permit for a material change of use for a warehouse, more specifically for a 8,244m^2 self-storage facility.

The Council refused the development application because of non-compliances with the City Plan. Broadly, the areas of non-compliance related to whether the proposed use is appropriate in the location, the scale of the proposed use, and amenity impacts.

Categorising the nature of the use

The Applicant accepted that self-storage facilities have historically been characterised as an industrial type use, however, the development application sought approval for a warehouse. The Applicant argued that the proposed development would cater for domestic and business users, rather than industrial users. The town planning expert for the Council conceded that the proposed development is a "*modern iteration of self-storage*" and different to the "*old-style self-storage facilities*". In particular, the Court noted that it has "*a retail user flavour, with bright internal access ways, electronic door monitoring systems, co-working office spaces and meeting rooms*". The Court was therefore persuaded that while a warehouse is within the "*industrial activities*" defined activity group in the City Plan, the self-storage facility proposed by the Applicant is not industrial, and is more closely aligned with retail and commercial uses.

Given the Court's finding that the proposed use is not industrial, the use therefore fell to the catchall phrase of "*any other use not listed*" in the Tables of Development and is impact assessable in the medium density residential zone. The Court found that the Table of Development for the medium density residential zone does not exclude or prohibit uses that are not specifically listed. The Court went on to find that it could not be readily inferred from the City Plan, when read as a whole, that the proposed development is discouraged on the subject land.

Scale of the land use and amenity controls non-compliant but remained appropriate

The Applicant accepted that the proposed development is a non-residential land use with a scale greater than anticipated in the medium density residential zone code, and that it did not comply with Performance Outcome PO9 of the code.

The Court considered section 3.4.5.1(14) of the Strategic Framework and whether it restricts non-residential uses to those which are small scale. The Court found that the proposed development "*performs well*" (at [102]) when assessed against the planning goals of the Strategic Framework.

The Council argued that the proposed development does not satisfy the assessment benchmarks with respect to the amenity of the design. The Council's main arguments and the Court's conclusions were as follows:

- The Council argued that that the proposed development exceeds the allowable building height, and that this gave rise to non-compliance with the Strategic Framework. The Court agreed that the proposed development is non-compliant but only to a minor extent. The Court found that the proposed development is acceptable when the future appearance of the local area is considered and that the proposed development performed favourably against the outcomes of the Strategic Framework.
- The Council argued that there was non-compliance with the overall outcomes and performance outcomes in the medium-density residential zone code. The Court found these arguments to be immaterial and that there was no evidence of an unacceptable amenity impact as a result of the proposed development.
- The Council argued that the proposed development did not comply with the overall outcomes of the commercial design code. The Court preferred the Applicant's expert evidence and concluded that the proposed development aligns with the approved retail and commercial development in the area.

Although the proposed development gave rise to some non-compliances, the Court found that the proposed development remained within the scope of the policy and purpose of the Strategic Framework and the City Plan.

Other relevant considerations

The Court also had regard to other "*relevant matters*" under section 45(5)(b) of the *Planning Act 2016* (Qld). The Court concluded that the following relevant matters supported the proposed development:

- The Court accepted that the Council had in October 2016 departed from the planning intent of the former planning scheme, being the *Our Living City - Gold Coast Planning Scheme 2003* (**2003 Planning Scheme**) having approved non-residential uses within the zone that were considered undesirable under the 2003 Planning Scheme.
- The Court heard expert economic evidence from both parties regarding the need for the proposed development. The Court found that the catchment area for the proposed development was in a localised area and separate from existing facilities. The Court went on to find that there existed a significant economic demand for the type of facility offered by a warehouse.
- The Court found that there are no adverse planning consequences from the proposed development in respect of amenity impacts.

The Council argued that there were relevant matters that supported the refusal of the proposed development. One argument was that other locations were more suitable for the proposed development. While the Court agreed there is a theoretical possibility for a self-storage facility to be developed in an area encouraged by the City Plan, it did not detract from the other supporting evidence for the proposed development on the subject land.

The Council also argued that the designation of the surrounding land had been overtaken by events and was an expansion of centre activities, and that the subject land ought to be therefore used for a centre activity. The Court rejected this argument because it was not supported by the Court's reading of the City Plan. The proximity of the subject land to a tavern and other premises with late trading hours raised doubts over what other development would be suitable.

The Court concluded that the weight of the relevant matters carried a more significant effect than the non-compliances with the assessment benchmarks. The Council's commercial and retail approvals of October 2016 had promoted a landscape of non-residential usage. This meant that the assessment benchmarks that the Council sought to rely on were no longer substantively relevant and did not embody the public interest for the use of the subject land. This was a departure from the existing principles of the City Plan that would not likely be reversed.

The Court therefore found that the proposed development ought to be approved subject to the imposition of lawful conditions.

New South Wales Court of Appeal awards costs in respect of a noise complaint that could have been avoided

Annie Dong | Anthony Landro | Todd Neal

This article discusses the decision of the New South Wales Court of Appeal in the matter of *Nadilo v Eagleton* [2021] NSWCA 232 heard before Meagher JA, Brereton JA, and Preston CJ

November 2021

In brief

The case of *Nadilo v Eagleton* [2021] NSWCA 232 (***Nadilo***) concerned a successful appeal to the New South Wales Court of Appeal (**Court of Appeal**) against a decision of the New South Wales Land and Environment Court (**Land and Environment Court**) in its Class 4 jurisdiction in respect of costs.

The substantive dispute concerned the Respondents' air-conditioning units and a water heat pump within the residential holiday suburb of Wangi Wangi in New South Wales. The issues were the following:

- Whether the units breached the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (NSW) (**Codes SEPP**) and section 4.2 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) in that the air-conditioning units and water heat pump required a development consent.
- Whether the operation of the air-conditioning units and water heat pump caused offensive noise and breached the *Protection of the Environment Operations (Noise Control) Regulation 2017* (NSW) (**Noise Control Regulations**).

Before the final hearing, the parties resolved the dispute after the Respondents replaced the water pump with a silent system, and took other measures to address the noise of the air conditioners. The parties then agreed to consent orders which included that the proceedings be dismissed. The Applicant made an application for costs.

The Land and Environment Court dismissed the application for costs.

The Applicant appealed to the Court of Appeal. The Court of Appeal allowed the appeal and ordered the Respondents to pay the Applicant's costs of the proceedings in the Land and Environment Court and the Court of Appeal.

Whilst this case is an example of what may be considered a trivial issue, the Court of Appeal's decision has important implications on the law of costs in the civil enforcement jurisdiction of the Land and Environment Court, irrespective of the scale of development or works in dispute.

Legal framework

Part 4 of the EP&A Act sets out the framework by which development is assessed in New South Wales. In essence, development requires consent unless an environmental planning instrument specifies that the particular type of development does not require consent (known as exempt development). Most categories of exempt development are set out in the Codes SEPP. The Codes SEPP also specifies the associated development standards for the particular type of exempt development.

Clause 2.5 of the Codes SEPP identifies air-conditioning units as exempt development. Clause 2.6 of the Codes SEPP sets out the applicable development standards, including, for example, minimum setbacks from lot boundaries (at clause 2.6(1)(b)), minimum setbacks to bedrooms of adjoining residences (at clause 2.6(1)(b1)), and noise level limitations during on and off-peak times of operation (at clause 2.6(1)(f1)).

Clause 45(a) and clause 53(1)(a) of the Noise Control Regulations restrict the use of air conditioners and heat pumps on residential premises to certain times of the day, where they emit a noise which can be heard within any room in any other residential premises (excluding a garage, storage area, bathroom, laundry, toilet or pantry). A breach of these clauses gives rise to an offence, and a liability to a maximum penalty of 50 penalty units for an individual and 100 penalty units for a corporation.

Courts are to have regard to the responsibility of each party for the incurring of costs in exercising its discretion to award costs

The Court of Appeal held that, rather than establishing a presumption, rule 42.20 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) reflects the default position that if proceedings are dismissed, the plaintiff "*has lost*" and must pay the defendant's costs, as "*costs follow the event*" (at [7]).

In *Nadilo*, the proceedings did not run to hearing and as a consequence no party "*lost*". However, the Court of Appeal found that the Applicant had achieved extra-curial success by agreeing to consent orders (see [7]), which would render any further proceedings pointless. The Court of Appeal found that since the Respondents had effectively "*capitulated*" or "*surrendered*" by making the air-conditioning and water heat pump noise-compliant without any element of compromise, the Applicant did not need to show that the Respondents had acted "*unreasonably*" before the surrender to justify a costs order (see [9] and [12]).

The Court of Appeal held at [12] that it was not necessary to demonstrate "*unreasonableness*" on the part of the Respondents to obtain an "*otherwise*" order for costs in circumstances where the Respondents had capitulated. The Court of Appeal held that, even if there was a requirement to demonstrate unreasonableness, this would have been satisfied by the Respondents' persistence in defending their case, which caused the Applicant to incur more costs.

In making a costs order, the relevant inquiry is whether an applicant has achieved the substance of their intended outcomes, rather than one of form. There is no need to undertake a close comparison of the outcomes under each alleged breach, if the remedy sought is substantially the same.

The Court of Appeal found that because the Applicant had achieved the outcomes sought in bringing the proceedings, it was plainly unjust for the Land and Environment Court not to have awarded costs in exercising its discretion under rule 42.20(1) of the UCPR.

As the Applicant would have inevitably succeeded in relation to the Codes SEPP breach, thereby entitling the Applicant to the substantive relief sought, it did not matter that a breach of the Noise Control Regulation had not been made out. On that basis, the Court of Appeal found that the Land and Environment Court had erred by not making a costs order simply because a breach of the Noise Control Regulation had not been made out (see [11], [68] to [70], and [91]).

Nadilo tested in the Land and Environment Court

Nadilo has been considered in the Land and Environment Court in the case of *Jodie Dianne Ansted v Northern Beaches Council* [2021] NSWLEC 136 (***Ansted***).The Applicant in that case was unsuccessful in obtaining a costs order because the Court distinguished the facts of that case from *Nadilo*.

The Land and Environment Court found at [32] in *Ansted* that the consent orders were a "*…clear compromise of not only the proceedings but the underlying dispute between the parties.*". The Land and Environment Court was unable to find that the Applicants would have inevitably succeeded, because it was not open to the Land and Environment Court to conduct a hypothetical trial to assess the Applicants' prospects of success (at [30]).

The Land and Environment Court also found at [36] that the Second and Third Respondents did not act unreasonably in defending the proceedings until such time as the consent orders were entered into. The Land and Environment Court dismissed the costs application and ordered the Applicants to pay the Second and Third Respondents' costs of the motion.

Insights

Nadilo and *Ansted* serve as an important reminder for parties in Class 4 proceedings and development disputes that may eventuate into civil enforcement litigation that there are potential cost consequences of defending and settling Class 4 proceedings for all scales of dispute, from air conditioner compliance through to more significant alleged breaches of the applicable planning legislation.

When considering whether to defend against or settle these types of proceedings, respondents ought to carefully consider the cost consequences against the strength of the applicant's case. Surrendering or capitulating mid-way through proceedings (whereby the applicant practically obtains the substance of the relief initially sought) may well lead to an order for the payment of costs.

Nadilo also serves as a timely reminder for landowners and tenants to consider noise-compliance of externally fitted plants, such as air conditioners, pool pumps, and the like, in the hope of avoiding litigation with their neighbours.

Queensland Court of Appeal refuses leave to appeal against enforcement orders requiring the modification of a dwelling to prevent it being misused for rental accommodation

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Court of Appeal in the matter of *Gavin & Anor v Sunshine Coast Regional Council* [2021] QCA 217 heard before Fraser and Morrison JJA, and North J

December 2021

In brief

The case of *Gavin & Anor v Sunshine Coast Regional Council* [2021] QCA 217 concerned an appeal by landowners (**Appellants**) to the Queensland Court of Appeal (**Court of Appeal**) against the enforcement orders made by the Planning and Environment Court of Queensland (**P&E Court**) in the case of *Sunshine Coast Regional Council v Gavin & Anor* [2020] QPEC 63.

The Appellants had committed development offences by renting out rooms of a building located at Birtinya, Queensland (**Premises**), contrary to the zoning requirements for the land under the *Caloundra City Planning Scheme 1996* (**Planning Scheme**).

The P&E Court made enforcement orders to the following effect:

- Without a development permit authorising a material change of use, the Premises or parts of the Premises were not to be used as an "*Accommodation Building*" or for any purpose other than a "*Dwelling House*" as defined in the Planning Scheme.
- A tenancy agreement in respect of the Premises was not to be entered into, and the Premises or parts of the Premises were not to be advertised for a letting purpose.
- Certain features of the Premises that might enable the Appellants to again use the Premises for accommodation were to be modified, including the removal of solid-core doors, internal locks, and electricity and water sub-meters.

The Appellants submitted that the orders made by the P&E Court were beyond power for the following reasons:

- The P&E Court could not prohibit a material change of the premises for a use that is an accepted use under the *Planning Regulation 2017* (Qld) (**Planning Regulation**) or Development Control Plan 1 - Kawana Waters.
- There was no limitation on the operation of the restriction of entering into a tenancy agreement or advertising the Premises or parts of the Premises.
- On a proper construction of section 180 of the *Planning Act 2016* (Qld) (**Planning Act**), the P&E Court could not order the alteration of a building where the building was lawfully erected, could lawfully be used without an alteration, and the development offences committed concerned the use of the Premises and not a physical part of the building.

The uses the Appellants sought to identify as accepted uses under the Planning Regulation and Planning Scheme were irrelevant to the Court of Appeal's decision, because they, or any other sensible use for the Premises, were not put before the P&E Court. Given the P&E Court's specialist jurisdiction, it was inappropriate for the issue to be raised for the first time before the Court of Appeal (at [84]).

The Court of Appeal held that although there is a general expectation that less intrusive enforcement orders will be complied with by a respondent, the powers in respect of making enforcement orders are very broad, and in rare cases, the interference with a respondent's rights beyond those orders that directly restrain the commission of a development offence will be appropriate (at [12]).

The Court of Appeal held that the enforcement orders made were within the power of the P&E Court, and in this case, the P&E Court's finding that the Appellants were likely to recommit a development offence without the modification of the Premises warranted a modification order.

Background

The Premises is three storeys, with 17 bedrooms of roughly the same size that each contain an ensuite, a solid-core self-closing door with an individual lock, an individual air-conditioner and electricity and water submeters, soundproofing, and fire prevention. The Premises has two common areas on each floor accessible via a stairway with a solid-core self-closing door, balconies with laundry facilities, and no toilet or bathroom in the common areas.

The Premises was certified as Class 1(a) "*single dwelling*", and could only be lawfully used as a "*Dwelling House*". Use of the Premises for an "*Accommodation Building*" was prohibited under the Planning Scheme.

The factual findings of the P&E Court, which were not contested on appeal, were relevantly the following:

- The Appellants had committed two development offences contrary to section 162 of the Planning Act by carrying out development that was prohibited under the Planning Scheme and section 165 of the Planning Act by using the Premises unlawfully for an accommodation building.
- The Appellants were aware before the Premises was constructed that an accommodation building was prohibited under the zoning of the Planning Scheme.
- The Appellants had always intended to use the Premises for an accommodation building, and had made misrepresentations to the Sunshine Coast Regional Council and the private certifier when seeking approval to construct the Premises as a "*Dwelling House*".
- One Appellant had occupied the Premises with his family for six weeks before advertising the Premises and renting out rooms between January 2019 and March 2020.
- Absent the order requiring the modification of the Premises, the Appellants would again contravene the Planning Act.

Limitation to use of the Premises as a dwelling is within power

The Appellants submitted that item 2(1) and item 6 of Schedule 6 of the Planning Regulation and permitted uses under Development Control Plan 1 - Kawana Waters identified accepted development which conflicted with the orders limiting the use of the Premises to a "*Dwelling House*".

The Court of Appeal held that those uses, or indeed any use to which the Premises might sensibility be put, were not identified before the P&E Court. The Court of Appeal did not have the benefit of the P&E Court's consideration or town planning evidence in respect of those uses (see [76] to [78]).

The Court of Appeal held that "*the form of the orders [were] directly affected by the way the proceedings were conducted below …*", and had accepted or permitted uses been put before the P&E Court, the P&E Court may have made a different order (at [83]).

As the P&E Court had identified the appropriate avenue for the Appellants and any successor to them was to apply to the P&E Court under section 181(4) of the Planning Act seeking a change be made to the enforcement orders (at [84] and [101]).

Modification orders made by the P&E Court were within power

One enforcement order made by the P&E Court required the Appellants to modify the Premises to make it less amenable to use as an accommodation building.

The relevant parts of section 180 of the Planning Act state the following:

> *(5) An enforcement order or interim enforcement order may direct the respondent—*
>
> *(a) to stop an activity that constitutes a development offence; or*
>
> *(b) not to start an activity that constitutes a development offence; or*
>
> *(c) to do anything required to stop committing a development offence; or*
>
> *(d) to return anything to a condition as close as practicable to the condition the thing was in immediately before a development offence was committed; or*
>
> *(e) to do anything to comply with this Act.*
>
> *Examples of what the respondent may be directed to do—*
>
> - *to repair, demolish or remove a building*
> - *to rehabilitate or restore vegetation cleared from land*

> *(6) An enforcement order or interim enforcement order may be in terms the P&E Court considers appropriate to secure compliance with this Act.*
>
> *Example—*
>
> *An enforcement order may require the respondent to provide security for the reasonable cost of taking the stated action.*

The Court of Appeal held that section 180(5)(e) of the Planning Act is broader than the other subsections of section 180, and allows for a direction requiring something to be done to bring about compliance with the Planning Act (at [7] to [8]). Further, that the example in section 180(6) of the Planning Act made clear that an enforcement order may infringe upon property rights beyond a direction under section 180(5)(d) of the Planning Act (at [9]).

The Court of Appeal also held that section 180(5)(b), (c), and (e) and section 180(6) of the Planning Act were the source of the power to order the modification of the Premises, because the P&E Court considered a development offence will be made unless the order is made (see [113], [115], and [116]).

The Court of Appeal held that the P&E Court was permitted to make an enforcement order to secure compliance with the Planning Act (at [10], [109], and [117]), including by making it more difficult for the respondent to recommit a development offence by requiring modifications be made to the Premises (at [11], [113], [116], and [117]).

Conclusion

The enforcement orders made by the P&E Court were within power and appropriate to prevent a development offence occurring in the future. Where an enforcement order is sought to be cancelled or changed, the appropriate course of action is to apply to the P&E Court under the Planning Act. The Court of Appeal therefore refused leave to appeal against the enforcement orders.

Planning and Environment Court of Queensland dismisses an appeal to extend the currency period of an approval which authorised development prohibited under current planning laws

Krystal Cunningham-Foran | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Coolum Chase Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 24 heard before Everson DCJ

December 2021

In brief

The case of *Coolum Chase Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 24 concerned an appeal to the Planning and Environment Court of Queensland (**P&E Court**) against the decision of the Sunshine Coast Regional Council (**Council**), which refused to extend the relevant period of a preliminary approval for reconfiguring a lot into 23 rural residential lots (**Preliminary Approval**).

The appeal was commenced under the *Sustainable Planning Act 2009* (Qld) (**SPA**) and therefore the SPA continued to apply under section 311(2)(a) of the *Planning Act 2016* (Qld).

The P&E Court was required under section 388(1)(a) of the SPA to have regard to the consistency of the Preliminary Approval with the "*… current laws and policies applying to the development …*", which included the *South East Queensland Regional Plan 2017* (**SEQRP 2017**), the *Planning Regulation 2017* (Qld) (**Planning Regulation**), and the *Sunshine Coast Planning Scheme 2014* (**Planning Scheme**), which made the development the subject of the Preliminary Approval prohibited development.

The Preliminary Approval contemplated a subdivision of land which was completely inconsistent with the current planning intentions in the SEQRP, Planning Regulation, and the Planning Scheme. The P&E Court therefore held that there was no justification for permitting further development under the Preliminary Approval, and dismissed the appeal.

History of the Preliminary Approval

The relevant history of the Preliminary Approval was as follows:

- In October 2002, the Council issued under the *Integrated Planning Act 1997* (Qld) a development permit for Stage 6A for lots 122 to 146 and a preliminary approval for Stage 6B for lots 99 to 121 (**Development Approval**).
- An appeal in respect of the Development Approval resulted in a negotiated change of Stage 6A to be one larger lot described as lot 124, and the preliminary approval for Stage 6B remained the same by a decision notice dated 7 December 2005, which became the current Preliminary Approval.
- In November 2015, the Applicant sought to extend the currency period of the Preliminary Approval for two years, which the Council refused.
- The appeal was filed with the P&E Court on 8 February 2016 under the SPA, and on 21 July 2017 the P&E Court declared that the Preliminary Approval had and would not lapse until the appeal was determined.

Consideration of the statutory requirements

The P&E Court was required by section 388(1) of the SPA to only have regard to the following matters:

> *(a) the consistency of the approval, including its conditions, with the current laws and policies applying to the development …*
>
> *(b) the community's current awareness of the development approval …*
>
> *(c) whether, if the request were refused—*
>
> *(i) further rights to make a submission may be available for a further development application; and*
>
> *(ii) the likely extent to which those rights may be exercised …*

In respect of section 388(1)(a) of the SPA, the P&E Court held as follows:

- The Subject Land is within the regional landscape and rural production area of the SEQRP, is for a subdivision, and is assessable development under Schedule 10, Part 14, section 21 of the Planning Regulation. Therefore, under Schedule 10, Part 16, section 23 of the Planning Regulation the proposed development is prohibited development.
- The Subject Land has constraints under the Planning Scheme, including "*… being subject to landslide hazard, being almost exclusively within a State Key Resource Area – Separation Area, subject to bushfire hazard and numerous environmental constraints.*"

In respect of section 388(1)(b) of the SPA, the P&E Court held that the community was aware of the proposed development because the Development Approval was essentially an identical layout to the Preliminary Approval.

In respect of section 388(1)(c) of the SPA, the P&E Court held that it was satisfied there would be no further rights to make a further development application, because the proposed development is now prohibited development.

Applicant's submissions not accepted

The Applicant submitted that the currency period of the Preliminary Approval ought to be extended despite the development being prohibited for the following reasons:

- To enable the completion of the final stage of the development, which is "*infill development for a small area of land already surrounded by existing rural residential development … where all of the parkland for the … development had already been dedicated, and all of the infrastructure …*" already provided.
- The Council had issued the Development Approval in 2005 when the *South East Queensland Regional Plan 2005-2026* (**SEQRP 2005**) was in force, which had placed the Subject Land in the regional landscape and rural production area.

The P&E Court did not accept the Applicant's submission for the following reasons:

- The infrastructure was required under the previous stages of the development, which was notably before obtaining a development permit for the final stage of which there was no guarantee.
- The position of the parkland and other infrastructure assumed no meaningful significance of the exercise of the discretion in section 388 of the SPA.
- It was not relevant that the Council did not have regard to the SEQRP 2005, because the Council's assessment was required to be against the relevant planning instruments in effect at the time the application was made, being, 2002. Further, the SEQRP 2005 expressly stated that it did not apply to a development approval lodged prior to 27 October 2004.

Conclusion

The P&E Court held that the Preliminary Approval is completely inconsistent with the current planning strategies, which prohibited the proposed development and there was no justification for permitting further development under the Preliminary Approval. The appeal was dismissed.

Storey time: Planning and Environment Court of Queensland considers the definition of "storey" and finds the local government did not act unreasonably in approving multiple dwellings

Hugh Russell | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Robertson & Ors v Brisbane City Council & Ors* [2021] QPEC 44 heard before Jones DCJ

December 2021

In brief

The case of *Robertson & Ors v Brisbane City Council & Ors* [2021] QPEC 44 concerned an application to the Planning and Environment Court of Queensland (**Court**) seeking a declaration that a development permit for a material change of use given by the Brisbane City Council (**Council**) was void and of no effect.

The relevant land is situated in Toowong on a 90-degree bend parallel to the adjoining street (**Subject Land**). Wayne Developments Pty Ltd (**Second Respondent**) made a development application seeking approval for a development permit for a material change of use for multiple dwellings (three units) on the Subject Land (**Proposed Development**). The Council assessed the development application as code assessable.

The Applicants are immediate neighbours to the Subject Land. By the time of the hearing, the Applicants alleged five errors in the decision-making process of the Council, being as follows:

- The development application ought to have been assessed as impact assessable.
- The Council erred in its findings in respect of the removal and replacement of a road safety barrier.
- The Council erred in concluding that there was compliance with certain assessment benchmarks in the Transport Access, Parking and Servicing Code (**TAPS Code**).
- The Council erred in concluding that there was compliance with certain assessment benchmarks in the Multiple Dwelling Code.
- More generally, no properly informed decision maker would have decided to approve the development application.

The Court dismissed the application.

Court considers the meaning of "storey" and holds that the development application requires code assessment

The Applicants alleged that a fully enclosed structure situated above the roof line of the third storey, occupying approximately 10 per cent of the total surface area of the third storey, constituted a fourth storey. The proposed fully enclosed structure has an area of 30/33m^2 and 50 per cent of it is occupied by a lift shaft and stairwell.

A "*storey*" is defined in the *Brisbane City Plan 2014* (**City Plan**) as follows:

> *a. means a space within a building between floor levels, or a floor level and a ceiling or roof other than -*
>
> *i. A space containing only a lift shaft, stairwell or meter room; or*
>
> *ii. A space containing only a bathroom, shower room, laundry, toilet or other sanitary compartment; or*
>
> *iii. A space containing only a combination of things stated in subparagraph (i) or (ii); or*
>
> *…"*

The Applicants' arguments and the Court's conclusions were as follows:

- The Applicants argued that the 14x16m^2 enclosed area external to the lift shaft and stairway is not a space that is excluded from the definition of a storey. The Court found that an exception to a "*storey*" is not restricted to exclusively including a lift or stairwell. In rejecting the Applicants' argument, the Court did not find anything in the City Plan to suggest that the exit of a lift or stairwell cannot be enclosed by four walls and a roof.

- The Applicants argued that the Second Respondent intended the enclosed area to be a separate feature since it had been referred to as a "*lobby*" and "*unit three lobby*" in the development application. In rejecting this argument, the Court held that the small size of the area and it being physically enclosed from the surrounding entertainment facility, except by a door, meant that the description of the enclosed area carried no consequence.
- The Applicants argued that the inclusion of the gross floor area (**GFA**) within the GFA Drawing that was part of the development application "*… leads objectively to a presumption that it is part of a storey unless it is demonstrated to be properly excluded.*" (see [26]). The Court held this to be an irrelevant consideration since the City Plan makes no reference to GFA in the definition of a storey.

Court finds no unreasonableness in the Council's decision-making

As a consequence of the proposed development, a metal guard rail separating the parallel street from the footpath and surrounding properties was to be replaced with energy absorbing bollards at 1.3 metre intervals.

The Applicants made the following submissions in respect of the Council's decision-making process about the bollards:

- The Council's decision was unreasonable as it failed to take into account relevant considerations, being safety considerations, and took into account irrelevant considerations, being the facilitation of refuse collection.
- The Council's decision was substantively unreasonable in the *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1KB 223 sense because the decision to remove the metal guard rail was "*… so devoid of logic that no reasonable decision maker could have made it …*" and "*… lacked an evident or rational justification.*" (at [36]).

The Court rejected all of these arguments raised by the Applicants. The Court preferred the email evidence between the Council and its delegate, which stated that the existing metal guard rail "*… provides minimal benefit, if at all, and can be removed.*" (see [40]) and that the replacing bollards "*… will improve pedestrian safety on the footpath …*" (see [39]). The Applicants could not provide any material evidence as to the effect on pedestrian safety as a consequence of replacing the metal guard rail with the bollards.

Council's findings in respect of compliance were not in error

The Applicants also argued that no properly informed decision-maker would have decided to approve the development application having regard to Performance Outcome PO43 of the Multiple Dwelling Code and matters concerning the TAPS Code.

Performance Outcome PO43 of the Multiple Dwelling Code relevantly provides that "*[d]evelopment provides refuse and recycling collection and storage facilities that … are located and managed so that adverse impacts on building occupants, neighbouring properties and the public realm are minimised*". The Court favoured the evidence in correspondence between the Council and its delegate that the temporary presentation of refuse bins "*… will not cause a significant adverse amenity [or safety] issue[s] …*" (see [46]), and held that there was no error in the Council's decision-making.

In respect of the TAPS Code, the Applicants argued that there was not compliance with Performance Outcome PO19, which states that "*[d]evelopment layout provides for services which … are wholly within the site, other than service vehicle manoeuvring areas which may overhang the verge on a minor road where use of the footpath is not adversely affected*". There was evidence that some large rigid vehicles and medium rigid vehicles may extend beyond the Subject Land, however, this was likely to be infrequent and, in the case of medium rigid vehicles, car access and egress from the adjoining property was still possible. Taking these matters into consideration, the Court was not convinced that the Council's decision was "*… so devoid of logic that no reasonable decision-maker could have made it …*" or that the decision "*… lacked an evident or rational justification.*" (see [36]) as argued by the Applicants.

The Applicants' final argument was that the Council wrongly concluded that there was compliance with Performance Outcome PO19 of the TAPS Code and acting upon that mistaken belief then considered it had no option other than to approve the development application as a consequence of the operation of section 60(2)(a) of the *Planning Act 2016* (Qld). The Court pointed to the two-page consideration of vehicular access in the relevant assessment report and did not accept that the Council acted upon a mistaken belief about compliance.

Conclusion

The Applicants' application was dismissed.

Planning and Environment Court of Queensland rejects a third application to extend a development approval for material change of use where there were chronic and persistent project funding difficulties

Matthew Wong | Nadia Czachor | Ian Wright

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sevmere Pty Ltd v Cairns Regional Council* [2021] QPEC 32 heard before Rackemann DCJ

December 2021

In brief

The case of *Sevmere Pty Ltd v Cairns Regional Council* [2021] QPEC 32 concerned an appeal to the Planning and Environment Court of Queensland (**Court**) against the decision of the Cairns Regional Council (**Council**) to refuse an application under section 87 of the *Planning Act 2016* (Qld) to extend the currency period for a development approval for a material change of use for a multiple dwelling development (**Development Approval**).

The subject land is located in Stratford and has an area of 3.54 hectares. The Development Approval was granted by way of an order of the Court on 30 April 2010 and the currency period was extended in 2014 and 2016. There were no current related development applications or current development approvals for the operational work or building work. In addition, a related operational work approval, which was granted in 2012, had been allowed to lapse.

Under section 87 of the *Planning Act 2016* (Qld), the assessment manager has a broad discretion and may consider any matter that the assessment manager considers relevant when assessing an extension application, even if the matter was not relevant to the assessment of the development application.

The Court dismissed the appeal and upheld the Council's decision to refuse the application to extend the currency period.

Financial difficulties

The Applicant produced evidence of its long-running unsuccessful attempts to obtain finance, and submitted that that was one of the primary reasons why the development had not progressed. Despite the fact that multiple institutions had been engaged by the Applicant from 2011 to 2016 to finance the project, finance could not be secured.

The Court accepted that the Applicant had made other attempts to manage the project, including the engagement of lawyers and consultants to prepare sale and tender documentation, approving various management plans, and making efforts to market and promote the development. The Court found that it was clear that the Applicant was not disinterested in the project.

However, in spite of the Applicant's optimism, the Court held that it was evident that the project's funding difficulties were chronic and persistent. The Applicant's explanation for the delay therefore could not persuade the Court to exercise its discretion to grant the extension.

Change in assessment framework

The development application for the Development Approval was made on 28 February 2007 as a development application superseded planning scheme. Under the repealed *Integrated Planning Act 1997* (Qld), the development required code assessment. In contrast, a development application made for the Development Approval under the current *Planning Act 2016* (Qld) would require impact assessment.

As a consequence, the Court held that the proposed development would now be subject to the following:

- A different development application process involving public notification.
- A different kind and level of assessment requiring consideration of submissions in response to public notification.

- Potential refusal by the Council as the assessment manager.
- Different appeal rights.

The Court gave significant weight to the change in the assessment framework, and found that the proposed development ought to be the subject of fresh assessment and decision.

Change in planning policy

The Court observed that the *1996 Cairns Planning Scheme* (**1996 Scheme**), under which the development application was assessed and decided, had been replaced by the *CairnsPlan 2016* (**2016 Scheme**). Under the 1996 Scheme, the subject land was zoned Residential 3 Zone and subject to the provisions of the Hillslopes Development Control Plan, whereas the subject land is partly in the Environmental Management Zone and partly in the Conservation Zone under the 2016 Scheme.

Under the Environmental Management Zone Code, the development of residential dwellings is restricted so as to not adversely affect the environmental and scenic amenity values of the surrounding area. The Court found that these constraints supported the conclusion that a fresh development application be made.

Issue estoppel

The Applicant also submitted that the Council was estopped from alleging conflict with the 2016 Scheme because the Development Approval was given as a consequence of a consent order made in an appeal to the Court, and that the consent order is capable of founding an estoppel. This contention was rejected, as it was recognised that estoppel cannot operate to prevent the exercise of a statutory discretion exercised for the public benefit.

Assessment of future operational work

The Applicant also submitted that the Development Approval will not be acted upon until a new operational work approval is obtained under the 2016 Scheme and, as part of that future development application, constraints and impacts would be assessed. However, the Court held that the hypothetical possibility of future contemporary assessments was not enough to warrant an extension.

Conclusion

The Court was not persuaded by the Applicant's explanation for its failure to act on the Development Approval and held that the Applicant ought to make a new development application. Hence, the extension was not granted, and the appeal was dismissed.

Land Court of Queensland finds that further particulars are not required to articulate human rights objections to an application for a mining lease for a thermal coal mine in the Galilee Basin

Jessica Day | Ian Wright

This article discusses the decision of the Land Court of Queensland in the matter of *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No. 2)* [2021] QLC 4 heard before FY Kingham

December 2021

In brief

The case of *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No. 2)* [2021] QLC 4 (**Waratah Coal No. 2**) concerned an application brought by Waratah Coal Pty Ltd (**Waratah**) for further and better particulars of human rights objections brought by Youth Verdict Ltd and Bimblebox Alliance Inc (**Objectors**) to Waratah's application for a mining lease and an environmental authority to develop a thermal coal mine in the Galilee Basin in Queensland.

Waratah Coal No. 2 follows from the case of *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 (*Waratah Coal No. 1*) in respect of which the Land Court of Queensland (**Land Court**) dismissed an application brough by Waratah to strike-out objections made under the *Human Rights Act 2019* (Qld) (**HRA**) to Waratah's proposed thermal coal mine. A summary of that case can be found in our November 2020 article.

The issues for the Land Court's determination were as follows:

- Whether the human rights objections were adequately articulated.
- What principles apply to particulars of an objection in a mining objection hearing.
- Whether the Objectors should be required to respond to any of the requests that remain in dispute.

The Land Court ultimately found that further particulars were not the best way to fully articulate the human rights objections, and directed the Objectors to provide an exhaustive list of classes of individuals whose human rights the Objectors contended would be limited by the grant of the mining lease.

Land Court finds that it would consider submissions about the principles of engagement and limitation in considering Waratah's application

The Objectors contended that the grant of a mining lease and environmental authority for the thermal coal mine would be incompatible with the HRA and would unreasonably limit the following rights protected under the HRA:

- Recognition and equality before the law.
- Right to life.
- Property rights.
- Right not to have the person's privacy, family, home, or correspondence unlawfully or arbitrarily interfered with.
- Right of every child, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.
- Cultural rights of Aboriginal peoples and Torres Strait Islander peoples.

The Land Court confirmed its finding in Waratah Coal No. 1 that the Land Court is subject to section 58 of the HRA in fulfilling its function under the *Mineral Resources Act 1989* (Qld) and the *Environmental Protection Act 1994* (Qld) in making recommendations in respect of the grant for mining leases and environmental authorities (at [7]).

The Department of Environment and Science (**DES**), the statutory party to the proceeding, contended that it would be better placed to assist the Land Court in its role as a model litigant if the human rights objections were more fully articulated. DES identified the following five considerations under the HRA, which it contended the Objectors should be required to address (see [8]):

1. *Engagement* – Whether the decision would be relevant to a human right protected under the HRA and which right.
2. *Limitation* – If a right protected under the HRA is relevant, whether that right would be limited by the decision.
3. *Justification* – Whether the limits can be demonstrably justified, which is informed by the requirements of legality and proportionality.
4. *Proper consideration* – Even if the limits are lawful and proportionate, the decision made ought to give proper consideration to the rights that are engaged.
5. *Inevitable infringement* – Where the Court could not reasonably act differently.

Waratah requested further and better particulars as to:

- the persons whose rights were alleged to be limited;
- which of the human rights protected under the HRA were alleged to be limited; and
- the facts, matters, and circumstances relied upon to allege those rights were limited for those persons.

The Objectors submitted that how the law should be applied is a matter better addressed in submissions or by way of a preliminary finding, and not by giving particulars. The Land Court accepted this submission, albeit held that it would consider submissions about engagement and limitation in considering Waratah's request (at [19]).

Land Court finds that the provision of particulars is not the only process used in a mining objection to narrow the issues

The Land Court found that in exercising its administrative function, rule 157 of the *Uniform Civil Procedure Rules 1999* (Qld), which concerns requests for particulars, did not apply albeit that the rule provides a useful approach when tempered by the Land Court's consideration of firstly, the requirement under section 7 of the *Land Court Act 2000* (Qld) about the way in which the Land Court exercises its jurisdiction, and secondly, the requirement that the Land Court observe procedural fairness in the exercise of its administrative jurisdiction (see [22] and [31]).

The Land Court held that it must consider all properly made objections even if they are unparticularised, and that it has the power to inform itself in the way it considers appropriate, but that this does not "*… relieve a party from the Court's expectation that parties will clarify the real and substantial issues for a mining objection hearing.*" (see [34] and [37]).

The Land Court observed that the proceeding was subject to the Land Court's managed expert evidence process, and that the experience of the Land Court was that parties can significantly narrow issues between themselves with the benefit of expert evidence.

Finally, the Land Court held that it had and could make further directions to narrow the issues and that the steps in the proceeding were intended to ensure no party, including Waratah was taken by surprise by a new issue.

Land Court directs Objectors to provide an exhaustive list of classes of individuals whose rights may be limited

Waratah requested particulars of the individuals whose human rights the Objectors contended would be limited under the HRA. The Objectors responded to that request by stating that "*… the individuals whose human rights are alleged to be limited are those human beings in Queensland now and in the future, including …*" inter alia "*… children living now and in the future, older people, people living in poverty, other disadvantaged people, and First Nations Aboriginal and Torres Strait Islander peoples …*" (see [59]).

Waratah contended that it was entitled to an exhaustive list of individuals whose human rights the Objectors contended would be limited by the grant of the mining lease. The Objectors contended that the individual subjects of human rights limitations were adequately particularised in their human rights grounds (see [60] and [61]).

The Land Court held that clarity was required as to the classes of persons whose rights the Objectors contented would be limited by the grant of the mining lease, before Waratah was to nominate its expert witnesses (at [65]).

Land Court finds that the Objectors were not required to respond to Waratah's request in respect of the Bimblebox Nature Refuge

The Land Court held that on a fair reading of the Objectors' response to Waratah's request for particulars, the Objectors had identified what facts, matters, and circumstances they proposed to rely on to support the ground of objection about the ecosystem services that the Objectors contended the Bimblebox Nature Reserve provided.

Land Court finds that further particulars about the phasing out of thermal coal was not necessary

The Objectors contended that the term of the mining lease applied for by Waratah, being 35 years, was not appropriate as it "*… would allow the mining and burning of coal well beyond the time by which thermal coal must be phased out to achieve the aims of the Paris Agreement.*" (see [83]).

The Land Court held that the question as to "*[w]hy thermal coal must be phased out to achieve the aim of the Paris Agreement is a matter that will require expert opinion and will likely involve questions of policy and weight as well as fact.*" (at [87]).

Land Court finds that the Objectors had provided sufficient detail about ecologically sustainable development

The Land Court considered that the Objectors' response to Waratah's request for particulars of the facts, matters, and circumstances relied upon to allege that the grant of the mining lease and the environmental authority would be inconsistent with the core objective of ecologically sustainable development and held that "*[i]t is unrealistic to expect an objector raising that principle to provide the level of detail Waratah seeks without expert opinion.*" (at [96]).

Land Court finds that further particulars about the limitation of the rights alleged was not required

Waratah requested particulars of the facts, matters, and circumstances relied upon by the Objectors to allege that their rights would be limited by the grant of the mining lease and the environmental authority (see [103]). Waratah stated that it "*… did not know what case it must meet in relation to First Nations people and, until it did, it could not decide whether anthropological or sociological or lay evidence was required.*" (see [109]).

The Land Court observed that the Objectors would provide a statement from First Nations witnesses to which Waratah would have the opportunity to provide lay evidence in reply and that it would have the statements of First Nations People before deciding whether to nominate anthropologists or sociologists to address those objections (see [111]).

Conclusion

The Land Court held that it was satisfied that the Objectors had provided enough detail for Waratah to nominate its expert witnesses and directed the Objectors to provide an exhaustive list of classes of individuals whose human rights they contend would be limited by the grant of the mining lease and the environmental authority.

The year in review: A look at the NSW waste industry in 2021

Katherine Pickerd | Todd Neal

This article discusses the events of 2021 which will likely impact the New South Wales waste industry in 2022

December 2021

In brief

While 2021 has been interrupted by the pandemic, there have been a number of events this year which will likely impact the NSW waste industry in 2022, including how criminal matters are prosecuted, where investment in energy from waste facilities is directed, and the likely results of the looming independent review of the Resource Recovery Framework.

A snapshot of the key 2021 events impacting the waste industry is below:

Two cases from the NSW Land and Environment Court relating to waste offences are worthy of note.

Environment Protection Authority v Sam Abbas [2021] NSWLEC 57

Some will remember the media frenzy in 2017 relating to the illegal dumping of waste material at a property in Spencer. Since then, the NSW EPA commenced criminal proceedings against Mr Sam Abbas for causing 21,990 tonnes of building waste to be brought onto a property adjacent to the Hawkesbury River predominantly in a flood zone.

The matter has now come to an end with Mr Abbas pleading guilty to three offences in contravention of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), namely:

1. land pollution (section 142A(1));
2. transporting waste to an unauthorised location (section 143(1)); and
3. unlawful use of a place as a waste facility (section 144(1)).

As all three offences were temporally and conceptually connected, the NSW Land and Environment Court applied the totality principle to order a $100,000 penalty and payment of some $80,000 for the prosecutor's costs, and the investigation costs.

Environment Protection Authority v Allam [2021] NSWLEC 103

The NSW EPA commenced criminal proceedings against ACE Demolition and Excavation Pty Ltd and its sole director, Mr Sami Allam, alleging offences under the 'false and misleading information about waste' provision, as well as the executive liability provision of the POEO Act.

In the course of the NSW EPA's investigations, Mr Allam's mobile phone was seized during the execution of a search warrant. The NSW EPA then issued Mr Allam a notice to provide information and records under section 193 of the POEO Act, specifically seeking the passcode to his phone so that it could be unlocked and data extracted. Under compulsion, the passcode was provided to the NSW EPA. The NSW EPA then served evidence in the criminal proceedings which included data extracted from the mobile phone.

In an interlocutory set of proceedings, Mr Allam sought an advance evidentiary ruling that certain evidence served by the NSW EPA was inadmissible. However, the Court refused to make the order sought by Mr Allam relying on *Ku-ring-gai Council v Chia (No. 4)* [2018] NSWLEC 75 to find that while the information obtained under the response to the section 193 notice might be inadmissible, it may then be used for an investigative purpose and that further information gathered is not rendered inadmissible. This is because of the clear words in section 212(5) of the POEO Act rendering that further information not inadmissible.

This case serves as a reminder of the broad investigative powers of the NSW EPA to obtain information and records from waste operators, including from personal devices such as mobile phones and computers.

Development in planning for Energy from Waste

This year, the NSW waste industry has also received further policy guidance on the future of energy from waste projects which will direct investment and infrastructure in this area of the sector.

The NSW Government's Energy from Waste Infrastructure Plan released in September 2021 identifies three key principles to guide the strategic planning needs for energy from waste projects.

The Plan requires that energy from waste in NSW must:

1. Improve certainty to communities and industry around acceptable locations and facilities.
2. Adhere to the precautionary principle where there is a greater risk of harm to human health due to proximity to high population areas (now and in the future), and in areas where there are regular exceedances of air quality standards from existing sources.
3. Maximise efficiencies in infrastructure, waste management, innovation, and energy recovery.

The Plan also sets out four priority infrastructure areas where energy recovery facilities must be located being:

1. West Lithgow Precinct.
2. Parkes Special Activation Precinct.
3. Richmond Valley Regional Jobs Precinct.
4. Southern Goulburn Mulwaree Precinct.

The exception to the above restriction is that energy from waste projects can operate at facilities that use waste, or waste derived feedstock to replace less environmentally sound fuels thermally treated at the site. The energy produced from the waste is also to be used to predominantly power the industrial and manufacturing processes on site, rather than exporting that energy to the grid.

While the Plan says the NSW Government is supportive of energy from waste where it is strategically located, the Plan curtails the locations where energy from waste facilities can operate. This appears to be based on community expectations as to where the acceptable locations for these types of facilities are.

Unless there is a drastic change in the policy, investment is likely to be focused in the four priority areas in the near future. If proven to be a safe and reliable way to manage waste, perhaps additional areas will be added to the list of acceptable locations.

What will 2022 bring for the NSW waste industry?

In 2022 we expect to see continued growth in the waste management industry as additional funding is made available by the Australian and New South Wales governments, and further resources are directed towards creating a circular economy and diverting waste from landfill.

However, the growth of the waste industry is, as always, impacted by regulation.

In that regard, the outcome of the independent review into the Resource Recovery Framework is expected to become available next year. It is presently proposed that the independent review will consider the definition of waste, which has been the subject of significant court decisions over the previous years, as well as waste classifications. The resource recovery order and exemption regime are also expected to be reviewed, noting that a number of waste facilities have been or are currently being subject to audits looking into their compliance with specific resource recovery orders. Therefore changes to the way resource recovery facilities presently operate may be introduced.

Following the EPA's successful prosecution in the Windsor Local Court for two offences relating to land pollution, which resulted in more than $200,000 in penalties being ordered, additional prosecutions can be expected in the Local Court. While proceedings could be commenced in the NSW Land and Environment Court, which has a higher jurisdictional limit to penalise offenders, there are benefits to running prosecutions in the Local Court for prosecutors, especially where significant penalties are issued which regulatory authorities may take advantage of.

Finally, with the pandemic restrictions easing, it would be no surprise for site inspections to be carried out by regulatory authorities such as the EPA more frequently as we all adjust to what will be the new normal.

The year in review: A look at NSW planning and environment law in 2021

Niki Kalimnios | Jeremy Kuan | Annie Dong | Zac Mills | Shannon Peters | Anthony Landro | Mollie Matthews | Katherine Pickerd | Todd Neal

This article is a review of New South Wales planning and environment law in 2021 and also a summary of expectations for 2022

December 2021

In brief

In this article, we briefly outline general themes we've seen in 2021 in proceedings before the Land and Environment Court (**LEC**), and on appeal, including developer contributions, compulsory land acquisition cases, criminal environmental proceedings, the growing trend of resident action groups bringing Class 4 judicial review applications, and the increase of joinder applications. We have also summarised our expectations for 2022.

General planning update

Scrutiny upon jurisdictional preconditions

Jurisdictional preconditions continue to be in the spotlight. All types of matters involve parties and the Court scrutinising whether jurisdictional preconditions have been met, and in turn, to ensure the Court's power to determine the application is enlivened. Some examples of this focus on jurisdictional preconditions are below:

Planners North v Ballina Shire Council [2021] NSWLEC 120

Preston CJ's judgment makes it clear that if a development does not meet the jurisdictional preconditions relevant to a development, a development appeal will be dismissed without consideration of the merits. This case concerned a development application for a manufactured home estate in West Ballina, which was partly located on coastal wetlands and littoral rainforest areas. The development was subject to both the *State Environmental Planning Policy (Coastal Management) 2018* (**Coastal Management SEPP**) and the *State Environmental Planning Policy No 36 - Manufactured Home Estates* (**Manufactured Homes SEPP**). His Honour identified four preconditions to the grant of consent, of which he was not satisfied had been met.

Firstly, His Honour did not consider that, in the circumstances, a manufactured home estate was permissible. Secondly, His Honour was not satisfied that under clause 9(1) of the Manufactured Home Estates SEPP that the proposed development on the excluded land would not have an adverse effect on land having special ecological qualities, which the land within the Coastal Wetlands and Littoral Rainforests Area had. Thirdly, under clause 11(1) of the Coastal Management SEPP, His Honour was not satisfied that the proposed development would not significantly impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or the quantity or quality of surface and ground water flows to and from the adjacent coastal wetland.

Finally, under section 7.16(2) of the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**), Preston CJ held that the proposed development would likely cause serious and irreversible impacts on the biodiversity values. The applicant needed to address these issues before the appeal could progress to the merits of the development. As the applicant had not done so, the appeal was dismissed.

In our experience, the Coastal Management SEPP and BC Act require careful attention where development triggers the application of the instrument and Act.

Olivia Ross v Patrick Lane (No. 2) [2021] NSWLEC 121

This judicial review matter concerned whether or not development consent given for additions and alterations to an apartment in Elizabeth Bay failed to address a jurisdictional fact required for that consent. The applicant argued that the nature of the additions and alterations sought in the development application needed consideration of whether or not the application fell within the scope of clause 4(I)(a)(ii) of *State Environmental Planning Policy No 65 Design Quality of Residential Apartment Development* (**SEPP 65**) as a matter of jurisdictional fact. The applicant further argued that since this did not happen, the development application was void.

Moore J did not engage with whether clause 4(1)(a)(ii) of SEPP 65 required the determination of a jurisdictional fact prior to the approval of a development application. This was despite the earlier judgment of Sheahan J in *Barton Securities Limited v Warringah Council & Others* [2009] NSWLEC 179, which found that to be the case. Instead, he made the assumption (for the purposes of this case only), that even if clause 4(1)(a)(ii) did involve that determination, SEPP 65 still did not apply in this case. This was because His Honour found that the development

was not a substantial redevelopment or substantial refurbishment of an existing building, and therefore SEPP 65 did not apply at all.

Consequently, the matter was dismissed with costs.

White v Ballina Shire Council [2021] NSWLEC 1468

The importance of biodiversity jurisdictional preconditions in development appeals was also highlighted in this case against Ballina Shire Council.

This development appeal concerned the decommissioning of an existing dwelling and construction of a new two-storey dwelling and swimming pool, as well as upgrading the access of an existing but unauthorised internal access way. The Council's contentions included that the applicant had not provided an adequate Biodiversity Development Assessment Report (**BDAR**). Specifically, that pursuant to section 7.16(2) of the BC Act, the BDAR did not adequately assess whether the development would have serious and irreversible impacts on the biodiversity values of the Site (particularly several species of vegetation and the Giant Barred Frog).

In his deliberation, Adams AC considered that section 7.16(2) of the BC Act raised a jurisdictional hurdle for the applicant, and that consent must be refused if the consent authority was of the opinion that the development was likely to have serious and irreversible impacts on biodiversity values. He found that the BDAR did not adequately address the biodiversity issues raised by the Council, and these findings contributed to his refusal to grant consent, resulting in the appeal being dismissed.

Awesome Corowa Pty Ltd v Federation Council [2021] NSWLEC 1633

This development appeal concerned a deemed refusal of a subdivision of two separate parcels of land into a total of 306 residential allotments, two drainage reserves, three public recreation reserves with associated roads, footpaths and infrastructure works. The Council's contentions included that the applicant's environmental impact assessment was insufficient with regard to significantly affected threatened species pursuant to Part 7 of the BC Act, particularly the Sloane's Froglet and vegetation within the road reserve.

The development was subject to the *Corowa Local Environmental Plan 2012* (**CLEP**), which included a 'Terrestrial biodiversity' clause (clause 7.4), that had the object of maintaining terrestrial biodiversity. Clause 7.4(3)(a) further instructed that before a consent authority determines a development application it must consider "*any adverse impact on the condition, ecological value and significance of the fauna and flora on the land*". Although neither parcel of land was identified as 'biodiversity' on the Terrestrial Biodiversity Map under the CLEP, some of the necessary infrastructure for later stages of the subdivision would run to the south of the site and that area was within the mapped area.

Morris AC found that the applicant provided insufficient information regarding whether or not the development would have adverse impacts on the nearby vegetation or the Sloane's Froglet. She was therefore not satisfied that clause 7.4 of the CLEP had been addressed. Morris AC further noted that because the Sloane's Froglet was listed as vulnerable on the BC Act, a higher level of consideration and assessment of the impacts was required.

For this reason, amongst several others, the appeal was dismissed.

Trends in developer contributions

In addition to the statutory reforms currently proposed, a number of interesting contributions decisions were handed down in the last year.

In *Anglican Church Property Trust Diocese of Sydney v Camden Council* [2021] NSWLEC 118, the Applicant challenged a condition of consent imposed by the Sydney Western City Planning Panel for the staged construction of a place of public worship requiring the payment of development contributions on a development involving a 500-seat place of worship, hall, meeting rooms, administration area, basketball court and ancillary café. The proceedings were brought in Class 4, and were an application for judicial review. The Applicant sought a refund of $598,326 paid to the Council in compliance with the condition.

The Land and Environment Court found that the condition was not invalid, and even if it were invalid, the Court did not have the power to order a refund of contributions already paid by the Church. This follows the NSW Court of Appeal's findings in *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177, where the Court denied the right to a refund of contributions under conditions of consent in the event of overpayment. Our August 2021 article, *New South Wales Court of Appeal finds there is no power to determine a modification application seeking to reduce development contributions after payment*, explores the Buyozo decision in more detail.

In *Anglican Church Property*, the Court held that the Planning Panel complied with the relevant requirements in section 7.11(2) of the EP&A Act when imposing the $589,833 contribution upon the Church. The Court concluded that the condition was therefore valid. The Court found at [133]-[165] that even if there was a finding that the condition was invalid, there was no power to order a refund.

The Court applied Beazley JA's reasoning in *Frevcourt Pty Ltd & Anor v Wingecarribee Shire Council* (2005) 139 LGERA 140; [2005] NSWCA 107 and held that there was no power to order a refund as the contributions made by the Church had been pooled and wholly spent. The Court also found at [150]-[154] that it did not have jurisdiction under section 9.46 of the EPAA or any part of the LEC Act to order a refund.

The Court found at [155] that even if there was jurisdiction under the EP&A Act or the LEC Act to order a refund, it could only make orders against the entity that breached the Act. The Court found at [155] that if the condition was found to be invalid, the Planning Panel would have breached the Act by issuing that condition. As the Church sought a refund from **the Council** and **not the Planning Panel**, the Court would not be able to make such an order.

Finally, the Court found at [175] that even if the condition was invalid and the Court had the power to order a refund, it ought not exercise its discretion to make such an order due to procedural issues. The Court found that the Church's delay in commencing proceedings and acquiescence in the imposition of the condition would be sufficient for it to not make such an order.

Compulsory acquisition of land round up

Genuine attempts to reach agreement

Elmasri v Transport for NSW [2021] NSWSC 929

In our 2019 article *Recap of recent developments in NSW compulsory acquisition law*, we wrote how questions remain as to what a "genuine attempt" means under section 10A, and how substantial the efforts need to be.

The Supreme Court of NSW addressed some of these questions in *Elmasri*. The plaintiff was ultimately unsuccessful in its case that section 10A(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (**Just Terms Act**) was not satisfied prior to the issue of a Proposed Acquisition Notice (**PAN**).

The Court took a more liberal approach to the issue of "genuine steps" finding that:

- "*The fact that [Transport for NSW's valuer] might be either wrong or rigid or both does not mean that Transport was not making a genuine attempt to acquire the plaintiffs' land by agreement*" at [115].
- "*some tardiness, some missteps and a lack of explanation for some aspects of [Transport for NSW's] conduct does not necessarily mean a genuine attempt was not made*" at [123].
- "*[Transport for NSW's] processes, timeliness and communications were not perfect but considered individually or collectively they did not demonstrate a lack of bona fides either. In the end result, the PAN was issued in circumstances where the parties were so far apart that the prospect of agreement was extremely remote*" at [124].

The decision in *Elmasri* affirms a process whereby an offer (or offers) is put to affected landowners based on external valuation advice, and if that offer is rejected, limited negotiation (in the traditional sense of the word) occurs.

New way forward: Acquisition of leasehold interests and business claims

Eureka Operations Pty Ltd v Transport for New South Wales [2021] NSWLEC 41

The Court of Appeal decision in *Roads and Maritime Services v United Petroleum* [2019] NSWCA 41 changed the landscape for business claims involving the acquisition of a leasehold interest in land by significantly limiting the scope of loss of profits claims traditionally made under section 59(1)(f) of the Just Terms Act.

In *Eureka*, the Land and Environment Court awarded compensation for the acquisition of a leasehold interest on the basis of market value, whereby the quantum exceeded any "profit rent". The critical fact in *Eureka* was that the land had an inherent profit-making feature for a particular use, and the exploitation of that feature is largely open to any occupier of the land (at [96]). The Court found at [103] that the appropriate valuation methodology was a before and after assessment of the value of the lease having regard to a discounted cash flow of the service station use, adopting the business' EBITDA as the indication of the base earnings capacity.

The case provides an important post-*United Petroleum* way forward for businesses with leasehold interests extinguished by a compulsory acquisition, which will no doubt be tested again in 2022 with larger claims.

Uncertainty remains for loss of profits claims under the disturbance head of compensation

In *Olde English Tiles Australia Pty Ltd v Transport for New South Wales* [2021] NSWLEC 90, the Court noted at [86] that the law on loss of profits claims is unsettled. However, Duggan J did not consider the question any further in the case given the finding that the Applicant did not have a relevant interest in the land.

Given the continuing uncertainty in this area, we are seeing future business loss claims follow the pathway outlined in *Eureka* (if the facts permit).

We also stress the importance of secure tenure for each affected entity. The strictness of the recent Court of Appeal cases of *United Petroleum* and *Alexandra Landfill* was adopted in *Olde English Tiles*. The Applicant was a company that occupied the land since 2002. The directors of the company were the registered proprietors of the acquired land. No formal agreement governed the company's use of the acquired land.

The Court found that the Applicant's right of occupation was a bare licence to occupy the land, and this did not constitute a "right, power, or privilege" over, or in connection with the Acquired Land as required by the Just Terms Act (which is a pre-condition to compensation entitlements).

The Court found at [85] that "*[t]here is no room in the statutory language of the Just Terms Act to permit of the "fairness" that the Applicant contended, there is only a determination of whether the arrangement between the two legal identities can be characterised as an interest for the purposes of the Just Terms Act*".

First consideration of reinstatement under section 56(3) of the Just Terms Act since commencement

The Trustee for Whitcurt Unit Trust v Transport for NSW [2021] NSWLEC 82

Section 56(3) of the Just Terms Act only commenced operation in 2017 after the Russell and Pratt review. This section seeks to provide applicants with the option of seeking reinstatement compensation in addition to the established heads of compensation under the Act.

For a claim to be made under this section the following factual elements need to be made out:

- the land is used for a particular purpose: section 56(3)(a)
- there is no general market for land used for that purpose: section 56(3)(a), and
- the owner genuinely proposes to continue after the acquisition to use other land for that purpose: section 56(3)(b).

It was considered for the first time in *The Trustee for Whitcurt Unit Trust v Transport for NSW* [2021] NSWLEC 82 by Pain J. Although Pain J found that the applicant had no basis for a claim under section 56(3) (at [154]), the case still provided some insight into potential future reinstatement claims.

A substantive reason Pain J found no basis for a reinstatement claim was that the business the applicant was seeking compensation for was conducted on a monthly tenancy involving the use of assets that they were leasing. The applicant was also unsuccessful in its claim under section 59(1)(c), with the Court distinguishing the case from *Hua v Hurstville City Council* [2010] NSWLEC 61 and *Konduru v Roads and Maritime Services; Konduru v Roads and Maritime Services* [2017] NSWLEC 36 (two prior matters with successful relocation costs). The key factual differences were that in those cases, the business assets were owned by the applicants, and lengthy leases were in place. Her Honour found these issues to be relevant to the reinstatement claim under section 56(3) at [108].

Her Honour also noted that even if a claim for reinstatement was maintainable, section 56(3) requires a discount in the amount of compensation available in relation to the improvement in financial improvement an applicant may receive due to the reinstatement (at [157]).

Update on planning and environment criminal proceedings

The rule against duplicity

This year we have seen several more judgments on the operation of the rule against duplicity, which applies strictly in criminal proceedings. We were involved in *Secretary, Department of Planning and Environment v Goodman Property Services (Aust) Pty Ltd; Secretary, Department of Planning and Environment v Burton Contractors Pty Ltd* [2020] NSWLEC 52 and *Secretary, Department of Planning and Environment v Goodman Property Services (Aust) Pty Ltd; Secretary, Department of Planning and Environment v Burton Contractors Pty Ltd (No. 2)* [2021] NSWLEC 34, where the prosecutor's summonses were held duplicitous twice by the Court.

The CCA's judgment in *Kiangatha Holdings Pty Ltd v Water NSW* [2020] NSWCCA 263 has been considered in several cases this year, including the following three cases:

Grant Barnes, Chief Regulatory Officer Natural Resources Access Regulator v Lidokew Pty Ltd [2021] NSWLEC 53

The summons in these proceedings related to meter offences and an allocation offence under the *Water Management Act 2000* (NSW) (**WM Act**), and alleged that the defendant had taken more groundwater for cotton irrigation than reflected on the meters on the defendant's property, and exceeding the defendant's water allocation.

The meter offences were found not to be duplicitous. Importantly, the meter offences had been pleaded as alternative counts. The defendant, Lidokew, was not being exposed to conviction of both alleged offences "*because no verdict can be returned on an alternative count unless and until there has been a determination of not guilty in respect of the primary count*" (at [47]).

However, it is not as simple as saying that any 'alternatives' used in a summons are not duplicitous. The judgment also drew the distinction between "*pleading alternative **factual** bases of liability, **which is likely to infringe** the rule against duplicity (see, for example, Riverina Australia Pty Ltd)*" and "*pleading alternative **legal** formulations of liability based on the same, or substantially the same, facts, **which is not***" (at [87]) (emphasis added).

Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd [2021] NSWLEC 37 and *Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd (No. 2)* [2021] NSWLEC 48

In these proceedings, the defendant was charged in separate summonses with the offence of polluting waters over a period of two months, and for breaching a condition of its Environment Protection Licence over the same period of time. The first judgment concluded that the charges were duplicitous, with each instance of discharging effluent into a tributary or spraying effluent onto the snow being capable of being a complete charge.

Following that judgment, the prosecutor sought that the Land and Environment Court certify the judgment on duplicity to the Court of Criminal Appeal (**CCA**) for determination pursuant to section 5AE of the *Criminal Appeal Act 1912* (NSW). Importantly, the second judgment stated at [41]:

> *If the EPA is not successful on appeal then it will face the spectre of either laying an additional 77 separate charges (see judgment at [115]), or electing to proceed with just a single charge on a single day irrespective of the period of the offending. As was stated in Charlotte Pass, the conclusion reached by the Court that the summons was bad for duplicity was "finely balanced" (at [101]) and was premised upon an application of the underlying reasoning in Kiangatha.*

Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd [2021] NSWCCA 289

On 8 December, the CCA handed down its decision on the EPA's question of law and found that the charge was not duplicitous, and that the second exception to that rule applied. That is, the acts of discharging effluent into the tributary during the charge period were sufficiently connected with each other to constitute a single criminal enterprise.

The application of the rule against duplicity is not always straightforward, particularly when considering the exceptions to this rule. Environmental offences often involve allegations of actions occurring over a period of time, and multiple times. However, the specific circumstances of each case, and the way in which the charge is pleaded must be closely analysed to understand whether the rule against duplicity has been contravened or not.

We anticipate parties will continue to grapple with this rule in criminal environmental proceedings in 2022.

Subpoenas

Tropic Asphalts Pty Ltd v Snowy Monaro Regional Council [2021] NSWCCA 24

In December 2016, the Snowy Monaro Regional Council commenced proceedings under section 125(1) of the EP&A Act charging Tropic Asphalts Pty Ltd (**Tropic**) for breaches of conditions of development consent to operate a 'temporary mobile asphalt batching plant', subject to conditions. The Council alleged that Tropic had breached conditions of consent relating to plant production operation capacity and the number of trucks accessing the site.

The Prosecutor issued a subpoena to Tropic seeking production of 'contracts between Tropic and RMS', as well as other 'delivery dockets' relating to the operation of the site.

This judgment related to Tropic's appeal of the Land and Environment Court's refusal to set aside the subpoena.

Tropic contended that the subpoena did not have a legitimate forensic purpose, because the document sought had already been produced under a section 119J notice. It was therefore not "on the cards" that RMS would produce new material. The argument was that the Subpoena was not issued bona fide for obtaining relevant evidence, and were instead a fall back option for the Council if RMS documents responding to the section 119J notice were held to be inadmissible.

However, there was on the particular facts in this case no "*reason why the Council should not seek to obtain in another, undoubtedly untainted, manner, the documents with which it will seek to prove its case against Tropic in the Land and Environment Court.*"

Importantly, this was not a case where the Council only knew about the documents it sought under the subpoena because they had already been produced under the section 119J notice. The CCA recognised that if that situation had occurred, "*Tropic might have had an argument that the documents sought should be excluded under s 138 of the Evidence Act from tender in the proceedings because they were improperly or illegally obtained, knowledge of their existence only having been acquired through issue of an invalid notice. Tropic could have argued that in such circumstances to seek production of the documents by the subpoena was an abuse of process.*"

All of the above cases point to the importance of scrutinising the validity of the summons and the validity of any notices which underpin a summons for criminal proceedings, but also subpoenas issued once proceedings are instituted.

Vicarious liability and a retrial

Chia v Ku-ring-gai Council [2021] NSWCCA 189

This case involved an appeal against a conviction for the payment of a fine of $40,000 under section 125(1) of the EP&A Act for causing "*injury to 74 trees the subject of the Ku-ring-gai Council Tree Preservation Order*". Chia appealed the conviction arguing, among other reasons, that the primary judge "*erred in finding Mr Chia vicariously liable for the tree removal*". The CCA found that the trial Judge erred in finding Mr Chia vicariously liable for the offences. Specifically, Harrison J provided the following at [75]:

> *His Honour did not make a clear finding on the issue of whether Mr Chia directed the contractors to comply with all relevant regulations and legislation, including the 10/50 Code. That issue was central to his defence. Mr Chia's success on this ground means that his conviction should be quashed and a new trial ordered.*

The CCA allowed the appeal, quashing the conviction and ordering a new trial.

Admissibility of evidence including a conversation

Peter James Harris and Jane Maree Harris v WaterNSW [2021] NSWCCA 184

This judgment followed a finding by the Land and Environment Court that Peter and Jane Harris had breached a condition of an approval for irrigation of their cotton farm under the WM Act. The condition prohibited irrigation unless the discharge of the Darling River and the Barwon River exceeded stipulated flows per day at certain gauges.

The Land and Environment Court found each offence proved and convicted Peter and Jane Harris.

On appeal to the CCA, the Harrises argued that the trial judge erred in accepting evidence of a conversation between the first appellant and an officer of WaterNSW, and erred in admitting evidence of measurements of flow rate of the Darling River, which had been taken by officers of the respondent.

In relation to the conversation, the first appellant did not give evidence, but his position was that the conversation did not take place. The appellants submitted that there was reasonable doubt about whether the conversation had in fact taken place due to the lack of precision, the time that had elapsed and the absence of a record of the conversation in earlier affidavits of the officer of WaterNSW. Despite this, the CCA held that the primary Judge had not erred in accepting the conversation into evidence.

This follows on from a theme in our earlier articles relating to the admissibility of evidence in criminal proceedings (here and here), and the importance of carefully considering situations in which an authority is making a request to interview you, or asking questions.

In relation to the evidence on the measurements of flow rate of the rivers, the appellants contended that the recording of the data, and the observations of employees or officers of Water NSW, was opinion evidence. Both the primary judge and the CCA dismissed that ground. That evidence was held by Robson J to be "*merely recording what they directly observed as objective facts*", as opposed to being opinion evidence, and therefore was not inadmissible. The CCA agreed, stating at [183] the way in which flow rates are recorded by field officers "*does not involve the officer forming an opinion, forming a conclusion, or making a judgment by applying a process of reasoning from facts which have been observed.*"

Resident action groups

Resident action groups formed through incorporated associations have again been prominent in Class 4 proceedings challenging various government decisions and other actions. There has been a mixed bag of success for such groups over the past year.

Some of the notable decisions this year include:

Black Hill Residents Group Incorporated v Marist Youth Care Limited (t/as Marist180) (No. 5) [2021] NSWLEC 43 and *Black Hill Residents Group Incorporated – INC1900196 v Marist Youth Care Limited (t/as Marist180) (No. 6)* [2021] NSWLEC 113

Declaration of interest: Colin Biggers & Paisley acted in this matter

The Black Hill Residents Group Incorporated (**BHRG**) commenced Class 4 civil enforcement proceedings challenging Marist Youth Care Limited's (**Marist**) operation of an intensive therapeutic transitional care (**ITTC**) facility as a "transitional group home" as defined under the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (NSW) (**ARH SEPP**). The BHRG's second challenge was that the transitional group home was not being carried out "by or on behalf of" a public authority so as to trigger Part 5 of the EP&A Act.

The Court found that, as Marist was operating an ITTC facility which was properly characterised as a "transitional group home" on behalf of a public authority (being the then Department of Family and Community Services), development consent was not required pursuant to clause 43(1)(a) of the ARH SEPP.

In settling costs, BHRG attempted to argue that the proceedings were caught by rule 4.2(1) of the *Land and Environment Court Rules 2007* (NSW) (**LEC Rules**) where proceedings are "brought in the public interest", the Court may deviate from the usual rule that costs follow the event, shielding parties from bearing the costs proceedings. Pain J rejected this argument, and held that BHRG's concerns relating to "loss of amenity" for residents in the area surrounding the Marist facility did not necessarily constitute an issue which rises to the level of the public interest. Pain J held that the members of the BHRG had an 'indirect pecuniary interest in the outcome of the proceedings', and therefore the proceedings could not also be considered to be in service of the public interest.

North Parramatta Residents Action Group v Infrastructure NSW [2021] NSWLEC 60 and *North Parramatta Residents' Action Group Inc v Infrastructure New South Wales* [2021] NSWCA 128

This case involved Class 4 judicial review proceedings brought by the North Parramatta Residents Action Group (**NPRAG**) against the validity of a development consent granted by the Minister for the construction of the Powerhouse Museum in Parramatta. In particular, the NPRAG sought review of the validity of the Environmental Impact Statement (**EIS**) prepared in support of the development proposal of which the Minister subsequently approved.

The Court found that the EIS was in fact validly constructed and met all requirements under the *Environmental Planning and Assessment Regulation 2000* (NSW), and therefore the NPRAG's review of the consent was dismissed.

On appeal in the NSW Court of Appeal, Bathurst CJ, Basten JA and Leeming JA arrived at the same decision as the primary judge, albeit by way of different reasoning, dismissing the appeal and confirming the validity of the consent. Unlike the BHRG decision above, however, NPRAG did not attempt to rely on the public interest provisions of the Land and Environment Court Rules and was ordered to pay the first respondent's costs.

KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc [2021] NSWCA 216

In September 2019, KEPCO Bylong Australia Pty Ltd (**KEPCO**) was refused development consent by the Independent Planning Commission (**IPC**) for the construction and operation of a coal mine in the Bylong Valley in Mudgee, NSW. KEPCO's subsequent judicial review proceedings of that decision were also dismissed in the Land and Environment Court in December 2020.

The current case involved an appeal to the NSW Court of Appeal challenging both the procedural and substantive aspects of Pain J's decision in the Land and Environment Court. The procedural grounds of appeal (grounds 1-4) related to the primary judge's interpretation of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) (**Mining SEPP**). The substantive ground of appeal (ground 5) related to the IPC's findings on the greenhouse gas emissions of the proposed coal mine.

The Court dismissed the appeal, holding that KEPCO had failed to satisfy all of the five grounds of appeal against Pain J's decision on the IPC's refusal to grant consent. The Court ordered that the appellant pay the costs of the first respondent, the Bylong Valley Protection Alliance Incorporated. While the Court referenced the IPC's findings on the public interest when addressing the merits of the proposal, it did not address whether the proceedings were brought in the public interest for a determination of costs in the current matter.

Joinder applications

Another continuing theme in 2021 is third parties applying to be joined to Class 1 merit appeal proceedings under section 8.15(3) of the EP&A Act.

Bilotta v Inner West Council [2021] NSWLEC 129

This case involved a Class 1 appeal against a deemed and actual refusal by the Inner West Council for separate modification applications for a site in Birchgrove, NSW. Two of the applicant's neighbours applied to be joined a party to the proceedings under section 8.15(2) of the EP&A Act and both applications were opposed by the applicant.

The Court found that the application met the requirements for joinder provided by the EP&A Act. Namely, that it was "in the interests of justice", and would "raise issues" that, but for joinder, would be "unlikely to be sufficiently addressed". Consequently, both neighbours were joined to the proceedings as second and third respondents, and were granted leave to prepare statements of facts and contentions raising contentions identified in their notices of motion. The town planner of the applicants for joinder was also granted leave to file and serve an individual expert report and to participate in any joint conferencing.

Barr Property and Planning Pty Ltd v Cessnock City Council [2021] NSWLEC 20

This case involved an appeal against a decision of the Hunter and Central Coast Regional Planning Panel to refuse a development application seeking consent for a 39-lot industrial subdivision and the creation of an environmental conservation lot in Black Hill, NSW.

While part of the decision related to whether objectors to the proposed development were entitled to be given notice of the appeal under section 8.12(1)(a) of the EP&A Act and whether they were entitled to be heard, the part of the judgment we have focused on involved one of the objector's, Black Hill Industrial Pty Ltd (**BHI**), application to be joined as a party to the proceedings.

The Court found that a failure to join BHI to the proceedings would deprive the Court of information in relation to matters consequential in determining the merits of the appeal. Joinder was therefore ordered and also because it was in the interests of justice and in the public interest.

AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces [2021] NSWLEC 76

These proceedings involved a Class 1 appeal against the determination of an application to modify a consent granted to the applicant, AQC Dartbrook Management Pty Ltd (**AQC**), for a below-ground coal mine in the Hunter Valley, NSW. This case has generated some other attention this year which we have previously written articles on (in relation to the limits on the ability to amend a modification application: here, and in relation to subsequent cases, here).

In the first instance decision, the Land and Environment Court joined the Hunter Thoroughbred Breeders Association (**HTBA**) as a third party to the proceedings. Two events related to joinder applications then followed from this decision.

Firstly, AQC sought leave to appeal the Land and Environment Court's decision which allowed HTBA to join proceedings. In *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112, the Court of Appeal granted leave and upheld AQC's appeal, before setting aside the decision handed down by the Land and Environment Court in the first instance. The Court of Appeal found that the Land and Environment Court had made an error by allowing HTBA, a third party, to join the proceedings following a section 34 conciliation agreement and examined what considerations are necessary in assessing joinder applications.

In determining the appeal, the Court held that section 8.15(2) of the EP&A Act was unavailable to support HTBA's joinder application, as AQC's appeal against the IPC's determination of the request to modify the development consent was instead an appeal under section 75W(5). The right of appeal under section 75W(5) had been continued by the transitional provisions and constituted a distinct right of appeal, and was not an appeal under Division 8.3 of the EP&A Act to invoke the appeal right under section 8.15(2).

The Court of Appeal also held that rule 6.24(1) of the UCPR was not an alternative source of power for the joinder application, as HTBA was not a "necessary" party as defined under the second limb of rule 6.24. Meagher and Leeming JJA found that HTBA did not have any legal interests which could be affected by the outcome of the litigation, and allowing its intervention in the proceedings would subvert the statutory scheme under section 34 of the LEC Act, through which the parties had already reached conciliated agreement.

Additionally, the Court noted the existence of other mechanisms for addressing jurisdictional issues, other than entitling an objector to become a party. Preston CJ (sitting on the Court of Appeal) built upon their Honours reasoning, and said that in order for a joinder party to be considered "necessary" under rule 6.24 of the UCPR, they must either satisfy one of two circumstances:

1. the determination of the matters in dispute will affect the party's rights or interests in some material respect, or
2. the party can assist the Court in the determination of the matters in dispute.

In relation to the second circumstance, the Court of Appeal found that HTBA could have assisted the Court through other means rather than being joined as a party to the proceedings, and on this basis allowed AQC's appeal.

Secondly, when the matter was remitted to the Land and Environment Court for determination, HTBA sought leave to be heard in the section 34 conciliation conference as an amicus curiae, or otherwise, under a "Double Bay Marina Order". Section 38(2) of the LEC Act provides:

> *In proceedings in Class 1, 2 or 3 of the Court's jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.*

HTBA argued that section 38(2) empowers the Court to take submissions from third parties through a Double Bay Marina Order.

The Court found that the provisions which direct the hearing of conciliation conferences under section 34 of the LEC Act do not prevent a third party from being joined to the proceedings under a Double Bay Marina Order, namely "*on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits*": section 38(2). However, Duggan J held that the extent of participation available for parties joined under such an order will depend on the circumstances of each matter, to be determined on a case-by-case basis. Accordingly, Duggan J granted HTBA leave only to assist the proceedings by way of written submissions on 'limited' grounds.

What will 2022 bring?

The Land and Environment Court statistics indicate the last two years of the pandemic to have resulted in fewer registrations, but the Court now has more Commissioners sitting enabling earlier dates for conciliation conferences.

The trends identified in this article will likely continue into 2022 requiring parties to carefully evaluate these trends in the context of new litigation.

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