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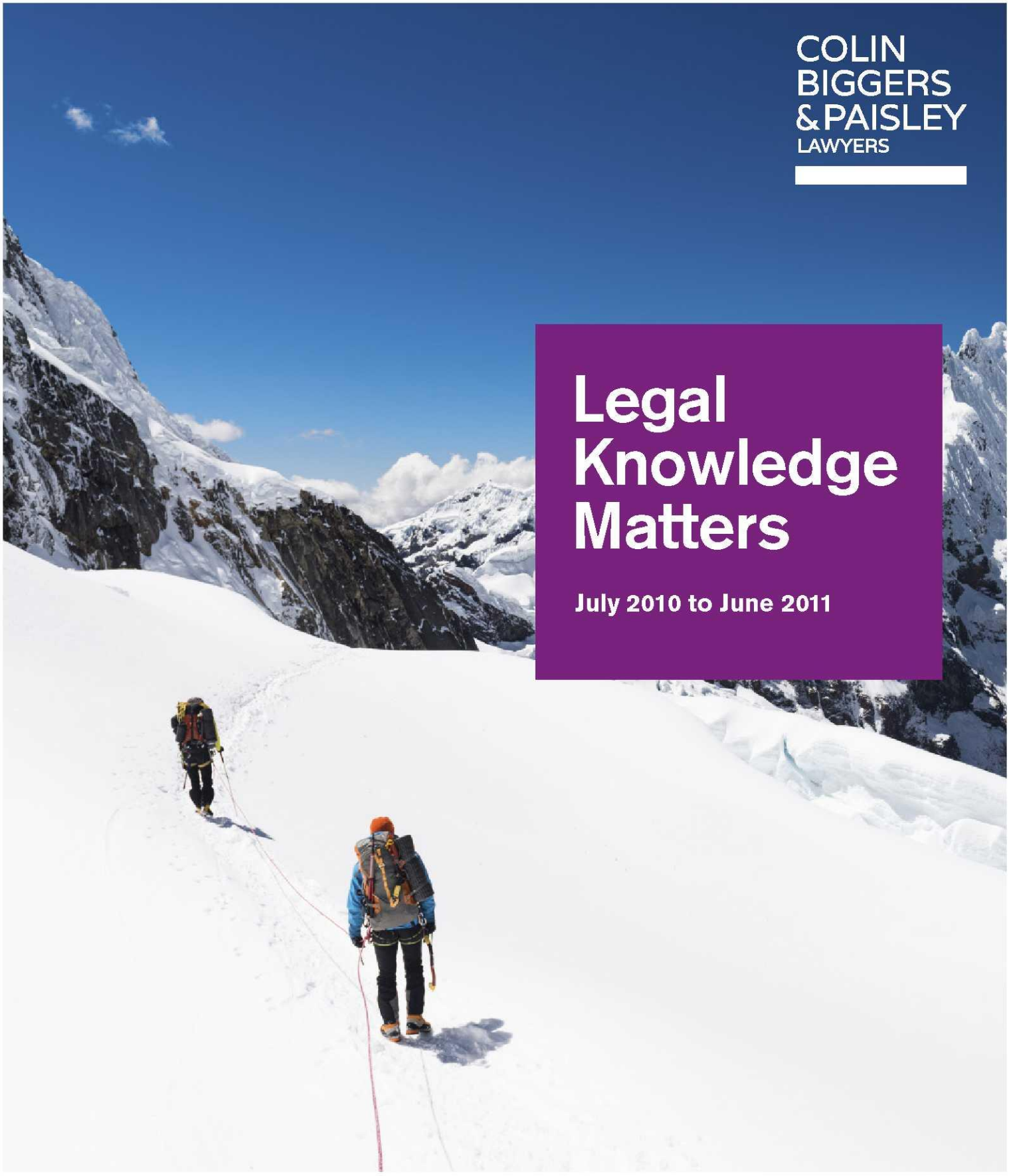

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COLIN BIGGERS & PAISLEY LAWYERS

Contents

Contents (cont'd)

COLIN BIGGERS & PAISLEY LAWYERS

Index

Index (cont'd)

Index (cont'd)

Table of Legislation

Commonwealth

New South Wales

Queensland

COLIN BIGGERS & PAISLEY LAWYERS

Table of Cases

Table of Cases (cont'd)

Table of Cases (cont'd)


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Submitter appeal dismissed

Samantha Hall | Matthew Soden-Taylor

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

Case

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

Facts

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

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

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

Decision

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

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

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

Held

The appeal was dismissed.

Deficiencies in the public notice process

Samantha Hall | Vivien Little

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

Case

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

Facts

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

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

Decision

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

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

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

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

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

In dismissing the application, his Honour Judge Jones:

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

Held

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

Demolition of a house under Brisbane City Plan 2000

Samantha Hall | Susan Cleary

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

Case

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

Facts

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

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

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

Decision

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

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

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

Loss of traditional "timber and tin" building character

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

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

Contribution to visual character of the street

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

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

Held

Appeal allowed.

Once again, the court if not the planning authority

Samantha Hall | Ronald Yuen

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

Case

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

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

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

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

Facts

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

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

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

Zanow's position

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

- the subject land had been historically used for industrial purposes;
- the development was consistent with the existing approved use pursuant to the 2003 approval and it was a limited expansion of the existing approved use. In fact, the existing approved use made the subject land unsuitable for residential use;
- the 2003 approval had overridden the provisions of the Ipswich Planning Scheme 2006 within the context of the approval, permitting light/service industry use;
- the development (if approved) would not prevent the subject land from being redeveloped in the future for residential purposes in the event that demand justified such redevelopment;
- the increase of traffic generated by the development was considered appropriate after taking into consideration the past and existing uses of the subject land, the absence of any alternative access to the subject land and the significant existing under-utilisation of the area of the subject land;

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

Council's position

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

Further, the council asserted that the proposed development:

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

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

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

Decision

Conflict with planning scheme

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

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

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

Future residential use

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

Traffic

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

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

Community expectations

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

Amenity

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

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

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

Need

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

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

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

Held

The appeal was dismissed.

Articulating Weightman

Samantha Hall | Vivien Little

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

Case

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

Facts

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

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

Decision

The applicant's submission raised 14 errors of law, many with subcategories, challenging almost every line in the relevant part of his Honour's judgment. The court described this as riddling "*his Honour's admirably clear and concise judgment*".[1]

Of note, was that whilst his Honour did not set out the steps articulated in Weightman, it was perfectly clear from his Honour's reasons that he identified the conflict with the planning scheme, did examine the planning grounds put forward by the applicant and did determine, on balance, that they were not sufficient to justify approving the application.[2]

Held

Application for leave refused with costs.

1 At paragraph 8.
2 At paragraph 17.

Exercising the court's discretion: A question of fact

Samantha Hall | Matthew Soden-Taylor

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

Case

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

Facts

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

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

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

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

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

Decision

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

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

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

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

Held

The application for leave to appeal was refused.

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Conflict with planning scheme – No error of law

Samantha Hall | Susan Cleary

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

Case

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

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

Facts

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

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

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

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

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

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

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

and

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

Decision

The first alleged error

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

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

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

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

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

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

The second alleged error

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

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

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

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

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

Matter of fact and law

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

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

> *It may be that where there has been a misconstruction of a scheme which is a factor in an evaluative exercise, it is sufficient for the appellant to show that the error might have affected the conclusion at first instance; or it may be that the appellant must show that there is a real or substantial possibility that the error did affect that conclusion; or it may be as the Chief Justice suggested, that the appellant must show that the judge at first instance was constrained by law to come to a different conclusion. There may be other possible tests. The correct one remains to be determined.*[3]

Held

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

[3] See paragraph [42].

Mineral or not: A question of its use

Samantha Hall | Ronald Yuen

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

Case

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

Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

Decision

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

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

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

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

Held

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

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

Samantha Hall | Ronald Yuen

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

Case

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

Facts

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

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

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

Decision

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

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

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

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

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

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

Held

Orders were made that:

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

Can Prince Charming awaken Sleeping Beauty?

Samantha Hall | Vivien Little

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

Case

This was an application by the:

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

Facts

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

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

Decision

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

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

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

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

Reasons for delay

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

Prospect for success

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

Length of delay

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

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

Prejudice

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

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

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

Held

The applicant's application refused with costs.

The respondent's application to strike out the appeal is granted.

When is a change permissible?

Samantha Hall | Diane Coffin

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

Case

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

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

Facts

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

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

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

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

Decision

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

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

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

Held

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

Dismissing appeal for breach of court orders

Samantha Hall | Matthew Soden-Taylor

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

Case

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

Facts

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

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

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

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

Decision

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

In his judgment his Honour provided as follows:

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

Held

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

Relief from failure to provide plan for reconfiguration in time

Samantha Hall | Susan Cleary

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

Case

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

Facts

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

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

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

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

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

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

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

Decision

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

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

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

Held

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

Expiry of local laws

Diane Coffin

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

Local laws of joint local governments

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

Other local laws

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

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

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

Local law making process

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

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

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

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

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

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

Stage 2: Undertake consultation with:

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

Stage 3: Proposed local law reviewed in light of results from Stage 2[4] and adoption by council resolution as the proposed local law.

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

Stage 5: Minister's approval.

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

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

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

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

Diane Coffin | Vivien Little

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

Case

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

Facts

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

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

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

The applicant sought declarations that:

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

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

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

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

Decision

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

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

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

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

Held

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

No excusal for non–compliance with IPA

Diane Coffin | Matthew Soden-Taylor

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

Case

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

Facts

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

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

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

Decision

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

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

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

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

Held

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

COLIN BIGGERS & PAISLEY LAWYERS

No jurisdiction means no application

Ronald Yuen | Diane Coffin

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

Case

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

Facts

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

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

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

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

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

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

Environmental Protection Act 1994

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

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

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

Nature Conservation Act 1992

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

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

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

Decision

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

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

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

Held

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

COLIN BIGGERS & PAISLEY LAWYERS

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

Samantha Hall | Vivien Little

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

Case

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

Facts

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

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

Issues raised in the appeal included:

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

Decision

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

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

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

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

Held

The appeal was dismissed.

Application to re–enliven lapsed development approval

Samantha Hall | Diane Coffin

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

Case

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

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

Facts

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

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

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

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

Decision

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

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

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

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

Held

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

COLIN BIGGERS & PAISLEY LAWYERS

Failure to register title no impediment to ownership of land

Samantha Hall | Susan Cleary

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

Case

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

Facts

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

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

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

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

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

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

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

Decision

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

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

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

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

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

Held

The appeal was dismissed.

Frivolous or vexatious claim

Samantha Hall | Ronald Yuen

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

Case

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

Facts

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

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

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

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

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

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

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

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

However, the council sought in this application:

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

Decision

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

With respect to the first costs order, the council primarily based its submissions on the issues of compliance and whether McCracken had a basis to contend that there would be compliance. At the outset, his Honour indicated that it was a discretion of the P&E Court, not an entitlement of the council, to have orders varied to include provisions for bonds. His Honour further indicated that, even if McCracken had in fact had no legitimate expectation of being able to comply with the orders, she was not bound to consent to orders for the bonds sought

by the council, nor did her failure to consent mean her response to the council's application for the provision of bonds was frivolous or vexatious.

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

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

Held

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

COLIN BIGGERS & PAISLEY LAWYERS

Single event to constitute material change of use

Samantha Hall | Matthew Soden-Taylor

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

Case

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

Facts

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

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

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

Decision

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

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

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

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

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

Held

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

Conflict with scheme: Residential use on preferred rural use land

Samantha Hall | Katherine McGree

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

Case

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

Facts

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

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

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

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

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

Decision

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

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

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

Held

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

Garden Cities of Tomorrow or a Brave New World

Ian Wright

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

Abstract

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

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

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

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

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

Planning's utopian tradition

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

Politicians continue to look for and disseminate notions of ideal or utopian forms that are based on our traditions. For example, in announcing that the Urban Land Development Authority will take responsibility for the major greenfield areas of Ripley Valley, Greater Flagstone and Yarrabilba, the Queensland Premier stated that "*These will be model communities where children can walk to school, workers can live near to their public transport and families will be guaranteed greenspace for recreation and the lifestyle that Queensland is famous for*".[5]

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

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

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

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

The utopian ideals of politicians, planners and lawyers alike can be traced to a book titled Utopia written in 1516 by Sir Thomas More, an English lawyer and Roman Catholic Saint.[6]

The book describes from the perspective of a traveller, the social, political and legal systems of the fictional island of Utopia and contrasts those arrangements to the European nation states of the time.

Utopia is described as an ideal community where there is no private property, men and women are educated alike, there is religious tolerance and the advice to and decisions of government, are not conflicted by political reality.

Prophetically the book foreshadows the very conflict between personal beliefs and service to the Crown that would ultimately result in More's execution by Henry VIII for refusing to take the oath of supremacy of the Crown over the Church.

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5 Bligh, A (2010) Three New Model Cities for SEQ, Ministerial Press Statement 25 May 2010.
6 Sir Thomas More (1516) Of the Best State of a Republic and of the New Island Utopia.

For servants of the Crown such as Ministers and public servants such as planners and lawyers, More's execution by the Crown exemplifies the recurring conflict between our personal beliefs and our professional responsibilities to the Crown.

A person caught in this conflict must make a More's choice. They must strictly adhere to their personal beliefs and suffer, like More, the consequences of their failure to support the Crown. Alternatively, they must accommodate the Crown by compromising their personal beliefs.

Planning's dystopian reality

Given that land use planning is a utopian construct, one would expect that the planning system would be criticised as being utopian in that like More's Utopia, it seeks something which is too good to be practicable.

However, today the planning system is not being criticised as utopian but rather as dystopian, that is something which is too bad to be practicable.[7]

The assessment of the planning system as dystopian rather than utopian appears to derive from community concerns that planning is carried out without sufficient reference to vision, evidence, the community, the environment, infrastructure, financial prudence or governance.

This paper considers each of these concerns and makes suggestions for possible reform to the planning system to ensure a more utopian planning system.

Planning without vision

The planning system is often criticised as being too focussed on detailed matters of development control in particular the failings of the development assessment system in terms of over–regulation, under–resourcing, stakeholder interference and development approval delays.

The focus on development control is a direct consequence of the continuing economic reform agenda commenced in the 1980s which seeks to boost economic performance by increased competition and the use of market or business like mechanisms.

As a result, the planning system was reformed to remove strategic land use and structure planning frameworks on the basis they represented impediments to competition in the private sector and that market mechanisms could better co–ordinate the planning and delivery of land use and infrastructure. For the reasons that are discussed later in this paper, these assumptions, particularly in relation to infrastructure, have proved to be wrong.

It is therefore critical that the planning system renew its focus on the visionary.

The State government has sought to respond to this issue by requiring a strategic framework to be included in a planning scheme prepared under the *Sustainable Planning Act 2009*. However, the current Queensland Planning Provisions with which planning schemes must comply, do not ensure that either strategic frameworks or planning instruments are visionary.

However, the Queensland Planning Provisions will achieve their stated goal of economic efficiency through consistency of format and structure.

The achievement of this goal will be further reinforced by the fact that since the advent of the *Integrated Planning Act 1997* a whole generation of Queensland planners have not been exposed to the strategic planning skills that once characterised the training of their predecessors.

It is interesting to reflect upon the fact that those somewhat ageing planners who are today recognised as the intellectual leaders of the Queensland planning profession did not develop their reputations as development assessment managers who gave expert evidence in Planning and Environment Court appeals. Rather, their reputations as planning experts were made as strategic planners who articulated planning principles in strategic planning instruments that were visionary in their focus.

State and local governments should therefore commit to preparing planning instruments which set out a clear vision of the strategic public interest outcomes to be achieved. This could be facilitated by amending the Queensland Planning Provisions to ensure that planning instruments are:

- place specific, not generally applicable, as was the case with many planning schemes prepared after the *Integrated Planning Act 1997*;
- expressed to be forward looking and not present looking;
- innovative not mechanical;
- unique not repetitive.

[7] John Stuart Mill (1868) in a speech to the British Parliament recorded in Hansard Commons 12 March, 1868.

Planning without evidence

The focus of orthodox planning is on the assessment of development against predetermined quantitative standards. This is clearly reflected in the structure of the planning schemes prepared under the *Integrated Planning Act 1997* and in the proposed Queensland Planning Provisions which prescribe the content of planning schemes to be prepared under the *Sustainable Planning Act 2009*.

The structure of these planning schemes is responsive to the requirements of the *Integrated Planning Act 1997* and the *Sustainable Planning Act 2009* which are primarily concerned with the administration of the integrated development assessment system.

State government agencies have responded to the development control focus of State planning legislation by investing significant resources in the administration of the integrated development assessment system at the expense of strategic planning based on evidence.

In my opinion, State and local government agencies have not invested significant resources in evidenced based strategic planning with dramatic consequences, especially in relation to the planning and delivery of infrastructure.

State and local government agencies should therefore commit to strategic planning which is based on evidence. This could be facilitated by the following reforms:

- The requirement for evidence based planning instruments should be embodied in the *Sustainable Planning Act 2009*.
- State and local planning instruments should be supported by a separate strategic planning document that sets out the planning evidence on which the strategic framework is based.
- A proposed planning instrument that is not based on planning evidence should be challengeable at law.
- The outcome statements in a planning instrument should only be able to be set aside if the evidence on which they are based is out of date or there is strong persuasive evidence to the contrary. This will provide more certainty to stakeholders than the current position where "sufficient grounds" can be used to set aside the outcome statements in a planning scheme.

Planning without the community

There is a frequent misconception amongst planners that the rights of a landowner to use their land is granted by a planning instrument. It is the common law that grants a landowner the right to use their land.

Planning instruments on the other hand restrict the common law rights of landowners in support of public interest outcomes which benefit the community as a whole.

For example, low density residential development may be restricted to support environmental outcomes, as in the case with the protection of open space, or to support economic outcomes such as the protection of industrial areas or the development of higher density transit orientated communities.

It is therefore incumbent on State and local governments to inform the community and landowners in particular, of the public interest outcomes and supporting evidence that are the basis for the restriction of the rights of a landowner.

State and local governments, acting in accordance with State planning legislation, frequently present the community with a planning instrument, without any comment as to the public interest outcomes to be achieved or the supporting evidence. The community is then requested to provide submissions on the planning instrument, not having any right to seek a review of the planning instrument.

In a situation where the local community is not involved in the preparation of a planning instrument and is not provided with information or a right of review of the planning instrument, it is little wonder that the community feels disengaged with the planning system.

State and local governments should therefore commit to engage the community in the planning system. This could be facilitated by the following reforms:

- The requirement for local planning instruments to contain local area provisions that are prepared by the local community through a planning process facilitated by local government.
- The requirement for all planning instruments to be supported by a statement of the public interest outcomes that are being sought to be achieved and the evidence in support of those outcomes.
- The requirement for all planning instruments to be prepared in consultation with relevant community interests and to be supported by a statement of the community engagement which has been undertaken.
- The requirement for all planning instruments to be subject to a legal right of review if they are not prepared in accordance with these requirements.
- Finally, as a general rule, strategic land use and infrastructure planning should be carried out by democratically elected and accountable institutions such as State and local governments and not by the private sector or statutory authorities unless there is an overriding need in the public interest.

Planning without the environment

Planning should also have a relationship to the sustainability of natural systems which should be measured in terms of their environmental resilience and the carrying capacity of the environment in which development is proposed.

Planning should also seek environmental benefits such as the enhancement of degraded natural systems, as a cost of providing for continued development which may adversely impact on existing natural systems.

Whilst it is the purpose of the *Sustainable Planning Act 2009* to seek to advance ecological sustainability, there is little evidence to support the contention that scientific measures such as environmental resilience and carrying capacity are actually used in the preparation of or the performance monitoring of, planning instruments. From a policy viewpoint, land use planning instruments are generally considered to be a scientific free zone.

State and local governments should therefore commit to ensuring that planning instruments are prepared and monitored on a proper scientific foundation to achieve the sustainability of natural systems. This could be facilitated by the following reforms:

- The requirement for all planning instruments to be prepared to ensure the sustainability of natural systems and the enhancement of degraded natural systems as a cost of providing for development which may adversely impact on existing natural systems.
- The requirement for the performance of all planning instruments to be monitored from a scientific perspective in terms of the sustainability of natural systems.

Planning without infrastructure

The community's concerns with the planning system has been reinforced by ongoing shortcomings in the planning and delivering of critical infrastructure, including electricity generation and distribution (2004), coal ports and rail infrastructure (2005), water supply infrastructure in South East Queensland (2006), public transport infrastructure in South East Queensland (2007), hospital infrastructure (2008) and more recently road transport infrastructure (2009).

The status of these infrastructure networks reflect systemic problems in the planning and delivering of critical infrastructure in Queensland. These problems include the following:

- First, the State public service has been deskilled in terms of its ability to plan and deliver critical infrastructure, a topic to which I will return later in this paper.
- Second, the national competition policy agenda of commercialisation, competitive neutrality and privatisation has resulted in planning and delivery functions being shared by an assortment of State government departments, State government owned corporations, local governments, local government owned corporations and private service providers without clear accountabilities. This was recently exemplified by the confusion of responsibilities over critical public health and safety issues such as water fluoridation and flood warnings in South East Queensland.
- Third, the planning and delivery of infrastructure such as roads, hospitals and schools which is the capital component of State government functions such as transport, health and education has become divorced from the planning and delivery of the other aspects of those functions. For example, the State focus on capital investment in hospitals and schools at the expense of systems (such as the Health Department payroll system) and people (such as the training of doctors and teachers).
- Fourth, the infrastructure planning and delivery process has become skewed in terms of responding immediately to the interests of powerful interest groups rather than considered public policy.
- Finally and most importantly for current purposes, the frameworks for planning and delivery of infrastructure are not co–ordinated and are not integrated with land use.

The State government has sought to address these issues through the following reforms:

- The South East Queensland Infrastructure Plan and Program 2009–2026 (**SEQIPP**) has been prepared to support the South East Queensland Regional Plan 2009-2031 (**SEQ Regional Plan**).
- A Queensland Infrastructure Plan is to be prepared which will integrate the SEQIPP, the Queensland Roads Investment Program and other State infrastructure planning documents.
- A new office of Growth Management Queensland has been created to manage the State government's growth agenda.

Whilst these reforms are strongly supported, they do not go far enough however, and in particular do not address the following problems:

- First, the Queensland Infrastructure Plan merely recycles the previous policy to prepare annual State infrastructure plans. This was announced by the State government in Strategic Infrastructure for Queensland's Growth in 2000 but was never implemented.

- Second, it is inherently difficult for strategic planners who do not have the required technical skills to take account of detailed technical considerations or to mobilise the commitment of those who have the detailed technical skills. Any strategic planner who has been involved in the preparation of a priority infrastructure plan for a local government will testify to these problems.
- Third, the conflicts which inherently arise between different functions can only be resolved by entities with real political power which at the administrative level are the Directors General of State government departments and at the Ministerial level are the Premier and the Treasurer. Ominously, Growth Management Queensland is only an office within the Department of Infrastructure and Planning.
- Fourth, there has been no integration of infrastructure and land use in local government planning instruments. Infrastructure charging plans and benchmark development sequences under the *Integrated Planning Act 1997* were replaced by priority infrastructure plans which were prepared by local governments without the benefit of a drafting template until 2009. As a result the State interest checks of some local government priority infrastructure plans submitted before 2009, are now reaching their fourth anniversary.
- Fifth, the State government has brought forward, in the name of housing affordability in South East Queensland, the land use planning for some 300,000 people in the major greenfield areas of Flagstone, Yarrabilba, Ripley Valley and Caloundra South without commitment to the planning and delivery of infrastructure. The obvious consequence is that urban development will lead infrastructure.
- Sixth, the requirement that structure plans for regional development areas, which bestow significant development entitlements on landowners, be made without any legally enforceable commitment by those landowners in the form of infrastructure agreements to fulfil the development obligations necessary to provide for those development entitlements.
- Finally, the SEQIPP is deficient in that its planning horizon of 2026 does not accord with the 2031 planning horizon of the SEQ Regional Plan and does not take account of the State infrastructure which is now required as a result of the bringing forward of the major greenfield areas and the making of structure plans for regional development areas. Furthermore the SEQIPP does not take account of the significant maintenance burden of existing State infrastructure which is currently unfunded.

The State government should therefore commit to fundamentally reforming Queensland's infrastructure planning and delivery frameworks to address these problems. This process could be commenced by the following reforms:

- The infrastructure planning and delivery frameworks should be codified in legislation.
- The infrastructure planning and delivery responsibilities and accountabilities of each relevant agency should be clearly stated in the legislation.
- Relevant agencies should be subject to a statutory duty to provide information to and co-operate with other relevant agencies.
- Disputes within relevant agencies should be resolved by the relevant Chief Executive whilst disputes between relevant agencies should be resolved by Chief Executives of the relevant agencies and in the absence of resolution, by the Premier through the cabinet process.
- If these arrangements are not successful, consideration should be given to the establishment of an independent expert agency with statutory powers to provide the necessary co–ordination and integration of infrastructure planning and delivery.

The consequences of continuing to plan without infrastructure are that State and local governments, particularly in South East Queensland, will continue to be faced with the chronic underprovision of infrastructure for urban development.

Planning without financial prudence

The existence of an infrastructure deficit will continue to place significant pressure on State and local government budgets.

It is clear that insufficient revenue is being generated by State and local governments to fund the infrastructure deficit.

The State government has sought to finance the infrastructure deficit through increased borrowing albeit at the expense of the State's credit rating, increased taxes principally in the form of increased mining royalties and land tax, increased Commonwealth government grants and the sale of State government assets.

It will also be necessary for local governments to increase borrowing, increase rates and to increase infrastructure charges for development infrastructure.

However the scale of the infrastructure deficit is such that it will be necessary for both State and local governments to find new revenue sources to fund infrastructure for urban development.

This could be facilitated by the following reforms:

- The introduction of infrastructure charges or a betterment tax for State infrastructure.

- The introduction of innovative mechanisms such as growth area bonds, securitised borrowings, special charges and business improvement districts which are used in the United States and the United Kingdom to finance local government infrastructure.

Planning without governance

Finally it is critical that land use and infrastructure planning is carried out by institutions which have appropriate governance structures.

The State government is to be congratulated for completing a substantial local government reform program which has resulted in the amalgamation of local governments to form regional councils. The new regional councils are much larger and have a better capacity to undertake planning, development assessment, asset creation and management.[8]

However there is also an immediate need for real reform of the State public service particularly in relation to infrastructure planning and delivery, the public administration of which is beset by a multitude of problems:

- First, public administration is politicised in terms of being focussed on the opinions of influential interest groups rather than public policy with the result that the public interest is often replaced by the private interests of those interest groups.
- Second, the management philosophy whereby management is seen as a generalist co-ordinating process that does not require technical skills, has resulted in a deskilling of the public service especially in the planning and delivery of infrastructure.
- Third, the focus on securing federal funding to compensate for the State's weak tax base, economic underdevelopment and the resulting vertical fiscal imbalance has caused power in the public service to move from technical specialists to those who are responsible for finance and intergovernmental relations.
- Fourth, Ministers of the Crown now appear to consult Ministerial advisers (or private servants) in preference to public servants with knowledge, skills and experience in the relevant area who are concerned with the public interest.
- Fifth, public administration is not based on a rigorous public policy process of cost benefit analysis carried out in a professional environment but rather is influenced by media driven short term populism that is carried out in a political environment.
- Finally, it would appear that the predominant guiding principle of public administration is not the public interest but political realities.

The result in Queensland is a decline in policy making capacity; the so–called "hollowing out" of government and a loss of organisational memory.[9]

It is therefore critical in the public interest that the State government commit itself to a process of real public sector reform which will ensure the reskilling and depolitisation of the public service, particularly in relation to the planning and delivery of infrastructure.

Conclusions

A planning system in which planning is carried out without vision, evidence, community, environment, infrastructure, financial prudence or governance is not utopian in the sense that it is too good to be practicable.

Rather such a planning system is dystopian in the sense that is too bad to be practicable. Indeed it is something other than planning.

The planning system does not look for and disseminate notions of perfect communities or ideal spaces such as that sought by Ebenezer Howard or Le Corbusier.

Rather the planning system merely seeks to alienate people and restrict individualism to control the perceived ugly consequences of present day behaviour, reminiscent of Aldous Huxley's *Brave New World* or George Orwell's *1984*.

The planning system emphasises the need for stakeholders to conform rather than excel. As such the planning system as presently structured is incapable in the long term of increasing economic efficiency or achieving ecological sustainability and is in urgent need of fundamental reform.

This paper provides some practical suggestions as to how the planning system may be reformed so that planners can once again pursue Ebenezer Howard's *Garden Cities of Tomorrow* rather than have their behaviours and actions controlled by a planning system subject to political influences rather than the interests of the individual.

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8 Infrastructure Australian Major cities Unit (2010) State of Australian Cities 2010, Commonwealth of Australian p129.
9 Prasser, S (2005) The State of priorities: On Queensland's infrastructure mess p4.

Planners have become a lightning rod for people's sense of frustration

Ian Wright

This article is a reproduction of a speech delivered by the UK Minister of Decentralisation on 30 December 2010. It outlines that planners have become the lightning rod for people's frustration and that restoration of respect for town planning must occur

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On the 30th of December 2010 the UK Minister for Decentralisation delivered a very interesting speech at a UK Town and Country Planning Association Event, in which the Minister said that planners were a "lightning rod for people's sense frustration" and spoke of the need to restore the "respect and pride to town planning". This is a very interesting speech that we have reproduced for your consideration:[10]

I'm pleased to be here today to set out some of the next steps in Government's proposals for putting communities in control of their own destiny through the planning system; and delighted to be able to say more about how the forthcoming Localism Bill will change planning for the better.

But let me start by talking about the wider context. Planning isn't a job – it's a vocation. All of us hope we leave a legacy in our professional life. Planners certainly do leave a legacy. They shape the workplaces where we spend thousands of hours each year; the homes we go home to the evening, and the schools where our children learn. At its best, their work is much more than functional. It inspires and elates.

So my starting point as planning Minister is that planners have an awesomely important job to do. I take very seriously my responsibility of enabling them to do that job to the very highest standards. But I agree with the TCPA that at present the planning system is not doing its job "as well as it should".

The current framework is bureaucratic. Last year, local authorities spent 13 per cent more in real terms on planning than they did five years ago – despite a 32 per cent drop in the number of applications received.

It is too centralised: regional spatial strategies imposed housing targets which made people feel put upon. And it is ineffective. The levels of housebuilding last year were the lowest in peacetime since 1924.

Evidence suggests that commercial development is suffering, and businesses say that the planning system is a barrier to growth. This government has ambitious proposals to make the system fit to meet the challenges of the 21st century.

Above all, we want to change the philosophy behind local planning. We want to move away from a system with significant elements of imposition from above, to one with participation and involvement at its heart – not just warm words, or a commitment in principle, but real opportunities for people to have a say. And away from a system that seeks to resolve the different needs of different groups at a local level by imposing choices from above, towards one which enables a mature debate at local level.

I'm delighted to have the chance to talk about these issues at the TCPA – for two reasons. One, your manifesto recognises in its very first clause the need for a planning system... "based on widespread community engagement." You have been a consistent champion of that principle, and a powerhouse of expertise on how it's done in practice. Two – TCPA's great strength is that it brings together all the different interests in planning – community groups, developers, businesses and more. It represents, at a national scale, the kind of coming together that we want to help happen in local discussions about planning.

The Big Society means putting real power in the hands of local people. It is based on the idea that in very many areas of life people can make the best decisions about what's best for themselves, for their family, for the place where they live. I think that people should be able to make real choices about planning – much as they should be able to make choices in relation to healthcare or education – as a matter of principle.

But evidence also suggests that restoring power to a very local level may have the practical effect of helping people feel positive about development. Imposition alienates. As any parent can tell you, telling someone to do something – even when you're absolutely convinced that it's in their best interests – doesn't always work. IPSOS Mori research from this summer says too many people feel locked out and "done to" by the planning system.

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[10] Michael Donnelly, 'Clarks Rallying Cry to Planners' on Planning Blog (1 December 2010) <http://planningblog.wordpress.com/2010/12/01/clarks-rallying-cry-to-planners>.

A typical comment from the research said: "I feel powerless – what can we do?" It's simpler to say "no" than to engage with a system that doesn't seem to listen to you. The reaction to the old regional spatial strategies seemed to bear this out. The South West regional strategy alone attracted 35,000 written objections. Conversely, proper discussion with local people encourages a sense of ownership about development. Experience suggests that developers of major projects have a better chance of securing consent if they carry out consultation with local communities before they make a planning application.

And the TCPA's own guide to community planning obligations gives a wealth of evidence about how involvement lets people see the benefits of development, and helps them be prepared to say "yes". Take the story of Ascott-Under-Wychwood in Oxfordshire. The local shop closed in 1998. When, in 2002, local people found out about plans to convert a farm, they saw their chance to get a village shop back again. In exchange for the developer gifting a shop to the community, they said they would put up no objection to the developer's plans. They were supportive, because they could see what was in for them. The shop is still going strong.

Or take what's happening with Burgess Hill Town Council in Sussex – who have begun a conversation with local people about the possibility of new housing – making the case that the extra investment that it would make possible could help pay for road improvements, a sports centre, new civic amenities, upgrades to the local station or a new business park. Our proposals are designed to enable this kind of mature debate about local planning everywhere. Because the problem is, although participation has been recognised as an essential element of good planning since the Skeffington Report in 1969, and although there are some examples of developers and planners getting it very right indeed, there are too many instances of participation being a an unimaginative add-on to the planning process.

We want to embed participation in the way the system works. Instead of having decision-makers consult local communities, we want to enable local people to make more decisions themselves. We want to hand over power and responsibility so that local communities have real choices, and experience the real consequences of those choices.

The Localism Bill contains several measures to achieve this. The Government has begun consulting on proposals for a new homes bonus. We would match the additional council tax raised over the following six years for new homes and properties brought back into use. It is proposed that there will be an additional amount for affordable homes. I made clear earlier this month that we intend to introduce changes to the community infrastructure levy – making sure that the benefits of growth are felt at a very local level indeed. We plan to require in law that local authorities set aside a meaningful proportion of revenue raised to be spent on infrastructure as neighbourhoods see fit.

And we will introduce neighbourhood planning alongside existing plans – placing an unprecedented level of influence and power at a very local level. The principle is simple. Local people come together and agree, "this is what we want our area to look like. Here is where we want the new homes to go and how we want them designed; here is where we want new shops and offices; here are the green spaces we want to protect".

Where people are most keen to take control and have certainty over development, they will be able to confer full planning permission, so that where the local community is crying out for new homes, developers can get on with building them. In other areas, people will be able to grant outline planning permission – with conditions on, say, the design details. When the neighbourhood plan has been prepared, people will vote on them in a local referendum. With a simple majority, the plan will come into force.

This is a rethinking of how planning operates – creating new pressures and powers that operate from the bottom up, rather than the top down. It offers a scope for self-determination unheard-of until now.

Localism in planning will create the freedom and the incentives for those places that want to grow, to do so, and to reap the benefits. It's a reason to say yes. I look forward to discussing these proposals in more detail with many of you when the Localism Bill is published and begins to make its way through parliament.

Opening up planning will requires non-legislative changes too. I'd be first to argue that planning demands special skills, but I don't think the best way to enable planners to do their job is to set endless prescription and guidance. The current sum of circulars, policy statements and so forth is bigger than the complete Works of Shakespeare, and not nearly as entertaining. Guidance on this scale flirts with the absurd: there's no way a practitioner can keep it all in mind.

Let alone the poor non-expert. This is a harmful side-effect: opacity is a barrier to community involvement. It's time for a radical review to simplify and streamline policy and guidance, to make it easier for community groups to understand and engage with it, and to give proper scope for planners to use their professional discretion. Our proposals imply changes to the role of town planners. In one sense, planners have been the first victims of the flaws of the current planning system.

Often, their job has involved much too much development control – saying yes and no to individual projects on a case by case basis – and too little genuine planning, thinking about the long-term needs of an area, talking to local people, and drawing up positive proposals for the future. Planners have become a lightning rod for people's sense of frustration. Instead of being the agents of imposition, they should have much more scope to help local people articulate their vision for their town or village or neighbourhood.

As Ann Skippers, the RTPI President for 2010, said earlier this year: "We should be proud to say [...] when we are asked, that we are planners. Say it well and say it loudly and say it again if you need to." Neighbourhood planning – which will see planners working with and for the community – should help achieve what Anne and I both want to see – planners being properly valued and respected for what they do.

There are three common arguments made against greater community involvement in planning. The first argument is about willingness. It says, do people really want to get involved in local planning issues? Aren't they busy enough with their jobs and family lives? In fact, people care deeply about the look and feel of the places where they live. Planning can in fact be the gateway that gets people involved in civic life. They might start by signing a petition to protect a local tree – they might end up volunteering on a regular basis, standing as a school governor, or becoming a councillor.

The second argument is about capacity. It says: even if they are interested, have people got the capacity to articulate what they want – and make a meaningful contribution to debate? There are two points to make in response to that. There's an inherent difference in expectations between centralists and localists. Centralists are a glum lot. Their outlook is predicated on the idea that, left to themselves, people can't make decisions in their own best interests. Localists, by contrast, are optimistic about people's good sense, generosity, and ability to make sound decisions. In planning – as in other areas of life – we start from the basis that people are inherently capable.

But planning also of course requires the application of specialist skills. We recognise that in some circumstances people will need some support to make the most of the opportunity to get involved. That's why, if a very local area wants to draw up its neighbourhood plan – we will require the local authority to provide support. We will also fund independent advice, so that local communities and neighbourhood groups who are new to the topic can learn from what has worked well in other areas.

The third argument against local planning is about equality. It says – are you, in effect, empowering those who are already powerful – giving the well-organised an opportunity to channel unwanted development towards the places where the less well-organised live?

There are several points to make in response here. One is that the provision of advice and support should enable those who want to, to draw up their neighbourhood plan, no matter where they live. Another is that there will be some safeguards in the system. Neighbourhood plans will need to be consistent with wider local plans. If the wider areas needs lots of new houses, they neighbourhood plan will not be a means to refuse development altogether. An independent assessment will make sure that neighbourhood and local plans are consistent.

But there's a much bigger point. This concern is based on the assumption that people come to the table thinking "development is bad." In fact, if local people have a chance to voice an opinion, and to see and feel the benefits of development, they have reasons to say "yes".

There is significant change ahead for planning. Taken as a whole, our reforms will help get England out of the housebuilding trough, make businesses see planning as a reason to invest, not a disadvantage, and give planners opportunity and encouragement to do what they do best: to create amazing, inspirational places.

Above all they will give communities a far greater sense of ownership over decisions that make a big difference to their quality of life. They will allow for the exercise of genuine power at a local level; and put the ideals of the Big Society at the very heart of planning. I look forward to working with you all to make sure these reforms deliver the change we all want to see.

COLIN BIGGERS & PAISLEY LAWYERS

State resource entitlement required for preliminary approval

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Northeast Business Park Pty Ltd v Moreton Bay Regional Council & Anor* [2010] QPEC 112 heard before Robin QC

Case

This was an appeal by Northeast Business Park Pty Ltd (**appellant**) to the Planning and Environment Court (**court**) against a decision of the Moreton Bay Regional Council (**council**) to refuse a development application for a preliminary approval for material change of use, and for variations to the applicable planning scheme under section 3.1.6 (Preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997* (**IPA**) in relation to a large mixed use development, including a marina (**development application**) to be constructed on land located at Farry Road, Burpengary and to be accessed via the Caboolture River (**site**).

Facts

In 2004, the appellant lodged the development application with the former Caboolture Shire Council. The appellant later purchased adjoining land to the west of the site which was the subject of a development application for a preliminary approval for a mixed use business and industrial park.

On 21 June 2006, the Northeast Business Park Project, comprising those two development applications, was declared a project of significance by the Coordinator-General under the *State Development and Public Works Organisation Act 1971* (**SDPWO Act**).

Consequently, in accordance with section 37 (Applications for material change of use or requiring impact assessment) of the SDPWO Act, the information and referral stage and the notification stage of IDAS did not apply to either application.

On 26 November 2007, the appellant lodged an application with the council to change the original development application to align with an environmental impact statement prepared for the project. The environmental impact statement for the project was publicly notified from February to April 2008.

On 31 October 2009, the Coordinator-General issued a report in relation to the project, recommending that the council approve the proposed development subject to conditions. The Coordinator-General's report was taken to be a concurrence agency's response in respect of the development application under the IDAS.

Preliminary legal issues

The council raised the following preliminary legal issues in respect of the development application:

- the development application did not state the way in which approval was sought to vary the effect of local planning instruments for the land as required by section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA (**3.1.6 point**);
- the development application was not supported by evidence required by section 3.2.1(5) (Applying for development approval) of the IPA for taking or interference with a State resource (**State resources point**).

The council was joined in the State resources point by the Chief Executives of the Department of Environment and Resource Management and the Department of Employment, Economic Development and Innovation (**co-respondents**) who were granted leave to appear.

Decision 3.1.6 point

His Honour Judge Robin QC referred to the decision of the Court of Appeal in *Stockland Developments Pty Ltd v Thuringowa City Council* [2008] QPELR 151 which indicated approval of the decision in *Lagoon Gardens v Whitsunday Shire Council* [2006] QPELR 490 and endorsed the principle that determining whether an application for development complies with section 3.1.6 (Preliminary approval may override a local planning instrument) of the IPA requires an objective interpretation.

It was necessary for the court to consider the operation of the development application in relation to the 1988 planning scheme, which applied at the time the development application was originally made in 2004, and the 2005 planning scheme, which applied at the time the development application was changed in 2007. The planning report and area plan submitted as part of the environmental impact statement for the project focussed on the variation of arrangements in the 2005 planning scheme.

The court concluded that the development application as made in 2004 contained a clear statement to the effect that levels of assessment which would ordinarily apply in the rural zone were to be changed for a dozen or so types of "development" or uses relevant to the project. Moreover, the IDAS forms which were completed in 2004 clearly indicated the change from "rural" to the new uses identified.

The development application as changed in 2007 contained levels of assessment which had been refined in accordance with the 2005 planning scheme. His Honour Judge Robin QC stated that the material submitted as part of the development application as changed was not in any way misleading or intended to conceal what the application was for.

His Honour Judge Robin QC concluded that, reading the development application objectively, it did state the way in which the effect of the planning instruments was sought to be varied.

State resources point

In considering the operation of section 12 (State resources (schedule 10)) of the *Integrated Planning Regulation 1998*, his Honour Judge Robin QC stated that "involves" is a word of extraordinarily wide import.

His Honour referred to the decision of Judge Searles in *Barro Group v Redland Shire Council & Ors* [2009] 3 QPELR 564, in which Judge Searles acknowledged that an application involves interfering with a State resource if development the subject of it would have that effect, even if there was no physical manifestation, even if any physical manifestation was dependant on further approvals being obtained.

The court stated that the material presented by the council established that the appellant's project, if realised, would involve State resources, given that the project would involve capital dredging of several kilometres of the Caboolture River, involving some 550,000 cubic metres of dredge spoil, maintenance of a dredge pump line along the river and in Farry Road, capital dredging works of extended duration, use of dredge spoil on at least the land the subject of the development application, construction of a fishing platform with canoe landings on the bank of, and extending into, the river and the removal of the bank of the river to construct a lock which would permit access to and from the marina.

The court was not persuaded that the necessity for further applications for development approval made any difference to the requirement to obtain the evidence required by section 3.2.1(5) (Applying for development approval) of the IPA.

The court noted that the Coordinator-General's report referred to the need to obtain State resources, and in part expressed confidence that the appellant could obtain the allocations required. His Honour Judge Robin QC concluded that whilst the Coordinator-General's report could potentially be seen as committing relevant State entities, such as the co-respondents, given the meaning of the report, neither the legislation nor the Coordinator-General's opinions gave such a wide-ranging effect.

Exercise of the court's discretion

Both the council and the co-respondents accepted that it was open to the court to relieve the appellant from its asserted non-compliance under section 820 (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009*.

The court concluded that no special order was required in relation to the 3.1.6 point, however, a special order was required in relation to the State resources point, essentially to the effect that the appellant may proceed on the basis of providing evidence of allocation of or entitlement to relevant State resources as required under section 3.2.1(5)(a) (Applying for development approval) of the IPA.

Held

The appeal was adjourned for the parties to agree which State resources were involved in the proposed development the subject of the development application prior to the court making an order in respect of the appeal.

Court exercises discretion to revive development application

Samantha Hall

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Maryborough Investments Pty Ltd v Fraser Coast Regional Council & Anor* [2010] QPEC 113 heard before Durward SC DCJ

Case

This was an application by Maryborough Investments Pty Ltd (**applicant**) for relief from non-compliance with section 3.2.12(2)(a) (Applications lapse in certain circumstances) of the *Integrated Planning Act 1997* (**IPA**), being a failure to give material to a referral agency within 3 months.

Facts

The development application was made on 19 April 2007, in respect of land adjoining the Mary River at Granville, near Maryborough. The development application progressed through the IDAS process, however, it was later discovered that a response to an information request made by the Department of Transport and Main Roads (**DTMR**) (formerly Department of Main Roads) had not been provided due to an oversight.

Decision

The application was filed in the Planning and Environment Court (**court**) after the commencement of the *Sustainable Planning Act 2009* (**SPA**), giving rise to the application of section 820 (Proceedings for particular proceedings and appeals) of the SPA.

The court decided to exercise its discretion under section 820 (Proceedings for particular proceedings and appeals) of the SPA excusing the Applicant's non-compliance.

In his judgment, his Honour Judge Durward SC referred to the cases of *Calvisi Holdings Pty Ltd v Brisbane City Council & Anor* [2008] QPELR 545, *Muir & Anor v Logan City Council & Anors* [2008] QPELR 552, *National Properties Group v Toowoomba City Council & Anor* [2008] QPELR 40 and *Volker v Scenic Rim Regional Council & Anor* [2009] QPELR 114 in support of the exercise of the court's discretion in the circumstances.

His Honour also considered the consent of the parties to the exercise of the court's discretion and the significant cost, delay and inconvenience to all parties which would result in a lapsed development application, as factors supporting the exercise of the court's discretion.

His Honour observed that this case was that which the broad discretion of the SPA was intended to remedy and a failure to exercise the court's discretion in the circumstances would result in an inflexible and technical application of the SPA.

Held

The application was granted, the applicant's non-compliance was excused pursuant to section 820 (Proceedings for particular proceedings and appeals) of the SPA, the consequences of non-compliance were relieved and the development application was revived. The period for complying with section 3.2.12(2)(a) (Applications lapse in certain circumstances) of the IPA was also extended.

Furthering our understanding of "substantially different development"

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Auspacific Engineers Pty Ltd v Scenic Rim Regional Council & Ors* [2010] QPEC 117 heard before Robin QC DCJ

Case

This was a preliminary hearing as to whether changes to the development application the subject of the appeal were "minor changes".

Facts

The proposed changes to the development application could be summarised as follows:

- an increase in the number of residential low density lots from 224 to 298;
- reduction of the overall development footprint;
- widening of a pathway to provide vehicular traffic between the northern and southern parts of the proposed development;
- an increase in development impacts;
- a change from self-sufficient water and sewerage arrangements to a connection to town water and the sewerage system serving the locality.

Decision

His Honour Judge Robin QC observed that by operation of section 821(2)(b) (Application of repealed IPA, s 4.1.52) of the *Sustainable Planning Act 2009* (**SPA**), "minor change" was to be determined by reference to section 350 (Meaning of minor change) of the SPA, the key question being whether the changes resulted in a "substantially different development".

In respect of the increase of proposed lots, interestingly, his Honour provided that whilst reference was made to percentage increases in lots in older approaches to "minor change", 'the legislative arrangements render inappropriate a simplistic exercise limited to one of calculating percentage increases'.

His Honour considered that in the circumstances, the increase in lots did not result in a substantially different development given that the development footprint was reduced.

Similarly, his Honour held that a connection which would spare future residents from having to use a main road, and the additional impacts the changes placed on the proposed development did not result in a substantially different development. His Honour also held that the change in water and sewerage arrangements would not result in a substantially different development.

Interestingly, his Honour provided that 'consistency with planning arrangements does not seem to me to bear on whether one form of development is substantially different from another'.

Held

His Honour held that the changes to the proposed development would not result in a substantially different development and were therefore a "minor change".

COLIN BIGGERS & PAISLEY LAWYERS

A question of jurisdiction: A standard building regulation certificate of classification

Samantha Hall | Katherine McGree

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stevenson Group Investments Pty Ltd v Nunn & Ors* [2010] QPEC 114 heard before Durward SC DCJ

Case

This was an application by Stevenson Group Investment Pty Ltd (**applicant**) to the Planning and Environment Court (**court**) to determine whether the court had jurisdiction to deal with allegations relating to a certificate of classification. The respondents to the application also sought costs, which they submitted they incurred because of the applicant's failure to comply with the Court's procedural requirements.

Facts

The applicant was the owner of six apartments in a building (**Deep Blue 1**) in a development of three buildings comprising Tangalooma Island Resort. The respondents included the owner of the resort, the private certifier, the architect, some of the apartment owners, the Brisbane City Council and the Queensland Fire and Rescue Service.

The applicant alleged that the certification of classification issued for Deep Blue 1 in November 2005 was void because Deep Blue 1 was not 'substantially completed' as defined in section 92 (Meaning of substantially completed) of the *Standard Building Regulation 1993* (**SBR**). The respondents asserted that the court did not have jurisdiction to hear and decide the certificate of classification allegation (**preliminary issue**) because the issue of a certificate of classification under the SBR was not a 'matter done' as required by section 4.1.21 (Court may make declarations) of the *Integrated Planning Act 1997* (**IPA**). The applicant's submission was that a clear link was established between the certificate of classification process administered by the SBR and the IPA as follows:

- the certificate of classification process was a code for the integrated development assessment system (**IDAS**) process in the IPA; and
- the management of the use of the premises connected the SBR process to the IDAS process in the IPA.

The application was initially commenced by an originating application and the originating application was subsequently substituted by a statement of claim. The respondents (except for Brisbane City Council) applied for orders that the applicant pay their costs incurred because of the applicant's failure to comply with the court's procedural requirements in respect of both the originating application and the statement of claim. The applicant submitted that the respondents' application for costs was premature because neither the preliminary nor the substantive issues of the matter had been determined (**costs issue**).

Decision

In respect of the preliminary issue, his Honour Judge Durward considered that the connections sought to be made by the applicant between the SBR and the IPA were not sufficient to satisfy the strict construction of the court's jurisdiction as conferred by section 4.1.21 (Court may make declaration) of the IPA. In other words, the certificate of classification process under the SBR was not a matter done, to be done or that should be done under the IPA. His Honour also drew a distinction between the use of premises in the SBR context, which relates to occupation of premises, and the 'lawfulness of use' in the IPA context, which is strictly a planning matter.

In respect of the costs issue, his Honour commented that it may be open to characterise some part of the conduct of the applicant as deserving of a costs order but was not persuaded that the costs order sought by the respondents was appropriate given the stage of proceedings.

Held

On the preliminary issue, the application was refused.

On the costs issue, the application was refused.

"The Summerhouse" at New Farm Park

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Blue Sky Pty Ltd v Brisbane City Council & Anor* [2010] QPEC 116 heard before Durward SC DCJ

Case

This was an appeal by Blue Sky Pty Ltd (**appellant**) against the decision of the Brisbane City Council (**respondent**) to refuse a development application for a development permit for a material change of use, reconfiguring a lot (a lease sub-division) and a preliminary approval for carrying out building work (**development application**) at 137 Sydney Street, New Farm (**land**).

Facts

The land was located within New Farm Park, which was included in the Parkland Area classification of the *Brisbane City Plan 2000* (**planning scheme**) and was heritage listed by the respondent and also included on the Queensland Heritage Register. New Farm Park was surrounded by the Brisbane River (to the east), Brunswick Street (to the south), Sydney Street (to the west) and residential development and the Powerhouse Centre for the Live Arts (to the north).

The original kiosk facility (known as "the Summerhouse") was established in about 1914 in the vicinity of the land, which was subsequently refurbished to include an outdoor dining area and a marquee for the conduct of functions and operated until it burnt down in a fire in September 2000. The Summerhouse was re-opened in about November 2000, using a temporary facility to house the kitchen and the dining area with the marquee which survived the fire. In 2002, the appellant was offered by the respondent a lease in respect of the land to re-establish the Summerhouse.

The development application was made jointly by the appellant and the respondent in 2003 to facilitate a re-establishment of the Summerhouse restaurant and kiosk with a facility which would include a takeaway food kiosk, café/restaurant featuring indoor and outdoor dining and a function room facility. The development application was impact assessable.

The development application was refused by the respondent because the proposed uses and the intended scale of the development were in conflict with the various components of the planning scheme in its full context and the respondent considered its location, design and impacts were not appropriate or acceptable.

Issues raised in the appeal included town planning (parkland focussed), heritage values, amenity (including noise and traffic) and arboreal.

Decision

Given that the proposed development was impact assessable, his Honour noted that the proposed development was required to be assessed against the whole of the planning scheme. His Honour further noted that the Planning and Environment Court (**court**) was required to consider the decision and to identify the nature and extent of the conflict and to assess, in the context of the planning scheme as a whole, whether there were planning grounds of sufficient weight to justify an approval, despite the conflict and bearing in mind the proscription in the repealed *Integrated Planning Act 1997* against prohibiting development.

His Honour did not believe the proposed development would create an additional risk of the spread of "phellinus noxious" (being an arboreal issue contended by the respondent). His Honour was satisfied that it was not necessary to apply the precautionary principles with respect to the issue and held that the issue alone could not reasonably justify a refusal of the development application.

His Honour however found that the proposed facility was a commercial development in New Farm Park and its scale and intensity were significant and the permanent function room was such that the entire proposed development as a complex was a destination, rather than a facility which would support or was merely ancillary to other uses within New Farm Park.

His Honour disagreed with the appellant's submission that "*if there is conflict, it is at the minor or lower end of the spectrum*". In his Honour's view, the proposed development was in significant conflict with a number of provisions of the planning scheme, in particular, its adverse impact on the heritage values of New Farm Park and the amenity of the adjacent residential areas (due to the size, scale and intensity of the proposed development) and the traffic (primarily parking) and noise (primarily hours of operation) issues arising out of the proposed development.

His Honour did not consider there were sufficient grounds to approve the proposed development despite the conflict with the planning scheme and accordingly, held that the appeal be dismissed.

Held

The appeal was dismissed.

Constitutional challenge to operate an aircraft

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Douglas William McIllwraith v Scenic Rim Regional Council* [2010] QPEC 126 heard before Robin QC DCJ

Case

This was an appeal by Douglas William McIlwraith (**appellant**) against the decision of the Scenic Rim Regional Council (**council**) to approve the appellant's development application for a development approval dated 14 May 2007.

Facts

The appellant lodged with the council a development application for a development approval dated 14 May 2007 to operate a private airstrip (**development application**). A decision of the council dated 1 February 2008 (**council's decision**) approved the development application.

The appellant appealed to the Planning and Environment Court (**P&E Court**) against the council's decision and sought the following orders or judgment:

- any necessary extension of time pursuant to section 4.1.55 (Court may allow longer period to take an action) of the *Integrated Planning Act 1997*;
- the development application be declared void as the council's decision was not required;
- costs.

The appellant filed an application in pending proceeding in the P&E Court on 1 November 2010 seeking, amongst others, an order that:

> *... it be determined as a preliminary point in the proceeding that the respondent does not have the legislative power under the Integrated Planning Act 1997 to regulate the operation of aircraft on, from and above the surface of the Applicant's land because the whole of the surface of the relevant land is subject to the constitutional control of the Commonwealth of Australia by the promulgation of Danger Area 673 such that any express or implied function pursuant to the Integrated Planning Act 1997 is rendered invalid by s 109 of the Australian Constitution.*

Decision

His Honour observed that the appeal was a constitutional challenge based on section 109 (Inconsistency of laws) of the Constitution of the Commonwealth and the appellant's proposition was that the matters the subject of the appeal were regulated federally and that the State or its local governments played no role in them.

Given that the appeal was a constitutional challenge under the Constitution of the Commonwealth, the council raised the relevance of section 78B (**Notice to Attorneys-General**) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and its impact which, to some extent, refrained the court from dealing with the appeal.

His Honour however believed that whilst any directions given by the court might prove of little value if an Attorney-General intervened, it was within the power of the court to give directions to the parties to prepare affidavit material and exchange it between the parties.

The appellant had in fact advised the Commonwealth and six State Attorney-Generals of the appeal and received a written indication of a lack of interest in taking steps in the appeal, except for the Attorney-Generals for Queensland and Western Australia. His Honour however noted that the P&E Court could not assess the adequacy of the steps taken by the appellant in advising the Attorney-Generals of the appeal in the absence of proper evidence, in particular, the Attorney-Generals were not given the appeal document. In any case, his Honour was of the view that the Attorney-Generals might not have been given a "reasonable time" as required by section 78B (Notice to Attorneys-General) of the Judiciary Act to consider the matter the subject of the appeal as they only had one month to do so.

The council further contended that the appellant had not established that it had notified the concurrence agencies and submitters in respect of the development application as well as the Chief Executive of the appeal. The appellant argued that the constitutional issue was being dealt with as a preliminary point pursuant to Rule 19(5) (Orders or directions) of the *Planning and Environment Court Rules 2010* and it was not necessary for the submitters to be involved in such exercise. His Honour however considered it to be appropriate, as a matter of caution, if the submitters and the concurrence agencies were to be notified of the appeal.

His Honour considered the relief which sought an extension of time should perhaps be dealt with first because the appeal has been commenced "well out of time" and there might be little point in an attempt to ventilate the constitutional issue if the appeal could not be entertained by the P&E Court at all.

His Honour noted it might be appropriate that if the issue of delay could not be overcome, the appellant might proceed by way of an originating application seeking a declaration to the effect that the development application and the council's decision were void. To that end, the appellant submitted that the P&E Court could direct that the notice of appeal filed by the appellant be treated as an originating application pursuant to Rule 14 (Proceeding incorrectly started by application) of the *Uniform Civil Procedure Rules 1999*. Whilst his Honour expressed some doubts on the proposition submitted by the appellant, given that the parties have not had an opportunity to prepare, his Honour ordered that:

- the appeal be adjourned for a mention on 9 December 2010;
- the appellant be entitled to have returnable, together with the appeal, any originating application which may be filed for the purposes of regularising procedural matter if so advised.

Held

The appeal was adjourned for a mention on 9 December 2010.

Approval in part not qualified

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Metroplex Management Pty Ltd v Brisbane City Council & Ors* [2010] QCA 333 heard before McMurdo P, Chesterman JA and Atkinson J

Case

This case was an application for leave to appeal the Planning and Environment Court's (**P&E Court**) decision to dismiss Metroplex Management Pty Ltd's (**Metroplex**) appeal to that court. Metroplex appealed to the P&E Court the Brisbane City Council's deemed refusal of its development application for a preliminary approval under section 3.1.5 (Approvals under this Act) of the *Integrated Planning Act 1997* (**IPA**) over a large site near the Ipswich Motorway and Centenary Highway interchange.

Facts

The area of the site was a little over 109 hectares and was designated Special Purpose Area SP3 – Major Defence and Communication Facility but that designation had been overtaken by events and was no longer appropriate.

The proposal identified three precincts into which the site was to be divided for the purposes of development. One precinct was a Waterways and Open Space Precinct of 11.554 hectare. There was also to be a Metroplex Industry Precinct of 80.541 hectare. The industry precinct was to be developed for three uses – Industry in accordance with the *Brisbane City Plan 2000* (**City Plan**) definition, Warehouse in accordance with the definitions in the City Plan including ancillary office space and Offices not ancillary to the proposed industry or warehouse which would allow up to 98,000m^2 for offices.

The development application ran into trouble because of that part of the proposal which would have allowed the development of up to 98,000m^2 of office space unconnected with the proposed industrial use or warehousing. Such a large office component conflicted with the Southeast Queensland Regional Plan which identified the Ipswich CBD and Springfield as the proper locations for offices in Brisbane's west. Faced with this obstacle, Metroplex asked the P&E Court to approve its development application in part by excluding from the Metroplex Industry Precinct the component of non-ancillary office space.

The P&E Court declined to approve part of the development application and the primary judge ruled that he had no power to do so. In its application for leave to appeal the P&E Court's decision Metroplex submitted that the opinion of the primary judge contained a legal error and that there was no implied limitation on the P&E Court's power to approve part of an application.

Decision

The council submitted, both before the P&E Court and the Court of Appeal (**court**) and the primary judge accepted, that the limitation on approving changed applications found in section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA that a change to an application be only a minor change, should be implied into the power under section 3.5.11 (Approvals under this Act) of the IPA to approve an application in part.

Metroplex submitted in the court that that interpretation of the IPA was erroneous and that the power to approve part of an application was, according to the terms of section 3.5.11 (Approvals under this Act) of the IPA, unqualified.

Chesterman JA found that there was nothing in the terms of either section 4.1.52(2)(b) (Appeal by way of hearing anew) or 3.5.11 (Approvals under this Act) of the IPA which made the provisions of one relevant to the other, noting that neither was made subject to the other, neither refers to the other and these sections deal with different subject matter. Section 3.5.11 (Approvals under this Act) of the IPA had as its subject matter, the approval of applications in whole or in part or their refusal. Section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA has as its subject matter, the approval of an application by the court which differed from the application made to the assessment manager.

McMurdo P, with whom Atkinson J agreed, considered that the court's construction in *SLS Property Group Pty Ltd v Townsville City Council & Anor* [2009] NSW LEC 133 of section 3.5.11 (Approvals under this Act) of the IPA and its interaction with section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA was correct. In SLS Property Group, the Court of Appeal found that where the only material difference between the application and the approval is that the development approved is part of the development for which the application was made, the case falls, prima facie, within the terms of section 3.5.11 (Approvals under this Act) of the IPA. For a viable argument to arise that the case was outside section 3.5.11 (Approvals under this Act) of the IPA, there must be features of the development which was approved which justified characterising that development as something materially different from that which was applied for, other than the mere fact that it was part of what was applied for. Her Honour found that this was a sensible and workable way of marrying the two provisions, consistent with the purpose of the IPA.

Chesterman JA, with whom McMurdo P and, consequently, Atkinson J agreed, found that the terms of section 3.5.11 (Approvals under this Act) of the IPA and the authority of SLS Property Group meant that the primary judge erred in his construction of that section. McMurdo, with whom Atkinson agreed, found that the primary judge erred in law in considering that the power under section 3.5.11 (Approvals under this Act) of the IPA to approve an application in part was qualified on an appeal to the P&E Court by the requirement of section 4.1.52(2)(b) (Appeal by way of hearing anew) of the IPA that the court must not consider a change to the application unless the change is only a minor change.

Held

The application for leave to appeal was granted and the appeal allowed setting aside the order of the primary judge. The matter was remitted to the P&E Court to be determined according to law.

Court of Appeal confirms decision of Planning and Environment Court

Samantha Hall

This article discusses the decision of the Queensland Court of Appeal in the matter of *Eames v Brisbane City Council & Anor* [2010] QCA 326 heard before Holmes and Muir JJA and Mullins J

Case

This case relates to an application for leave to appeal to the Court of Appeal (**court**) the decision of the Planning and Environment Court (**P&E Court**) in *Eames v Brisbane City Council & Anor* [2010] QPEC 14, which was discussed in our April 2010 publication of Legal Knowledge Matters.

The application to appeal to the court was premised on an error of law by the P&E Court in deciding the preliminary point of whether the development application was properly made, in that owner's consent was not obtained for land which had the benefit of an easement because of an inconsistency with the terms of the easement. The P&E Court held that owner's consent was not required as there was no inconsistency between the proposed development and the terms of the easement.

Facts

The proposed development was to gain sole vehicle access to and from the development land via an easement over a neighbouring lot. The applicant was the owner of land that adjoined the proposed development which also had the benefit of access via the easement.

The issue for determination by the P&E Court was whether the material change of use the subject of the proposed development included waste disposal and whether the method of collection of waste was inconsistent with the terms of the easement which was for access only.

In his judgement at first instance, his Honour Judge Rackemann found that the activity of vehicles entering on the land, stopping and collecting the rubbish was an activity that already happened and was not a function of the material change of use, meaning any inconsistency was not something generated by the material change of use.

On appeal to the court, the appellants argued that the primary judge erred in his categorisation of the use and further argued that there was no right granted by the easement that would allow rubbish collection trucks to stand in the easement while collecting the rubbish.

Decision

In the Court of Appeal's judgment, her Honour Justice Mullins observed that the matter was complicated as it was a consideration of whether there was a properly made application after the imposition of conditions relating to waste collection. Her Honour held that the issues should be considered primarily in the context of the application lodged with the council rather than focusing on the conditions of the development approval relating to waste collection.

In determining whether there was a properly made development application, the court referred to *Barro Group Pty Ltd v Redland Shire Council* (2009) 169 LGERA 326. However it was able to distinguish the current appeal. Unlike the application in *Barro*, the development application in question disclosed the terms of the easement and did not expressly propose any activities on the easement which prima facie fell outside the terms of the grant under the registered easement.

The court noted that the manner in which rubbish was collected previously (ie rubbish collection trucks entering and stopping on the easement) was not the only method available. The terms of the easement allowed for the wheelie bins from the development to be wheeled to the street for collection. It was found that the second respondent always intended to observe the terms of the easement in connection with the development and the development was able to proceed consistent with that expressed intention.

Held

It was held that the development application was properly made and the application for leave to appeal was dismissed with costs.

COLIN BIGGERS & PAISLEY LAWYERS

Costly consequence of failure to comply with environmental protection orders

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Chief Executive Department of Environment & Resource Management v Hole & Anor* [2010] QPEC 118 heard before Britton SC DCJ

Case

This was an application by the Chief Executive, Department of Environment and Resource Management (**DERM**) under rule 899 (Substituted performance) of the *Uniform Civil Procedure Rules 1999* (**UCPR**) for substituted performance of an order of the Planning and Environment Court (**P&E Court**) made on 26 February 2010 (**order**).

The order required Hole, the first respondent, to comply with the requirements of an Environmental Protection Order (**EPO**) dated 29 October 2008 issued by DERM in respect of activities on land described as Lot 1 on RP 212094 situated on the corner of Lancaster Street and Thackeray Street, Toowoomba (**premises**). The order also required Hole to comply with condition E5 of a development permit dated 23 June 2004 issued by Toowoomba City Council in respect of the premises (**development permit**).

Facts

The premises were formerly used by Hole to carry on a business as a tyre recycling facility. Condition E5 of the development permit relevantly provided as follows:

> *The total quantity of waste tyres stored at the authorized place for recycling must not exceed an amount equal to 3000 passenger car tyres in whole or equivalent parts.*
>
> *Note: Tyres must be stored in lots of no more than 300 to allow access in the event of an emergency.*

On or about 14 December 2007, DERM became aware that the number of tyres stored on the premises exceeded the number permitted by the development permit and was estimated to be approximately 180,000.

DERM proceeded to take enforcement actions against Hole to seek to achieve compliance by Hole with the development permit. DERM issued several environmental protection orders, the final EPO being issued on 29 October 2008, which required Hole to remove all tyres and parts of tyres from the premises in order to comply with condition E5 of the development permit. The EPO was the subject of the order made by the P&E Court on 26 February 2010.

The affidavit material provided by DERM established non-compliance with the EPO. Moreover, it was established that upon an inspection of the premises by DERM, there had been no significant change to the number of tyres stored at the premises since the order was made.

It was also submitted that the breach of condition E5 of the development permit was not merely a technical one and that a catastrophic fire at the premises would have the potential to have a significant adverse effect on the environment and human health and safety.

The premises had been owned by Rhode, the second respondent, and were rented to Hole pursuant to an arrangement entered into on 1 June 2005. That arrangement was subsequently terminated on or about June 2008 and Hole was no longer entitled to be in occupation of the premises.

Rhode deposed to a number of facts which supported the application made by DERM and indicated that she had been suffering financial hardship due to not receiving any rent from Hole since June 2008 and that she was unable to let the premises to another tenant until the tyres were removed.

The application the subject of the appeal was for an order that the P&E Court appoint DERM to perform all acts necessary to ensure the number of tyres stored on the premises complied with condition E5 of the development permit. An order was also sought that Hole pay DERM's costs and expenses caused by his failure to comply with the order including the costs to be incurred by DERM under the order sought.

Decision

Rule 889(1) (Substituted performance) of the UCPR provides that if a non-money order requires a person to perform an act and the person does not perform the act, the court may appoint another person to perform the act and order the person liable under the order to pay the costs and expenses caused by the failure to perform the act.

The P&E Court indicated that the grant of the relief sought by DERM was discretionary and rule 889 (Substituted performance) of the UCPR did not attempt to fetter the exercise of the discretion by the P&E Court.

His Honour Judge Britton SC was satisfied that the failure by Hole to remove the tyres at the premises constituted a significant risk to the environment in the event of a fire occurring.

Hole had a public duty to comply with the conditions of the development permit to operate the type recycling business, an environmentally relevant activity, under the *Environmental Protection Act 1994* (**EPA**) and to comply with the general environmental duty under section 319 (General environmental duty) of the EPA.

The purpose of the application by DERM was to enforce compliance with those duties. Moreover, it was in the public interest that compliance with those duties be enforced.

The P&E Court was satisfied that it was appropriate to make the order sought by DERM.

Held

The P&E Court made an order in the terms sought by DERM, that it be appointed to perform all acts necessary to ensure that the tyres stored on the premises complied with condition E5 of the development permit. Hole was required to pay DERM's costs and expenses caused by his failure to comply with the order and the costs to be incurred by DERM under the order for substituted performance.

COLIN BIGGERS & PAISLEY LAWYERS

Exercise of discretion to grant enforcement orders

Samantha Hall | Katherine McGree

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Patella Properties Pty Ltd & Ors* [2010] QPEC 122 heard before Robertson DCJ

Case

This was an application by the Sunshine Coast Regional Council (**council**) for a declaration and enforcement orders in the Planning and Environment Court (**P&E Court**) as to whether the respondent property developers had a development approval for a material change of use of premises (**MCU approval**) and whether they had committed breaches of the MCU approval.

Facts

Mr and Mrs Patella, a married (now separated) couple, operated two successful property development companies. Each of Mr and Mrs Patella and the companies were respondents in this application (referred to collectively as Patella).

Patella purchased a 7.29 hectare property at Buderim in April 2006. The initial intention for the site was to build a residence with rooms that could accommodate private yoga classes, spiritual lectures and gatherings. The council granted an operational works permit for works to service the residence.

By late 2006, Patella sought to develop the property as a community facility which could be hired for the purposes of yoga classes, spiritual lectures and gatherings and Patella lodged the associated material change of use application (**MCU application**). The MCU application was deemed to be refused by the council after long delays but was subsequently approved with conditions by the P&E Court after the parties negotiated a consent order.

As part of the narrowing of the issues, it was necessary for the P&E Court to determine whether the development approval for material change of use had been abandoned. Mrs Patella, as the owner of the land at the time of the proceedings, had stated unequivocally in an affidavit that the material change or use had been abandoned. The issue was whether this statement of intention was confirmed by an action or conduct.

In draft orders before the P&E Court, the Patella's acknowledged the commission of a development offence by contravening the permit for operational works in relation to the construction of the driveway. Specifically the driveway constructed had a two lane carriageway with a guard rail, and had used fill to widen the approved road base whereas the permit limited the driveway to a single lane with three overtaking bays and the widening of the road base by cut only.

In these circumstances the P&E Court's discretion to make enforcement orders was engaged. The factors considered in the exercise of the discretion included:

- Mr and Mrs Patella's genuine desire to give something back to the community;
- the unlikelihood that a successful developer against whom no previous breach of planning law was alleged would wilfully ignore conditions to achieve a development for no commercial return;
- the development of the site had been financially and emotionally costly for Mr and Mrs Patella, and was likely a contributing factor to their marriage breakdown;
- Mr Patella had a transformative and positive change of attitude during the course of the proceedings;
- council officers by issuing a variety of stop work, compliance and demand notices but not following through after no action was taken or a letter was received from a Patella consultant, demonstrated an ambivalent attitude towards alleged breaches of permits and local laws;
- if council officers had followed through with earlier demands the dispute may never have eventuated;
- there had been long and unacceptable delays in the assessment process;
- the evidence of the council's engineer was not confined to observations and opinions framed by his expertise as an engineer and he had allowed himself to become an advocate for the council.

Decision

His Honour Judge Robertson determined that the use as a community facility pursuant to the MCU approval had been abandoned because the strong expression of intent by the landowner was accompanied by actions, including that Mr Patella had directed a spiritual teacher to the effect that the premises were no longer available for meetings.

His Honour also held that the appropriate response to Patella's conduct was the exercise of the P&E Court's discretion to grant enforcement orders. To do so would send a strong message to any developer who may think to proceed with a development without proper approvals or to act contrary to the conditions of permits given.

Held

Application for enforcement orders granted.

Jurisdictional limits of the building and development committee

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Building and Development Committee in the matter of *Fraser Coast Regional Council v Lawton* [2010] QPEC 149 heard before Robin QC DCJ

Case

This case concerned an appeal by the Fraser Coast Regional Council (**appellant**) against a decision of the Queensland Building and Development Committee (**B&DC**) to set aside a decision of the appellant, which prohibited the construction of a shed on land owned by Mr & Mrs Lawton (**respondents**).

Facts

On 17 March 2010, the respondents lodged a development application with the appellant for a preliminary approval for building work for a proposed garage to be sited on their land at Livistonia Drive, Poona. The appellant approved the application subject to conditions, one of those being a condition not to commence construction of the garage until obtaining building works approval for a "detached house". The appellant's primary justification for imposing such a condition was based upon the concern about the proliferation of large garages of the kind proposed. The proposed garage was of a size which would permit use for accommodation and the appellant considered that it did not satisfy its vision for residential development and would be unwelcome to residents of conventional detached dwellings.

The respondents successfully appealed the appellant's decision to the B&DC on the basis that the condition was inappropriate and unreasonable. The B&DC held that the proposed garage did not impact on the neighbourhood as its intent was for storage of maintenance equipment, not for habitation. Furthermore, it was held the existing planning scheme did not support such a condition and that there were a number of sheds of similar size and location already in existence within the immediate neighbourhood which had received approval.

Appeals to the B&DC are available for members of the public not satisfied with decisions made by local government and private certifiers. Appeals can be heard about matters such as sitting requirements, inspections of building work, swimming pool fencing, fire safety, pluming and drainage, compliance assessment, limited development approvals and errors in infrastructure charges notices. The B&DC has limited jurisdiction to decide certain matters defined in legislation such as the *Sustainable Planning Act 2009* (**SPA**).

On 16 August 2010, the appellant appealed to the Planning and Environment Court of Queensland (**P&E Court**) arguing that the respondent's appeal to the B&DC was not within jurisdiction of the B&DC under either the SPA or the *Sustainable Planning Regulations 2009* (**SPR**). Appeals against decisions of the B&DC are made pursuant to section 479 (Appeals from building and development committees) of the SPA, which provide grounds where there was an error or mistake in law on the part of the committee, or that the committee had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

Decision

His Honour Robin allowed the appellant's appeal on the basis that the B&DC had no jurisdiction to make the decision. His Honour assessed the appeal provisions in chapter 7, part 2, division 4 (Appeals to committees about development applications and approvals), division 5 (Appeals to committees about compliance assessment), and division 6 (Appeals to committees about building, plumbing and drainage and other matters) of the SPA and found no section which identified jurisdiction upon the B&DC to hear the respondent's appeal.

His Honour noted at p.15 that:

> *As things stand there is no basis emerging on which the court might take issue with Mr Connor's submission which is essentially that he's identified the full extent of the committee's appeal jurisdiction which leads to the conclusion that it doesn't extend so far as to letting the Lawton's appeal.*

Held

The appellant's appeal was allowed and the B&DC's determination was set aside.

No standing means no proceeding

Samantha Hall | Ronald Yuen

This article discusses the decision of the Queensland Court of Appeal in the matter of *Crowther v Brisbane City Council* [2010] QCA 348 heard before Margaret McMurdo P, Holmes JA and Chesterman JA

Case

This was an appeal to the Queensland Court of Appeal against the decision of the Queensland Planning and Environment Court (**P&E Court**) to strike out the appellant's application to restrain the Brisbane City Council (**council**) from carrying out works in the Yeronga Memorial Park for want of jurisdiction.

Facts

The council proposed to carry out works by way of removal and replacement of trees in the Yeronga Memorial Park pursuant to an exemption certificate under part 6 (Development in Registered Places) division 2 (Exemption Certificates) of the *Queensland Heritage Act 1992*.

The appellant made an application to the P&E Court and sought an injunction against the council from removing the trees, in reliance of provisions of the *Nature Conservation Act 1992* (**NCA**) and the *Environmental Protection Act 1994* (**EPA**). The P&E Court held that the appellant had not established that the P&E Court had jurisdiction to deal with the application and it was therefore struck out for want of jurisdiction.

The appellant sought leave to the Court of Appeal to appeal the decision of the P&E Court.

On appeal, the appellant did not rely on provisions of the NCA but continued to rely on section 505 (Restraint of contraventions of Act etc) of the EPA as a source of jurisdiction. It was contended that the appellant was "*a person whose interests were affected by the tree removal*" for the purpose of section 505(1)(c) (Restraint of contraventions of Act etc) of the EPA or alternatively, the appellant was someone who could bring the proceedings with leave of the court under section 505(1)(d) (Restraint of contraventions of Act etc) of the EPA.

Decision

Justice Holmes gave the leading judgment which was supported by Justice McMurdo and Justice Chesterman.

Standing

The court noted that, even if there were offence provisions under the EPA which might be favourable to the appellant and relevant to the application (a point on which the Court did not make a final determination), the question as to whether the appellant was entitled to commence a proceeding to restrain such an offence still remained.

The court considered section 505(1)(c) (Restraint of contraventions of Act etc) and section 505(1)(d) (Restraint of contraventions of Act etc) of the EPA and also their operation as a whole. The court observed that, persons with interests in the nature of "*proprietary, material, financial or special interest*" which were affected by the activities in question, might proceed under section 505(1)(c) (Restraint of contraventions of Act etc) of the EPA or otherwise, leave of the court must be sought under section 505(1)(d) (Restraint of contraventions of Act etc) of the EPA.

In the court's view, if an individual whose interests in the subject matter were limited to "*a mere intellectual or emotional concern with the only advantage to be gained*" being "*the satisfaction of righting a wrong, upholding a principle or winning a contest*", such an individual would not be "*someone whose interests are affected*" for the purpose of section 505(1)(c) (Restraint of contraventions of Act etc) of the EPA.

The court did not believe the appellant would fall within section 505(1)(c) (Restraint of contraventions of Act etc) of the EPA as the appellant's interests were not affected by the removal of the trees, although the appellant was "*interested in the fate of the trees*".

The court noted that the appellant could have sought leave of the court under section 505(1)(d) (Restraint of contraventions of Act etc) of the EPA but the appellant did not do so. Nonetheless, the court noted that the appellant had not given written notice to the Minister or relevant authority asking the Minister or the authority to bring a proceeding under section 505(2) (Restraint of contraventions of Act etc) of the EPA, which, amongst other things, the court must be satisfied with prior to deciding to grant leave.

The court dismissed the appellant's allegation that as the appellant was not given the opportunity to submit further material in respect of the appellant's standing there was a breach of natural justice. The appellant's request to tender such further material was rejected on the obvious basis that it was "*immaterial to the correctness*" of the decision of the P&E Court.

The appellant's application for leave to appeal was dismissed.

Costs

In light of the dismissal of the appellant's application for leave to appeal, the respondent sought its costs of the application. The appellant contended that costs should not be awarded to the respondent as the application was in the public interest. The court disagreed with the appellant's contention that the application had a public interest element and concluded that costs be awarded to the council but only limited to the costs of one junior counsel in respect of counsel's costs, as the court did not believe the appellant's application warranted the council briefing two counsel.

Held

Orders were made that:

- the appellant's application to adduce further evidence was refused;
- the appellant's application for leave to appeal was dismissed; and
- costs were awarded to the respondent but restricted in respect of counsel's costs to the costs of one junior counsel.

Change to proposal not substantially different

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Minamarc Pty Ltd v Gold Coast City Council & Anor* [2010] QPEC 146 heard before Robin QC DCJ

Case

This was an application by the parties to resolve an appeal, made by Minamarc Pty Ltd (**appellant**) against a decision of the Gold Coast City Council to refuse the appellant's development application, by allowing the appeal and granting an approval on conditions.

The issue for the court was whether changes to the proposed development arising from negotiations between the parties represented a minor change.

Facts

The changes to the proposed development included the following:

- an increase in number of dwellings from 96 to 125;
- an increase in number of bedrooms from 272 to 319;
- an increase in maximum building height from two storeys to four storeys;
- a reduction in site coverage from 19.9 percent to 13.1 percent;
- a reduction in car parking spaces from 260 to 243.

The changes would result in a 17 percent increase in bedrooms compared with an approximately 30 percent increase in dwellings. The appellant focussed on the increase in bedroom numbers arising from the change as a fair indicator of increasing impacts of proposed development on local services and infrastructure.

Decision

By virtue of section 819(2) (Appeals to court − generally) of the *Sustainable Planning Act 2009* (**SPA**), the court was required to decide the appeal as if the SPA had not commenced. However, section 821 (Application of repealed IPA, section 4.1.52) of the SPA relevantly provided that minor change issues were to be dealt with by reference to the definition of minor change in section 350 (Meaning of minor change) of the SPA.

The relevant consideration for the court was that referred to in section 350(1)(d)(i) (Meaning of minor change) of the SPA which provided that a minor change was a change that "*does not result in a substantially different development*".

The court also had regard to the Department of Infrastructure and Planning's *Statutory Guideline 06/09 Substantially different development when changing applications and approvals*. The guideline referred to whether the changes would increase the severity of known impacts and have "*impacts on infrastructure provision from a location or demand*". Having regard to the 17 percent increase in intensity of bedrooms, the court held that the change would not have a significant impact on infrastructure provision or demand.

The other issue for consideration was whether the variation would dramatically change the built form of the development in terms of scale. It was held that the impact of the change would not dramatically change the built form of the proposed development.

His Honour Judge Robin also referred to the similar case of *Auspacific Engineers Pty Ltd v Scenic Rim Regional Council & Ors* [2010] QPEC 117 wherein a one-third increase in the number of residential lots proposed was held to be a minor change.

Held

The court held that the changes proposed did not result in a substantially different development and accordingly, the appeal was approved.

COLIN BIGGERS & PAISLEY LAWYERS

What is in a definition? Everything!

Samantha Hall | Diane Coffin

This article discusses the decision of the Queensland Court of Appeal in the matter of *Sunshine Coast Regional Council v EBIS Enterprises Pty Ltd* [2010] QCA 379 heard before McMurdo P, Chesterman JA and Philippides J

Case

This case was an application to the Court of Appeal by EBIS Enterprises Pty Ltd (**EBIS**) for leave to appeal the Planning and Environment Court's (**P&E Court**) decision to uphold the Sunshine Coast Regional Council's (**council**) originating application which sought an enforcement order pursuant to section 4.3.26 (Effect of orders) of the *Integrated Planning Act 1997* (**IPA**) directing EBIS to cease the use of land at 26 Ascot Way, Little Mountain for the purpose of an 'accommodation building' as defined in the *Caloundra City Plan 2004* (**plan**) until an effective development permit authorising such use was obtained.

Facts

The premises at 26 Ascot Way which was located in the Rural Residential Settlement precinct, consisted of a large house set on 4,000m^2 of land. The premises had 6 bedrooms, 4 bathrooms and a large theatre/entertaining room as well as separate living and dining areas. The property was owned by EBIS whose directors, Mr and Mrs Stanfield, sometimes live in it but frequently let it to groups of people not exceeding 20 people. The average length of tenancy was short, usually only 2 or 3 days but on occasion the letting period was for a week or two.

The council's originating application set out the grounds on which the council relied for its enforcement order as follows:

> *2. For the purposes of Caloundra City Plan 2004:*
>
> *(a) the land is ... in the Rural Residential Settlement precinct …;*
>
> *(b) an accommodation building', as defined, constitutes assessable development in the … precinct.*
>
> *3. The (applicant) has, or caused to permit, (sic) the land to be used for the purpose of an 'accommodation building' ... without an effective development permit. ...*
>
> *4. The use of the land ... for the purpose of an 'accommodation building':*
>
> *(a) constitutes assessable development for the purposes of (IPA); and*
>
> *(b) undertaken in the absence of an effective development constitutes a development offence ... .*

In the plan, 'accommodation building' was defined to mean "*a use of premises for residential accommodation which does not comprise dwelling units*". The plan also defined 'dwelling unit' to mean "*any building or part of a building comprising a self contained unit designed, adapted or used for the exclusive use of one household*". There was no doubt that the premises were used for residential accommodation but EBIS contended that the premises did not satisfy the definition of 'accommodation building' because the house was a 'dwelling unit'.

EBIS also contended that its premises came within the plan's definition of 'detached house'. The use of premises as 'accommodation building' constitutes assessable development in the Rural Residential Settlement and as such required a development permit which EBIS did not have. However, if the premises fit the definition of 'dwelling unit' it would be a detached house and would not be an accommodation building.

The P&E Court judge held that the premises was not a dwelling unit stating that contained within the definition of dwelling unit is a "*use*" notion that the dwelling unit is to be 'used' by a household. The P&E Court judge also found that the combined effect of the definition of 'detached house' together with the categorisation of properties in section 3.2.2 of the plan meant that the premises could not be described as a 'detached house' because of the short term nature of the accommodation. The P&E Court judge finally found that the premises were an 'accommodation building' because the building was not used for the exclusive use of one household.

Decision

Chesterman JA, with whom McMurdo P and Philippides J agreed, stated that the question for the P&E Court was whether the premises comprised a dwelling unit. In coming to the decision that the P&E Court judge did, Chesterman JA noted that there were 2 errors in the approach taken by the P&E Court judge to interpret the plan.

The first error was to rely on a flowchart in section 3.2.2 of the plan to alter the definition of 'detached house'. Chesterman JA stated that there was nothing in the explicit definition of 'detached house' which made premises a detached house only if used for long term accommodation. There was, with respect to the P&E Court judge, no warrant for altering the express terms of the definition by reference to the flowchart in section 3.2.2 of the plan. Chesterman JA stated that if the words used in the definition in the plan were not to mean what they say, the manner in which, and the means by which, they depart from their ordinary meaning should appear with unambiguous clarity in the plan itself. Chesterman JA further stated that there was no indication that the definitions were not to be read as they were written.

The second error was to disregard the terms of the definition of 'dwelling unit', being a building comprising a "*self contained unit designed, adapted or used for the exclusive use of one household*". The P&E Court judge held that the premises were not used for the requisite exclusive use of one household but did not consider whether the house was designed or adapted for the exclusive use of one household. Chesterman JA found that the premises appeared to have been designed as a large family residence and noted that it was common ground between the parties that the building was designed for the exclusive use of one household. In Chesterman JA's opinion the words of the definition of 'dwelling unit' should be given their ordinary meaning and that a building will be a dwelling unit if it was designed, or adapted or used for the exclusive use of one household. The premises in question was designed for the requisite use.

Held

It was held that:

- leave granted to appeal;
- appeal allowed;
- order of the P&E Court set aside and instead ordered that the council's originating application be dismissed;
- council to pay EBIS's costs of the application for leave to appeal to be assessed on the standard basis;
- parties to provide written submissions on the question of costs of the P&E Court proceeding.

COLIN BIGGERS & PAISLEY LAWYERS

Proposed development exceeds scope of existing easement

Samantha Hall | Katherine McGree

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MC Property Investments Pty Ltd v Sunshine Coast Regional Council & Ors* [2010] QPEC 145 heard before Robertson DCJ

Case

This was an interlocutory application by MC Property Investments Pty Ltd (**MC Property**) to the Planning and Environment Court (**P&E Court**) to determine whether a development application for a material change of use was a "properly made application" within the meaning of section 3.2.1(7) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**). The proposed development involved the construction of ramps within an existing easement over adjoining land owned by BP Australia Limited (**BP**). The written consent of BP did not accompany the development application.

Facts

MC Property proposed to develop a new building structure at 7172 Bruce Highway, Forest Glen, involving ramps for vehicular movement to be accommodated within an existing easement over the adjoining BP site. Within the existing easement there was a suitably formed concrete driveway providing access to MC Property's site.

BP's land was included in the description of the relevant land in the development application (as was required). However, BP's consent was not provided on the basis that MC Property's town planner, in a letter which accompanied the application, had referred to the easement and relied on section 3.2.1(12) (Applying for development approval) of the IPA as justification for the absence of BP's consent on the basis that "*the development is not inconsistent with the easement*".

The purpose of the registered easement was as a "Right of Way". Its scope included:

> *Full and free right and liberty for (MC Property) … to enter leave go pass re-pass along through over and across (BP's site) … for all lawful purposes connected with the use and enjoyment of the (MC Property's site) … for what sort of a purpose as (MC Property's site) … may from time to time be used and enjoyed.*

The terms of the easement did not include any express right to construct a structure in the easement although did contain a limited right to construct for the purposes of providing utilities and services to MC Property's site.

The questions before the court were:

- whether the easement was an all purposes easement within which the construction of the ramps for the purpose of access to the proposed development was permitted; and
- whether the construction of the ramps was contemplated as part of the ancillary rights necessary for the enjoyment of the rights expressly granted by the easement.

Decision

His Honour Judge Robertson referred to the well established legal principle that "*the scope of rights granted by a registered easement does not extent further than those rights granted by reference to the plain meaning of the words used in the easement itself*". Applying that principle his Honour held that the easement, being qualified by the words "*for all lawful purposes connected with the use and enjoyment of the (MC Property's site) … for what sort of a purpose as (MC Property's site) … may from time to time be used and enjoyed*", was not for all purposes.

His Honour considered that the easement would include a right to construct improvements on BP's site where necessary and convenient for the exercise of the rights conferred by the easement but that the ramps were not needed for access from the Bruce Highway off ramp across BP's land to MC Property's site. Instead the ramps were needed because MP Property proposed a multi level building which had as part of its design external ramps over BP's site. His Honour held that the construction of the proposed ramps would impose a burden on BP's site not intended by the original grant of easement.

Held

Finding that the construction of the ramps was inconsistent with the terms of the easement, his Honour ordered that the parties were to be heard as to the appropriate orders.

Permissible change for increase in accommodation units

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *RSA (Moorvale Station) Pty Ltd v Isaac Regional Council* [2010] QPEC 147 heard before Robin QC DCJ

Case

This was an application to the Planning and Environment Court (**P&E Court**) for a "permissible change" under the *Sustainable Planning Act 2009* (**SPA**) to an existing development approval for a new use to accommodate 400 accommodation units for miners.

Facts

The application to the P&E Court proposed that the number of accommodation units be increased from 400 to 440, an increase of 10 percent of the approved amount.

The application for the proposed change was supported by the Isaac Regional Council and the Department of Environment and Resource Management.

The interesting point to arise in this case was that the development was already fully constructed and operating and rather than lodging a fresh development application for the increase in accommodation units, the applicant relied on the SPA provisions to allow the expansion. His Honour in reference to this described it as "an intriguing concept".

Decision

The question before his Honour was whether the change resulted in a substantially different development. His Honour decided that the proposed change did not and provided as follows:

> *… I think that the court's obligations under section 4 and 5 of the SPA to promote efficiency, accountability, coordination and the like in respect of decision making processes indicates that the court ought to grant the relief sought. I don't find anything in the SPA which would stand in the way of the relief sought being granted, especially in circumstances where all concerned are supportive.*

Held

The proposed change, the subject of the application, was held to be a "permissible change" under the SPA.

COLIN BIGGERS & PAISLEY LAWYERS

Frivolous or vexatious proceedings

Samantha Hall | Aaron Madden

This article discusses the decision of the Queensland Court of Appeal in the matter of *EBIS Enterprises Pty Ltd v Sunshine Coast Regional Council* [2011] QCA 15 heard before McMurdo P, Chesterman JA and Philippides J

Case

This case was an application to the Court of Appeal by EBIS Enterprises Pty Ltd (**EBIS**) to seek an order that the respondent, Sunshine Coast Regional Council (**council**), should pay its costs of a proceeding in the Planning and Environment Court (**P&E Court**).

Facts

The P&E Court decision upheld the council's originating application seeking an enforcement order pursuant to section 4.3.26 (Effect of orders) of the *Integrated Planning Act 1997* (**IPA**). The effect of the P&E Court's orders was to direct EBIS to cease the use of land at 26 Ascot Way, Little Mountain for the purpose of an 'accommodation building' as defined in the *Caloundra City Plan 2004*.

The land was deemed to be an 'accommodation building by the council as it was frequently let to groups of not more than 20 people. The orders were first sought after the matter was brought to the attention of the council by way of various noise complaints from neighbouring properties.

This decision was overturned however, upon application to the Court of Appeal with costs being awarded to EBIS for the application for leave to appeal and the Court of Appeal inviting the parties to make written submissions on the question of costs of the P&E Court proceeding.

To this end, EBIS sought to bring an action in the present case under section 4.1.23 (Effect of Orders) of the IPA, which under section 832(1) (Enforcement Orders of the Court) of the *Sustainable Planning Act 2009* remains the relevant section. Section 4.1.23 (Costs) of the IPA provided that each party to a proceeding must bear its own costs, however EBIS sought to rely on subsection (2)(b) which provided an exception to this rule with the court able to make awards of costs if the proceeding was deemed *'to have been frivolous or vexatious*'.

Decision

Justice Chesterman gave the leading judgement which was supported by Justice McMurdo, and Justice Philippides.

Chesterman JA initially recognised the inherent limitations of the present court in hearing the application in the absence of an investigation of the surrounding facts of the case, particularly as there was no earlier intimation to the P&E Court that such an application would be sought if successful. This was however, not deemed to preclude the action from success.

The judgement drew heavily on the previous P&E Court decision of *Mudie v Gainriver Pty Ltd (No. 2)* [2003] 2 Qd R 271 which dealt with the meaning of 'frivolous' and 'vexatious' in the context of section 4.1.23(2)(b)(Costs) of the IPA. Relevantly it was found that in regard to the section, the ordinary dictionary meaning should apply, as distinct from the meaning of the words commonly applied in the context of striking out a claim which is groundless or an abuse of purpose. In light of the analysis of the section in *Mudie*, Chesterman J stated that a proceeding may be deemed frivolous "*if it lacked substance, so there was no reasonable basis for starting it so that its prosecution produced unjustified trouble for the other party*". His Honour also elucidated a common meaning of 'vexatious' as a proceeding brought "*without sufficient grounds for winning purely to cause trouble or annoyance*".

Given this definition, the mere fact that the P&E Court initially found for the council in making the enforcement order provided an immediately significant impediment to showing that the proceeding was vexatious in nature.

In support of its application, EBIS submitted email correspondence between council officers which sought to highlight a difference of opinion in regard to initiating proceedings for an enforcement order. Chesterman JA sought to highlight the fact that for the emails to be relevant to determining whether the proceeding was '*frivolous or vexatious*' they would need to provide evidence that the officers who supported the institution of proceedings believed that the use of the building was not in contravention of the planning scheme, or that the noise complaints giving rise to the initial investigation were not genuine. Furthermore, while the legal advice the council received was deemed privileged, it was found that in order for proceedings to be found to be '*frivolous or vexatious*' the council must have been found to have received advice that the use of the premises was lawful, which it had ignored in instituting the proceedings.

EBIS additionally contended that the proceedings initiated by the council's application merely constituted a politically convenient method of dealing with complaints about noise, and would have given rise to inconsistencies in the operation of the planning scheme over the long term. However Chesterman JA found that regardless of the outcome of the council's construction of the planning scheme, in order to establish the necessary grounds, the applicant needed to again show that the council did not believe that the letting of the building as an 'accommodation building' was unlawful.

In the absence of clear evidence that the council had instituted proceedings despite a genuine belief that its legal position was not correct, it was decided by the court that a '*frivolous or vexatious*' proceeding could not be established under section 4.1.23(2)(b) (Costs) of the IPA.

Held

It was held that:

- Application for an order of costs should be dismissed.
- Council to be awarded costs for responding to the application.

Green-light for beachfront apartment building three times "maximum height"

Samantha Hall | Katherine McGree

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *K Page Main Beach Pty Ltd v Gold Coast City Council & Ors* [2011] QPEC 1 heard before Rackemann DCJ

Case

This was an appeal by K Page Main Beach Pty Ltd (**applicant**) against the Gold Coast City Council's (**council**) refusal of an application for a development permit, for a material change of use, to facilitate the development of a high rise apartment building on a vacant beachfront allotment on Main Beach Parade, Main Beach. The co-respondents by election were some of the submitters who objected to the proposal. The issues in dispute centred upon the height, bulk and scale of the proposal and the alleged consequent character and amenity impacts.

Facts

This case, in which a central allegation was that the proposed high rise apartment building was too tall and bulky for its location and site area, was essentially determined by matters of fact and degree.

The site of the proposed development was about 20 meters wide and 44 meters deep, rising from the Main Beach Parade frontage to the beach frontage (that is, the eastern side of Main Beach Parade). The proposed building was to cover 35% of the site with landscaping proposed in the remainder. The proposed building was seven stories with a partial eighth storey, although the generous floor to ceiling heights resulted in the building technically being 10 storeys for the purposes of the council's planning scheme. The relevant experts agreed the proposed building was of a high architectural quality.

The relevant overlay map of the planning scheme depicted a maximum building height of three stories for the site. The result was that the development application was impact assessable.

The site fell within the Residential Choice Domain under the planning scheme. That domain included two identically worded performance criteria (**PC1** and **PC6**), the acceptable solution to which stated that:

> *All buildings must be of a height which is in keeping with the predominant residential character of the surrounding area. Building height must not result in a significant loss of residential amenity.*

The proposed building was not as tall as the development to the western side of Main Beach Parade and marginally shorter than the shortest of the tall high rise buildings on the eastern side of Main Beach Parade.

The council submitted that the proposal was not in keeping with the prevailing residential character on the basis of its site area among other grounds. The prevailing residential character being a combination of tall buildings with relatively small footprints in substantial allotments or relatively low buildings occupying a greater proportion of allotments.

In relation to whether there was any loss of visual amenity, the focus was on the impact of the higher stories of the proposal on units in the mid-levels of buildings to the west. The proposal would result in some interference for non-beach front properties but the views and vistas would remain both reasonable and substantial.

The proposed development's compliance with the applicable codes, being the Residential Choice Place Code and the Highrise Residential and Tourist Accommodation Code, was also considered.

Decision

His Honour Judge Rackemann held that whether the proposal conflicted with the planning scheme by virtue of its height could not be determined simply by looking at the overlay map in isolation. The maximum height was not an absolute maximum to which the planning scheme required rigid adherence but a maximum beyond which an impact assessable development application was required. The overlay map was relevant but not necessarily determinative and the ultimate test was not whether the proposal approximated the acceptable solution but whether it met the performance criterion.

The proposal was held to be to be appropriate in terms of building height for the following reasons:

- the proposal's height sat comfortably and was in keeping with the residential character of the surrounding area;

- even if site area was assumed to be relevant to PC1 and PC6 of the Residential Choice Domain, the site area in this case did not render the height of the building out of keeping with the predominant residential character of the surrounding area; and
- the height of the proposal was held not to adversely affect the character of the area, and the likely loss of visual amenity was not, as a matter of fact and degree, found to be significant.

In respect of the other development requirements of the Residential Choice Place Code the proposal was held to comply with the relevant acceptable solutions for density and site coverage and be consistent with the relevant performance criteria for building setback, sitting, appearance, landscaping and amenity.

In respect of the other development requirements of the Highrise Residential and Tourist Accommodation Code, the proposal was held to be consistent with the relevant performance criteria for plot ratio, shadowing and minimum site area.

Held

Appeal allowed; development application approved subject to conditions.

The hearing was adjourned to allow the parties to consider the conditions.

Court of Appeal considers liability of directors in the context of the Queensland Building Services Authority Act 1991

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Court of Appeal in the matter of *Younan v Queensland Building Services Authority* [2011] QCA 1 heard before McMurdo P, Fraser JA and Cullinane J

Case

This was an application for leave to appeal by the Queensland Building Services Authority (**authority**) against a decision of the District Court which held that the Commercial and Consumer Tribunal of Queensland (**tribunal**), which affirmed a decision of the authority, had made an error of law, set aside the tribunal's decision and directed a rehearing in the Queensland Civil and Administrative Tribunal.

Facts

The circumstances which led to the authority's decision were as follows:

- Mr Younan was a shareholder in and the sole director of Cavalier Homes (Gold Coast) Pty Ltd (**Cavalier**), a building company that traded from about December 2002.
- The major shareholder in Cavalier was T & T Building Pty Ltd (**T & T**), a company of which Mr Younan was the sole director and building licence nominee.
- On 18 June 2007, it was ordered on the application of a creditor that Cavalier be wound up and liquidators appointed to that company.
- The winding up order and the appointment of the liquidator were both "relevant company event" for the purpose of section 56AC (Excluded individuals and excluded companies) of *Queensland Building Services Authority Act 1991* (**Act**), the effect of which was that Mr Younan became an "excluded individual" and T & T became an "excluded company" for each event.
- Section 56AF (Procedure if licensee is excluded individual) of the Act required the authority to cancel Mr Younan's licence if he did not apply to be categorised as a "permitted individual".
- Mr Younan made an application to the authority to become a "permitted individual" under section 56AD (Becoming a permitted individual) of the Act.

In accordance with the relevant test under section 56AD(8) (Becoming a permitted individual) of the Act, the authority could categorise Mr Younan as a permitted individual if it was satisfied that he had taken all reasonable steps to avoid the coming into existence of the circumstances that resulted in the order to wind up Cavalier and the appointment of the liquidator to that company.

The authority refused Mr Younan's application. Mr Younan applied for review of the authority's decision to the former tribunal. The tribunal affirmed the authority's decision. Mr Younan then applied for leave to appeal from the tribunal's decision to the District Court. A judge of the District Court held that the tribunal had made an error of law and set aside the tribunal's decision. The authority then applied for leave to appeal against the decision in the District Court.

Factual background to the tribunal's finding

On 20 July 2004, after Mr Younan had decided to wind down Cavalier's business, one of the owner's with whom Cavalier had contracted served a claim in the New South Wales Trader and Tenancy Tribunal (**NSW tribunal**). The claimant contended that Cavalier constructed his house so badly that it should be demolished and rebuilt. The NSW tribunal did not accept the claimant's argument that the house should be demolished but ordered Cavalier to pay the claimant rectification costs. Cavalier did not have any means of satisfying the order and the claimant issued a statutory demand. Mr Younan offered to buy the claimant's property but the claimant was not satisfied with the offered price and was not prepared to compromise on the ordered amount. Mr Younan was not prepared to pay the ordered amount with his own money or cause T & T to pay it. On the claimant's application, Cavalier was wound up and a liquidator was appointed.

Tribunal's reasons

The tribunal considered that Mr Younan's offer to settle the claim was not a reasonable step because the amount he offered was too small and Cavalier did not appeal against the decision of the NSW tribunal. The tribunal indicated that the offer "effectively ignored" the NSW tribunal's decision, was neither measured nor appropriate and that Mr Younan was willing to withdraw the financial support provided by T & T to the company and thereby let the company fall.

Primary judge's reasons

The primary judge considered that the fundamental flaw in the tribunal's reasoning was that it assumed that where a company becomes insolvent the shareholders are obliged to pay the company's debts. The primary judge held that the implication in the tribunal's decision, that any failure of directors or others to put in extra money to meet an insolvent company's obligations was unreasonable, unless the relevant individual lacked the financial capacity to do so, would render section 56AD (Becoming a permitted individual) of the Act futile.

Moreover, the primary judge considered that the terms of section 56AD(8A) (Becoming a permitted individual) of the Act, which specifies the matters that the authority is to have regard to in deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event, were concerned with the prudent management of a company as an ongoing business so that the focus was on prevention rather than dealing with the problems that had arisen.

Accordingly, the primary judge sent the matter back to the Queensland Civil and Administrative Tribunal to hear and determine the review of the authority's decision afresh.

Decision

The question for the Court of Appeal was the proper construction and application of the facts to the requirement in section 56AD(8) (Becoming a permitted individual) of the Act "*that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event*".

His Honour Justice Fraser stated that, to determine what are "reasonable steps" for the purpose of section 56AD(8) (Becoming a permitted individual) of the Act, it was necessary to take into account the principle of limited liability enshrined in the *Corporations Act 2001* (Cth). That principle required rejection of the view that the mere fact that T & T owned most of the shares in Cavalier justified the conclusion that Mr Younan's failure to cause T & T to lend money to Cavalier was an omission to take a reasonable step to avoid the liquidation of Cavalier.

His Honour Justice Fraser went on to state, consistent with the decision of the primary judge, that there was no indication in the Act that this "fundamental and pervasive principle" was to be disregarded.

His Honour Justice Fraser, President McMurdo and His Honour Justice Cullinane agreeing, affirmed the primary judge's decision to set aside the decision made by the tribunal.

Held

The Court of Appeal allowed the appeal, set aside the order made in the District Court and ordered that Mr Younan was categorised as a permitted individual for the relevant events of the order to wind up Cavalier and the appointment of liquidators to that company. The appeal was otherwise dismissed, with the authority to repay Mr Younan's costs of and incidental to the application for leave to appeal and the appeal.

COLIN BIGGERS & PAISLEY LAWYERS

When an approval takes effect

Samantha Hall | Aaron Madden

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *CEO Department of Main Roads v Club Cavill Pty Ltd (ACN 099 023 711)* [2011] QPEC 15 heard before Robin QC DCJ

Case

This case was an originating application in the Planning and Environment Court seeking a declaration that a preliminary approval had not lapsed. The applicant sought to show that a claim for compensation under a deed entered into by the parties was premature, as it was not payable under the terms of the deed until the preliminary approval had lapsed under section 3.5.21 (When approval lapses if development not started) of the *Integrated Planning Act 1997* (**IPA**).

Facts

The relevant approval was granted by the Gold Coast City Council on 4 August 2006 and related to Lot 3 on Survey Plan 180847, County of Ward, Parish of Gilston (the owner of which was the applicant), as well as Lot 4 which was owned by Sunrise Water Pty Ltd (Receivers and Managers Appointed). Given that the decision affected their land, Sunrise Water Pty Ltd ultimately also made submissions to the court in support of the applicant.

The determination regarding when the approval had lapsed under section 3.5.21 (When approval lapses if development not started) of the IPA, ultimately rested with the following section of IPA, which set out when an approval has effect:

> ***Section 3.5.19 (When approval takes effect)***
>
> *1. If the application is approved, or approved subject to conditions, the decision notice, or if a negotiated decision notice is given, the negotiated decision notice, is taken to be the development approval and has effect:*
>
> *a) if there is no submitter and the applicant does not appeal the decision to the court, from the time–*
>
> *i) the decision notice is given;*
>
> *ii) if a negotiated decision notice is given - the negotiated decision notice is given; or*
>
> *b) if there is a submitter and the applicant does not appeal the decision to the court, the earlier of the following–*
>
> *i) when the submitter's appeal period ends;*
>
> *ii) the day the last submitter will not be appealing the decision; or*
>
> *c) if an appeal is made to the court, subject to section 4.1.47(2) and the decision of the court under section 4.1.54 - when the appeal is finally decided.*

There was a submitter appeal commenced on 13 September 2006, which was discontinued by notice of discontinuance filed on 29 October 2007. The applicant contended that the lapsing date for the approval under section 3.5.21 (When approval lapses if development not started) of the IPA would not occur until October 2011, on the basis that the approval took effect upon the discontinuance or withdrawal of the submitter's appeal (and ran for the standard 4 years under the section). The respondent however, contended that the phrase '*when the appeal is finally decided*' in section 3.5.19(1)(c) (When approval takes effect) of the IPA did not apply in the current situation as it only contemplated situations in which a determination by a court ends a matter. As such, the respondent argued that the current case fell within section 3.5.19(1)(b) (When approval takes effect) of the IPA. As there was no notice under section 3.5.19(1)(b)(ii), it was contended that the approval would lapse 20 business days after the council's decision was given to the submitter (in accordance with section 4.1.28(4) (Appeals by submitters - general)) of the IPA.

Decision

In order to ensure the proper construction of section 3.5.19(1)(c) (When approval takes effect) of the IPA, much of the decision was concerned with the proper meaning of the phrase 'finally decided'. Robin QC DCJ firstly considered the word 'decide'. By examining it in light of its ordinary meaning, his Honour demonstrated that the word had a broader application than in the context of a determination by a court, as posited by the respondent.

Robin QC DCJ stated that in fact, an appeal is 'finally decided' at the point where the "*outcome of the appeal is known, and the effects (if any) of the proceeding on the relevant development approval are known*". His Honour then stated that if he was wrong, and the above 'literal or grammatical' interpretation of 'finally decided' should lead to the view that it only applied to a decision of the court, the literal interpretation should give way to one which examines the phrase in light of the overall purpose of the statute. The construction of the provision in the context of the IPA supported his Honour's interpretation.

Robin QC DCJ then went on to examine the effect of the words 'or withdrawn', which were added after 'finally decided' in the later incarnation of section 3.5.19(1)(c) (When approval takes effect) in the form of section 339 (When approval takes effect) of the *Sustainable Planning Act 2009*, Robin QC DCJ considered various cases dealing with the use of later statutes in giving meaning to an earlier statute. This case law was clear in suggesting that the first statute must be sufficiently ambiguous or obscure to justify interpreting it in light of a later amendment. His Honour found that section 3.5.19(1)(c) (When approval takes effect) of the IPA was not sufficiently ambiguous for this purpose, and that it in fact, the section implicitly referred to situations which contemplated an appeal being withdrawn. This of course, supported the applicant's overall submission, but rendered its preferred interpretation of the later statute moot.

His Honour went on to further support the applicant's claim by reference to arguments elucidated by counsel for Sunrise Waters Pty Ltd (the owners of Lot 4), Mr D Gore QC. The submission included an illuminating hypothetical regarding the respondent's interpretation of section 3.5.19(1)(c) (When approval takes effect) of the IPA. Mr Gore QC submitted (a), (b), and (c) are all discrete scenarios which are intended to be mutually exclusive. He gave the example of an appeal by a submitter which was later dismissed by the court. Under the argument of the respondent, the approval would seem to have effect firstly under (b) and then later under (c). This had the effect of creating a high level of uncertainty between the periods where the approval changed from having effect under (b) to (c), as it may not be clear whether the development was authorised to start. Further if the appeal remained on foot for the entire period of the approval, the submitter could merely discontinue after the approval lapsed, thus never allowing development to begin. Pertinently Mr Gore QC pointed out that the respondent contended that the present case fell within section 3.5.19(1)(b) (When approval takes effect) of the IPA, however he submitted that this was incorrect as this interpretation failed to address the fact than an appeal had been undertaken, and that the appeal was discontinued.

These submissions ultimately found favour with Robin QC DCJ, who used them to further justify his finding for the applicant.

Held

That the declaration sought be allowed.

COLIN BIGGERS & PAISLEY LAWYERS

Excusal of errors in IDAS forms

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mount Isa Developments Pty Ltd v Cloncurry Shire Council* [2011] QPEC 25 heard before Robin QC DCJ

Case

This was an application to the Planning and Environment Court (**court**) to hear preliminary points in respect of an appeal against the conditions of the development approval.

The preliminary points involved matters of minor change and whether the development application was properly made on account of several errors contained in the IDAS Forms accompanying a development application.

Facts

The changes to be determined by the court were to a significant extent to satisfy concerns of the council. The changes included providing a further road connection, changing access arrangements for a lot, amendment to the internal design and an increase in the number of rural residential lots from 26 to 29.

However, the key issue in this case was whether the application was properly made on account of certain errors contained in the IDAS forms.

The first error involved the ticking of the "development permit" box instead of the "preliminary approval" box for question 1 in IDAS Form 1. Item 2.1.13 in the IDAS assessment checklist was also incorrectly completed, by ticking the "no" box instead of the "yes" box for whether the development application was one made pursuant to section 3.1.6 (Preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997* (**IPA**).

A further error involved the general explanation of the proposed use as "re-zoning from low impact business and industry to rural, residential, and general business and industry".

Decision

His Honour Judge Robin QC held that the changes were minor and did not change the nature of the development or make it a substantially different one.

In respect of the errors, including the incorrect ticking of boxes on the IDAS forms, his Honour said that they were embarrassing discrepancies, but that's all they were. His Honour also referred to the fact that the former Department of Natural Resources and Water understood the development application to be for a preliminary approval for material change of use to vary the planning scheme. His Honour provided that in some of the authorities, the understanding of the development application by such entities has been afforded some significance.

In considering the description of the development application, his Honour said at [50] that:

> *development applicants have run into strife in apply for re-zoning, which is an outdated concept, and indeed, inappropriate, given that a re-zoning is not 'development', and since the Integrated Planning Act came into force, what is regulated and facilitated is development rather than re-zonings as in former times. An instance is the decision in Lagoon Gardens Pty Ltd v Whitsunday Shire Council [2009] QPEC 66.*

In distinguishing this case from Lagoon Gardens, his Honour said that:

> *the proposal here is clearly identified. There's no mystery as to what development might actually occur as there would be if no more were sought than bare 're-zoning' which would be likely to facilitate the potential adoption of a whole range of uses.*

Accordingly, his Honour excused any non-compliance with section 3.1.6 (Preliminary approval may override a local planning instrument) and section 3.2.1 (Applying for development approval) of the IPA.

Held

The proposed changes were held to be minor changes.

Any non-compliance with section 3.1.6 (Preliminary approval may override a local planning instrument) and section 3.2.1 (Applying for development approval) of the IPA was excused.

Dust! An environmental nuisance

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Department of Environment & Resource Management v Clark* [2011] QPEC 20 heard before Wall QC

Case

This case concerned an application by the Department of Environment and Resource Management (**applicant**) for orders under section 505(5) (Restraint of contraventions of Act etc) of the *Environmental Protection Act 1994* (**EPA**) to remedy environmental offences committed by Barry Clark (**respondent**).

Facts

The respondent owned land situated at 22 Rudman Parade, Burleigh Heads (**site**). The majority of the site was unsealed and un-vegetated. He leased this site out to other persons for the purpose of carrying out various environmentally relevant activities including, operating a waste transfer station, crushing concrete, screening material extracted from the earth, and stockpiling sand, soil and gravel. He was at all material times responsible for the environmental management of any activities carried out on the site's 'common areas', including traffic movement along shared internal access roads and the release of stormwater runoff from the common areas of the site.

From September 2003 through to July 2010, the applicant had been receiving complaints from various members of the public and neighbouring businesses about dust emissions coming from the site. This included dust being blown from the site to neighbouring areas, dust being blown by vehicles driving over unsealed areas of the site and dirt being deposited on Rudman Parade by vehicles after existing the site which then turned to dust as other vehicles drove over it. It was argued that the respondent, by allowing these activities to occur, was causing an environmental nuisance pursuant to section 15 (Environmental nuisance) of the EPA. This section provided that an:

> *Environmental nuisance is unreasonable interference or likely interference with an environmental value caused by –*
>
> *(a) aerosols, fumes, light, noise, odour, particles or smoke; or*
>
> *(b) an unhealthy, offensive or unsightly condition because of contamination; or*
>
> *(c) another way prescribed by a regulation.*

The persistent refusal by the respondent to take any steps to prevent the escape of dust or dust generating from the site, and to remove the mud and dirt from Rudman Parade, led to environmental protection orders (**EPO**) being issued by the applicant, pursuant to section 358 (When order may be issued) of the EPA. These were issued on 26 September 2003, 15 August 2008 and 14 October 2008. The EPOs ordered the respondent to stop and remedy the activities which were causing the environmental nuisance, namely the movement of traffic along the unsealed common areas of the site. In each of those instances, the respondent paid the fines attached to the EPOs, but continued to ignore the notices imposed under them and persisted with the usual management of the site.

In May 2009, the applicant applied to the Planning and Environment Court (**court**) to seek orders to stop vehicles traversing over the common unsealed areas of the site until those areas had been sealed and further orders that the respondent install and operate a vehicle wheel wash. The applicant contended that the respondent's continual dismissal of the EPOs issued to him amounted to an offence pursuant to section 361 (Offence not to comply with order) of the EPA. This provision carried a maximum fine of $165,000 for a contravention of an EPO and a maximum fine of $200,000 or 2 years imprisonment if a person 'wilfully' contravened an EPO. To act wilfully in defying an EPO was defined in schedule 4 (Dictionary) of the EPA to mean to act 'intentionally, recklessly or with gross negligence'. The applicant also contended that the respondent had committed and would continue to commit offences against the EPA, pursuant to section 440 (Offence of causing environmental nuisance) of the EPA, unless he was restrained.

Decision

His Honour, Judge Wall QC, agreed with the applicant that the roads on the site should be sealed and a vehicle wheel wash should be installed. His Honour was satisfied that the respondent had committed offences against the EPA and would continue to do so unless he was ordered otherwise. His Honour went on to say that until these practices had been remedied, the respondent should be ordered to stop or prevent vehicles traversing the common areas of the site.

In respect of the damage caused to the environment and the considerations that were taken into account, his Honour noted at [19] that:

> *There can be little doubt that, as far as it can be achieved, clean air, dust free air, is an environmental value in the sense that is a quality or desirable physical characteristic of the environment that is conducive to the public amenity or safety and, depending on the circumstances, also ecological health. We would all like the air to be clear and clean as possible all of the time. The environment includes people and communities living and working in a particular location or place or area and the contribution of clean, dust free air to the amenity and harmony of those locations, places and areas. It also includes the effect on those locations, places and areas and the people living and working in them of unclean air and dust laden air such as is complained of here. Taking into account the nature, frequency, intensity and regularity with which it is generated, the number of people and business affected, their proximity to the activities generating the dust and the character of the neighbourhood, the dust here complained of clearly amounts to an unreasonable interference with an environmental value.*

In his judgment, Judge Wall QC also made note of the respondent's general lack of care for the environment and the damage he had been causing to it and to other members of the public. This was evident in the respondent's conduct towards the applicant's environmental officers and his general behaviour and attitude towards the claims made against him. His Honour went so far as to say at [28] that:

> *The respondent is aged 77 and appears to be a successful businessman but as a person and a witness he was difficult, demanding, unrealistic, rude, unco-operative, self-centred, uncompromising, rigid, untruthful, selective in what he said he could and could not remember, selfish, mean grossly irresponsible, uncaring for the rights of others and dismissive of the case against him despite compelling evidence to the contrary. He couldn't care less that the activities he allows to be conducted on his land have caused and are causing significant environmental nuisance problems for others in the near neighbourhood. He is dismissive of any regulatory attempts to limit or control his activities and is unwilling to consider any suggestion that he may have some responsibility for what is happening.*

Held

The application was upheld and orders were to be determined at a later date.

Failure to address requirements for State resource entitlement and no exercise of power to excuse non-compliance

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Vidler v Fraser Coast Regional Council & Anor* [2011] QPEC 18 heard before Robin QC DCJ

Case

Following on from a number of decisions of the courts in late 2010, including *Northeast Business Park Pty Ltd v Moreton Bay Regional Council & Anor* [2010] QPEC 112, *Mahaside Pty Ltd v Sunshine Coast Regional Council* [2010] QPEC 70 and *Qld Construction Materials Pty Ltd v Redland City Council & Ors* [2010] QCA 182, in respect of the requirement in section 3.2.1(5) (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**) that a development application be supported by evidence of a State resource entitlement, the Planning and Environment Court considered yet another appeal in which a State resource entitlement was raised as a preliminary legal issue.

Facts

Background

The underlying appeal was by Vidler (**appellant**) against a decision of the Fraser Coast Regional Council (**council**) to refuse a development application for a preliminary approval for a material change of use of rural land for a residential low density development, park and commercial precinct (shops, supermarket and hotel) and a development permit for reconfiguring the site into two lots to accommodate the commercial development (**development application**).

Preliminary legal issues

The first preliminary legal issue raised by the council concerned public notification of the development application. The appellant conceded that public notification of the development application was inadequate and that it must be returned to the notification stage.

Second, the council suggested that the appellant's development application was not supported by evidence required by section 3.2.1(5) (Applying for development approval) of the IPA for taking or interfering with a State resource.

The appellant argued that the proposed development the subject of the development application did not involve a State resource prescribed under a regulation which required the development application to be supported by relevant evidence.

Decision

The relevant State resource concerned was "water" as defined under the *Water Act 2000*, specifically, water in a watercourse and overland flow water.

It was suggested by the appellant that given that the development application was for a preliminary approval, which by its nature does not authorise any actual development, it could not be said to involve taking or interfering with the resource of water.

The court held that the proposed development involved interference with water, given that substantial works were involved in the proposal, including excavation of an existing artificial channel and filling of the proposed residential areas in the south and north east of the site. Moreover, substantial filling was necessary on the site.

Both parties accepted the approach taken to the concept of interference in *Stockland Property Management Proprietary Limited v Cairns City Council & Ors* [2009] QCA 311, wherein the court stated that:

> *…the legislature's intention is that the occasion for the engagement of the requirements in s 3.2.1(5)(b) is indeed a clash with, or a hampering or hindering of, the State's enjoyment of ownership or stewardship of the State resource which is related to the allocation of, or entitlement to, the enjoyment of those rights in the applicant.* [40]

The issue for the court was whether a development application for a preliminary approval could result in a "*concrete effect in the nature of a clash…hampering or hindering of the State's ownership or stewardship of the resource*".

The court considered the decision of Judge Pack in *Herberton Land Corporation Pty Ltd v Tablelands Regional Council* (Unreported, Appeal No 3100 of 2009, 20 July 2010), where the information provided at the time of the making of the development application indicated that a creek crossing was likely to be required at a later date, which would involve interference with a State resource. However, given that the application did not seek approval for a crossing, road or bridge over the creek, it was held that the development the subject of the application did not "involve" a State resource.

Ultimately, the court adopted the approach approved in *Northeast Business Park Pty Ltd v Moreton Bay Regional Council & Anor* [2010] QPEC 112. There, an analogy was drawn between the mandatory requirement that the owner of land consent to any development application concerning its land and the relevant emanation of the State as owner of a particular State resource.

Given that there is no relevant distinction drawn in section 3.2.1 (Applying for development approval) of the IPA between a preliminary approval and a development permit in respect of obtaining owner's consent and the evidence required by subsection (5), an application for a preliminary approval may involve taking or interference with a State resource entitlement.

Exercise of the Court's discretion

The question for the court was whether the excusatory power in section 820 (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009* (**SPA**) was available to excuse the appellant's failure to provide the evidence required by section 3.2.1(5) (Applying for development approval) of the IPA.

There was no material before the court which indicated the position of the relevant State department in respect of the development application and the necessary State resource entitlement. As a consequence, the court held that it was not appropriate to further process the development application, as there was no indication as to whether the State resource issue would defeat it and make the consideration of the development application a costly, pointless exercise.

Accordingly, the court did not make an order under section 820 (Proceedings for particular declarations and appeals) of the SPA to excuse the appellant's failure to comply with the requirements of section 3.2.1(5) (Applying for development approval) of the IPA.

Held

The appeal was dismissed, however, the parties were given an opportunity to make submissions.

Building and Construction Industry Payments Act 2004 (Qld)

Paul Muscat | Mick Patrick

This article relates to the *Building and Construction Industry Payments Act 2004* (BCIPA) which considers the issue of submitting identical payment claims and abuse of process – *David Spankie v James Trowse Constructions Pty Ltd* [2010] QSC 336

Background

The case concerned a payment claim dated 31 August 2009, made under the BCIPA. An adjudication took place for that claim but it was later declared void by the Supreme Court of Queensland.

A subsequent payment claim dated 31 May 2010 was served. The claim was for identical amounts and the same work as the previous 31 August 2009 claim.

David Spankie argued that:

- firstly, the Act does not permit the making of successive payment claims for identical amounts for the same work, regardless of whether another reference date has passed; and
- secondly, under the contract, there is not a second reference date because the expression "for work under the contract done to the end of the month" means that a claim may only be made if work is done in that month.

Peter Lyons J held that:

- as to the first argument: looking at s17 in context, to state that a payment claim may include an amount the subject of a previous claim does not inevitably mean that can only occur if some other amount is also claimed. The natural reading of the Act favours the view that a payment claim may be made for any amount that has been the subject of a previous claim and only for that amount (see pages 5 and 6 of the judgement); and
- as to the second argument: the contract provisions do not limit the entitlement to make a progress claim for work done within the month. Rather, it permits a progress claim to be made simply for work done under the contract. It is difficult to see why the contractual entitlement does not extend to work done in respect of earlier periods. Therefore, on a correct construction of the contract, a progress claim may be made whether or not work was done in that month.

This decision:

- is not consistent with the Queensland Supreme Court decisions of *Doolan v Rubikcon (Qld) Pty Ltd* [2008] 2 Qd R 117 (**Doolan**); *Northside Projects Pty Ltd v Trad* [2009] QSC 264; and *Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC 162; and
- distinguishes or attempts to limit the ambit of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] 74 NSWLR 190 (NSW Court of Appeal particularly per Allsop P); and *The University of Sydney v Cadence Australia Pty Ltd* [2009] NSWSC 635.

Key provisions of the Act

- S 17(5): A claimant cannot serve more than one payment claim in relation to each reference date under the construction contract.
- S 17(6): However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

Summary of the reasoning of Peter Lyons J regarding identical successive payment claims

The natural reading of the Act favours the view that a payment claim may be made for any amount that has been the subject of a previous claim and only for that amount (see pages 5 and 6 of the judgement).

In *Dualcorp*, the court held that the Act as a whole generally manifests an intention to prevent the repetitious re-agitation of the same issues that had been earlier determined. However, in *Dualcorp* there had been a binding adjudication of the first claim. That is not the case here (see pages 7 and 8 of the judgment).

Hammerschlag J in *Cadence* referred to the single statutory opportunity being both availed of and exhausted (ie the opportunity being to make a payment claim and to have that payment claim adjudicated). That is not the case here (see pages 9 and 10).

There is an additional reason for adopting the above construction of s17:

- if a second payment claim can be made on a later reference date, it can include the amount which has been the subject of a previous claim only if additional work is done after the first reference date;
- if that is correct, it is difficult to see why the statutory intention is to permit the making of such a claim but prevent a claim which relates only to an amount that has been the subject of a previous claim (ie the second claim makes an identical claim to the first claim); and
- to take an extreme example, if the first claim relates to a very substantial amount of work and results in a very large claim and, thereafter, a very small amount of work is done with a very small additional claim, that would be permitted as a result of s17(6). It is difficult to see why the legislature would intend to permit the making of such a claim, but preclude the making of a claim which related only to an amount the subject of a previous claim. This is an unlikely intention and is inconsistent with the objects of the Act.

On appeal

David Spankie appealed the decision and on 14 December 2010 the Court of Appeal delivered its decision which unanimously upheld Justice Lyons' decision. Accordingly, the Court of Appeal has now overturned Justice Freiburg's decision in Doolan and the "identical successive payment claim" argument that could previously be raised by respondents.

What does this mean for the industry?

The impacts of the decision are as follows:

- respondents should ensure that they properly address payment claims that appear to be resubmissions of earlier payment claims, given the defence in the Doolan case has now been overturned;
- claimants will be able to reissue previously issued payment claims;
- claimants will not have to find additional work to claim to reissue a payment claim;
- the decision makes sense and reflects the objects of the BCIPA Act; and
- parties need to consider the terms of the BCIPA Act when drafting contracts to ensure consistency between the contract terms and the BCIPA Act.

Commencing a building dispute in Queensland: QCAT v Court

Paul Muscat | Mick Patrick

This article relates to building disputes, in particular domestic building disputes, which can be commenced and heard in either the Queensland Civil and Administrative Tribunal (QCAT) or any court of competent jurisdiction, for example the Magistrates, District or Supreme Court. The correct court will usually depend on the monetary value of the claim

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Commercial building disputes may also be heard in QCAT, however, commercial building disputes of a monetary value greater than $50,000 may only be heard by QCAT if there is consent between the parties.

Features of the Tribunal v Court

Outlined below are some comparisons of the two jurisdictions that should be considered when deciding which jurisdiction to commence your proceedings.

- QCAT deals with a very wide range of matters that come before it, not only building disputes, and as a result is not a specialist building tribunal as it once was.
- Some courts, for example the District Court now has a commercial list under which building matters are expressly included, so such matters can be dealt with under the commercial list in that court.
- Both jurisdictions encourage and provide alternative dispute resolution processes. QCAT will generally list a matter for a compulsory conference, which is presided over by a member of QCAT, and which may proceed as a mediation.
- The court can make an order for mediation, but would ordinarily only do so in circumstances where both parties are interested in participating in it.
- It is important to consider that if one party is determined not to resolve the dispute, a court would be reluctant to order mediation, and a compulsory conference or mediation in either jurisdiction is unlikely to achieve a resolution, whether compulsory or not.
- QCAT is a less formal jurisdiction. Parties are generally required to represent themselves except in very limited circumstances. Also, the rules of evidence do not apply in QCAT proceedings. This may or may not suit the parties depending on the nature of the dispute.

In court the parties are entitled to be legally represented, and the rules of evidence apply. In addition there are rules relating to procedure that apply, including the process discovery (disclosure of documents), which in many situations is of significant assistance to prosecuting or defending a claim.

In QCAT parties generally pays their own costs, even if legally represented. As a result, if a party wants to be legally represented, it is important to consider that QCAT may not allow legal representation, and further, even if it does, you may not recover your costs.

The court system however entitles parties to recover legal costs if they are successful.

Transferring proceedings

Pursuant to section 53 of the *Queensland Civil and Administrative Tribunal Act 2009* (**Act**) a party to a building dispute commenced in a court can apply to the court to have the matter transferred to QCAT. In these circumstances the Court has the discretion to make an order for the transfer of the proceeding to QCAT.

In the matter of *Randall Wayne March & Anor v Metrotek Constructions Pty Ltd* [2011] QDC 376 (**Metrotek**), an application was brought by the defendant, Metrotek, pursuant to section 53 of the Act seeking a transfer of the proceeding, which had been commenced by the plaintiffs in the District Court, to QCAT.

The defendant filed a conditional notice of intention to defend on the basis that the proceeding was commenced in the incorrect jurisdiction. No defence responding to the plaintiff's claim was filed before the hearing of the application.

The application failed on essentially the following grounds:

- despite QCAT having jurisdiction to hear the dispute, the plaintiffs had commenced their proceeding in the District Court which was a court of competent jurisdiction to hear the proceeding;
- the plaintiffs wished to be legally represented and, accordingly, were comfortable with the structure provided by the District Court in relation to the conduct of the proceeding; and

- the arguments advanced by Metrotek, which included submissions such as the informal approach by QCAT, compulsory ADR and streamlined costs were not accepted as sound reasons on their own for the proceeding to be transferred to QCAT.

What does this mean for the industry?

Prior to commencing proceedings it is important to consider the jurisdiction in which you would like to commence your action. Considerations may include:

- the complexity of the dispute;
- the value of the claim;
- whether you wish to be represented by a lawyer;
- the extent to which you wish to be exposed to legal costs, noting that the court provides for the awarding of legal costs to the successful party; and
- in a court proceeding, the *Uniform Civil Procedure Rules 1999* (**rules**) allow for a much more strict approach to pursue your proceeding should you wish to progress it quickly by having the matter set down for an early trial date, which may agitate early attempts at alternative dispute resolution techniques to have the proceeding settled;
- in a court proceeding, the rules of evidence apply to ensure that the court only act only on evidence that is relevant, reliable and probative;
- in a court proceeding, the rules also ensure parties plead their case properly and completely, disclose all relevant documents, and prosecute, or defend, claims expeditiously and without unreasonable delay;
- applications by a party to transfer a proceeding from a court to QCAT may be resisted as it was, successfully, in Metrotek.

The removal of an important feature: Minor change?

Samantha Hall | Aaron Madden

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Wroxall Investments Pty Ltd v Cairns Regional Council* [2011] QPEC 58 heard before Robin QC DCJ

Executive Summary

This case concerned an analysis of what constitutes a 'minor change' in relation to a code assessable development application for a 50 lot subdivision in Cairns.

The court found that if the alterations to the development proposal could be considered a 'minor change' in the context of section 821(2)(b) (Application of repealed IPA, s 4.1.52) of the *Sustainable Planning Act 2009* (**SPA**), it could endorse an order sought by both parties to the appeal to allow the development application.

The changes of note were as follows:

- the replacement of a condition proposing a vehicular link through the development site linking two sections of the town; and
- the removal of a 5000 square metre lot.

The court found that the changes were considered to be 'minor changes' under section 350 (Meaning of minor change) of the SPA, and it was held that the court should not be deterred from finding a minor change on the basis that some important feature of a proposal was being removed.

Case

This case concerned an application for an order seeking the finalisation of an appeal originally heard in *Wroxall Investments Pty Ltd v Cairns Regional Council* [2010] QPEC 092.

Facts

The developer originally appealed against a refusal of a code assessable development application for a 50 lot subdivision on a site separating the two areas of North and South Wonga Beach. Ultimately the appeal resolved into one concerning conditions, with the council supporting the development with the relevant exception of the proposed construction of a vehicular link through the development site joining the northern and southern sections of a town.

The original appeal was adjourned to allow finalisation of conditions and layout of the subdivision. Having reached a consensus on the form of these changes, the parties sought to have the appeal finalised by way of the proposed order.

Decision

His Honour Judge Robin QC DCJ considered that the order could be endorsed if the changes made to the development proposal could be considered a 'minor change'. His Honour stated that by operation of section 821(2)(b) (Application of repealed IPA, s 4.1.52) of the *Sustainable Planning Act 2009* (**SPA**), 'minor change' was to be determined by reference to section 350 (Meaning of minor change) of the SPA. The key consideration was whether the changes would constitute a 'substantially different development'.

His Honour noted that when the appeal was heard, the development proposal had been changed from that which was publicly notified. In determining whether the further changes could be considered minor, his Honour stated that comparison should be made to the proposal which was originally publicly notified.

In resolving the issue concerning the connecting road, the parties agreed upon a condition which required the installation of bollards to block vehicular traffic from moving beyond each constructed stage of development (thus preventing through-traffic between North and South Wonga Beach). Further significant changes to the proposal included the removal of a 5000 square metre lot which was to face the opening of a street on the development (Marlin Drive). His Honour Judge Robin DCJ noted that during the original hearing of the trial there was some suggestion that the large allotment may be utilised as a site for shops to service the subdivision.

His Honour ultimately found these changes to be minor and thus not a 'substantially different development' under section 350 (Meaning of minor change) of the SPA. In arriving at these conclusions, his Honour stated that the court should not be deterred from finding a minor change on the basis that some important feature of a proposal was being removed. In making this statement, his Honour appeared to distance himself somewhat from previous judgements which have made this a possibility. In this regard particular mention was made of *Carillon Developments Ltd v Maroochy Shire Council* [2000] QPELR 216.

Held

That the order be made as per the initialled draft.

Sufficient planning reasons justify approval

Samantha Hall | Susan Cleary

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Heritage Properties & Anor v Redland Shire Council & Ors* [2011] QPEC 56 heard before Searles DCJ

Executive Summary

The Planning and Environment Court, considering an appeal against a deemed refusal by the Redland City Council of a development application to allow a residential development at Thornlands, gave determinative weight to the council's IPA planning scheme provisions to allow the development to proceed, despite the development application being made under the provisions of the council's transitional planning scheme.

The evidence of the parties' town planning experts was critical to the court's determination that there were sufficient planning grounds to approve the development application despite conflict with the provisions of the transitional planning scheme and the IPA planning scheme.

The decision also gives further guidance to applicants and assessment managers as to what constitutes a 'minor change' under the *Sustainable Planning Act 2009* and when the court can approve part of an application.

Case

This was an appeal against a deemed refusal by the Redland City Council (**council**) of a development application for a preliminary approval for a material change of use and development permits for reconfiguring a lot for two stages (**development application**).

Facts

The original appellants were Heritage Properties Pty Ltd (**Heritage**) and Ausbuild Pty Ltd, the owners of the land the subject of the development application. However, on the first day of the hearing, Heritage advised the court that it sought a partial approval of the development application, which excluded the two lots owned by Ausbuild Pty Ltd. Accordingly the land owned by Ausbuild Pty Ltd was not a part of the appeal before the Court and Ausbuild Pty Ltd took no part in the appeal.

The Chief Executive of the Department of Transport and Main Roads joined the appeal, along with local residents Mr and Mrs Nahrung (**fourth co-respondents**) and Mr and Mrs Turk (**fifth co-respondents**). The first, second and third co-respondents by election withdrew from the appeal before the hearing.

The development application was lodged under the provisions of the council's transitional planning scheme and the land was identified in that scheme as being within the Rural/Non-Urban Zone and partly within the Special Planning Intent No. 4 Area in the 1998 Strategic Plan.

The land the subject of the development application was identified in the council's IPA planning scheme, which commenced in March 2006, as being within the Emerging Urban Community Zone. The IPA planning scheme was amended on 31 March 2010 to include the South East Thornlands Structure Plan (**structure plan**) which allocated the subject land to a number of precincts including housing, green space and district park.

Preliminary legal issues

The court considered two preliminary legal issues regarding whether the changes in the development proposal before the court constituted a minor change from the development application as lodged and whether the court was empowered to approve part of an application.

The changes to the proposed development involved the following:

- the reduction of the number of lots to the west of the dam from 18 or 19 lots to 9 lots;
- in stage 1a, the reduction of the number of lots from 34 to 33;
- the identification of land in the north-west corner of the site as a district park rather than being subdivided;
- a change of access to the fourth and fifth co-respondents' properties;
- the provision of a new rear access from the proposed development to the fifth co-respondent's property.

The court held that having regard to the definition of "minor change" in section 350 (Meaning of Minor change) of the *Sustainable Planning Act 2009* (**SPA**) and Statutory Guideline 06/09 Substantially different development when changing applications and approvals issued by the Department of Infrastructure and Planning, the change was a minor change.

On the issue of whether the court could approve part of an application, the court held that having regard to sections 3.5.11 (Decision generally) and 3.5.14A (Decision if application under s 3.1.6 requires assessment) of the *Integrated Planning Act 1997* (**IPA**) and the decisions of *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QCA 333 and *SLS Property Group v Townsville City Council* [2009] 175 LGERA 136, the court had power to approve part of an application.

Merits issues

The critical planning issues considered by the court concerned the weight to be given to the council's IPA planning scheme and the conflicts between the proposed development and the relevant planning scheme provisions.

Section 4.1.52(2)(a) (Appeal by way of hearing anew) of the IPA provides that an appeal is to be determined based on the laws and policies applying when the development application was made but with appropriate weight given to any new laws and policies the court considers appropriate. Given that the structure plan had been in force for 12 months prior to the appeal being heard, the court held that the IPA planning scheme should be given determinative weight, considering it reflected the current planning for the land the subject of the appeal. Adopting the words of His Honour Judge Wilson SC in *Ross Nielson Properties Pty Ltd v Brisbane City Council & Anor* [2007] QPELR 323, his Honour Judge Searles indicated that it would be illogical not to afford the current scheme determinative weight.

The court considered whether the proposed development conflicted with the transitional planning scheme and the IPA planning scheme. The court accepted the evidence of the parties' town planning experts that the proposed development conflicted with the transitional planning scheme in respect of the provisions relating to the Special Planning Intent No. 4 Area in the 1998 Strategic Plan, the Rural Zone and the Rural/Non-Urban Zone. Heritage submitted that any conflict with the transitional planning scheme was of little significance, given the weight to be afforded to the content of the IPA planning scheme.

The court also considered the conflict with the IPA planning scheme in respect of the development around the existing dam within the green space network land use precinct. The town planning and environmental experts who gave evidence in the appeal agreed that some form of urban development on the dam land was appropriate and that the nine lot proposal was acceptable.

The court went on to consider the issues raised by the fourth co-respondents and fifth co-respondents regarding traffic, amenity and environmental impacts and held there was nothing in any of the issues raised which would prevent an approval being given to the development application, as changed, if it warranted approval in all other respects.

Decision

The ultimate question for the court was whether there were sufficient planning grounds to approve the development application despite the conflict with the provisions of the transitional planning scheme and the IPA planning scheme. The court held that on the basis of the improved environmental and planning outcome and need for housing in the local and wider area, sufficient planning reasons existed to justify approval despite the conflicts.

Held

Appeal allowed.

Applying a "best fit" approach

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *AAD Design Pty Ltd v Brisbane City Council* [2011] QPEC 54 heard before Jones DCJ

Executive Summary

The Planning and Environment Court (**court**) has confirmed a decision of the Development Dispute Resolution Committee (**committee**) in respect of a determination that a proposed use of premises, being a house comprising numerous bedrooms which were to be separately leased out to unrelated persons for the purpose of student accommodation, is properly defined as "Multi-unit dwelling" and not "House" under the *Brisbane City Plan 2000*. In making its decision, the Planning and Environment Court confirmed its support for the "best fit" approach where there are two or more defined purposes which cover a particular proposal.

Case

This case involved three appeals to the Planning and Environment Court from the Building and Development Dispute Resolution Committee in respect of a determination that a proposed use of premises the subject of the proceedings was for "Multi-unit dwelling" and not "House" under the *Brisbane City Plan 2000* (**planning scheme**).

Facts

AAD Design Pty Ltd (**applicant**) made three separate development applicants to the Brisbane City Council (**council**) for a material change of use respectively described as follows:

- Residence not complying with House Code (10 bedrooms);
- Residence not complying with House Code (11 bedrooms);
- Residence not complying with House Code (9 bedrooms).

The proposed developments included a house comprising bedrooms which were to be separately leased out to unrelated persons for the purpose of student accommodation.

Between 9 and 12 July 2010, the council advised the applicant that the development applications were not properly made for the following reasons:

- the use applied for was defined as a "Multi-unit dwelling (boarding house)";
- the level of assessment was impact assessment;
- the IDAS forms required amendment;
- payment of further fees in excess of $16,000 was required.

On or about 14 July 2010, the applicant applied to the committee seeking declarations that the development applications were properly made on the basis that the use applied for was "House".

The Committee dismissed the application stating the following:

> *Based on an assessment of the facts, it is the Committee's decision that the proposed use is a 'multi-unit dwelling' as that term is defined in the planning scheme, and as a result the development application was not properly made because the correct fee was not provided with the development application.*

On appeal to the court, the applicant alleged the committee erred in its decision as follows:

- failing to give effect to the natural and ordinary meaning of the words used in the definition of "House" where used within the City Plan 2000;
- failing to give effect to the final sentence of the definition of "Multi-unit dwelling" in the City Plan 2000;
- using performance criteria P8 and acceptable solution A8 of the House Code to exclude the application of the definition of "House";
- taking into account the tenancy agreements in construing the competing definitions.

Decision

The court held that the use of the proposed developments was better defined as "Multi-unit dwellings" rather than "House" and dismissed the applicant's appeal.

In reaching this determination the court held the following:

- given that non-compliance with an acceptable solution does not necessarily involve conflict with a planning scheme, the Committee probably erred in having regard to A8 in reaching its conclusions about the proper categorisation of the subject proposals, however, that does not mean that the Appellant succeeds;
- the Committee did not err in bringing into account the commercial aspects of the proposal, that is, the tenancy arrangements, as the characterisation of a use naturally involves an analysis of the factual circumstances surrounding the proposal;
- it was clear that the proposed developments could fit within both the definition of “Multi-unit dwelling” and “House”;
- where there are two or more defined purposes which cover a particular proposal, a “best fit” approach is appropriate;
- the best fit for the proposed developments is a multi-unit dwelling and not a house. While some of the features usually associated with a “boarding house” or "hostel" are absent, for example the provision of services such as meals, room cleaning and/or washing, there are a number of significant similarities;
- it seems tolerably clear that the emphasis of the definition of “House” is more focused on the entity of a domestic group whereas the emphasis of the definition of “Multi-unit dwelling” is more directed to the existence of multiple independent “individuals”, “domestic groups” and “discrete households”. The proposed use falls more comfortably under the latter descriptions than the former;
- the principle of resolving ambiguity in the circumstances in favour of the landowner could only be used as a last resort, if it is available at all, concerning the construction of a planning scheme. That was not the situation in this case.

Held

The court held that the decision reached by the committee was correct and no determinative error of law was shown.

Accordingly, the appeal was dismissed.

Applying laws and policies after an application has been made

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Waverly Road Developments Pty Ltd v Gold Coast City Council* [2011] QPEC 59 heard before Andrews SC

Executive Summary

When courts assess decisions made by local governments they must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies that the court considers appropriate. This invariably means that developers are often required to comply with planning controls introduced years after a development application is submitted. This was the case for a developer applying for a residential subdivision in 2004, who was ultimately required to comply with the Gold Coast City Council's Priority Infrastructure Plan that was introduced three years later.

Case

This case concerned an appeal by Waverly Road Developments Pty Ltd (**appellant**) against a decision of the Gold Coast City Council (**respondent**) to grant a preliminary approval subject to conditions for a development permit for reconfiguring 2 lots into 78. This case also concerned separate originating applications filed by the appellant and respondent in respect of the infrastructure charges associated with the preliminary approval. All three matters were heard and decided together by the Planning and Environment Court (**court**).

Facts

History of the site

In June 2004, Australian Agricultural and Property Management Ltd (**AAPM**) applied to the respondent for a development application for a development permit for reconfiguring 2 lots into 78 for residential purposes with respect to land situated at 41 and 55 Waverly Drive, Pimpama (**site**). Prior to this development application, the respondent had resolved to adopt the East Coomera Sewerage Infrastructure Strategy (**ECSIS**) as a basis for the assessment of development applications within the East Coomera catchment area. The site was located in Zone F for the purposes of the ECSIS. At the relevant time there were issues associated with the ECSIS in respect of the allocation of the number of equivalent tenements that could connect to the sewerage infrastructure within the East Coomera catchment area. As a result of this, in August 2005, the respondent indicated to AAPM that it did not support a development permit for the site as there was not the necessary sewer infrastructure in the relevant Zone to support AAPM's development. The respondent indicated that amendment to the ECSIS would be required and until that time, only a preliminary approval of the development application would be considered.

In May 2006, Harridan Pty Ltd purchased the site from AAPM. In August 2006, the respondent issued a decision notice in respect of the site granting a preliminary approval subject to conditions. A condition of the approval provided:

> *This Preliminary Approval cannot be superseded by a Development Permit for Reconfiguring a Lot until such time as the applicant can demonstrate a suitable and achievable point of connection to the Council's sewerage network to the satisfaction of Gold Coast Water. Connection to any permanent or temporary sewerage infrastructure system can only be achieved if the capacity required to service the proposed development is available.*

In September 2006, the appellant appealed to the court against the decision of the respondent and sought the issue of a development permit. Importantly, in January 2007, the respondent's Priority Infrastructure Plan (**PIP**) and infrastructure charges schedule (**ICS**) came into effect. This gave the respondent power to issue an infrastructure charges notice (**ICN**) on any approval given to the appellant, as the development application was lodged prior to the commencement of the PIP, but would be decided after the PIP had come into force.

In March 2009, the appellant changed its application pursuant to section 4.1.52(2)(b) (Appeal by way of hearing anew) of the *Integrated Planning Act 1997* (**IPA**). In April 2009, the respondent notified the appellant that it would support the issue by the court of a development permit for reconfiguring a lot (subdivision to create 83 residential lots, public open space and internal road) subject to conditions and to also issue an ICN in respect of the recreational facilities, transport and stormwater networks.

Current proceedings

The current proceedings concerned the appellant's appeal against the decision of the respondent in 2006 to grant a preliminary approval subject to conditions. The proceedings also concerned an application by the appellant seeking, amongst other things, declarations that the respondent was not entitled to issue an ICN as a result of the development approval. Finally, the proceedings also dealt with an application sought by the respondent for a declaration that the respondent was entitled to issue an ICN to levy charges for the recreational facilities, transport and stormwater networks of the development.

All three proceedings related primarily to the appropriate legal mechanism for the imposition of infrastructure charges on the proposed development and the quantum of charges that ought to be imposed. In this context, the main issue to be determined by the court was whether the laws and policies applying at the time the appellant's development application was lodged should be applied or whether the court should give weight to later laws and policies.

Decision

His Honour, Judge Andrews SC, rejected the appellant's declarations and found that the respondent, upon the court deciding to approve the development application, would be entitled to levy charges for the recreational facilities, transport and stormwater networks under the ICS by giving an ICN.

Referring to section 4.1.52(2) (Appeal by way of hearing anew) of the IPA and also section 821 (Application of repealed IPA, s 4.1.52) of the *Sustainable Planning Act 2009* (**SPA**), his Honour identified that the court must decide the appeal based on the laws and policies applying when the appellant's application was made, but may also give weight to any new laws and policies which the court considered appropriate. Even though the council's PIP and ICS came into force after the appellant's development application was lodged, the respondent was authorised to consider these instruments in its assessment.

Based on this finding, his Honour noted that pursuant to section 629 (Funding trunk infrastructure plans for trunk infrastructure) and section 633 (Infrastructure charges notice) of the SPA, the respondent would be entitled to levy a charge for supplying recreation facilities, transport and stormwater trunk infrastructure under the ICS and would be authorised to issue an ICN if the court were to grant a development permit for the site subject to conditions.

His Honour further noted that the respondent was correct in its decision in August 2006 to refuse to grant a development permit, as the appellant's development application did not demonstrate compliance with the respondent's Reconfiguring a Lot Code nor its Works for Infrastructure Code. His Honour mentioned at [93]:

> *It was not appropriate to condition the applicant at the time to construct its own reticulation system and all the more so without knowing what that condition involved. Such a condition might not achieve compliance with: PC 23 of the Reconfiguration of a Lot Code in that such a system might not be cost effective; or PC5 or the purpose of the Works for Infrastructure Code, it would result in sewerage infrastructure provided with best management land development principles in accordance with Planning Scheme Policy 11 – Land Development Guidelines.*

On the issue of the respondent's use of the ECSIS, his Honour was satisfied that a lawful application of the ECSIS was used in respect of the assessment of the appellant's development application. His Honour noted that because sewage treatment capacity in the East Coomera area was less than required for urban development, the ECSIS, as a source of sewerage infrastructure capacity requirements, was essential to the assessment of the appellant's development application.

Held

The declarations sought by the appellant were refused. The court deciding to approve the development application, the respondent is entitled to levy charges for the recreational facilities, transport and stormwater networks under the ICS by giving an ICN.

Early resolution of infrastructure charges and development approval conditions disputes

Samantha Hall | Jonathan Evans

On 9 May 2011, Chief Judge PM Wolfe issued Practice Direction 1 of 2011 for the Planning and Environment Court (P&E Court). Its purpose is to ensure that a proceeding involving infrastructure charges or conditions of a development approval are subject to an alternative dispute resolution (ADR) process at an early stage, preferably without the need for an order or direction of the P&E Court

What is ADR?

ADR provides parties in civil matters with an alternative to a trial. The two most common forms of ADR are:

- mediation – where an independent person or mediator helps the parties to negotiate an agreement to resolve the dispute, or part of it; and
- case appraisal – where an independent person or case appraiser assesses the merits of the case and makes a decision similar to a judgment of a court.

The benefits of ADR include:

- reducing the case load in the courts and helping prevent delays;
- avoiding the expense of a trial;
- helping the parties reach a settlement at an early stage;
- being a lot less formal than court proceedings; and
- sessions being confidential so agreements reached do not need to be made publicly available.

What does the practice direction require?

The practice direction requires that parties to a proceeding involving infrastructure charges or conditions of approval should, **within one month after commencement** of the proceeding, by agreement, participate in or fix a date and time with the Alternative Dispute Resolution Registrar (**ADR registrar**) to participate in:

- a mediation conducted by the ADR registrar;
- a without prejudice conference chaired by the ADR registrar; or
- a case management conference chaired by the ADR registrar.

These services are free to parties involved in P&E Court matters.

If the parties do not comply with this direction, the ADR registrar shall immediately list the proceeding for review by a judge, so that the judge may make orders for a dispute resolution plan. The aim of such a plan being directed towards the narrowing and if possible, resolution by agreement of the issues in dispute.

Consultant convicted for clearing of koala habitat

Samantha Hall | Jamon Phelan-Badgery

This article relates to the matter of *Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd* [2010] NSWLEC 144 heard before Pain J

Executive Summary

This New South Wales case is the first instance of a consultant (rather than a developer) being prosecuted for offences arising from the development process which were committed because of advice received from the consultant. The case demonstrates that consultants should be aware that accepting an obligation to "ensure legal compliance" as part of a development approval imposes a very high standard which may require legal input. If this obligation is accepted then a failure to provide advice that an offence may be committed may be taken to be the direct cause of an offence. Subsequently, consultants should be careful to say that legal advice is not being provided and should wherever possible limit their scope to the provision of necessary factual and technical information not legal advice.

Case

This was a prosecution by Gordon Plath of the New South Wales Department of Environment and Climate Change (**prosecutor**) of planning and environment consultants Anthony Fish and Orogen Pty Ltd (**defendants**). The defendants pleaded guilty to offences pursuant to the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**), *Native Vegetation Act 2003* (NSW) (**NVA Act**), and *Threatened Species Conservation Act 1995* (NSW) (**TSC Act**) which occurred as a result of unlicensed clearing of native vegetation on the subject site which was the habitat of koalas, a threatened species.

Facts

Buildev Group (**developer**) relied on advice from the defendants for their professional guidance on planning and ecology matters for a 21 lot industrial subdivision of a property at Taylors Beach, New South Wales.

The defendants were aware from their involvement in the matter that the development site contained koala habitat and movement corridors.

The development site was comprised of two differently-zoned areas pursuant to the Port Stephens Local Environment Plan 2000 (**LEP**): The zones were "1(a) Rural" and "4(a) Industrial". The treatment of clearing of vegetation in each zone differs under the LEP and under some of the other legislative instruments cited in the case. Therefore, under each piece of legislation it was possible that a portion of the total clearing works were unlawful while the balance was not.

Orogen Pty Ltd's fee proposal contained an acceptance of responsibility for ensuring 'legislative compliance' in respect of the vegetation clearing works involved. At the time the relevant clearing occurred, Orogen Pty Ltd, along with the developer and clearing contractors, was party to a contract to provide advice on legislative requirements related to the clearing of vegetation and to check for threatened species prior to commencement of works.

The defendants advised the developer that no consent was required to clear vegetation on the 4(a) Industrial land. This advice was either incorrect or only limited to the issue of development consent (as no consent or permission was required under the LEP).

The defendants failed to advise the developer that:

- Section 118D of the NPW Act makes it an offence to "*…damage any habitat of a threatened species, endangered population, or an endangered ecological community if the person knows that the habitat concerned is habitat of that kind…In this section, damage includes cause or permit damage.*"
- In order to lawfully clear threatened species habitat, it was necessary to obtain a licence or certificate under the NPW Act or TSC Act, or another form of authorisation such as a development approval, property management plan or joint management agreement under one of various other legislative provisions.

The clearing works were not undertaken by the defendants, but by contractors engaged by the developer. The decision to clear the vegetation was not the decision of the defendants but the decision of the developer.

Decision

The judge considered the overall culpability of the defendants to be of low to medium significance because while the defendants were responsible for ensuring legislative compliance, the defendants did not make the decision to clear the vegetation nor carry out the clearing. Similarly, the degree of environmental harm caused was on the lower end of the spectrum, as the illegal clearing caused a loss of habitat sufficient to support up to a pair of adult koalas and a narrowing of a significant movement corridor.

Interestingly, the court made use of the provisions of the NPW Act which allow for additional orders to be made, such as:

- ordering the offender to take specified action to publicise the offence and its environmental and other consequences; or
- ordering the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit.

Pursuant to these provisions and other general sentencing principles, the defendants were required to:

- pay $15,000 in fines; and
- undertake an environmental service order being the preparation of part of a koala mapping project (the value of this project is estimated to be more than $160,000); and
- publish a notice of their offence in the Sydney Morning Herald and the Newsletter of the Ecological Consultants Association of NSW; and
- pay the prosecutor's costs of $105,000.

COLIN BIGGERS & PAISLEY LAWYERS

Submitter's rights in a conditions appeal

Samantha Hall | Aaron Madden

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Morgan v Toowoomba Regional Council & Ors (No. 2)* [2011] QPEC 61 heard before Robin QC DCJ

Executive Summary

The case involved a submitter application to be joined as an additional co-respondent by election to an appeal. In addition to addressing this application, Robin QC DCJ also considered a number of issues relating to co-respondents and submitters in the proceeding upon which judgement had been reserved at an earlier hearing.

These issues included the following:

- the possibility of an extension of time to elect to become co-respondents;
- what constituted a 'properly made submission' as defined under schedule 10 (Dictionary) of the *Integrated Planning Act 1997*;
- the scope of the conditions which may be appealed by submitters and co-respondents in a conditions appeal;
- the power of the court to extend time for making a submission.

Case

This case involved a submitter application to be joined as an additional co-respondent by election to an appeal. In an earlier hearing (1 March 2011) judgement was reserved on certain issues relating to co-respondents and submitters. This judgement sought to deal with these various issues prior to the next scheduled mention of the matter.

Facts

The appeal had been commenced by the developer against certain conditions imposed by the council on its development approval in relation to an extension of a feedlot. During the course of the substantive proceedings, questions arose as to whether an extension of time was available for submitters to elect to become co-respondents.

Further questions arose as to whether a submission made by a would-be submitter, a Mr Newson, would be 'properly made' under the definition in schedule 10 (Dictionary) of the *Integrated Planning Act 1997*:

> ***Properly made submission*** *means a submission that –*
>
> *(a) is in writing and unless the submission is made electronically under this Act, is signed by each person who made the submission.*

The scope of the conditions which may be appealed by submitters and co-respondents was also required to be considered by Robin QC DCJ ahead of the subsequent hearing of the matter, due to uncertainty surrounding these issues.

Decision

For the majority of the judgement, Robin QC DCJ dealt with the primary application as to the possibility of an extension of time for the third and fourth respondents by election (Damien & Leah McInnerney) to elect to become co-respondents (thereby initiating their own appeal). In considering the analogous case of *King v Charters Towers City Council* [2004] QPELR 51.

His Honour pointed to the fact that adding further co-respondents significantly weakened the appellant's position in terms of gaining a development approval. As such his Honour found that the decision to grant submitters, such as the McInnerney's, additional time to initiate their own appeal should not be taken lightly. This was the case even in the current instance where the McInnerney's had received legal advice which suggested that they would not be able to challenge the development approval unless they instituted their own appeal.

In taking this approach, Robin QC DCJ referenced the case of *Kangaroo Point Residents Association v Brisbane City Council* [2006] QPELR 471, in which incorrect advice by the council to the submitters as to the appeal period was not sufficient justification to grant an extension of time. Furthermore the case of *Bradshaw v Beaudesert Shire Council* [2006] QPEC 71 was also raised in which Rackemann J was willing to grant an extension of one day. This extension however was only granted due to the fact that it was the omission of the respondent's solicitors which resulted in the relevant delay.

In regards to whether the submissions made by Mr Newson were 'properly made' under schedule 10 (Dictionary) of the *Integrated Planning Act 1997*, Robin QC DCJ noted that it was for the would-be submitter to satisfy this requirement. The document itself was submitted by email, and it was contended by the appellant's counsel that because it was not signed, it was not a properly made submission. Robin QC DCJ did not elucidate a great deal on this point, however he agreed with the appellant's contention. In doing so his Honour seemingly rejected the argument of the would-be submitter that an electronic signature on the cover email sufficed for the purposes of the definition in schedule 10 (Dictionary) of the *Integrated Planning Act 1997*, Robin QC DCJ also reaffirmed the principles in *Adco Construction v Brisbane City Council* [2009] QPELR 349 which suggested that there was no power for the court to extend the time for making a submission.

Finally, in addressing the scope of conditions which may argued by parties to the appeal, Robin QC DCJ stated that in a conditions appeal, the parties are not limited to arguing about conditions which the appellant complained of. Indeed, any submitter co-respondent is entitled to raise any issues in regard to the conditions including any which the council may raise. However his Honour stated that the conditions which were to be appealed should be made known to the other parties prior to the hearing.

Held

- That the application for an extension of time for the applicant to elect to be joined as co-respondent to the appeal be refused.
- That the application to be joined as an additional co-respondent by election to the appeal be refused.

COLIN BIGGERS & PAISLEY LAWYERS

Easing the easement: A conditions appeal

Samantha Hall | Matthew Soden-Taylor

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Parsons v Redland City Council* [2011] QPEC 62 heard before Robin QC DCJ

Executive Summary

In this case, the Planning and Environment Court (**court**) heard an appeal against certain conditions of approval imposed on a development permit for material change of use (dwelling house and carport) by the Redland City Council. The key condition in dispute was a condition requiring a drainage easement which in effect sterilised 90% of one of the two lots the subject of the development approval. The court held that whilst such easements were appropriate, the drainage purposes could be achieved by way of an easement with more modest dimensions and ordered the conditions of approval be amended.

Case

This case involved an appeal to the court against certain conditions of approval imposed on a development permit for a material change of use (dwelling house and carport) (**development approval**) by the Redland City Council (**council**).

Facts

The development approval related to land situated at 65 Coondooroopa Drive, Macleay Island and more particularly described as Lots 268 and 269 on RP31213.

Lot 268 was wholly located in the conservation zone in the council's planning scheme, as was most of Lot 269, with a small portion being located in the residential zone.

What was applied for was a two level, one bedroom house within the residential zone with no development in the conservation zone. The reason the house was restricted to just one bedroom was because of the amount of land above the storm surge line at AHD 2.4 metres available for trenches for waste water treatment.

The council imposed various conditions on the development approval, which included the following conditions which were appealed by the appellant:

- **Condition 6:** "*A drainage easement is required over the subject allotment to provide drainage for a Q100 (1 in 100 year) storm and/or flooding event. The easement shall be as indicated on Council's Drawing Number A2-C316-2(B) attached. Written agreement of the owner of the allotment must be received prior to the commencement of building works, to allow Council to survey and register the easement at the Titles Office (see attached easement consent form).*"
- **Condition 18:** "*Due to the limited area available for effluent disposal, this approval is for a one (1) bedroom dwelling house only. No further bedrooms will be permitted on this allotment, unless it can be demonstrated that such a proposal can comply with the requirements of the relevant Australian Standards, Council's Household Wastewater Treatment/Disposal Policy (ENBS006) and the Plumbing and Drainage Act 2002 (Qld).*"
- **Condition 31:** "*No building works, cutting or filling or plumbing and drainage works are permitted below the 2.4 metre AHD level (Australian Height Datum) contour level or below the 100 Year ARI (Average Recurrence Interval) flood level.*"
- **Condition 37:** "*This development permit for a Material Change of Use will remain current until 30 January 2011 starting the day the approval takes effect, as per sections 3.5.21(1) and 3.5.19 of the Integrated Planning Act 1997 (Qld).*"

The appellant argued that he should not have to suffer from works done or permitted by the council and predecessor authorities which exacerbated the drainage problem on his land by diverting and concentrating overland flows of stormwater to the disadvantage of Lot 269.

Decision

The court observed that the effect of condition 6 was that the easement related to 90% of Lot 269 and in practical terms the appellant and his successors could do nothing with it, yet retained legal responsibility for it including the obligations of maintenance and paying rates.

In considering whether condition 6 was reasonable or relevant, the court held as follows:

> *The relevance of the conditions still in dispute may be accepted, whether or not that are strictly necessary. But it is a serious question whether it is reasonable to impose a condition which requires the owner of Lot 269 to accept storm water run-off collected and concentrated in Cross Street in a way effectively sterilising most of the parcel in order to accommodate a wide path for overland flow of that run-off, with the possibility of works in the Cross Street reserve (not ever likely to be used as a road) described by Mr Rogers not taken up.*

In respect of condition 6 the court held as follows:

> *The court accepts the principle of easements in such circumstances. Mr Collins' observations are in line with the court's experience. Without the right to enter as necessary to preserve the integrity of drainage systems, a council with responsibility to protect the community interest is left having to implement unwieldy, complicated, time-consuming and costly processes to gain access, and may be frustrated in situations of some urgency.*

However, the court held that the easement was a serious fetter on potential development of the land and held that the purpose of securing the path for overland flow in very high volume events could be achieved by an easement of more modest dimensions and ordered that condition 6 be amended accordingly.

In respect of condition 18, the court held that only the first sentence should stand and held that the remaining condition represented an unjustifiable restriction.

The court also held that condition 31 was appropriate even if it simply repeated what is required under present planning arrangements.

Finally, the court held that the currency period for the development approval would run from the date of the court's order rather than as provided in condition 37.

Held

The court allowed the appeal and ordered that conditions 6, 18 and 37 be amended or removed as described above.

COLIN BIGGERS & PAISLEY LAWYERS

Apprehension of bias in exercise of judicial discretion

Samantha Hall | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Court of Appeal in the matter of *Elsafty Enterprises Pty Ltd & Anor v Gold Coast City Council* [2011] QCA 84 heard before Chesterman and White JJA and Martin J

Executive Summary

The principles of natural justice provide grounds to appeal a decision where there is a reasonable apprehension of bias in the decision maker. This principle is echoed in the appeal rights in the *Sustainable Planning Act 2009*.

In this instance, the self-represented applicants contended the primary judge had predetermined his decision and that this was reflected in the proceedings, for example in interjections by the judge and his refusal to allow extra witnesses to give evidence. On review of the primary judge's decision and the transcript of the hearing, it was decided that the applicants had no reasonable prospects of success if given leave to appeal.

Case

This was an application pursuant to section 498 of the *Sustainable Planning Act 2009* in which the applicants sought leave to appeal a decision of Robin QC DCJ in the Planning and Environment Court (**P&E Court**).

The original action in the P & E Court involved an application by the Gold Coast City Council (**GCCC**) for the court to issue an enforcement order. The court's order prohibited Elsafty Enterprises Pty Ltd (**Elsafty**) and Sustainable International Property Pty Ltd (**SIP**) from using the roof top terrace of the premises known as 'Burleigh Beach House' in Burleigh Heads to serve food and drink. Town Planning Permit No. 9/225 had been granted in 1986 to operate a restaurant in the premises (**existing permit**). Elsafty and SIP contended that their intended use of the roof top was encompassed in the existing permit.

The grounds on which the applicants, Elsafty and SIP, relied are summarised as follows:

- apprehension of bias arising from the conduct of the judge in dealing with the self-represented litigants, specifically "*in refusing the application for an adjournment, interjecting, limiting cross-examination and refusing to allow further witnesses to give evidence in the applicant's case, the applicants contend the primary judge demonstrated a determination not to be persuaded to the applicants' cause*";
- miscarriage of the exercise of the judge's discretion whether to issue an enforcement order, from failing to consider the hardship that would be suffered by Elsafty and SIP and the representations made by the GCCC that the intended use was acceptable;
- error in law of the construction of the relevant planning legislation.

Facts

Essentially, the GCCC contended that there was no planning permission in place for the intended use of the roof by Elsafty and SIP as a 'Restaurant', 'Café', 'Reception Room', or 'Tavern' as defined in the relevant planning scheme.

Elsafty and SIP asserted that there was no need for further approval, as their intended use was included in the existing permit. Additionally, and unfortunately for Elsafty and SIP, some communications with and actions of the GCCC in the intervening years between the existing permit and the enforcement order gave the impression there was no need for further approval. However, these communications, even where they may have contradicted the legal position, were not sufficient to displace the duty of the local government to uphold the legislative and planning scheme provisions in place.

A show cause notice was issued to Elsafty dated 14 August 2009. Work being conducted by Elsafty and SIP to improve the roof top terrace was ordered to be ceased and the show cause notice was lifted on 4 November 2009. In March 2010, the council wrote to Elsafty confirming its position that any use of the roof top terrace was unlawful without a planning permit.

During the hearing, the directors of Elsafty and SIP were self-represented by their directors (Mr El Safty and Mr Youssef respectively).

At the first day of the hearing on Thursday, 9 December 2010, it became clear that there was not enough time to hear all the evidence. The primary judge indicated that he would adjourn the matter until the following Tuesday, with a written statement to be filed of Mr Youssef's evidence on the Monday.

A further adjournment was then denied on the Tuesday, on the basis that Elsafty and SIP had been aware of the GCCC's position since March 2010. Mr Youssef had not prepared a statement, and was reluctant to give evidence without legal counsel. The primary judge disallowed evidence to be given by Mrs Elsafty as no statement had been filed.

Decision

Leave to appeal was refused because there were no prospects of the applicants' succeeding on any of the grounds which they raised.

With respect to the ground of apprehension of bias, the court held that "*A fair minded lay observer would not, at any point in the proceedings, have thought that the primary judge did not bring an impartial and unprejudiced mind to the resolution of the question which he was required to decide.*"

The court noted among other points that the primary judge:

- considered the relevant provisions in the legislation and concluded that the proposed use was not a minor change in the scale or intensity of an existing use;
- paid due regard to the money spent by Elsafty and SIP in preparing the premises for their intended use;
- concluded that Elsafty and SIP were determined to press ahead with their intended use and that there was no prospect of the parties reaching accommodation, that is there was a high likelihood of a development offence occurring; and
- had not predetermined his decision by the close of the hearing on Tuesday, 14 December 2010.

The court also noted that interventions by the primary judge where they did occur "*were directed to exposing the issues which had to be decided. His Honour was plainly drawing out the facts and circumstances of relevance with Mr El Safty and seeking to probe the construction point.*"

With respect to the ground that the primary judge failed to exercise his discretion in a balanced manner, the court held that the primary judge "*did engage in weighing the relative arguments advanced by the parties and, indeed, gave particular prominence to those of the applicants.*"

With respect to the ground that the primary judge's construction of the relevant legislation and planning scheme was incorrect, the court conducted a detailed review of each of the material terms that required construction by the primary judge. The outcome of this review included the following conclusions:

- The applicants were correct in their construction argument that pursuant to the planning scheme "*the roof area does not exceed the allowable margin of total use area. But that is not the true issue.*"
- The true issue was that Elsafty and SIP proposed to start a new use of the premises.
- The court noted that had a reasonable apprehension of bias been established by the applicants, the matter would have been remitted to the P&E Court for consideration anew by another judge, so as to preserve the appearance of neutrality which is so fundamental to the legal system.

Held

Application for leave to appeal refused.

COLIN BIGGERS & PAISLEY LAWYERS

General authority to use State resources

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Court of Appeal in the matter of *WAW Developments Pty Ltd v Brisbane City Council* [2011] QCA 47 heard before Muir and Chesterman JJA and Ann Lyons J

Executive Summary

When applying for a development approval that involves or interferes with a State resource, such as building a deck over a public footpath, a 'General Authority' from the Department of Environment and Resource Management (**DERM**) is usually required in support of that application as evidence of the Department's satisfaction that the development can proceed in the absence of an allocation of, or an entitlement to, the State resource. It is the interpretation of this authority that can sometimes lead to confusion, as was the case for the Planning and Environment Court in late 2010, which ultimately lead to its decision being set aside by the Queensland Court of Appeal this year.

Case

This case concerned an appeal to the Queensland Court of Appeal (**court**) by WAW Developments Pty Ltd (**appellant**) against a decision of the Planning and Environment Court (**P&E Court**) to strike out its appeal against the Brisbane City Council's (**respondent**) refusal of its development application to extend an existing approved restaurant use.

Facts

In August 2009, the appellant applied to the respondent for a development approval for a material change of use to extend an existing approved restaurant use with respect to land situated at 68 Commercial Road, Newstead. The approval that was sought can be more particularly described as an approval to use a 40m² deck area that was constructed over the existing footpath adjoining the restaurant for outdoor dining and to form part of the restaurant premises. The respondent subsequently refused the appellant's development application and in December 2009, the appellant appealed the respondent's refusal to the P&E Court.

In those proceedings, the respondent subsequently made its own application to the P&E Court for a declaration pursuant to section 4.2.21 (Court may make declarations) of *Integrated Planning Act 1997* (**IPA**) that the appellant's development application was not a properly made application. The respondent argued that pursuant to section 3.2.1(5) (Applying for a development approval) of the IPA, the development application was not a properly made application because the development involved a State resource prescribed under a regulation and it was not accompanied by evidence that the Chief Executive of the department administering the resource was satisfied either that the development was consistent with an allocation of, or entitlement to, the resource, or that the development application may proceed in the absence of an allocation of, or entitlement to, the resource.

The State resource in question was the road reserve adjoining the appellant's land and the application involved the use of the resource because the appellant's deck was built on and over part of the existing public footpath, thereby providing an alternative means of pedestrian access along the footpath. Prior to the development application being lodged with the respondent, the appellant had applied to the relevant department with responsibility for administration of the road, the Department of Environment and Resource Management requesting evidence of resource entitlement and also for tenure approval for the existing outdoor dining and footpath entitlement over the State resource. The DERM responded by way of a letter to the appellant identifying that it did not require tenure over the subject area but it would give a General Authority that the activity of outdoor dining was 'traditionally consistent with the use of a road'.

In the initial appeal in the P&E Court, the issue to be determined was whether this 'General Authority' issued by DERM satisfied the requirement of section 3.2.1(5)(c) (Applying for a development approval) of the IPA.[11] Namely, whether it was in fact evidence of the Chief Executive of the department administering the State resource being satisfied that the development application would proceed in the absence of an allocation of, or an entitlement to, a State resource. In that appeal his Honour Everson DCJ, did not agree that the letter issued by DERM constituted such evidence, rather that it was only 'referring to a General Authority' and that such authority only included outdoor dining to which the public has unrestricted access where there were no 'fixed improvements unless they form part of the streetscape'.[12] His Honour did not consider that the appellant's deck formed part of the streetscape and summarily dismissed the appeal on the ground that the development application was not a properly made one.

11 *WAW Developments Pty Ltd v Brisbane City Council* [2010] QPEC 69 at [2].
12 Ibid at [16].

In September 2010, the appellant applied to the Queensland Court of Appeal to appeal against the summary dismissal of its appeal arguing that the P&E Court had erred in its decision in respect of section 3.2.1(5) (Applying for a development approval) of the IPA.

Decision

His Honour, Chesterman JA, with Muir JA and Ann Lyons J agreeing, found that the P&E Court erred on a question of law by wrongly concluding that the DERM's letter did not provide the evidence required by section 3.2.1(5) (Applying for a development approval) of the IPA. His Honour noted that it would be impossible to read the letter provided by DERM as indicating anything other than the Chief Executive's satisfaction that the development might proceed and that the development did not adversely affect the State resource in question. As his Honour pointed out, the letter expressly noted that the DERM did not require the appellant to obtain tenure over the part of the footpath covered by its deck and the reference to the General Authority, and copy provided with the letter, clearly indicated that the DERM did not require the appellant to obtain entitlement to the State resource and was content for the development application to proceed without such an entitlement.

His Honour's interpretation of the General Authority was that it clearly indicated that the DERM regarded the use of the deck for outdoor dining as an acceptable use of the footpath. He went on to further note that the P&E Court's analysis of the use of the deck in respect of forming part of the streetscape of Commercial Road was inappropriate in this context, as his Honour noted at paragraph [20]:

> *This approach misses the point. Ms Dunn's letter did not say that the Chief Executive would be satisfied that the development might proceed in the absence of an allocation of or entitlement to the resource only if the application fell within one of the examples described in the General Authority. The clear tenor of her letter was that the department did not require the application to obtain an entitlement to the resource, and was content for the application to proceed without such an entitlement.*

Held

- The application for leave to appeal was granted.
- The appeal was allowed.
- The order of the Planning and Environment Court was set aside.
- The respondent was to pay the costs of the application and the appeal.

Determining the level of assessment: The meaning of 'building height'

Samantha Hall | Katelin Kennedy

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *AO-TAI Cleveland Pty Ltd v Redland City Council* [2011] QPEC 63 heard before Andrews SC DCJ

Executive Summary

In this case, the Planning and Environment Court gave extensive consideration to the interpretation of the meaning of 'building height' in a local government planning scheme, in order to determine whether a development application was code assessable or impact assessable.

This case indicates the significance of adopting the correct interpretation of planning scheme provisions during the initial stages of the development application process in order to avoid time and cost delays of progressing with a development application on the basis of an incorrect interpretation of words in a local government planning instrument.

Case

This was a determination of a preliminary point regarding whether a development application for a development permit for a material change of use (**development application**) was code assessable or impact assessable, based upon the interpretation of the phrase "building height" as used in the Redlands Planning Scheme (**planning scheme**).

Facts

The appellant, AO-TAI Cleveland Pty Ltd (**appellant**) made a development application on or about 18 February 2009. On 7 December 2010, following a number of information requests and discussions between the appellant and Redland City Council (**council**), the appellant filed an appeal against the deemed refusal of the development application.

The issue for determination in this case was the definition of the words "building height" in the planning scheme in terms of the impact this phrase had on the determination of whether the development application would be code assessable or impact assessable.

Under section 2.1.23 (Local planning instruments have force of law) of the *Integrated Planning Act 1997* (**IPA**), the planning scheme was a statutory instrument to be used in the identification of development that is exempt, self-assessable, or assessable. Particularly relevant to the matters at hand were sections 4.14.4 (Medium Density Residential Zone - Table of Assessment for the Material Change of Use of Premises) (**Table of Assessment**) and 4.14.8 (Specific Outcomes and Probably Solutions applicable to Assessable Development, Table 2 - Maximum Overall Building Height) (**Table 2**) of the planning scheme.

The Table of Assessment provided that a development application would be code assessable if the building height did not exceed that detailed in Table 2. Table 2 provided two criteria related to building height, "Maximum Overall Building Height" (19 metres) and "Maximum Height to the Top of the Floor Level of the Highest Habitable Room" (13 metres (5 storeys)).

The development application was for an apartment building with a building height that did not exceed the "Maximum Overall Building Height" as outlined in Table 2, but with a height to the top of the floor level of the highest habitable room that exceeded the maximum in Table 2 (that is, greater than 13 metres). The council argued that because the building height exceeded the "Maximum Height to the Top of the Floor Level of the Highest Habitable Room" specifications, that it was impact assessable. The appellant alleged that the words "building height" in the Table of Assessment should be interpreted consistently with the definition in schedule 3 of the planning scheme as "the vertical distance from ground level to the highest point of the building and structures", and as such that only the "Maximum Overall Building Height" in Table 2 was required to be complied with in order for the development application to be assessed as code assessable.

Decision

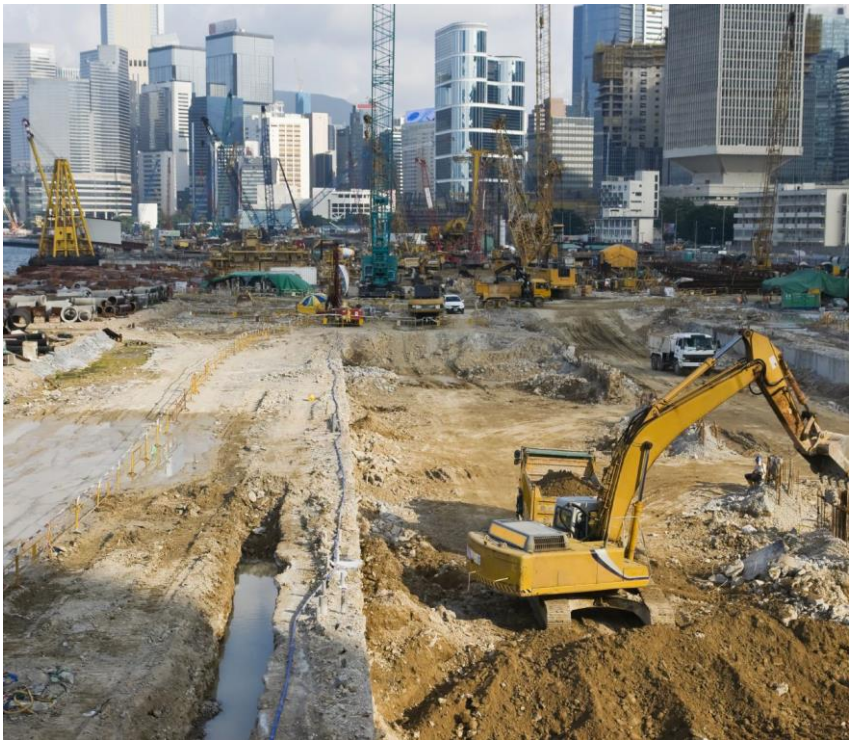
In deciding how the words "building height" should be interpreted and applied to the relevant provisions, his Honour Judge Andrews SC referred to sections 32A (Definitions to be read in content) and 32AA (Definitions generally apply to entire Act) of the *Acts Interpretation Act 1954*. He found that the definition of "building height" in the planning scheme, as outlined above, applied to the entire planning scheme, unless the context or subject matter indicated otherwise. Despite the council's demonstration that "building height" had not been used as defined in other sections of the planning scheme, his Honour found that unlike elsewhere, the words "building height" in the Table of Assessment did not indicate by context or subject matter that the definition of "building height" should not apply.

Furthermore, in reading the words in the Table of Assessment with the words in Table 2, his Honour determined that the Table of Assessment required a reference only to the "Maximum Overall Building Height" specification, rather than to both the "Maximum Overall Building Height" and "Maximum Height to the Top of the Floor Level of the Highest Habitable Room" specifications. His Honour came to this conclusion by virtue of the use of the words "building height" within the heading "Maximum Overall Building Height" and due to the fact that the specifications in the column entitled "Maximum Height to the Top of the Floor Level of the Highest Habitable Room" retained a purpose in setting a criterion for the assessment of an application (rather than for the determination of the level of that assessment).

As a result of these considerations, his Honour found that the planning scheme definition of "building height" should not be ignored when interpreting the Table of Assessment and the "Maximum Overall Building Height" column in Table 2.

Held

The development application was found to be code assessable, as it complied with the specifications for "building height" in the "Maximum Overall Building Height" column in Table 2 of the planning scheme.



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Application of the Draft South-East Queensland Regional Plan – unusual circumstances

Samantha Hall | James Langham

This article discusses the decision of the Queensland Planning and Environment Court in the matter *Graeme Adrian Brown & Ors v Moreton Bay Regional Council* [2011] QPEC 71 of heard before Robin QC DCJ

Executive Summary

This case involved unusual circumstances unlikely to ever be repeated. The Moreton Bay Regional Council (**respondent**) conceded it made an error in judging that two of development applications lodged by the Browns (**applicants**) fell foul of the draft South-East Queensland Regional Plan (**regional plan**) in force on the relevant day. The court ordered that the applications should be assessed as if the applications were properly made in the first instance, subject to the applicants paying the respondent the outstanding application fees for the applications and providing the original application documents.

Case

This case involved the respondent's refusal to receive related development applications for material change of use (**MCU**) from rural to rural residential and reconfiguring a lot (**ROL**) in the mistaken belief that draft regulatory provisions in the regional plan applied.

Facts

On 8 November 2004, the applicants attempted to lodge a development application for a MCU to carry out a rural residential use in a regional landscape and rural production area located at Clear Mountain. The land was identified as Lot 3 on RP126780 (Lot 3) and had an area of 6.69 hectares (**MCU application**). This application was accompanied by a concept plan which showed as, a new parcel, a block occupying the north-east part of Lot 3, being surrounded on the west and south by another L-shaped lot, that was also, being surrounded on its western and southern boundaries by another L-shaped lot.

On 2 June 2006, the applicant attempted to lodge development applications for a MCU and ROL. The ROL application referred not only to Lot 3 but also Lot 22 on SP112539 (**Lot 22**) as the relevant land. The proposed use was described as border alignment (to facilitate a future five lot rural residential subdivision) (**ROL application**). Lot 22 was owned by two gentlemen who were also applicants to the proceeding.

The respondent refused to accept the applications based on a misunderstanding of the regional plan, part G, which came into effect on 27 October 2004, which imposed requirements that the respondent asserted the applicants had not satisfied.

Decision

In deciding whether the MCU application should be allowed to proceed, his Honour Judge Robin QC referred to section 3.2.1 (Applying for development approval) of the *Integrated Planning Act 1997* (**IPA**) and, in particular, subsection (7)(f) which states "*An application is a properly made application if … the development would not be contrary to a State planning regulatory provision*". Applying this provision, his Honour then looked to the regional plan, concluding that is common ground that the MCU application did not comply with section 3 of division 2 of part G of the regional plan and it was on that basis that the respondent refused to accept the development application. However, his Honour confirmed that in concluding that the MCU application did not comply with the regional plan the respondent relied on requirements that the regional plan did not impose in the case of the MCU application.

His Honour, declared that the attempt to lodge the MCU application complied with the regional plan, therefore, the MCU application should be treated as though it was a properly made application, notwithstanding the following:

- the MCU application failed to contain a description of all the subject land in the lot;
- fees for the MCU application were not paid;
- the MCU application failed to include the consent of the owner of part of the subject land; and
- the MCU application referred to a different concept plan.

In deciding the ROL application, his Honour applied a ministerial exemption which was provided for the express purpose of enabling the ROL application to be lodged with the relevant authority in compliance with the IPA provisions within six months of 2 December 2005.

His Honour ordered as follows:

1. In relation to the MCU application, the applicants must by 25 May 2011:
   (i) pay the respondent the outstanding application fees;
   (ii) provide the respondent with the original application documents.
2. Upon receiving payment by 25 May 2011 and the original MCU application documents, the respondent must:
   (i) within 10 business days issue an acknowledgement notice for the MCU application; and
   (ii) assess the MCU application under the *Integrated Planning Act 1997*, as if it were properly made on 8 November 2004.
3. In relation to the ROL application, the applicants must by 25 May 2011:
   (i) pay to the respondent the outstanding application fees; and
   (ii) provide the respondent the original ROL application documents.
4. Upon receiving payment by 25 May 2011 and the original ROL application documents the respondent must:
   (i) within 10 business days, issue an acknowledgement notice for the ROL application; and
   (ii) assess the ROL application under the *Integrated Planning Act 1997*, as if it were properly made on 2 June 2006.

Held

The appeal was allowed.

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Letting an appeal run stale

Samantha Hall | Tom Buckley

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Hungerford v Maroochy Shire Council* [2011] QPEC 77 heard before Robertson DCJ

Executive Summary

In civil proceedings parties have an overriding responsibility to the court and to each other to proceed with their matter as expeditiously as possible. This obligation is enshrined in court rules throughout Australia and is provided with the objective of ensuring that undue delay, expense and hardship are not burdened upon the courts and upon potential litigants. If a party allows an appeal to sit without any action taken to pursue the matter, then its proceeding may be dismissed by the court. This was the case for an appeal that was left to sit for eight years since the last substantive action was taken on the matter.

Case

This case concerned an application by Mr Donald Hungerford (**appellant**) to the Planning and Environment Court (**court**) to seek leave to proceed with his appeal against the former Maroochy Shire Council's (**respondent**) refusal of his development application for a development permit for a material change of use to establish a caretaker's residence, in which the last substantive step in the appeal had occurred over eight years ago.

Facts

In May 2002, the appellant applied to the respondent for a development application (**superseded planning scheme**) for a development permit for a material change of use to establish a caretaker's residence on land situated at 62-68 Parsons Road, Forest Glen. This development application was refused by the respondent on various planning grounds and the appellant subsequently lodged an appeal with the court in May 2003 appealing the refusal. At that time in May 2003 an entry of appearance was filed on behalf of the respondent and subsequently no action was taken in respect of the appeal until March 2011, when the respondent sought to have the matter mentioned in the court for review.

Despite the respondent's attempt to pursue the matter earlier in November 2009 and the overall lack of inactivity on the file, the appellant subsequently filed an application with the court seeking leave to proceed with the appeal pursuant to rule 389(2) (Delay) of the *Uniform Civil Procedure Rules 1999* (**UCPRs**). Under this rule if no step has been taken in a proceeding for two years from the time the last step was taken, a new step may not be taken without the order of the court.

In his evidence, the appellant outlined as reasons for his failure to proceed with the appeal in an expeditious manner is that he became involved in an unrelated planning appeal in relation to an adjoining property which took up most of his time and resources and he was also involved in a lengthy dispute with an electricity distributor regarding a proposal it had made to place power lines through his property. The respondent opposed the appellant's application to proceed with the appeal.

Decision

His Honour, Judge Robertson, refused the appellant's application, citing that the reasons submitted in response to the significant delay in continuing the proceedings were both unconvincing and unpersuasive.

His Honour referred to the case of *Zehnder Dezent JE Pty Ltd v Caloundra City Council* [2010] QPEC 68 and also to the general obligations provided under rule 5 (Philosophy—overriding obligations of parties and court) of the UCPRs which places an obligation on all parties to litigation, by way of an implied undertaking to the court, to proceed in an expeditious way. His Honour expressed the importance of this obligation and the appellant's quite obvious length of delay in continuing the appeal. His Honour also referred to the case of *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 which listed the factors that the court takes into account in determining whether the interests of justice require a case to be dismissed under rule 389 (Delay) of the UCPRs.

Judge Robertson indicated that the relevant factors which would support the refusal of the appellant's application included the length of the delay, the reasons for the delay, the explanation for the delay and the prospects of success. His Honour concluded that the eight year delay was an unacceptable time to allow the proceeding to continue without action, the explanation provided for the delay was unsatisfactory, the evidence submitted was unpersuasive and there was no real or substantial prospects of success were the appeal to proceed.

Held

The application for leave to proceed with the appeal was refused.

The appeal was dismissed.

COLIN BIGGERS & PAISLEY LAWYERS

Scope of an adverse submitter appeal

Samantha Hall | James Langham

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Barnes & Anor v Southern Downs Regional Council & Ors* [2011] QPEC 75 heard before Rackemann DCJ

Executive Summary

The issue for the Planning and Environment Court (**P&E Court**) to determine was the permissible scope of an adverse submitter appeal against the decision of the respondent, Southern Downs Regional Council (**council**), to grant a development approval for the partial demolition of a building listed on the Queensland Heritage Register (**QHR**) and the council's register of cultural heritage places. The application was dismissed.

Case

This case was an application in respect of an adverse submitter appeal against the approval of a development application for the partial demolition of a building listed on the QHR and the council's register of cultural heritage places.

Facts

The second co-respondent, The McConaghy Group Pty Ltd (**developer**) had lodged a development application to partially demolish 84 Fitzroy Street, Warwick (**Number 84**) and to entirely demolish the neighbouring building at 82 Fitzroy Street, Warwick (**Number 82**). The demolition of Number 82 was self assessable under the relevant planning scheme. His Honour Rackemann DCJ (**Judge Rackemann**) had previously ruled that the appeal be limited to the partial demolition of Number 84 being the part of the development application that was impact assessable.

In the appeal, the appellants contended the following grounds:

- that the development application conflicted with the laws and policies administered by the first co-respondent, the Department of Environment and Resource Management (**DERM**); and
- that the partial demolition of Number 84 conflicted with the relevant planning scheme.

In this application, the developers asked the court to:

- determine that the appellants had no right of appeal with respect to that part of the decision notice that represents the response of the first co-respondent, DERM; and
- strike out the third ground of the appellants' appeal that the development application conflicted with the laws and policies administered by the DERM.

The scope of a submitter appeal was limited under *Integrated Planning Act 1997* (**IPA**). Section 4.1.28(1) (Appeal by submitters) of the IPA relevantly provided that a submitter for a development application may appeal to the court only against the part of the approval relating to the assessment manager's decision under section 3.5.14 (Decision if application requires impact assessment) of the IPA. Section 3.5.14 (Decision if impact assessment requires impact assessment) of the IPA applied to a decision on any development application which required impact assessment.

Section 4.1.28(2) (Appeals by submitters) of the IPA provided that an appeal under subsection (1) may be against 1 or more of the following:

> *(a) the giving of a development approval;*
>
> *(b) any provision of the approval including -*
>
> *(i) a condition of, or lack of a condition for, the approval; or*
>
> *(ii) the length of a period mentioned in section 3.5.21 for the approval.*

Decision

The developer contended that the grounds of appeal should be struck out in so far as they related to the laws administered by the DERM and submitted that such grounds fell outside the purview of section 4.1.28(1) (Appeals by submitters) of the IPA as they were not directed to that "part of the approval relating to the assessment managers decision under section 3.5.14 (Decision if impact assessment requires impact assessment) of the IPA".

Judge Rackemann found that the appeal was not, however, against the imposition of the DERM's conditions but rather it was an appeal of the kind referred to in section 4.1.28(2) (Appeals by submitters) of the IPA against the giving of a development approval. Accordingly, Judge Rackemann found that the relevant part of the Appellants' grounds of appeal sought not to overturn any part of the decision notice which was dictated by the DERM but rather to rely upon alleged conflict between the proposal and the laws administered by the DERM.

The developer also contended that the grounds of appeal should be limited to the matters referred to in section 3.5.14 (Decision if impact assessment requires impact assessment) of the IPA. Judge Rackemann found that if the permissible grounds of a submitter appeal were limited to whether the approval offended the subsections of 3.5.14 (Decision if impact assessment requires impact assessment) of the IPA, then the submitter appellants would not only be precluded from reliance on the laws administered by or policies applied by a concurrence agency, but would in so far as the assessment managers assessment was otherwise concerned, effectively be limited to arguing that the decision was beyond power and there would, in effect, be no right to contend for a different outcome by the exercise of discretion.

The developer finally contended that submitter appeal rights should be limited to matters concerning the planning scheme provisions since it was those provisions which triggered impact assessment. Judge Rackemann found that the question was not what triggered impact assessment but whether the appeal fell within section 4.1.28(1) (Appeals by submitters) of the IPA which he was satisfied it did.

Held

Application dismissed.

COLIN BIGGERS & PAISLEY LAWYERS

Protection of good quality agricultural land

Samantha Hall | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Caralan Pty Ltd & Anor v Caloundra City Council* [2011] QPEC 80 heard before Griffin SC DCJ

Executive Summary

When deciding an appeal by way of hearing the matter anew, section 495 (Appeal by way of hearing anew) of the *Sustainable Planning Act 2009* (**SPA**) provides the Planning and Environment Court (**court**) must consider the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate. The judgment in this case is a good example of the court's process in interpreting various instruments with potential relevance and assigning weight to each accordingly. After this exercise, the court determined that the proposal conflicted with the relevant planning instruments which had a strong focus on the protection of Good Quality Agricultural Land (**GQAL**), and there were insufficient grounds to justify approving the development.

Case

This was an appeal against a refusal by the Caloundra City Council (**respondent**) of an application by Caralan Pty Ltd and Avilka Pty Ltd (**appellant**) for rezoning of the subject site from "Rural" to "Park Residential" under the relevant planning scheme and subdivision of the subject site into 79 park residential lots of 1,500 square metres in area and 2 balance lots.

Facts

The subject site was at 147-191 Railway Parade, Glasshouse Mountains and is properly described as part of Lot 96 on C311431 and part of Lot 97 on C311431.

The subject site was located approximately 1.3 kilometres from the township of Glasshouse Mountains and adjacent to an 'anomalous' residential subdivision (**Glasshouse Meadows Estate**) created in 1996.

The subject site was a part of a larger pineapple farm and had, along with surrounding parcels, been commercially farmed in the past by a tenant. Extensive farming areas were located to the south-west and north of the subject site, with other rural uses to the east.

The following planning instruments were considered by the court to have relevance to the application. Some salient points regarding the relevance of each instrument to the proposal are also detailed below:

1996 Caloundra City Planning Scheme (1996 scheme)

- This was the planning scheme in force at the time the application was made, and was a transitional planning scheme under the now-repealed *Integrated Planning Act 1997* (**IPA**).
- The Rural Zone designation, which much of the subject site was within, provided a minimum lot size of 40 hectares.

2004 Caloundra City Planning Scheme (2004 scheme)

- The 2004 scheme was able to be considered by the court pursuant to s4.1.52 (Appeal by way of hearing anew) of the IPA, which is in substantially the same terms as section 495 (Appeal by way of hearing anew) of the SPA.
- The Desired Environmental Outcomes of the 2004 scheme provide for:
  - GQAL to remain available for productive use, contribute to the City's scenic area and to be protected from incompatible development;
  - defined urban growth boundaries which create distinct urban and rural township communities;
  - the pattern of development to secure the inter-urban breaks which separate each hinterland township linked by the North Coast Railway. State Planning Policy 1/92 (**SPP 1/92**).
- SPP 1/92 provides for the conservation of GQAL.
- SPP 1/92 requires that GQAL should be protected from development unless there is an overriding need for the development in terms of public benefit.

South-East Queensland Regional Plan 2009-2031 (SEQRP)

- The SEQRP allocates the subject site to the Regional Landscape and Rural Production Area (**RLRPA**).
- With respect to rural land, the SEQRP provides the following:
  - rural production lands will be protected from further fragmentation and urban encroachment;
  - the RLRPA protects land from inappropriate development, particularly urban or rural residential development;
  - a desired regional outcome is the protection of agricultural lands and rural communities.

The following points summarise the points of conflict of the proposal with the relevant planning instruments:

- the introduction of urban development into the inter-urban break;
- the subsequent change in the intended rural character of the locality;
- the loss of GQAL in an area of commercial agricultural production; and
- the overall ineffective nature of the proposal in terms of a development with respect to the use of infrastructure and loss of agricultural land.

Decision

The court acknowledged that the Glasshouse Meadows Estate was anomalous in the area, however the existence of the Glasshouse Meadows Estate subdivision was not sufficient to allow the proposal on the nearby subject site.

The court decided the proposed development was substantially in conflict with the planning scheme in force, the 1996 scheme, and to varying extents with the other relevant instruments as identified, and that no sufficient grounds existed to justify approval of the proposal.

Held

The appeal be dismissed.

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