

COLIN
BIGGERS
& PAISLEY
LAWYERS

Legal Knowledge Matters

July 2012 to June 2013

Planning Government Infrastructure & Environment

Legal and policy designers, strategic and tactical experts
and trusted partners

Colin Biggers & Paisley
Brisbane Sydney & Melbourne

www.cbp.com.au



Welcome to Colin Biggers & Paisley

Colin Biggers & Paisley was founded over a century ago and today has offices in Brisbane, Sydney and Melbourne. We provide a personalised service for our clients with our partners taking a hands-on approach to every project. We have both the capacity and the expertise to deliver on complex regional, national and international projects in the following areas of practice:

- Commercial and corporate and dispute resolution
- Construction and engineering
- Insurance
- Property and development

Construction & Engineering Group

Colin Biggers & Paisley has one of the largest specialist construction and engineering practices in Australia with over 35 partners, special counsels and senior associates. Our Construction & Engineering group has the following specialist expertise:

- Construction disputes
- Major projects and infrastructure
- Commercial and residential projects

Planning Government Infrastructure & Environment Team

Our Planning Government Infrastructure & Environment team are the trusted partners of public and private sector entities. We are the legal and policy designers of strategic and tactical solutions to complex problems in the fields of planning, government, infrastructure and environment.

Our team has a deep understanding of what is required to deliver a complex project and has more than 50 years experience in designing innovative outcomes for development and infrastructure projects, including new cities, towns and communities.

We provide the following specialist expertise:

Planning

Strategic and tactical planning in development issues and processes in major residential communities, commercial and industrial projects.

Government

In-depth understanding in government legislation, policy and processes.

Infrastructure

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

Environment

Legal excellence in all areas of environmental law.

Contents

INDEX	iii
TABLE OF LEGISLATION.....	v
TABLE OF CASES	vi
Reinvigorating planning and the planning system in Queensland – A neoliberal perspective	1
Green Paper on planning reform in NSW released by government	16
NSW Land and Environment Court has power to permit the "regranting" of development consents which have been declared invalid	18
When does a jurisdictional error materially affect the outcome of a decision?	20
Encroachment on rural land by residential development	22
Incorrect consideration of amenity amounting to jurisdictional error	25
Subpoena issued to Gold Coast City Council – confirmed fishing exercise	28
Wednesbury unreasonableness	30
Defining an extractive industry – local planning instruments to be subordinate	32
Continuing approvals under predecessor legislation	34
Compensation for error in a planning and development certificate	37
To be legally effective does a development application have to be properly made?	39
Changed costs provisions reframe strategic considerations for development applications	42
Reform of directors' and managers' liability for environmental offences in NSW	45
Proposed changes to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP)	47
Radical changes to the role of Development Control Plans (DCPs) in NSW	49
New proposed standards for the Building Code of Australia (BCA) 2013	51
Independent review of rezoning decisions and powers given to councils to make Local Environmental Plans (LEPs)	52
Meaning of "commercial fishing operators"	54
Perils of related approvals to prevent original approvals lapsing	57
Lost opportunity to impose condition	59
Development in a flood plain: the importance of alternative solutions	61
The perils of inadequate searches when purchasing property	64
EPA unsuccessful in prosecution for transport of building materials as "waste"	66
Determining the "effective height" of a building for the purposes of the Building Code of Australia	68
Sufficient grounds despite a conflict with the planning scheme?	70
Failure to overcome conflict with the planning scheme	72
Overwhelming community interest in the future of planning in NSW	74
Integration of commercial and residential uses	76
Can cultural heritage significance be debated?	78
Development in critical habitat?	81
Is it a properly made development application?	83
Deemed refusal upheld by the court	85

Contents (cont'd)

Can non-compliance with public notification be excused?	87
Costs, natural justice and cartel provisions	90
Minor change of development application	92
Excusal of non-compliance with statutory requirements	94
Blow torch applied to land valuation system in NSW	98
Filling in the watercourse	99
Fetter on future exercise of council's discretion	101
Court's powers to extend the relevant period of a development approval	105
Permissible change allowed despite likelihood of submissions	107
Need for school outweighs loss of good quality agricultural land and conflict with Far North Queensland Regional Plan	109
Unlawful earthworks	111
Construction of a town planning consent permit	113
Public need for a proposed development	115

Index

A New Planning System for New South Wales – Green Paper	16
Access easement.....	34
Amber light notification regime.....	17
Amenity.....	25, 26
Appeals from Building and Development Committee.....	20
Approval attaches to the land	59
Biomass power plant.....	107
Buffer	22, 23, 24
Building materials.....	67
Certificate.....	35, 37, 38
Commercial fishing operators	54, 55, 56
Compensation.....	37, 38, 55
Concrete batching plant	25, 26
Conditions.....	4, 5, 6, 7, 10, 23, 34, 35, 37, 38, 54, 59, 60, 62, 64, 65
Conditions attach to land	34, 35
Construction of development approval.....	113
Continuing approval	34, 35
Continuing offence.....	65
Costs thrown away.....	54
Declaration.....	25, 28, 30, 39, 40, 54, 55, 57, 58, 59, 60, 64, 65, 111, 112
Development application.....	20, 22, 23, 24, 25, 26, 32, 33, 37, 39, 40, 41, 42, 43, 57, 58, 59
Development approval.....	26, 30, 31, 34, 37, 38, 39, 40, 41, 57, 59, 60, 61, 64, 65
Development certificates.....	47
Development consent	18
Development control plan	18, 19, 23, 49, 73
Development offence	99, 100
Development standards	48
Discretion	20, 23, 32, 42, 44, 57, 58
Earthworks.....	111, 112
Ecologically sustainable development	74
Effective height	68
Egress.....	68, 69
Enforcement order	100, 111, 112
Environmental offences	45
Environmentally relevant activity.....	59
Executive liability.....	45
Exempt development	47
Existing lawful use	99
Extractive industry.....	32, 33
Flood plain	61
Former planning scheme	35
Full planning and development certificate.....	64, 65
Future of planning.....	74
Good quality agricultural land.....	22, 23
Infrastructure contributions	64, 65
Jurisdictional error.....	20, 25, 26
Kitchen facilities	113, 114
Land valuation.....	98
Landfill	59
Lapse.....	57
Leave to appeal	28, 29, 37, 38
Licence	59
Local Environmental Plans	52
Local Use Plans.....	16
Non-compliance	25, 32, 39, 40, 58
Notification requirements	48
Original consent authority	18
Parliamentary Land Valuation Inquiry	98
Permissible change.....	107, 108
Planning and development	37, 38
Policy	5, 23, 33
Properly made application	39, 40
Public notification	22, 24
Public Participation Charter	16
Referral agency.....	6, 32

Index (cont'd)

Related approval.....	57, 58
Relevant and reasonably required	113, 114
Residential subdivision	22
Resource entitlement evidence	40
Rezoning.....	52
Riverine Protection Permit	99
Safe access and movement.....	51
State resource.....	39, 40
Statutory construction	33
Statutory interpretation.....	35
Submitter	107
Submitter appeal.....	70, 76, 105, 115
Subpoena	28, 29
Substantially different development	107, 108
Successors in title	34, 65
Sufficient grounds	23, 25, 26, 61, 62
Sunshine Coast Regional Council.....	113
Town planning consent permit	113
Transitional provisions	34
Unlawful	28, 111, 112
Waste.....	66

Table of Legislation

New South Wales

<i>Contaminated Land Management Act 1997</i>	45, 46
<i>Environmental Planning and Assessment Act 1979</i>	19, 49
<i>Environmental Planning and Assessment Amendment Bill 2012</i>	49
<i>Environmentally Hazardous Chemicals Act 1985</i>	46
<i>Forestry Act 1916</i>	46
<i>Heritage Act 1977</i>	46
<i>Land and Environment Court Act 1979</i>	18
<i>Local Government Act 1993</i>	19
<i>Mining Act 1992</i>	46
<i>Miscellaneous Acts Amendment (Directors' Liability) Bill 2012</i>	45
<i>National Parks and Wildlife Act 1974</i>	46
<i>Native Vegetation Act 2003</i>	46
<i>Pesticides Act 1999</i>	46
<i>Protection of the Environment Operations Act 1997</i>	45, 46, 66
<i>Sydney Water Catchment Management Act 1998</i>	46
<i>Threatened Species Conservation Act 1995</i>	46
<i>Water Industry Competition Act 2006</i>	46

Queensland

<i>Acts Interpretation Act 1954</i>	35, 58
<i>Building Act 1975</i>	20, 114
<i>Building Units and Group Titles Act 1980</i>	34
<i>Competition Policy Reform (Queensland) Act 1996</i>	91
<i>Contaminated Land Management Act 1997</i>	45, 46
<i>Criminal Code Act 1899</i>	99
<i>Environmental Protection Act 1994</i>	6, 59, 94
<i>Integrated Planning Act 1997</i>	22, 25, 34, 37, 39, 57, 70, 72, 73, 85, 87, 95
<i>Integrated Planning Regulation 1998</i>	39
<i>Local Government (Planning and Environment) Act 1990</i>	23, 34, 59, 113, 114
<i>Local Government Act 2009</i>	6
<i>Nature Conservation Act 1992</i>	81
<i>Pesticides Act 1999</i>	46
<i>Planning and Environment Court Rules 2010</i>	44
<i>Property Law Act 1974</i>	35
<i>State Development and Public Works Organisation Act 1971</i>	54
<i>Sustainable Planning Act 2009</i>	20, 30, 32, 39, 42, 56, 57, 64, 71, 81, 83, 87, 92, 95, 101, 105, 107, 109
<i>Sustainable Planning and Other Legislation Amendment Act 2012</i>	42
<i>Sustainable Planning and Other Legislation Bill 2012</i>	42
<i>Sustainable Planning Regulation 2009</i>	32, 99
<i>Transport Infrastructure Act 1994</i>	32
<i>Uniform Civil Procedure Rules 1999</i>	56, 90, 108
<i>Urban Land Development Act 2007</i>	6
<i>Vegetation Management Act 1999</i>	81

Table of Cases

<i>Adam v Gold Coast City Council</i> [2007] QPEC 025.....	116
<i>Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth of Australia & Ors</i> (1977) 139 CLR 50.....	101
<i>Associated Provincial Picture Houses Ltd v Wednesbury Corporation</i> [1948] 1 KB 223.....	31
<i>Atkinson v Ipswich City Council</i> (2006) QPELR 550.....	77
<i>Australian Capital Holdings Pty Ltd v Mackay Regional Council</i> [2008] QCA 157.....	116
<i>BM Carr Holdings atf The Carr Farming Trust v Southern Downs Regional Council & Anor</i> [2013] QPEC 4.....	101
<i>Braudmont Pty Ltd & Ors v Gold Coast City Council</i> [2012] QCA 140.....	28
<i>Canungra Commercial Pty Ltd v Scenic Rim Regional Council & Ors</i> [2013] QPEC 1.....	92
<i>Christian Outreach Centre v Toowoomba Regional Council & HSBG Pty Ltd</i> [2012] QPEC 29.....	30
<i>Cleveland Power Pty Ltd v Redland City Council & Ors</i> [2013] QPEC 7.....	107
<i>Cleveland Power Pty Ltd v Redland Shire Council</i> [2013] QPEC 9.....	105
<i>Cowan v Brisbane City Council & Ors</i> [2012] QPEC 81.....	78
<i>Csillag v Woollahra Council (No 2)</i> [2012] NSWLEC 135.....	19
<i>Csillag v Woollahra Council</i> [2011] NSWLEC 17.....	18
<i>Devy v Logan City Council</i> (2011) QPELR 207.....	58
<i>Dexus Wholesale Property Ltd v Townsville City Council & Ors</i> [2013] QPEC 14.....	115
<i>Environment Protection Authority v Alkem Drums Pty Ltd</i> (2000) 113 LGERA 130.....	65
<i>Environment Protection Authority v Terrace Earthmoving Pty Ltd & Page</i> [2012] NSWLEC 216.....	66
<i>Evans v Marmont</i> (1997) 42 NSWLR 70.....	102
<i>Falzon v Gladstone Ports Corporation & Anor</i> [2012] QPEC 50.....	54
<i>Gillion Pty Ltd v Scenic Rim Regional Council & Ors</i> [2012] QPEC 33.....	32
<i>Hall-Bowden v Pine River Shire Council</i> (2006) QPELR 546.....	101
<i>Heritage Properties Pty Ltd v Redland City Council</i> (2010) QPELR 510.....	93
<i>Holcim (Australia) Pty Ltd v Brisbane City Council</i> [2012] QPEC 32.....	25
<i>House v Defence Force Retirement Invest Benefits Authority</i> [2011] 193 FCR 112.....	21
<i>Kindimindi Investments Pty Ltd v Lane Cove Council</i> [2007] NSWCA 38.....	18
<i>KT Corporation Pty Ltd v Logan City Council and State of Queensland</i> [2005] QPEC 119.....	31
<i>Larrell Pty Ltd v Brisbane City Council</i> (2012) QPELR 66.....	58
<i>Littleford v Gold Coast City Council & Anor; Moon v Gold Coast City Council & Anor</i> [2013] QCA 4.....	90
<i>Logan City Council v Poh & Anor</i> [2013] QPEC 003.....	99
<i>Lu v Minister for Immigration and Multicultural & Indigenous Affairs</i> (2004) 141 FCR 346.....	21
<i>MacAdam v Moreton Bay Regional Council & Anor</i> [2012] QPEC 38.....	22
<i>Mahaside Pty Ltd v Sunshine Coast Regional Council & Anor</i> [2012] QPEC 41.....	39
<i>Mahaside Pty Ltd v Sunshine Coast Regional Council & Ors</i> (2010) QPELR 43.....	39
<i>Maher & Anor v Fraser Coast Regional Council</i> [2012] QPEC 67.....	57
<i>Maryborough Investments v Fraser Coast Regional Council</i> [2010] QPEC 113.....	88
<i>Metricon Innisfail Pty Ltd v Cassowary Coast Regional Council</i> (2011) 1 QD R 226.....	40
<i>Metrostar Pty Ltd v Gold Coast City Council</i> (2007) 2 Qd R 45.....	95
<i>Minister for Immigration and Multicultural Affairs v Bhardwaj</i> (2002) 209 CLR 597.....	95
<i>Minister for Immigration and Multicultural Affairs v Yusef</i> (2001) 206 CLR 323.....	21
<i>Montrose Creek Pty Ltd and Manningtree (Qld) Pty Ltd v Brisbane City Council; Brisbane City Council v Manningtree (Qld) Pty Ltd and Montrose Creek Pty Ltd</i> [2012] QPEC 65.....	64

Table of Cases (cont'd)

<i>Morgan & Griffin Pty Ltd v Fraser Coast Regional Council & Parmac Investment Pty Ltd</i> [2013] QPEC 2.....	94
<i>Mulgrave Central Mill Co Ltd v Cairns Regional Council & Anor</i> [2013] QPEC 6.....	109
<i>Multus v Rockhampton Regional Council & Ors</i> [2012] QPEC 85	87
<i>Newcomb & Ors v Brisbane City Council & Anor</i> [2010] QPEC 71	83
<i>Newman v Brisbane City Council</i> [2001] QPEC 287	55
<i>Project Blue Sky Inc v Australian Broadcasting Authority</i> (1998) 194 CLR 355.....	33
<i>Queensland Cement Queensland v United Global Cement Pty Ltd & Ors</i> (1999) QPELR 167	95
<i>R v Hunt ex parte Sean Investments</i> (1979) 180 CLR 322	102
<i>Raftopoulos v Brisbane City Council</i> [2012] QCA 84	37
<i>Rathera Pty Ltd v Gold Coast City Council & Ors</i> [2000] QCA 506.....	96
<i>Re Refugee Review Tribunal; Ex parte Aala</i> (2000) 204 CLR 82	21
<i>Ryde Municipal Council v The Royal Ryde Homes</i> (1970) 19 LGRA 321	59
<i>Serafini v Gladstone Regional Council & Anor</i> [2012] QPEC 83.....	72
<i>Shardlow & Ors v Moreton Bay Regional Council</i> [2012] QPEC 82.....	85
<i>Stevenson Group Investments Pty Ltd v Nunn & Ors</i> [2012] QCA 351.....	95
<i>Stockland Development Pty Ltd v Townsville City Council & Ors</i> [2012] QPEC 84	76
<i>Stockland Property Management Pty Ltd v Cairns City Council</i> (2011) 1 Qd R 77	40
<i>Suffolk County Council v Mason</i> [1979] AC 705	35
<i>Sunshine Coast Regional Council v Owners of Lots 1-40 on SP115731 at Noosa Lakes Resorts & Anor</i> [2013] QPEC 13	113
<i>Sunshine Coast Regional Council v Recora P/L & Anor</i> [2012] QPEC 8	65
<i>Szylkarski & Ors v Brisbane City Council & Anor</i> [2012] QPEC 80.....	70
<i>The Arora Construction Pty Ltd & Anor v Gold Coast City Council & Anor</i> [2012] WPEC 052.....	61
<i>The Owners - Strata Plan No. 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance</i> [2012] NSWSC 1244	68
<i>Thomas v Marshall</i> [1953] AC 543.....	35
<i>Towers v Building and Dispute Resolution Committee & Ors</i> [2012] QPEC 28	20
<i>Transpacific Industries Group (ACN 105 155 221) v Ipswich City Council</i> [2012] QPEC 69.....	59
<i>Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council</i> [2012] QPEC 70	81
<i>Tremellen v Southern Downs Regional Council</i> (2011) QPELR 56	58
<i>Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v The Valuer General (No. 2)</i> [2011] NSWLEC 34.....	98
<i>Warringah Shire Council v Sedevcic</i> (1987) 10 NSWLR 335.....	112
<i>Westfield Ltd v Gold Coast City Council</i> (2002) QPELR 542	116
<i>Weston Aluminium Pty Ltd v Environment Protection Authority</i> (2007) 82 ALJR 74.....	55
<i>Wirkus & Anor v Wilson Lawyers</i> [2012] QCS 261	34
<i>Zhang v Canterbury City Council</i> (2001) NSWCA 167.....	102



Reinvigorating planning and the planning system in Queensland – A neoliberal perspective

Ian Wright

This article explores ideological and planning theories and planning models and identifies the potential for reinvigoration of Queensland's planning system via a neoliberal perspective

September 2012

Abstract

The modernist perspective of planning has been concerned with making public and political decisions in respect of the planning of our places more rationally and consistent with an overarching public interest.

However, the modernist perspective of rational planning action has been challenged by a post-modernist perspective, and more recently by a neoliberal perspective, rooted in the political ideals of liberalism which holds that a liberal market supportive style of planning will produce more environmentally sustainable outcomes.

The paper considers how the modernist, postmodernist and neoliberal perspectives of planning have been applied in the context of the planning system particularly in relation to matters such as the following:

- the planning of master planned areas contrasting the top down approaches of some structure plans with the bottom up approaches of others;
- the role of development assessment managers contrasting planners as managing planning decisions and facilitating action to realise publicly agreed goals on the one hand or alternatively realising market sensitive individuals' goals on the other;
- the planning, funding/financing and delivery of infrastructure contrasting rationally planned methods based on cost/benefit analyses of efficiency and equity on the one hand with the politically market driven methods on the other;
- the planning system contrasting the top down State directed model of planning provided by the *Sustainable Planning Act 2009* (Qld) on the one hand with community based planning from the ground up geared to community empowerment on the other.

The paper considers the modernist, postmodernist and neoliberal perspectives of planning for the purpose of identifying how the recently elected Liberal National Party government may seek to reinvigorate planning and the planning system in Queensland.

Introduction

Queensland Government reform

In March 2012, Queensland elected a Liberal National Party (LNP) government with an overwhelming mandate for change.

Central to that mandate is the promotion of a four pillar economy involving the resources, agriculture, construction and tourism sectors, as well as the empowerment of local government.

The LNP government intends to move quickly to implement its reform agenda, which because of the government's majority, is likely to have significant implications for the public, private and third sectors for decades to come.

Neoliberal reform agenda

The full scope of the LNP's planning reform agenda is yet unclear. However what is apparent is that neoliberalism is the dominant ideological rationalisation for the LNP's reform agenda of the Queensland government.

Neoliberalism is an ideology that involves a commitment to the rolling out of market mechanisms and competitiveness and the rolling back of governmental intervention (Peck and Tickell 2002).

From a neoliberal perspective much of urban public planning is seen as a distortion of land markets which increases transaction costs through bureaucratisation of the urban economy. Neoliberalism holds that this should be rolled back by contracting the domain of planning (de-regulation) and then privatising segments of the residual sphere of regulation (outsourcing). As such, the *raison d'être* of planning as a tool of correcting and avoiding market failure is dismissed and planning is subsumed as a minimalist form of spatial regulation whose chief purpose is to provide certainty to the market and to facilitate economic growth (Gleeson and Low 2000).

Ideology, theory, practice and policy

While it is unclear how ideology influences planning and in turn how planning theory affects planning practice, a consideration of ideology and planning theory does provide an opportunity to understand the evolving processes that planning practice may face as a result of the LNP's neoliberal planning reform agenda.

As Forester (1989:12) observes:

Theories can help alert us to problems, point us towards strategies of response, remind us of what we care about, or prompt our practical insights into the particular cases we confront.

Themes of paper

This paper therefore has 5 themes:

- First, it establishes a model of urban change, that seeks to show the relationship of ideological and planning theories and models to the components of urban change and the institutions responsible for that change.
- Second, it seeks to flesh out the debate on premodernism, modernism, postmodernism and neoliberalism, to provide an ideological context to both the broad policy settings of a neoliberal government and the use of planning theory in a neoliberal state.
- Third, it seeks to flesh out the debate on planning theory to provide a theoretical context for the consideration of planning models, in particular the postmodernist collaborative planning model and the neoliberal strategic planning model.
- Fourth, it discusses the key characteristics of the neoliberal strategic planning model to provide context for the consideration of the potential planning practice implications of the use of this model.
- Finally, it seeks to identify the planning policy outcomes which are likely to be associated with a neoliberal government, to provide context to the potential scope of the LNP planning reform agenda in Queensland.

Urban change model

Components and institutions of urban change

Urban change occurs as a result of the interplay of three institutional components (Newman 2000:1):

- the market represented by the private sector;
- the government represented by the public sector; and
- the community comprising civil society or the so called third sector.

The characteristics of the institutional components and associated institutions of urban change are described in Table 1.

Table 1 Components and institutions of urban change

Market – private sector	Government – public sector	Civil society – third sector
Stakeholders of institution		
Consumers, producers, employers, employees, trade associations and unions	National, State and local government – including public sector entities	Communities including media, churches, educational bodies, associations, community groups
Role of institution		
Provision of wealth for development	Protection of rights and public realm	Guardian of culture and ethics
Instituted outputs		
Goods and services	Laws and regulations; Infrastructure and services	Values and vision

Market – private sector	Government – public sector	Civil society – third sector
Conception of the public interest		
Focussed on an aggregated criteria of choice based on the notions of utility or satisfaction	Focussed on an overall idea such as 'the spirit of history' or the 'essence of the soul'	Focussed on the community as the first ethical subject and consequently on a common conception of the good life
Institutional horizons		
Short term	Medium term (based on the term of office)	Long term

Source: Newman 2000:2; Moroni 2004:155; Alexander 2012:75

Planners influence all components of urban change: the market, government and civil society. They work through the private, public and third sectors using a collection of planning theories and practices to influence urban change, or on some occasions to prevent urban change.

Relationship of planning theory and practice for urban change

The interrelationship between the planning theories and practices used by planners and the components and institutions of urban change is shown in Figure 1.

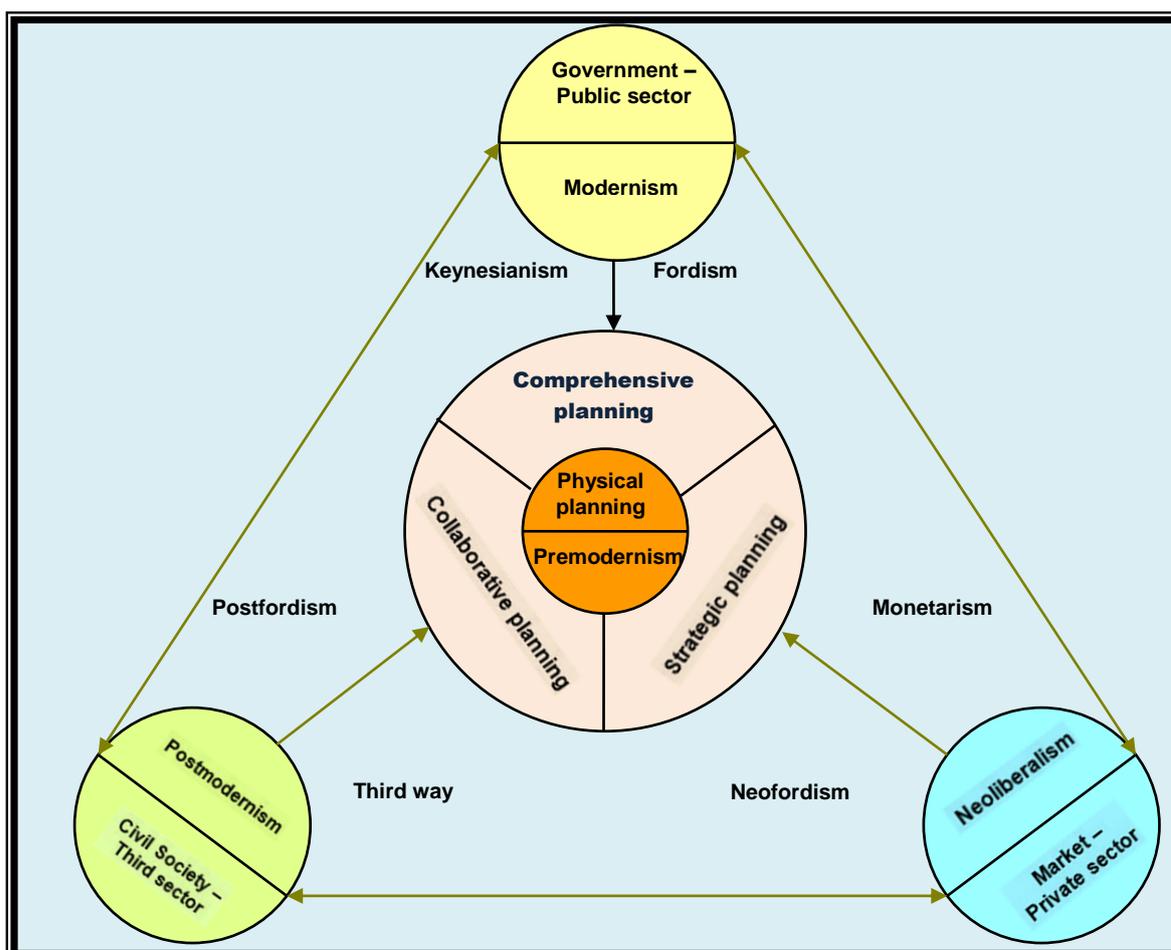


Figure 1 Urban change model

It is clear that planning and the capacity to effect urban change is critically influenced by planning theory and practice.

An understanding of planning theory requires it to be placed within the context of broader cultural, socio-economic and political change; being the historic shift from premodernism to modernism, and then to postmodernism and more recently to neoliberalism.

Premodernism, modernism, postmodernism, neoliberalism

Neoliberalism in a historic context

The broad cultural, socioeconomic and political changes that have influenced western societies such as Australia have had a profound effect on planning theory and practice.

These changes exist in a historic century-long linear process of transition from premodernism to modernism to postmodernism and finally to neoliberalism.

The cultural, socioeconomic and political conditions of modern, postmodern and neoliberal societies are described in Table 2.

Table 2 Cultural socio-economic and political conditions of ideological theories

Modern	Postmodern	Neoliberal
Period of era		
<i>Modernity</i> – The period of modern thought from the Enlightenment to the present	<i>Postmodernity</i> – The period of postmodern thought from the 1960s to the present	<i>Late capitalism</i> – The period of neoliberal thought from the late 1980s and early 1990s to the present
Cultural conditions		
<i>Modernism</i> – The cultural conditions which accompany a method of thought in which human reason is able to identify objectively existent and knowable laws of reality that can be used to effect change to achieve a unitary common public good or truth (Hirt 2002:3)	<i>Postmodernism</i> – The cultural conditions which accompany a method of thought in which human reason is able to identify the subjectively constructed views of groups that can be used to effect change to achieve a good as defined by these groups	<i>Neoliberalism</i> – Has little to say about the cultural conditions of society
Social conditions		
<i>Fordism</i> – The social conditions which accompany industrial mass production using repetition and simplicity of standardised products for mass consumption by a mass market (Goodchild 1990:126)	<i>Postfordism</i> – The social conditions which accompany flexible small batch production of specialised products for consumption by different groups in niche markets (Goodchild 1990:126)	<i>Neofordism</i> – The social conditions which accompany the provision of services using information technologies to niche markets that predominates over manufacturing which is de-industrialising
Economic conditions		
<i>Keynesianism welfarism</i> – The economic conditions of a mixed economy involving predominately the private sector but a significant role for the public sector involving monetary policy by central banks and fiscal policy by governments to stabilise output over the business cycle	<i>Third way</i> – The economic conditions of a market economy involving the private sector where the role of the public sector is limited to macro-economic stability, investment in infrastructure and education, containing inequality and guaranteeing opportunities for self-realisation (Giddens 2000:164)	<i>Monetarism</i> – The economic conditions of a market economy involving the private sector where the role of the public sector is limited to monetary policy by central banks

Modern	Postmodern	Neoliberal
Political conditions		
<p><i>Social democracy</i> – The political conditions involving:</p> <ul style="list-style-type: none"> ▪ a universal society existing as a structure ▪ the collective good of the society ▪ welfare services that are delivered to ensure equality of opportunity and removal of differences within society 	<p><i>Deliberative democracy</i> – The political conditions involving:</p> <ul style="list-style-type: none"> ▪ multiple societies existing as networks and flows ▪ the good of each society ▪ welfare services that are delivered to ensure personalised integrated services to reflect the differences of society 	<p><i>Liberal democracy</i> – The political conditions involving:</p> <ul style="list-style-type: none"> ▪ individuals – there being no society or societies ▪ the good of the individual ▪ welfare services that are delivered by the market with limited targeted welfare services

Neoliberal cultural socioeconomic and political conditions

In the context of the current LNP government it is important to understand the potential political, cultural and social conditions of a neoliberal society:

- *Cultural conditions* – Neoliberalism has little to say about the cultural conditions of society as it is a theory derived from economics.
- *Social conditions* – Neoliberalism is premised on the social conditions of a service based economy where the provision of services using information technologies to niche markets predominates over a declining industrial sector.
- *Economic conditions* – Neoliberalism is premised on the economic conditions of a market based economy involving the private sector, where the role of the public sector is limited to monetary policy by central banks. Neoliberalism rejects the use of fiscal policy by government to stabilise output over the business cycle.
- *Political conditions* – Neoliberalism is also premised on the political conditions of a liberal democracy that involves the following:
 - individuals have the right to pursue a good life that does not harm others;
 - services are delivered by the market;
 - the role of the government is limited to providing information and guidelines as well as targeted welfare services for limited social exclusion areas.

These broad socioeconomic and political conditions provide the ideological context which will influence the broad policy settings of a neoliberal government.

Policy settings of a neoliberal government

The broad policy settings which are generally associated with modern, postmodern and neoliberal theory are described in Table 3.

Table 3 Institutional characteristics of ideological theories

Modern	Postmodern	Neoliberal
Government size		
Big government	Smaller but better integrated government	Small government
State and local government relationship		
Centralised local governments address the public interest	Centralised local governments address group interests, in particular areas of social exclusion. Secondly, local governments are well funded but are also more accountable	Governments (politicians and public servants) are to demonstrate entrepreneurial spirit (risk-taking, investment and profit motivated)

Modern	Postmodern	Neoliberal
		Central government solicits growth whilst local governments facilitate growth. Further, State government downloads unfunded central government risks and responsibilities to local governments which are to compete against each other for economic growth
Government and civil society relationship		
Government help	Community self-help with government help for social exclusion	Individual self-reliance and entrepreneurship Customer focus
Government and private sector relationship		
Government provision, commercialisation and corporatisation	Public-private partnerships	Facilitate the private sector by privatisation and outsourcing
Government financial management		
Higher taxes and spending	Lower but better targeted taxes and higher spending on socially excluded areas	Lower taxes and lower spending (fiscal conservatism and austerity)
Government regulation		
Regulation	Further regulation	Deregulation Less importance on rules, processes and expert jurisdictions

Source: Jackson 1990:405

In the context of neoliberal theory the following broad policy settings are likely to be adopted by a neoliberal government:

- Small government – witness the dramatic downsizing of the public service by some 14,000 jobs announced in the 2012 Queensland budget.
- The downloading of unfunded State government risks and responsibilities to local governments which are forced to compete against each other for economic growth – witness the State government's transition of financial liabilities for urban development areas under the *Urban Land Development Act 2007* to local governments, and the Brisbane City Council's 2031 Strategic Vision which envisions Brisbane as 'Australia's New World City' which is competing globally against other world cities.
- Individual self-reliance and entrepreneurship with little or no government help.
- The outsourcing of government functions and privatisation of government assets.
- Lower taxes – witness the cost of living reductions in electricity, water and public transport charges announced in the 2012 Queensland budget.
- Deregulation – witness green tape reduction, reforms to the *Environmental Protection Act 1994*, referral agency reforms under the *Sustainable Planning Act 2009* and local government reforms under the *Local Government Act 2009*.

These broad policy settings together with the broader socioeconomic and political conditions of neoliberal theory provide the context for the consideration of the use of planning theories by planners.

Planning theory in a neoliberal state

Neoliberal planning theory

Given the neoliberal socioeconomic and political conditions and broad policy settings which are expected to develop in Queensland under the LNP government, it is likely that the use of neoliberal planning theory will become more dominant amongst planners.

The approaches to planning theory that are embodied in premodern, modern, postmodern and neoliberal ideologies are described in Table 4.

Table 4 Ideological approaches to planning theory

Premodern	Modern	Postmodern	Neoliberal
Humanistic premise of planning (ie ends of planning)			
<i>Utopia</i> – An end state in which individuals are emancipated towards an ideal society	<i>Collective public interest</i> – An end state in which society en masse is emancipated towards a common good for the society	<i>Group interest</i> – An end state in which groups within society are emancipated towards a good defined by those groups	<i>Individual interest</i> – There is no end state for society but rather the right of each individual to pursue a good life that does not harm others
Epistemological premise of planning (ie the means of planning)			
<i>Artistic design method</i> – Universal laws of physical and aesthetic design principles can be objectively defined by human reason	<i>Rational scientific method</i> – Universal laws of planning principles can be defined through value free scientific reason (positivist knowledge)	<i>Participatory method</i> – There are non-universal laws but the subjective value laden principles of individuals can be determined through a participative process	<i>Managerialist method</i> – There are no universal laws and personal goods can be pursued through a managerial process determining goals, objectives and strategies and implementing them
Planning theories			
<ul style="list-style-type: none"> Physical planning (Unwin 1909; Triggs 1909) 	<ul style="list-style-type: none"> Rational planning (Sharp 1940; Abercrombie 1959; Keeble 1969) Systems planning (McLoughlin 1969) Procedural planning (Faludi 1973) 	<ul style="list-style-type: none"> Advocacy planning (Davidoff 1965) Incremental planning (Lindblom 1959) Radical (action) planning (Friedmann 1987) Participatory planning (Arnstein 1969) Communicative planning (Habermas 1984; Healey 1997) 	<ul style="list-style-type: none"> Strategic spatial planning (Kaufman and Jacob 2007; Healey 2007)
Planning models			
Physical planning	Comprehensive master planning	Collaborative planning	Strategic planning
Planning era			
Before First World War	<ul style="list-style-type: none"> Interwar period – avant-garde movement Post war – adopted by government 	<ul style="list-style-type: none"> 1960-1980 – part of counter culture 1980 onwards – adopted by government 	1990s onwards

Source: Goodchild 1990:126; Hirt 2002

Planning theory is based on two different premises. The first is that planning has a humanistic or social emancipation end. The second is that planning theory has an epistemological premise being the means by which planning delivers the end (namely social emancipation).

Humanistic premise of planning theory

In neoliberal planning theory the planning end is not an end state for society such as the collective public interest (for modern planning) or group public interest (in the case of postmodern planning theory).

Rather it is individual interest; the right of each individual to pursue a good life that does not harm others.

Epistemological premise of planning theory

Neoliberal planning theory postulates that the end of an individual good life is not pursued through the rational scientific method of value free scientific reason (in the case of modern planning theory) or a participative process to define group values (in the case of postmodern planning theory).

Rather, the neoliberal end of an individual good life is to be achieved through a management process of defining goals, objectives and strategies and by implementing them.

In neoliberal planning theory, the managerialist method, which is embodied in the planning model of strategic planning, is the predominant planning model.

Strategic planning model in a neoliberal state

Strategic planning is a planning process that is focussed on the implementation of specific and attainable goals, objectives and strategies. It differs from comprehensive master planning which aspires to an abstract common public good or interest. It also differs from collaborative planning which focuses on the group good or interest as defined by groups within society.

It is anticipated that the strategic planning model will become the predominant planning model among planners in Queensland.

The characteristic of the strategic planning model are described in Table 5.

Table 5 Key characteristics of planning models

Physical planning	Comprehensive master planning	Collaborative planning	Strategic planning
Institutional arrangements			
Limited uncoordinated community and government initiatives	Government lead with limited community involvement	Government lead with significant community involvement	Private sector lead through market
Institutional decision making			
Top down with no bottom up community involvement	Top down with limited bottom up community involvement	Top down and bottom up	Bottom up through market
Planning scales			
City and district level planning	City and district level planning with limited local and site level planning	City and district level planning with emphasis on local and site planning	Emphasis on local and site level planning
Planning horizon			
Long term	Medium term	Medium term at strategic and district levels and short term at local and site levels	Short term

Physical planning	Comprehensive master planning	Collaborative planning	Strategic planning
Planning focus			
Physical and aesthetic design based (place based planning)	Spatial based planning	Spatial based planning at strategic and district levels and place based planning at local and site levels	Place branding, marketing, promotion and competition (European cities, capital cities, world cities, cool cities and creative cities) Attraction of the creative class (IT, arts, biotechnology, science) Attraction of corporate investment (free land or buildings, lower infrastructure charges, grants, tax relief such as stamp duty and payroll tax)
Concepts of the city			
<i>City Beautiful</i> – Cities are a symptom of social order and disorder	<i>Mechanistic City</i> – Cities are economic objects that can be rationally ordered and mass produced	<i>Just City</i> – Cities are an expression of the social diversity of its citizens and the ecological diversity of its environment	<i>Competitive and productive City</i> – Cities are economic objects that are competing against each other for economic growth
Strategic and district level planning themes			
<ul style="list-style-type: none"> ▪ Promotion of massed suburban expansion ▪ Promotion of garden cities ▪ City beautiful movement ▪ Parks movement 	<ul style="list-style-type: none"> ▪ Redevelopment of slums with high rise buildings in open space ▪ Controlled low density suburban expansion ▪ New towns within green belts ▪ Urban neighbourhoods criss-crossed by freeways 	<ul style="list-style-type: none"> ▪ Renewal and regeneration of central cities and infill sites ▪ Increased urban density within compact urban space ▪ Containment to minimise land consumption, preserve open space and reduce infrastructure costs 	<ul style="list-style-type: none"> ▪ Promote urban branding, imagery and advertising ▪ Promote redevelopment of central cities and adjoining suburbs as residual places ▪ Urban expansion not containment ▪ Mega projects are seen as strategic economic assets (exhibition centres, science parks, sport stadiums, waterfront developments, cultural districts)
Local and site level planning themes			
<ul style="list-style-type: none"> ▪ More daylight and sunlight for canyon streets ▪ Public health and sanitary reform ▪ Settlement house and reform movement 	<ul style="list-style-type: none"> ▪ Zoning of urban space into self-contained single land use or functional districts ▪ Reduction of urban density ▪ Mixed flats and houses ▪ Demolition of dilapidated buildings 	<ul style="list-style-type: none"> ▪ Integration of land uses and functions into mixed-use districts of urban space ▪ Increased urban density ▪ Mixed land uses ▪ Emphasis on local context ▪ Preservation of historic buildings and local cultural heritage 	<ul style="list-style-type: none"> ▪ Performance zoning (flexible zones, urban enterprise zones, business improvement districts) ▪ Flexible building standards ▪ Integrated development control ▪ Reduced standards of services for infrastructure, roads and open space ▪ Reduced government space for houses

Source: Goodchild 1990:126; Jackson 2009:405

A strategic planning model operating in a neoliberal state is anticipated to have the following significant characteristics:

- *Institutional arrangements* – Planning is market led by private sector developers.
- *Institutional decision making* – Planning is a bottom up through the market rather than the top down/bottom up approach characteristic of the comprehensive master planning model (associated with modern planning theory) and the collaborative planning (associated with postmodern planning theory).
- *Planning scales* – Planning is focused on local and site level planning rather than the strategic and district level planning and local and site level planning associated with comprehensive master planning and collaborative planning.
- *Planning horizon* – Planning has a short term horizon reflecting the reality that planning is intended to be capable of continual revision in response to the market.
- *Planning focus* – Planning is focussed on place marketing, rather than the spatial based planning and place based planning approaches associated with comprehensive master planning and collaborative planning.
- *Concept of the city* – Planning is focussed on ensuring that the city is an economic growth object which can effectively compete against other cities for economic growth.
- Strategic and district level planning themes.
- Local and State level planning themes.

The increased use by planners of a strategic planning model in Queensland will have a significant influence on the state of planning practice in Queensland.

Planning practice in a neoliberal state

Neoliberal planning practice

The broad neoliberal socioeconomic and political conditions and associated policy settings which are expected to develop under an LNP government will encourage the use of neoliberal planning theory and models that will have an increasing influence on planning practice.

The anticipated implications for planning practice of the increased use by planners of neoliberal planning theory and models are described in Table 6.

Table 6 Implications for planning practice of neoliberal planning theory and models

Neoliberal response	Implications
Government size	
Small government	<ul style="list-style-type: none"> ▪ Reduced State government planning ▪ Contracting out of planning functions
Central and local government relationship	
<p>State government solicits growth and local government facilitates growth</p> <p>State government downloads unfunded State government risks and responsibilities to local governments</p> <p>Governance to mimic corporate style and logic</p>	<ul style="list-style-type: none"> ▪ Local governments contract out selected services ▪ Limited government control of local government plans ▪ Local governments forced to compete with each other for economic growth ▪ Greater focus on place marketing and competition than place making ▪ Planners gain financial acumen and act as urban entrepreneurs ▪ Local governments focus on economic growth projects generally in central city locations at the expense of investment elsewhere
Government and civil society relationship	
Individual self-help and entrepreneurship	<ul style="list-style-type: none"> ▪ Corporate style advisory boards replace community based consultative groups ▪ Focus on owner occupied housing rather than public housing

Neoliberal response	Implications
	<ul style="list-style-type: none"> ▪ Focus on private schools rather than public, TAFE and other public educational facilities ▪ Limited investment in social infrastructure ▪ Focus on private hospitals and private health insurance rather than public hospitals ▪ Less community houses and housing associations ▪ Areas of social exclusion not linked to the market economy are the subject of targeted welfare spending
Government and private sector relationship	
Outsourcing, privatisation; facilitation of private sector activity	<ul style="list-style-type: none"> ▪ Rise of the intermediate service sector (such as professional advisers) ▪ Developer led development rather than plan led development ▪ Developers are stakeholders in major public infrastructure projects ▪ Public assets privatised ▪ Privatised regulations (certification) ▪ Limited public review of public infrastructure projects (sell not evaluate a project) ▪ Private sector involvement in financing and operating infrastructure ▪ Competitive bidding for urban renewal and infrastructure projects ▪ Private sector provision of rental housing rather than public housing ▪ Privatisation of public spaces (shopping centres and city centre plazas, centre malls, pavements and urban parks) ▪ Privately governed as secured neighbourhoods through management (gated communities) and passive design (master planned residential estates)
Government financial management	
Lower taxes and lower spending	<ul style="list-style-type: none"> ▪ Less maintenance of existing public services ▪ Limited provision of public services in growth areas ▪ Greater private sector provision ▪ Reduced developer contributions in new growth areas ▪ Reduced focus on urban renewal projects such as Boggo Road, Kelvin Grove, Roma Street Parklands
Government regulation	
Deregulate	<ul style="list-style-type: none"> ▪ Simplified planning regulations ▪ Plans that give less direction to local government ▪ Plans that give more certainty and predictability to developers ▪ Plans with fewer directives and more negative regulation ▪ Plans that specifically integrate State government priorities ▪ Removal of comprehensive master planning and collaborative planning models

Neoliberal response	Implications
	<ul style="list-style-type: none"> ▪ State enabling regulation for major or mega projects ▪ Revised planning powers (Ministerial call-ins) to facilitate projects ▪ Plans that are more flexible ▪ Speeding up of development assessment, public inquiry procedures and plan preparation

Source: Jackson 1990:405

Generally speaking it is expected that the comprehensive master planning model (associated with modern planning theory) and collaborative planning model (associated with postmodern planning theory) will be curtailed as the strategic planning model (associated with neoliberal planning theory) is implemented in public policy and legislative reform.

Role of the planner

The anticipated emergence of neoliberal planning theory and its associated strategic planning model and consequential implications for planning practice will inevitably result in a re-evaluation of the role of planners.

The role of a planner under the physical planning, comprehensive master planning, collaborative planning and strategic planning models is described in Table 7.

Table 7 Planner's role under planning models

Physical planning	Comprehensive master planning	Collaborative planning	Strategic planning
Knowledge and skills			
Specialist knowledge of utopian ideals and planning principles	Specialist knowledge of planning principles and specialist skills to manage the planning process to define the public interest and planning principles	Specialist knowledge and skills to manage the planning process to facilitate consensus of social, environmental and economic outcomes	Specialist knowledge and skills to manage the planning process to facilitate economic outcomes
Ethical position			
Technician – Value neutral adviser to decision maker	<i>Technician</i> – Value neutral adviser to decision maker	<i>Politician</i> – Value committed activist that advocates policies	<i>Hybrid</i> – Hybrid of a technician and a politician

Source: Steele 2009:4

In a neoliberal environment it is expected that planners will be required to develop specialist knowledge and skills to manage the planning process to facilitate economic outcomes in preference to social and environmental outcomes.

This will require planners to gain greater financial acumen and act as urban entrepreneurs.

This will inevitably require the planner to adopt a hybrid role involving the following:

- First, as a technician that seeks to be a value neutral adviser to decision makers; but
- Secondly, and more significantly, as a politician who is a value committed activist that advocates economic growth.

It is this second political role that is likely to cause significant ethical dilemmas in the planning profession for the following reasons:

- First, there is currently a strong professional and in some cases personal commitment, to sustainable development and its goal of balanced economic, social and environmental outcomes.
- Second, to actively facilitate development could be seen to co-opt planning to the private sector which is only one of the sectorial interests involved in urban planning, and whose concern is profit.

Conclusions - Neoliberalism rules?

The planner plays a critical role in influencing and sometimes preventing urban change through their work for the private, public and third sectors; which are the institutions responsible for urban change in our society.

The traditional modern and postmodern perspectives of planning that have underpinned the planners' use of planning theory and practice in Queensland are being challenged by an energised neoliberal perspective.

The neoliberal approach rejects planning's role as a tool to correct and avoid market failure and seeks to subsume planning as a minimalist form of spatial regulation to provide certainty to the market and facilitate economic growth.

Planners must understand that neoliberalism is but a process; it is not an end state of history or geography. The neoliberal project is neither universal, monolithic or inevitable; it is contestable (Peck and Tickell 2002:383).

Neoliberalism is simply the process of restructuring the relationships between the public, private and third sectors, to rationalise and promote a growth first approach to urban change.

As such, each planner must personally and professionally determine where they stand in relation to the restructuring of the institutions of urban change that is being heralded by the reform of planning and the planning system in Queensland.

Planners, if they are to avoid political irrelevancy, must take an active and positive part in the forthcoming contest of ideas.

References and further reading

- Abercrombie, P 1959, *Town and Country Planning*, Oxford University Press, London.
- Allmendinger, P and Houghton, G 2012, 'Post-political spatial planning in England: A crisis of consensus?', *Transactions of the Institute of British Geographers*, vol. 37, no. 1, pp. 89-103.
- Alexander, E 1986, *Approaches to Planning: Introducing Current Planning Theories, Concepts and Issues*, Gordon and Breach, Langhorne.
- Alexander, ER, Mazza, L and Moroni, S 2012, 'Planning without plans? Nomocracy or teleocracy for social-spatial ordering', *Progress in Planning*, vol. 77, pp. 37-87.
- Arnstein, S 1969, 'A ladder of citizen participation', *Journal of the American Institute of Planner*, vol. 35, no. 4, pp. 216-224.
- Balducci, A, Boelens, L, Hillier, J, Nyseth, T and Wilkinson, C 2011, 'Strategic spatial planning in uncertainty: Theory and exploratory practice', *Town Planning Review*, vol. 82, no. 5, pp. 483-501.
- Calthorpe, P 1993, *The Next American Metropolis*, Princeton Architectural Press, New York.
- Cook, N and Ruming, K 2008, 'On the fringe of neoliberalism: Residential development in our outer suburban Sydney', *Australian Geographer*, vol. 39, no. 2, pp. 211-228.
- Clarke, G 1992, 'Towards appropriate forms of urban spatial planning', *Habitat International*, vol. 16, no. 2, pp. 149-165.
- Davidoff, P 1965, 'Advocacy and pluralism in planning', *Journal of the American Institute of Planners*, vol. 31, no. 4, pp. 186-197.
- Dowling, R and McGuirk, P 2009, 'Master-planned residential developments: Beyond iconic spaces of neoliberalism?', *Asia Pacific Viewpoint*, vol. 50, no. 2, pp. 120-134.
- Eagle, SJ 2009, 'Reflections on private property, planning and state power', *Planning and Environmental Law*, vol. 61, no. 1, pp. 3-11.
- Fainstein, S 2000, 'New directions in planning theory', *Urban Affairs Review*, vol. 35, pp. 451-478.
- Faludi, A 1973, *Planning Theory*, Pergamon, Oxford.
- Filion, P 1999, 'Rupture of continuity? Modern and postmodern planning in Toronto', *International Journal of Urban and Regional Research*, vol. 23, no. 3, pp. 421-444.
- Filion, P 2001, 'The urban policy-making and development dimension of fordism and post-fordism: A Toronto case study', *Space and Polity*, vol. 5, no. 2, pp. 85-111.
- Filion, P and Kramer, A 2011, 'Metropolitan-scale planning in neoliberal times: Financial and political obstacles to urban form transition', *Space and Polity*, vol. 15, no. 3, pp. 197-212.
- Forester, J 1989, *Planning in the Face of Power*, University of California, Berkeley.
- Forster, C 2006, 'The challenge of change: Australian cities and urban planning in the new millennium', *Geographical Research*, vol. 44, no. 2, pp. 173-182.
- Friedmann, J 1987, *Planning in the Public Domain from Knowledge to Action*, Princeton University Press Princeton, New Jersey.
- Friedmann, J 2008, 'The uses of planning theory: A bibliographic essay', *Journal of Planning Education and Research*, vol. 28, pp. 247-257.
- Giddens, A 2000, *The Third Way and its Critics*, Polity Press, Cambridge.
- Gleeson, B and Low, N 2000a, 'Revaluing planning rolling back neoliberalism in Australia', *Progress in Planning*, vol. 53, pp. 83-164.
- Gleeson, B and Low, N 2000b, 'Unfinalised business: neoliberal planning reform in Australia', *Urban Policy and Research*, vol. 18, no. 1, pp. 7-28.
- Goodchild, B 1990, 'Planning and the modern / postmodern debate', *The Town Planning Review*, vol. 61, no. 2, pp. 119-137.
- Gunder, M 2010, 'Planning as the ideology of (neoliberal) space', *Planning Theory*, vol. 9, no. 4, pp. 298-314.
- Habermas, J 1984, *Theory of Communicative Action*, Polity Press, London.
- Houghton, G and McManus, P 2012, 'Neoliberal experiments with urban infrastructure: The cross city tunnel, Sydney', *International Journal of Urban and Regional Research*, vol. 36, no. 1, pp. 90-105.
- Healey, P 1997, *Collaborative Planning*, University of British Columbia Press, Vancouver.
- Healey, P 2007, *Urban Complexity and Spatial Strategies: Towards a Relational Planning for Our Times*, Routledge, London.
- Hirt, S 2002, 'Postmodernism and planning models', *Critical Planning*, vol. 9, pp. 116-127.
- Hirt, S 2005, 'Toward postmodern urbanism? Evolution of planning in Cleveland Ohio', *Journal of Planning Education and Research*, vol. 25, pp. 27-42.
- Hirt, S 2009, 'Premodern, modern, postmodern? Placing new urbanism into a historical perspective', *Journal of Planning History*, vol. 8, no. 3, pp. 248-273.

- Howard, E 1989, *Garden Cities of Tomorrow*, Faber and Faber, London, Reprinted 1946.
- Jackson, J 2009, 'Neoliberal or third way? What planners from Glasgow, Melbourne and Toronto say', *Urban Policy and Research*, vol. 27, no. 4, pp. 397-417.
- Jacobs, J 1961, *The Death and Life of Great American Cities*, Rizzoli, New York.
- Kaufman, JL and Jacobs, HM 2007, 'A public planning perspective on strategic planning', *Journal of the American Planning Association*, vol. 53, no. 1, pp. 23-33.
- Keeble, LB 1969, *Principles and Practice of Town and Country Planning*, The Estates Gazette, London.
- Kirkpatrick, O and Smith, M 2011, 'The infrastructure limits to growth: Rethinking the urban growth machine in times of fiscal crisis', *International Journal of Urban and Regional Research*, vol. 35, no. 3, pp. 477 – 503.
- Lindblom, C 1959, 'The science of muddling through', *Public Administration Review*, vol. 19, pp.78-88.
- Lloyd, MG and Peel, D 2007, 'Neo-traditional planning. Towards a new ethos for land use planning?', *Land Use Policy*, vol. 24, no. 2, pp. 396-403.
- Lloyd, MG and Peel, D 2007, 'Shaping and designing model policies for land use planning', *Land Use Policy*, vol. 24, no. 1, pp. 154-164.
- Lynch, K 1960, *The Image of the City*, MIT Press, Cambridge Massachusetts.
- Lynch, K 1981, *A Theory of Good City Form*, MIT Press, Cambridge Massachusetts.
- McGuirk, P 2005, 'Neoliberalist planning? Re-thinking and re-casting Sydney's metropolitan planning', *Geographical Research*, vol. 43, no. 1, pp. 59-70.
- McLoughlin, JB 1969, *Urban and Regional Planning: A Systems Approach*, Faber and Faber, London.
- Milroy, B 1991, 'Into postmodern weightlessness', *Journal Planning Education and Research*, vol. 10, no. 3, pp. 181-187.
- Minnery, J 2012, 'Affordable housing, urban governance and special purpose authorities in a fast growing region', *48th International Society of City and Regional Planners Congress*, available at: http://www.isocarp.net/projects/case_studies/cases/cs_info.asp?ID=2152.
- Moroni, S 2004, 'Towards a reconstruction of the public interest criterion', *Planning Theory*, vol. 3, no. 2, pp.151-171.
- Moroni, S 2007, 'Planning liberty and the rule of law', *Planning Theory*, vol. 6, no. 2, pp. 146-163.
- Moroni, S 2010, 'Rethinking the theory and practice of land use regulations; Towards nomocracy', *Planning Theory*, vol. 9, no. 2, pp.137-155.
- Newman, P 2000, *Promoting Sustainable Urban Change*, Murdoch University, http://www.istp.murdoch.edu.au/ISTP/casestudies/Case_Studies_Asia/susturbc/susturbc.html.
- Pallagst, K 2006, *Growth Management in the San Francisco Bay Area: Interdependence of Theory and Practice*, Institute of Urban and Regional Development, University of California, Berkeley.
- Peck, J and Tickell, A 2002, 'Neoliberalizing space', *Antipode*, vol. 34, no. 3, pp. 380-404.
- Roy, A 2008, 'Post-Liberalism: On the ethico-politics of planning', *Planning Theory*, vol. 7, no. 1, pp. 92-102.
- Ruming, KJ 2005, 'Partnership, master planning and state provisions: A case study of 'actually existing neoliberalism' on the central coast of New South Wales', *Geographical Research*, vol. 43, no. 1, pp. 82-92.
- Ruming, KJ 2009, 'The complexity of comprehensive planning partnerships: The case of the Warnervale town centre', *Urban Policy and Research*, vol. 27, no. 1, pp. 25-42.
- Sager, T 2009, 'Responsibilities of theorists: The case of communicative planning theory', *Progress in Planning*, vol. 72, pp. 1-51.
- Sager, T 2011, 'Neo-liberal urban planning policies: A literature survey 1990 - 2010', *Progress in Planning*, vol. 76, pp. 147-199.
- Sharp, T 1940, *Town Planning*, Penguin, Harmondsworth.
- Steel, W 2009, 'Australian urban planners: Hybrid roles and professional dilemmas', *Urban Policy and Research*, vol. 27, no. 2, pp. 189-203.
- Taylor, N 1999, 'Anglo-American town planning theory since 1945: Three significant developments but no paradigm shifts', *Planning Perspectives*, vol. 14, no. 4, pp. 327-345.
- Tochterman, B 2012, 'Theorizing neoliberal urban development', *Radical History Review*, vol. 112, pp. 65 – 87.
- Triggs, HI 1909, *Town Planning, Past, Present and Possible*, Methuen and Company, London.
- Tewdwr-Jones, M 2008, 'The complexity of planning reform: A search for the spirit and purpose of planning', *The Town Planning Review*, vol. 79, no. 6, pp. 673-688.
- Unwin, R 1996, *Town Planning in Practice: An Introduction to the Art of Designing Cities and Towns*, 4th edn, Princeton Architectural Press, New York.
- Wright, FL 1932, *The Disappearing City*, Payson, New York.

Green Paper on planning reform in NSW released by government

Anthony Perkins

This article explores the NSW Government's Green Paper for overhauling the State's planning system through the identification of four key areas for planning reforms: community participation, strategic focus, streamlined assessment and provision of infrastructure

July 2012

Green Paper responds to independent review of NSW planning system

On 14 July 2012, the NSW government released its long awaited blueprint for planning reform in NSW: *A New Planning System for New South Wales – Green Paper*. The document sets out a comprehensive agenda for overhauling the NSW planning system which, according to the government, is mired in complexity, overly regulated, unacceptably politicised and focused on process rather than outcome.

The Green Paper is the government's initial response to the recommendations of the *Independent Review of the NSW Planning System* that commenced in July 2011 and was led by The Hon Tim Moore and The Hon Ron Dyer.

At a broad level, the Green Paper focuses on four key areas of reform – community participation, strategic focus, streamlined assessment and provision of infrastructure. The Green Paper goes on to introduce some 23 "transformative changes" which, through further consultation, will form the basis of the new draft legislation, due out in early 2013.

Some of the key transformative changes are summarised below.

Greater emphasis on community consultation and participation

There will be greater emphasis on community consultation and participation during the strategic planning stage of the process, with the aim of reducing community consultation (and disputation) at the assessment stage.

This policy initiative will be supported by the adoption of a "Public Participation Charter" which, when implemented, will require that community consultation occurs in the early stages of the plan-making process. The charter will set minimum standards and also encourage innovation and best practice in consultation techniques.

Abolition of Local Environmental Plans and Development Control Plans

These will be replaced over time by various planning hierarchies, including the introduction of "Local Use Plans". LUPs will be structured differently to LEPs.

In short, LUPs will comprise four key parts, including a strategic section, a statutory spatial land use plan, a section on infrastructure and services and a section on development guidelines and performance monitoring requirements. The statutory spatial land use plan will contain the bulk of what is currently found in the comprehensive LEPs, including zonings.

Scrapping of State Environmental Planning Policies and Section 117 Directions

These will be replaced by around 10 Ministerial Directives. The Green Paper also proposes switching off concurrences and referrals. The government has, in part, commenced the process of eliminating concurrent authorities and has pledged to continue this process.

Expanding the scope of complying development

The government will look at expanding the codes to new industrial buildings on industrial land, additions to industrial buildings, additions to existing commercial buildings, townhouses, terrace housing and villas and housing on smaller lots. The government is also considering introducing a new mechanism that would allow for the consideration of variations from the standards for an otherwise compliant house.

Creation of new suburban character zones

The creation of new suburban character zones will enable local councils to decide to limit development in specific areas.

Creation of new enterprise zones

These will be zones where a range of development can take place. While it is principally designed to stimulate employment-generating development, there will be some flexibility to allow for other compatible uses.

Planning Assessment Commission (PAC) and Joint Regional Planning Panels (JRPPs)

The role of the PAC and the JRPPs will be maintained in decisions on developments that are State and regionally significant.

At a local level, the Green Paper is contemplating a requirement that councils appoint expert panels (such as Independent Hearing and Assessment Panels) and delegate local decision making to those panels, with the aim of depoliticising the assessment process.

Expanding the review roles of the PAC and JRPPs

The Green Paper proposes to expand the review roles of the PAC and JRPPs to include pre-gateway reviews where a consent authority refuses or delays the preparation of a planning proposal; gateway reviews where the council or the proponent do not agree with the gateway determination and, significantly, rezoning proposals that have not been approved.

Introduction of an "amber light" notification regime

The effect of an "amber light" notification regime would be to permit a consent authority which has determined to refuse a development application to allow the developer to make certain modifications to the development prior to the determination, which would render the application acceptable for approval.

Need for fundamental change in delivery culture

The initiatives proposed by the NSW government are unquestionably bold in their aims and, when implemented, will significantly change the way that development is procured in NSW.

What is even more important than the government's transformative proposals, as outlined in the Green Paper, is a fundamental change in the "delivery culture" related to the implementation of development in NSW. Only this will facilitate true reform in the four key areas of community participation, strategic focus, streamlined assessment and provision of infrastructure that the Green Paper has identified.

The government has acknowledged that significant further work needs to be carried out before the publication of the White Paper and the release of the accompanying Exposure Bill early next year. The devil, of course, will be in the detail.

NSW Land and Environment Court has power to permit the "regranting" of development consents which have been declared invalid

Anthony Perkins

This article discusses the powers of the NSW Land and Environment Court to permit the readvertising and regranting of a deemed invalid development consent

July 2012

Executive Summary

In limited circumstances, the Land and Environment Court will exercise its power under the *Land and Environment Court Act 1979* to permit the original consent authority - typically the local council - to readvertise and "regrant" a development consent that has been found to be invalid.

Csillag v Woollahra Council [2011] NSWLEC 17

The case of *Csillag v Woollahra Council* [2011] NSWLEC 17 involved a challenge to a decision made by Woollahra Municipal Council to grant a development consent to carry out alterations and additions to a penthouse apartment known as 15/335 New South Head Road, Double Bay.

The building in which the penthouse apartment was located, however, also had an address known as 353 Edgecliff Road, Double Bay. Council proceeded to notify the development publicly with reference to its New South Head Road address, without reference to its Edgecliff Road address.

Failure by council to identify the property properly

The court held that, though the error was technical in nature, the failure to identify the property properly by its alternative address constituted a failure by the council to notify the development application in accordance with the *Woollahra Development Control Plan for Advertising and Notification of Development Applications*. As a consequence, the court found that the development consent was invalid.

Before making any final determination in relation to the development consent, the court referred to the provisions set out in Division 3 of Part 3 of the *Land and Environment Court Act 1979*.

Invalid consents remitted back to consent authority for reassessment

Essentially, the provisions set out in Division 3 of Part 3 provide a statutory mechanism which enables the court to suspend the operation of the defective consent and have the consent remitted back to the original consent authority for reassessment and redetermination, or what the Court Act refers to as "regranting" (provided, of course, the original consent authority is satisfied with the merits of the application).

As the court observed, these provisions must be considered in all cases where the determination of invalidity of a development consent would otherwise be made.

As discussed in the Court of Appeal decision of *Kindimindi Investments Pty Ltd v Lane Cove Council* [2007] NSWCA 38, the legislative intent behind the operation of the regranting provisions "emphasises the legislative concern that development consents not be frustrated by potential invalidities in respect of which the court may, as a matter of discretion, consider making a s.25B order."

Court suspends the development consent

Without embarking on a detailed assessment of the merits of the current application, his Honour held that it was appropriate in the circumstances to exercise the court's discretion under Division 3 of Part 3 of the Court Act:

[59] Without suggesting that alterations and additions proposed for apartment 15 can have no external impact, given the existence and location of the tower building it would appear that impacts, if any, would be limited to relatively few people. Moreover, the development is, by any objective standard, relatively small in its scope of work and cost. In these circumstances, I consider it appropriate to suspend the operation of the consent granted on 6 July 2009 in accordance with s 25B(1) of the Court Act. Otherwise, the processes provided for in Div 3 of Pt 3 of the Court Act should take their course.

In the current case the court:

- suspended the development consent pending further order of the court;
- remitted the development consent (now effectively treated as a development application) back to the council for re-notification and advertising in accordance with council's development control plan for advertising and notification;
- directed the council to give further consideration to the development application in accordance with section 103 of the *Environmental Planning and Assessment Act 1979* following receipt of any submissions or objections received in consequence of notification and advertisement;
- directed the council to re-determine the application, having regard to the merits of the development; and
- relisted the matter for further hearing.

Court finds that its earlier orders have been complied with

The matter came back before the Land & Environment Court for consequential orders in June 2012, *Csillag v Woollahra Council (No 2)* [2012] NSWLEC 135. The court was satisfied that its earlier orders had generally been complied with and that, on this occasion, the regranting of the consent had been validly made.

As the court noted, it was not the role of the court to consider the merits of the application, but merely to consider whether its orders had been complied with and that due process had been followed.

[14] In exercising the function of the Court under Div 3 of Pt 3 of the Court Act, I am not called upon to determine, as a matter of merit, whether the amended development application should be the subject of the Council's approval. Rather, the function that I am performing is to determine whether the orders that I made on 25 February 2011 for advertising, notification and reconsideration have been observed.

Regranting of development consent took more than 18 months

Despite the beneficial nature of the relief granted, the process of regranting can be far from satisfactory for affected property owners. In the present case, for a multiplicity of reasons, the regranting process took in excess of 18 months to complete (from the date on which the consent was suspended by the court to the date on which the regranted consent was declared valid) and involved three rounds of significant amendments to the original approval. Overall, the exercise was a frustrating and costly one for the affected land owners.

Local councils and their officers and staff exempted from liability

Added to the burden of a land owner faced with a defective consent – requiring the land owner to pursue the regranting process or lodge a new development application – is the realisation that there is only very limited recourse against the consent authority for financial losses incurred as a result of the defective consent.

Tucked away in the back of the *Local Government Act 1993* is section 731, which effectively exempts local councils from any liability arising from the consequences of their actions, provided those actions were in the furtherance of their obligations and were made in good faith. That exemption extends to officers and staff working for a local council.

When does a jurisdictional error materially affect the outcome of a decision?

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Towers v Building and Dispute Resolution Committee & Ors* [2012] QPEC 28 heard before Searles DCJ

August 2012

Executive Summary

This case involved an appeal by Brenton Towers pursuant to section 479 (Appeals from Building and Development Committees) of the *Sustainable Planning Act 2009 (SPA)* against a decision of the Development Dispute Resolution Committee. The committee upheld a decision originally made by Burnett Country Certifiers as Assessment Manager, at the direction of the Bundaberg Regional Council as Concurrence Agency. The decision involved the refusal of a development application for a Building Code of Australia Class 10a structure referred to as a Bali Hut, an open sided shade structure with thatched roof.

In dismissing the appeal, the Planning and Environment Court (**P&E Court**) rejected the assertion that the committee took into account an irrelevant consideration by considering the availability of an alternative location for the Bali Hut on the property without contravening the Queensland Development Code (**QDC**). The P&E Court held that if he was wrong on this point, the appeal should still be dismissed as the irrelevant consideration would not have materially affected the decision arrived at by the committee.

Facts

In March 2011 the council became aware that the Bali Hut appeared to infringe the six metre setback requirement of the QDC. The council considered that such apparent infringement would require a siting concession from the council as Concurrence Agency pursuant to section 57(2) (Building Certifier's or Concurrence agency's discretion) of the *Building Act 1975*.

On 20 May 2012, the applicant lodged a Request for Concurrence Agency Assessment - Building with the council requesting assessment of the design and siting of the Bali Hut (**application**). In the application, the applicant outlined a number of features of the Bali Hut which sought to justify the granting of the concession and also relevantly, a number of constraints which would make the relocation of the Bali Hut impractical or non-viable.

On or about 27 May 2011, the council refused the application on the basis that the bulk and road setback of the Bali Hut in its current position was not in compliance with Performance criteria P1 of MP1.2 (Design and Siting Standards for Single Detached Housing – on Lots 450m² and over) of the QDC. Further, it was noted that there was sufficient area available within the applicant's land to relocate the Bali Hut to a position which would comply with the requirements of the acceptable solutions of Performance criteria P1 of MP1.2 (Design and Siting Standards for Single Detached Housing On Lots 450m² and over) of the QDC.

Subsequently, the Private Certifier, appointed by the applicant, refused the application at the direction of the council as Concurrence Agency. The applicant appealed the decision of the Private Certifier to the committee.

The committee dismissed the appeal on 17 October 2011 on similar grounds as the council's refusal. In particular, one of its reasons was that the structure could be relocated onto available space within the property without contravening MP1.2 (Design and Siting Standards for Single Detached Housing - on Lots 450m² and over) of the QDC.

The applicant appealed the decision of the Committee to the P&E Court under section 479 (Appeals from Building and Development Committees) of the SPA. In essence, the Applicant contended that the decision of the committee involved an error of law in that it rested its decision on the findings that there was available space on the property to which the Bali Hut could be moved, but the question of availability of other available space on the property was not a consideration in the QDC.

Decision

The P&E Court noted that the question of law raised by the applicant was not clearly stated. In agreement with the council's interpretation, further noted that the applicant's contention appeared to be that the committee had taken into account an irrelevant consideration by considering the availability of an alternative acceptable location for the Bali Hut on the property.

The court, by reference to *Minister for Immigration and Multicultural Affairs v Yusef* (2001) 206 CLR 323 at 351, noted that any decision involving taking into account of an irrelevant consideration was more correctly categorised as an excess of jurisdiction rather than an error of law.

The council submitted that the issue of acceptable relocation of the Bali Hut was a relevant consideration in that it was an issue raised by the applicant in his request for Concurrence Agency Assessment. The court held that as the committee was considering a relevant matter raised by the applicant, it did not take into account an irrelevant consideration. His Honour noted however, that if he was wrong in that regard, it was not such as to have materially affected the decision of the committee.

As to what materially affected a decision, the court referred to the decision of *House v Defence Force Retirement Invest Benefits Authority* [2011] 193 FCR 112 which stated (with reference to the decisions of *Lu v Minister for Immigration and Multicultural & Indigenous Affairs* (2004) 141 FCR 346 and *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82) that:

...when the court is considering whether an applicant should be denied relief on the ground that a demonstrated error of law could not have materially affected the tribunal's decision, the court must be satisfied that the error of law did not deny the aggrieved applicant of the possibility of a successful outcome (Lu) or, put another way, the error of law (ultimately relevant to the tribunal's findings of fact) could make no difference (Gleeson CJ, ex parte Aala) to the result already reached....

Having regard to the relevant principles, the court was satisfied that, other than the (assumed) irrelevant consideration of relocation, the applicant had no possibility of a successful outcome in light of the committee's reasons for decision.

Whilst the applicant submitted that each party should pay their own expenses, the court considered it appropriate that the applicant paid the council's costs to be assessed on a standard basis.

Held

The court ordered that:

1. The appeal be dismissed.
2. The council's costs be paid by the applicant to be assessed on a standard basis.

Encroachment on rural land by residential development

Ronald Yuen | Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *MacAdam v Moreton Bay Regional Council & Anor* [2012] QPEC 38 heard before Jones DCJ

August 2012

Executive Summary

This case concerned an appeal by an orchard operator, Mr MacAdam, against the decision of the Moreton Bay Regional Council to approve the development application lodged by Task Development Corporation No. 6 Pty Ltd for a residential subdivision. The appeal involved numerous issues including public notification, adequate provision for a park, the need to provide for koala habitat, conflicts with the council's planning scheme, and the need for and impact on good quality agricultural land (**GQAL**). Whilst His Honour Judge Jones accepted that the council had failed to fully comply with the public scrutiny requirements under section 3.2.8 (Public scrutiny of applications and related material) of the repealed *Integrated Planning Act 1997 (IPA)*, as the orchard operator nor any other interested member of the public had not been materially prejudiced by such failure, His Honour excused the noncompliance. As to the remaining issues raised by the orchard operator, His Honour believed that the proposed buffer along the northern boundary was inadequate but did not consider that the other issues raised by the orchard operator warranted a refusal of the development application.

Facts

On or about 11 December 2007, the Task Development Corporation No. 6 Pty Ltd lodged a development application with the council to subdivide land located on the north-eastern corner of Paradise Road and Lagoon Road, Burpengary, to create 36 residential allotments. The developer requested that the development application be assessed against the council's superseded planning scheme. The orchard operator and his wife were the registered proprietors of two rural residential blocks located to the north of the land the subject of the development application. To the east of the proposed development that fronted Paradise Road, the southern boundary of the orchard operator's land adjoined three smaller rural residential allotments. To the west of the proposed development, on the opposite side of Lagoon Road, was a residential subdivision known as "Lagoon Road West". Adjoining the northern-most of the orchard operator's rural residential blocks was another proposed residential subdivision known as "Grape Farm" on which no meaningful work had occurred.

For over two decades the orchard operator and his wife had operated an orchard on the land. While the orchard trees were predominately located on the northern block of the orchard operator's land, some were scattered throughout the western section of the southern block. The orchard operator's residence, nursery and machinery shed were also located on the southern block. The orchard operator's main concern was that the proposed development would threaten the long-term future of the orchard and the ongoing use of GQAL for farming purposes.

Decision

Public notification

Mr MacAdam contended that the council had failed to comply with the public scrutiny requirements under section 3.2.8 (Public scrutiny of applications and related material) of the IPA in that it failed to display the adverse response of the then Environmental Protection Agency (**EPA**) in respect of the development land, and that he and other interested parties were prejudiced by not having the EPA's response available to them when making submissions to the council. While the Judge accepted that there was a failure on the part of the council to fully comply with the public scrutiny requirements, he excused the council's non compliance. The Judge determined that given that Mr MacAdam was able to identify certain environmental characteristics of the development land and to articulate clearly his environmental concerns, no material prejudice had been suffered by him or any other interested member of the public. Further, the Judge also excused the council's non compliance on the grounds that the proposed development was consistent with the council's planning scheme, that it was supported by a detailed ecological assessment report and that it was not opposed by the EPA (subject to suitable buffers and stormwater management).

Park area

The orchard operator submitted that the majority of the park identified within the proposed development would be utilised for storm water detention and as such would be unlikely to be suitable for any meaningful recreational activities. The orchard operator further submitted that 10% of fair-average land should be dedicated as park. The council in its assessment concluded that a full land dedication was not appropriate in this instance given the extensive open space and recreational opportunities available in proximity to the development land and therefore accepted a financial contribution instead. Whilst the orchard operator acknowledged that the council had the discretion to accept a financial contribution in lieu of park dedication, he submitted that the council had failed to appreciate that those areas identified for open space and recreational opportunities provided no opportunity for sporting activities. The town planners for the respective parties agreed that there was sufficient parkland planned for the locality and that a condition requiring a monetary contribution was a reasonable and relevant requirement for the proposed development. In light of this, the court held that there was no basis for concluding that the council should not have accepted a monetary contribution in lieu of more park area.

Environmental issues

The orchard operator submitted that if the court were to reject his argument for a 10% dedication of fair-average land then, alternatively, a condition, identical to the one imposed on the Grape Farm development, requiring the co-respondent to retain as much native vegetation as possible should be imposed. The EPA in its advice indicated that the proposed development was within an area dominated by various flora species and was close to wetland areas of significance and recommended that an approval would require a 20 metre buffer between the proposed development and the designated and preserved habitat area opposite the development land to the south of Paradise Road. The council, after having regard to the ecological assessment report provided by the developer and other material, determined that environmental concerns, and in particular, clearing of the land were not sufficient grounds for refusing the application and recommended conditions such as that fauna spotter/catchers be employed during the clearing of vegetation and temporary exclusion fencing be utilised to delineate the removal of vegetation. The court accepted that the vegetation over the development land was capable of providing habitat for koalas from time to time but found that there was no reason to conclude that the conditions imposed were not adequate, despite them not being on identical terms to those imposed on the Grape Farm development.

Conflict with the council's planning scheme

The court considered the alleged conflicts with the council's planning scheme and noted that the relevant planning instruments made it sufficiently clear that the development land and its immediate environs were earmarked for future small residential, which was recognised by all parties' respective town planners. The court endorsed the town planners' conclusion that the proposed development was not in conflict with the council's planning scheme and noted that for there to be a genuine conflict there must be some real and identifiable variance or disagreement, which was not present in this instance.

Need

The council's planning scheme was a transitional scheme within the meaning of section 6.1.3 (What are transitional planning schemes) of the IPA and therefore the proposed development required assessment under the regime prescribed by the *Local Government (Planning and Environment) Act 1990 (LGPEA)*. Section 4.11 (Combined applications) of the LGPEA required a development application to be refused if it conflicted with any relevant strategic plan or development control plan and there were no sufficient planning grounds to justify approving the development application despite the conflict. As the court had found that the proposed development was not in conflict with any relevant strategic plan or development control plan, it concluded that the question of need did not arise.

Appropriate buffers and good quality agricultural land

At the time of the hearing the required buffer along the northern boundary of the proposed development was to be a 3 metre wide buffer (to be heavily vegetated) and a 1.8 metre high solid timber fence. The orchard operator contended that a buffer in the order of 30-40 metres was required to provide sufficient separation between his orchard activities and residential development. The orchard operator was concerned with the width of the proposed buffer and that complaints would be made about his farming activities causing pressure on him and his wife to close down their orchard business.

The orchard operator, in support of his argument, submitted that the appellant's land was GQAL for the purposes of *State Planning Policy 1/92 (SPP1/92)* and its associated guidelines, in particular the *Planning Guidelines: Separating Agricultural and Residential Land Uses (Separation Guidelines)* which recommended a minimum buffer of 40 metres. The court noted that, prima facie, SPP1/92 and its associated guidelines provided support to his argument. However, the guidelines recognised circumstances where future development of land should be assessed on its town planning merits without reference to agricultural issues such as in instances where a parcel of land was effectively committed for development. To that end, given the appellant's land and surrounding smaller parcels of land, including the development land, had been earmarked for higher density residential development for a number of years, the court held that the operation and effect of the Separation Guidelines were not directly relevant to the appeal.

Although the Separation Guidelines did not apply, the court considered it necessary to determine the appropriate buffer between the orchard operator's land and the proposed development, in particular, given the orchard operator's activities could create a nuisance from time to time for the residents of those lots closest to the southern boundary of the orchard operator's land and that the use of the orchard operator's land was a lawful one which could be expanded or intensified. The court did not consider it to be reasonable that the developer be required to designate the whole of the area occupied by the four lots proposed along the northern boundary as a buffer or effectively freeze the sale of those lots until the orchard operator's land was developed for residential purposes. Whilst the court was unable to readily determine the appropriate buffer width as there was insufficient evidence on this issue, the court held that the proposed buffer along the northern boundary of the proposed development was inadequate, particularly having regard to the fact that the orchard operator (or anyone else) could exercise their lawful right to expand the existing use or introduce a more intensive use of the orchard operator's land.

The court was of the view that the uncertainty surrounding the adequacy of the proposed buffer could be readily resolved and held that, apart from its concerns about the proposed buffer, there were no grounds for refusing the development application. The court invited the parties to approach the court in the future to resolve the remaining issue of the buffer along the northern boundary of the proposed development but if no consensus was reached, the court would hear from the parties as to the future conduct of the appeal.

Held

The court ordered that:

1. The co-respondent's failure to comply with the public notification requirements of the IPA be excused.
2. It would hear from the parties as to the future conduct of the appeal.



Incorrect consideration of amenity amounting to jurisdictional error

Samantha Hall

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Holcim (Australia) Pty Ltd v Brisbane City Council* [2012] QPEC 32 heard before Searles DCJ

August 2012

Executive Summary

This case involved an application to the Planning and Environment Court (**P&E Court**) for a declaration that the Brisbane City Council's decision of 15 March 2011 and subsequent negotiated decision of 14 July 2011 were invalid and of no legal effect. Both decisions approved a development application for a material change of use for multi-unit dwellings and for a preliminary approval to carry out building work on land located in Albion. The P&E Court held that the council's decision and subsequent negotiated decision were invalid and of no legal effect.

Case

This case involved an application seeking declaratory relief from the P&E Court for the council's decisions in respect of the development on land located at 35 Burdett Street, Albion, Brisbane and more particularly described as lot 2 on RP801651.

Facts

Holcim (Australia) Pty Ltd, Lida Ambroselli, Desiree Coroneo, Ross James Johnston, Nicholas Karaloukas and Mark Trevor Warnock (**applicants**) relied on two grounds to challenge the council's decisions which, for convenience, are described as the Amenity ground and the Height ground.

Amenity ground

The applicants submitted that the council erred in its decision to approve the development due to the following five jurisdictional errors (**JE**):

- JE1 – the amenity of the development was affected by Holcim's concrete batching plant, therefore, there was non-compliance with the *Albion Neighbourhood Plan*, performance criteria P16;
- JE2 – given the non-compliance with P16, the council was obligated to apply the test under section 3.5.13(3) and (4) (Decision if application requires code assessment) of the *Integrated Planning Act 1997 (IPA)*. Compliance with the test involved consideration of whether there were sufficient grounds to justify the approval despite the conflict with P16;
- JE3 – the council failed to take into account the recent aspects of amenity as contemplated in P16 including: nuisance, character, visual appearance, way of life, perception, feeling of the area, traffic amenity issues and standard of the neighbourhood and reasonable expectations of the future residents;
- JE4 – the council misdirected itself in a number of respects in relation to the critical aspects of P16 including:
 - applying the wrong test under P16 in concluding that the development would not affect the amenity of the surrounding area. The correct test which should have been applied was the effects the concrete batching plant would have on the development;
 - adopting a report of the council's committee which stated that the development complied with the *Albion Neighbourhood Plan*, when it did not comply;
- JE5 – the council approving the development was so unreasonable that no reasonable authority could have ever come to the same decision as:
 - the concrete batching plant was directly across the road;
 - future residents would have to drive past the concrete batching plant and manoeuvre heavy vehicles;
 - there was no way the future residents could avoid the concrete batching plant's operations;
 - there would be amenity issues of traffic and heavy vehicles, visual appearance of an intense industrial use, perception, character, noise, dust air quality, nuisance and reasonable expectations of residents;

- the development was premised on the basis that the residents would act like hermits in their units with windows and doors shut and air-conditioning on.

Height ground

The applicants asserted that the development would exceed the maximum height limit of RL 33m AHD prescribed in Acceptable Solution 4.1 of the *Albion Neighbourhood Plan*, in which event the Development should have been impact assessable and not code assessable.

Decision

Amenity

Looking at P16, the P&E Court reiterated the purpose of P16 in that the amenity of the development must not be affected by the operation of the existing concrete batching plant. The P&E Court went further in saying that when P16 and section 3.3 (Compliance with Precinct intent) of the *Albion Neighbourhood Plan* are read together P16 was clearly designed to guard against any adverse effect on the amenity of any new residential development which results from the concrete batching plant operations.

Acceptable Solution A16 provided a way in which the developer, Arden Management Group Pty Ltd, could comply with P16, being to delay construction until the concrete batching plant ceased operation. However, as Holcim had no intention of ceasing operation, it was necessary for Arden to find an alternative method to satisfy P16.

The *Albion Neighbourhood Plan* expressly recognises the concrete batching plant and states that any new residential development in the relevant area must take into account the importance of the effects of amenity. The court held that there was no doubt, based on the council's documents, that the council confined its focus to the question of P16 amenity to air quality, noise and traffic.

The court held that the council was obligated to properly address the entire concept of amenity. It did not do so. Therefore, the council miscarried as a result of this failure. It could not be said that the omission was insignificant so as not to have materially affected the decision; it was at the core of council's considerations. That failure constituted a jurisdictional error so as to invalidate the council's decision.

Further, given the above conflict with P16, the council had a statutory obligation to identify sufficient grounds to justify approval of the development application despite the conflict pursuant to section 3.5.13 (Decision if application requires code assessment) of the IPA. It did not do so, but rather, granted the development approval which constituted another jurisdictional error leading to invalidity.

Height

As the P&E Court had established a jurisdictional error, no decision was made in respect of the height issue.

Held

The P&E Court declared that the council's decisions were of no legal effect and were set aside.



Subpoena issued to Gold Coast City Council – confirmed fishing exercise

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Braudmont Pty Ltd & Ors v Gold Coast City Council* [2012] QCA 140 heard before Muir and Fraser JJA and Martin J

October 2012

Executive Summary

The Court of Appeal refused an application for leave to appeal against a decision of the Planning and Environment Court (**P&E Court**) setting aside a subpoena to the Chief Executive Officer of the Gold Coast City Council, issued in the context of an application seeking declarations that the council had unlawfully constructed a path.

Case

This case concerned an application for leave to appeal brought by landowners of residential property fronting Pacific Parade at Currumbin (**the applicants**) in the Court of Appeal in respect of a path constructed by the council on land contiguous with the eastern boundaries of the applicants' properties.

The application related to a decision of the P&E Court setting aside a subpoena to the Chief Executive Officer of the council and ordering the applicants to pay the council's costs of and incidental to the application to set aside the subpoena.

Facts

The applicants brought an application in the P&E Court seeking a declaration that the council had unlawfully constructed a path on the landward side of, and partly on, misaligned, discontinuous boulder walls buried under a coastal dune which resulted in serious environmental harm and sought consequential orders including an injunction requiring the council to remove the path. In the course of the appeal in the P&E Court the applicants issued subpoenas to the Chief Executive Officer and other members of the council which sought documents relating to the boulder walls in the vicinity of the path. The council applied to set aside the subpoenas and towards the end of the hearing of the council's application, the applicants abandoned their reliance upon all of the subpoenas other than the subpoena directed to the Chief Executive Officer. The primary judge found that the issue of the subpoena was an abuse of process and ordered that it be set aside.

The applicants sought leave to appeal against the decision of the primary judge and an order that the applicants be at liberty to issue a further subpoena to the Chief Executive Officer of the council seeking the same documents set out in the original subpoena.

Decision

His Honour Justice Fraser, in the Court of Appeal considered three arguments presented by the applicants and gave his findings, with which Justices Muir and Martin agreed.

First, His Honour Justice Fraser considered whether the documents described in the subpoena were relevant to the issues in the application seeking declarations that the path had been constructed unlawfully.

His Honour Justice Fraser pointed to the following relevant aspects of the schedule to the subpoena:

- each of the specified subjects to which the required documents related concerned the boulder walls;
- the subpoena did not appear to limit the required documents by reference to any of the specified subjects, but merely required the production of documents relating to the boulder walls;
- to the extent that the subpoena required the production of documents relating to the specified subjects, the nature of that relationship was expressed in very wide terms.

The applicants argued that the documents sought by the subpoena might have disclosed a policy position adopted by the council in another part of the coast that a pathway should not be constructed until the alignment of a boulder wall was corrected.

However, His Honour Justice Fraser found that such an argument was not capable of justifying a subpoena which required the production of documents relating to the boulder walls and the specified subjects in any way. The subpoena did not limit the required documents by reference to any council policy and most of the described documents could not have influenced the question whether any such policy existed.

Furthermore, the applicants had abandoned an allegation that the boulder walls were related to the alleged environmental harm caused by the construction of the path. Notwithstanding that the applicants sought to supply particulars which had not been requested to reintroduce an issue in respect of the boulder walls, His Honour Justice Fraser found that there was no justification for requiring the production of documents which referred to or related in any way to the boulder walls.

Second, His Honour Justice Fraser considered the applicants' argument that the primary judge had not made a finding that the subpoena was oppressive, but rather the primary judge's statement merely amounted to a recitation of the evidence. His Honour Justice Fraser indicated that since there was no challenge to that evidence, the absence of an explicit finding was immaterial and there was no error in the primary judge's conclusion that the issue of the subpoena in the terms in which it was issued was an abuse of process.

Third, His Honour Justice Fraser considered a submission made by the applicants' counsel that if the subpoena was too wide, it should be saved by appropriate variation. The applicants did not apply to amend the subpoena nor did they describe any narrower class of documents which might legitimately be sought. As such, His Honour Justice Fraser found that it was not appropriate to grant leave to appeal to permit the applicants to seek to re-draft their subpoena on appeal.

Ultimately, His Honour Justice Fraser found that the applicants' application for leave to appeal should be refused because there was no prospect that the Court of Appeal would make an order that the subpoena be reissued in the same terms as it was originally sought. Furthermore, the applicants were required to pay the costs of the application.

Held

The application for leave to appeal to the Court of Appeal was refused, with costs.

Wednesbury unreasonableness

Samantha Hall

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Christian Outreach Centre v Toowoomba Regional Council & HSBG Pty Ltd* [2012] QPEC 29 heard before Searles DCJ

October 2012

Executive Summary

In proceedings brought against government authorities which are in the nature of judicial review, one of the grounds often alleged is that the decision of the authority was so unreasonable that no reasonable decision maker could have ever made that decision. This is commonly known as the Wednesbury test of unreasonableness and it is a ground of review that it is not often raised in proceedings brought before the Planning and Environment Court (**P&E Court**) as the test of unreasonableness is high and usually requires overwhelming proof of the unreasonableness of the decision. However, this application brought by the Christian Outreach Centre, is one of the few examples of the Wednesbury test of unreasonableness being successfully raised in the P&E Court.

Case

This case concerned an application by the Christian Outreach Centre (**applicant**) against the decision of the Toowoomba Regional Council (**respondent**) to approve a change to a development approval for a material change of use for a retail showroom, indoor recreational facility (gym) and food outlet (café/restaurant) granted to HSBG Pty Ltd (**co-respondent**).

Facts

In July 2009, the respondent granted to the co-respondent a development permit for a material change of use for a retail showroom, indoor recreational facility (gym) and food outlet (café/restaurant) in respect of land situated at 471-493, Hume Street, Toowoomba.

In July 2011, the co-respondent lodged with the respondent a request to make a permissible change to the Development Approval pursuant to section 369 (Request to change development approval) of the *Sustainable Planning Act 2009* (**SPA**). The proposed changes included:

- deleting the indoor recreational facility (gym);
- varying the approved building envelope by housing the proposed development in a single building rather than three separate buildings; and
- relocating the approved access from approximately half way along the Hume Street frontage to a position approximately 140m south at a common boundary between the land and the applicant's land.

In October 2011, the applicant met with the respondent, in which the applicant conveyed its concerns about part of the co-respondent's proposed changes to the development approval, that being the shifting of the approved access point and the potential queuing of traffic past the applicant's land resulting therefrom. At that meeting, the applicant also conveyed that it would definitely look at making a submission against the proposed changes to the development approval.

In assessing a proposed change to a development approval, the responsible entity must be satisfied that the proposed change is a "permissible change". Relevantly, amongst other matters, a permissible change to a development approval is a change (for an approval that previously required impact assessment) that would not be likely, in the responsible entity's opinion, to cause a person to make a properly made submission objecting to the proposed change, if the circumstances allowed (see section 367(1)(c) (What is a permissible change for a development approval) of the SPA).

In November 2011, the applicant's solicitors wrote to the respondent advising that it was concerned about the adverse impacts of the proposed changes to the development approval and it requested the respondent to not decide the request to change the development approval until the applicant provided its formal position within 10 business days.

Later that month, the respondent approved the co-respondent's request to change the development approval and the applicant subsequently lodged an originating application in the P&E Court pursuant to section 456 (Court may make declarations or orders) of the SPA, seeking the following orders:

- a declaration that the proposed changes were not a "permissible change"; and
- a declaration that the decision of the respondent to approve the proposed changes was of no force or effect.

The issue to be determined by the P&E Court was, by reference to section 367(1)(c) (What is a permissible change for a development approval) of the SPA, whether the respondent's decision to approve the proposed changes to the development approval was so unreasonable that no reasonable local government could have made that decision.

Decision

His Honour Judge Searles, determined, referring to *KT Corporation Pty Ltd v Logan City Council and State of Queensland* [2005] QPEC 119, that the respondent, acting reasonably in the execution of its statutory role, could not have formed any opinion other than that there was a "substantial chance, a real not remote chance regardless of whether it was more or less fifty percent", that the applicant would have made a properly made submission as envisaged by section 367(1)(c) (What is a permissible change for a development approval) of the SPA.¹

In coming to this conclusion, His Honour identified that the representations made by the applicant in October 2011 and the subsequent letter from its solicitors in November 2011 should have made it clear to the respondent that had the applicant had a legal right to do so, it would have made a submission detailing its concerns with the proposed changes to the development approval.

His Honour ultimately concluded that the test espoused by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 had been satisfied and that the decision of the respondent was so unreasonable that no reasonable authority could have ever come to it.² Accordingly, the decision to approve the proposed changes to the development approval was thereby invalid.

Held

1. That the proposed change was not a permissible change.
2. The decision of the respondent was of no force or effect.

¹ *Christian Outreach Centre v Toowoomba Regional Council & HSBG Pty Ltd* [2012] QPEC 29 [30].

² *Ibid* [37].

Defining an extractive industry – local planning instruments to be subordinate

Samantha Hall | Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2012] QPEC 33 heard before RS Jones DCJ

October 2012

Executive Summary

This case concerned a preliminary point on whether the subject development application was required to be referred to the Chief Executive administering the *Transport Infrastructure Act 1994 (TIA)*, which would occur if it fell within the meaning of "extractive industry" in the *Sustainable Planning Regulation 2009 (SPR)*. The Planning and Environment Court (**P&E Court**) concluded that the term "extractive industry" should not be read down or given a more narrow meaning simply because it was used in a local government's planning scheme to describe a more specific or different use. The P&E Court found that the proposed development for a material change of use of land for the extraction of groundwater for commercial purposes did fall within the meaning of "extractive industry" for the purposes of the SPR and therefore the development application should have been referred to the Chief Executive, Department of Transport and Main Roads (**DTMR**). Pursuant to section 440 (How Court may deal with matters involving noncompliance) of the *Sustainable Planning Act 2009 (SPA)*, however, the court exercised its discretion to excuse the non-compliance.

Case

The issue before the P&E Court was whether a proposed use of land for the extraction of groundwater for commercial purposes fell within the definition of "extractive industry" under the SPR, and therefore whether it should have been referred to the Chief Executive of the DTMR.

Facts

The substantive proceeding involved an appeal by Gillion Pty Ltd against the decision of the respondent, the Scenic Rim Regional Council to refuse its development application for a material change of use of land situated in the Mount Tamborine region. The proposed use of that land by Gillion was the extraction of groundwater for commercial purposes, namely the selling of bottled drinking water. Under the relevant planning scheme, the proposed use was impact assessable and fell within the definition of "commercial groundwater extraction".

Under schedule 11 of the SPR, development for the purpose of an "extractive industry" with a threshold of 10,000 tonnes per annum must be referred to the Chief Executive administering the TIA. While it was accepted by all parties that the proposed use met the threshold of 10,000 tonnes per annum, the parties disagreed as to whether the extraction of water fell within the meaning of "extractive industry" in the SPR. This term was not defined in the SPA or SPR.

The applicants of the preliminary point, who were co-respondent's by election in the appeal, argued that the term "extractive industry" in the SPR should not be read down or made subordinate to the meaning of "commercial groundwater extraction" in the planning scheme. They argued that the words "extractive" and "industry" should be looked at objectively and given their natural and ordinary meaning and that accordingly the proposed use was an extractive industry for the purposes of the SPA and SPR.

In contrast, Gillion argued that where the proposed use was clearly identified under the planning scheme as commercial groundwater extraction not as extractive industry, there was no scope for the operation of schedule 11 of the SPR. The council's position was that it would abide the order of the court, however its submissions were generally supportive of Gillion.

In March 2012, in compliance with an order of Judge Rackemann, Gillion notified the Chief Executive of the DTMR of the substance of the development application and asked for the DTMR's position on whether the application should have been referred to it pursuant to the SPR. The DTMR responded stating that it was satisfied that it was not triggered as a referral agency under the SPR.

Decision

The P&E Court noted that historically the term "extractive industry" was used to catch the activity of extracting from the ground resources such as sand, gravel, rock and clay and that this theme tended to be repeated by the SPR by stating "...including mineral processing, refinery and smelter". The P&E Court further acknowledged that the terminology used in the State Planning Policy 02/07 (SPP), which defined an extractive industry as one involving the extraction and processing of extractive resources which are defined as "natural deposits of sand, gravel, quarry rock, clay and soil extracted from the earth's crust...", tended to support Gillion's cause. However, the P&E Court pointed out that the SPP, the SPA and the SPR were "concerned about materially different matters", and concluded that the definitions given in the SPP were not of any real assistance in determining the meaning of the words "extractive industry" where used in schedule 11 of the SPR.

The P&E Court then considered the statements of the High Court on statutory construction in the case of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. In that case the High Court stated that "the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute".³ In line with this approach, the P&E Court in this case found that:

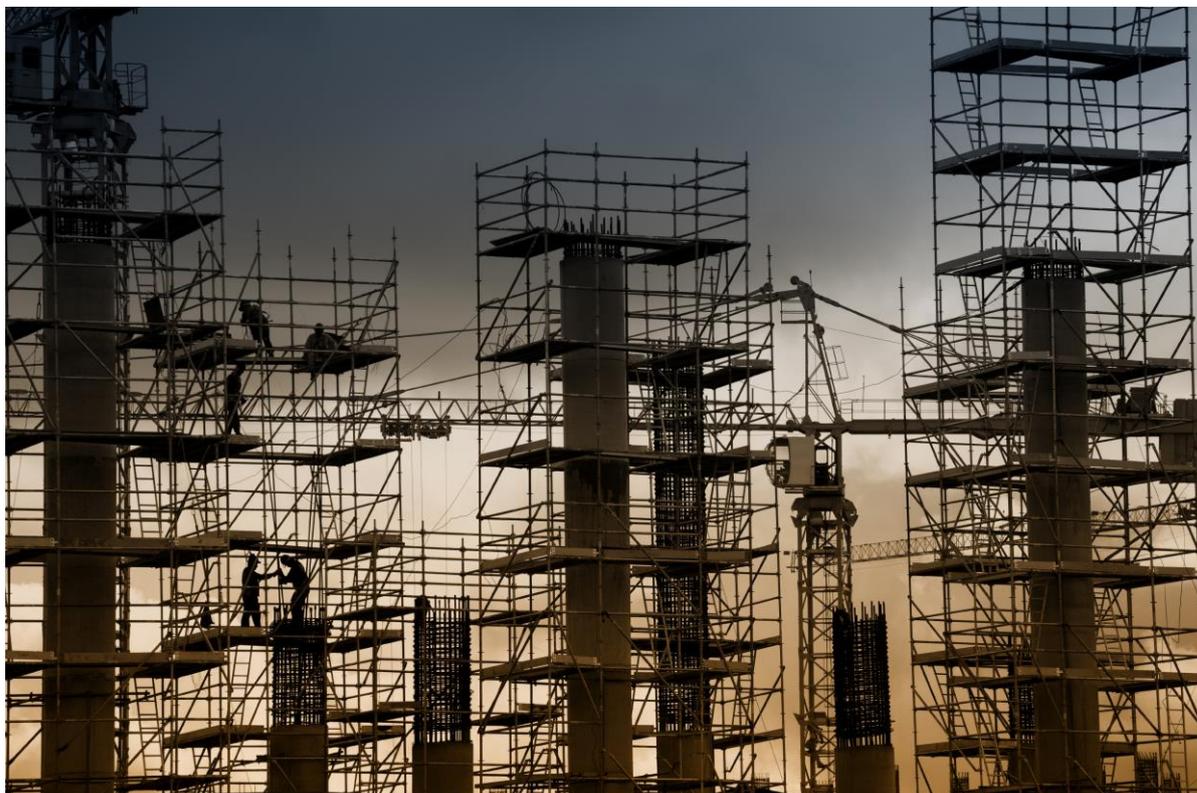
*[w]hen read in context with the other relevant provisions of the SPA and the SPR and the words are given their ordinary meaning, an extractive industry for the purposes of Schedule 11 is one concerned with the extensive extraction of a natural resource. Groundwater is a natural resource. The words should not be read down or given a more narrow meaning because that term is used in a local authority's planning scheme to describe a more specific or different use.*⁴

The P&E Court concluded that the policy, purpose and real intentions of the legislature were best met by the construction of schedule 11 of the SPR contended for by the applicants.

Held

The application was allowed and the court ordered that:

1. The proposed development was an extractive industry for the purposes of schedule 11 of the SPR.
2. The subject development application was required to be referred to the Chief Executive of the DTMR.
3. The failure to refer the development application to the DTMR was excused.
4. It would hear from the parties (if necessary) as to any further consequential orders.



³ [1998] 194 CLR 355 [69].

⁴ [2012] QPEC 33 [27].

Continuing approvals under predecessor legislation

Samantha Hall | Jamon Phelan-Badgery | Phoebe Bishop

This article discusses the decision of the Queensland Court of Appeal in the matter of *Wirkus & Anor v Wilson Lawyers* [2012] QCS 261 heard before Fraser JA, Philip McMurdo and McMeekin JJ

November 2012

Executive Summary

This case was an appeal to the Queensland Court of Appeal concerning whether the conditions of a 1987 development approval assessed against the 1978 Town Plan (**the 1987 approval**) under the *Building Units and Group Titles Act 1980* (**BUGTA**) remained attached to the land through the transitional provisions of subsequent legislation and therefore bound the body corporate of that land. In the primary case, it was determined that the conditions of the 1987 approval did not attach to the land. On appeal, the Court of Appeal held that there was no basis for disturbing the conclusion of the primary judge and dismissed the appeal.

Case

The issue for the appellants (**the Wirkuses**), whose property was adjacent to the body corporate (**Goldieslie Park**) subject to the 1987 approval, was an access easement which benefited their land. The respondents (**Wilson Lawyers**) had advised the Wirkuses in relation to a dispute with Goldieslie Park, which had been settled with an easement being granted. However, it was contended by the Wirkuses that a requirement to grant an easement on more favourable terms was contained in the 1987 approval, that the 1987 approval attached to the land, and that Wilson Lawyers ought to have identified this in the course of the dispute and advised the Wirkuses accordingly.

Facts

The 1987 approval in respect of Goldieslie Park was subject to a condition that access easement rights be granted benefiting the Wirkuses' land in the form of a "single common accessway to Lots 1 and 2 on registered Plan 202855 generally as indicated on drawing no 367/2 dated 9th June 1987".

Pursuant to the condition, an easement was prepared and executed by the developer of Goldieslie Park, but never actually registered. The plan of subdivision was registered after the local government issued the necessary certification, indicating under section 24(5) (Approval of subdivision) of the BUGTA "that all other conditions of approval...have been complied with in every respect". The subdivision made the easement instrument unregistrable.

Prior to the enactment of the *Local Government (Planning and Environment) Act 1990* (**LGPEA**) and the *Integrated Planning Act 1997* (**IPA**) there was no legislation which attached conditions of a development approval to land and made them binding upon successors in title. The Wirkuses' argument was that certain transitional provisions ought to be interpreted such that the 1987 approval was attached to the land and could have been enforced by the Wirkuses against Goldieslie Park if Wilson Lawyers had so advised. The provisions argued to be relevant and the court's findings in each case are set out below.

Decision

Section 8.10(8) of the LGPEA

Section 8.10(8) (Savings and transitional) of the LGPEA relevantly provided that an approval (but not associated conditions) granted prior to the commencement of the LGPEA will "*continue to have force and effect as if it were an approval, consent or permission, as the case may be, made pursuant to this Act (but any conditions attaching to the approval, consent or permission are still to apply as if this Act had not commenced)*".

The court held that the evident intention of that provision was that conditions of such prior approvals should not attach to the land and bind successors in title, so that their effect should be unchanged by the LGPEA. For this reason, the LGPEA had no effect on the body corporate's position.

Sections 6.1.23 and 6.1.24 of the IPA

Sections 6.1.23 (Continuing effect of approvals issued before commencement) and 6.1.24 (Certain conditions attach to land) of the IPA contained the concept of "continuing approvals" which were approvals given effect as if they were granted under the IPA.

Section 6.1.24(1) (Certain conditions attach to land) of the IPA provided that where conditions were imposed in relation to a continuing approval, those conditions attached to the land and were binding on successors in title.

The court therefore had to determine whether the 1987 approval was a "continuing approval" within section 6.1.24(1) (Certain conditions attach to land) of the IPA.

Section 6.1.1 (Definitions for pt 1) of the IPA defined "continuing approval" for the purposes of part 1 of the IPA as "...a condition, certificate, permit or approval mentioned in section 6.1.23(1)". It was common ground that the 1987 approval did not fall within subparagraphs (a), (b), (c) or (e) of section 6.1.23(1) (Continuing effect of approvals issued before commencement) of the IPA. The Wirkuses, however, argued that the 1987 approval fell within subparagraph (d) in that it was given under a "former planning scheme".

A definition of "former planning scheme" was provided in section 6.1.1 (Definitions for pt 1) of the IPA, with an alternative definition given in section 6.1.24(4) (Certain conditions attach to land) which applied only to that section. The alternative definition, unlike the definition in section 6.1.1 (Definitions for pt 1), included a planning scheme which was made under an Act repealed by the LGPEA, and would therefore include the 1978 Town Plan. The Wirkuses sought to apply the alternative definition of a "former planning scheme" within section 6.1.24(1) (Certain conditions attach to land) of the IPA, notwithstanding that the term "former planning scheme" did not expressly appear in that subsection. In order to do this the Wirkuses argued that section 6.1.24(1) (Certain conditions attach to land) should be read as if the term "continuing approval" did not appear, but that in its place were the words of section 6.1.23(1)(d) on the basis that "*wherever the [defined] term appears, the text must be read as if the full definition were substituted for it*" (as stated in *Bennion on Statutory Interpretation*, 5th ed, at page 562, citing *Thomas v Marshall* [1953] AC 543 per Lord Morton at 556 and *Suffolk County Council v Mason* [1979] AC 705 per Lord Diplock at 713).

The court rejected this argument and stated that the alternative definition of "former planning scheme" given in section 6.1.24(4) (Certain conditions attach to land) applied only where the term "former planning scheme" itself was used in that section. Furthermore, the court found that if the Wirkuses approach was accepted it would have to be consistently employed, which would have self-defeating and absurd results.

Section 32A of the Acts Interpretation Act 1954

The Wirkuses also argued that the alternative definition of "former planning scheme" should be preferred because section 32A (Definitions to be read in context) of the *Acts Interpretation Act 1954* provided that "*Definitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires*".

The argument advanced was as follows:

- the IPA's purpose was to provide for the continued operation for various planning schemes which were current as at the introduction of the IPA;
- a further purpose of the IPA was to preserve the operation of approvals in force immediately before its commencement;
- it was illogical to discard current approvals by reason of the planning scheme under which they were given;
- therefore, the expression "*a former planning scheme*" should be given its ordinary meaning which is "*any previous scheme*".

The court again did not accept this argument as it did not consider that there was anything in the context or the subject matter which suggested that the definition of "former planning scheme" in section 6.1.1 (Definitions for pt 1) of the IPA, which was expressed to apply for that part, should not apply to paragraph (d) of section 6.1.23(1) (Continuing effect of approvals issued before commencement) of the IPA. Furthermore, the court stated that no example had been demonstrated of a particular anomaly that would be caused by the application of the definition in section 6.1.1 of the IPA. Rather, it was noted that application of the alternative definition would cause an anomaly, because the conditions would only attach to the land a decade after they were imposed and after the completion of the development the subject of the approval.

The court concluded that Goldieslie Park could not have been compelled to grant an easement over the accessway identified in the 1987 approval. This was an essential element of the Wirkuses' pleaded case and as such the case had no prospect of success.

The unpleaded case

For the first time in their oral submissions, the Wirkuses raised an alternative case which did not depend upon the condition having become binding upon the body corporate. They argued that the respondent's failure to discover the unsatisfied condition for an easement caused them to suffer a loss, because the existence of the unsatisfied condition, along with the fact of the unregistered instrument by which it was to be granted, would have been relevant to a court determining what relief should have been given to the appellants under section 180 (Imposition of statutory rights of user in respect of land) of the *Property Law Act 1974*.

The court asked whether this new case, which was never argued before the primary judge, ought to have the consequence of defeating a judgment which was correctly given upon the case as pleaded. The court held that it should not have that result and rejected this alternative case for the following reasons:

- the respondent had had no means of preparing an answer to that case;

- a response to such a case was made more difficult by the fact that the proposed case had not been reduced to a draft pleading;
- there was no explanation for why such a case was raised so late; and
- the proposed case seemed hardly compelling.

Held

1. The appeal be dismissed.
2. The appellants pay the respondent the costs of the appeal.



Compensation for error in a planning and development certificate

Samantha Hall | Edith Graveson

This article discusses the decision of the Queensland Court of Appeal in the matter of *Raftopoulos v Brisbane City Council* [2012] QCA 84 heard before Muir and Chesterman JJA and P Lyons J

November 2012

Executive Summary

The *Integrated Planning Act 1997 (IPA)* provides a mechanism for compensation where a person has suffered financial loss because of an error or omission in a planning and development certificate issued by a local government. In this case the Court of Appeal considered an application for leave to appeal where a claim for compensation had been summarily dismissed in the Planning and Environment Court (**P&E Court**).

The Court of Appeal upheld the P&E Court's decision and dismissed the application on the grounds that the statutory right to compensation had not arisen because a planning and development certificate was not in existence, and the alleged loss of profit was not caused by any error in information that was provided by the Brisbane City Council (**respondent**).

Case

This case concerned an application for leave to appeal by Robert Raftopoulos (**applicant**) to the Court of Appeal against a summary dismissal of a matter before the P&E Court.

The applicant lodged an application to the P&E Court seeking compensation under section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA.

Section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA provides for reasonable compensation to be paid by a local government where a person has suffered financial loss because of an error or omission in a planning and development certificate. The applicant's claim had two basic premises:

1. that a decision notice and a Planning and Development Certificate were identical in content and function; and
2. the conditions of approval the applicant objected to in the decision notice (particularly condition 30) were "errors".

The applicant also raised a number of miscellaneous complaints about the P&E Court hearing associated with procedural fairness.

Facts

The applicant owned land at 11 Amphthill Street, Highgate Hill. In November 2006, George Pascucci lodged a development application for a development permit for multi-unit dwellings in respect of the property of which the applicant signed as land owner. The respondent gave a decision notice approving the development subject to conditions. Mr Pascucci subsequently wrote to the respondent, notifying his acceptance of the decision notice and indicating that he would not exercise any right of appeal to the P&E Court.

Conditions and compensation

However, several conditions in the decision notice gave rise to concern to the applicant, namely, the conditions in relation to the provision of a pedestrian pathway from the street frontage to the front door of each unit, retention of the "existing Poinciana" and certification of existing retaining walls on the south eastern side of the existing road reserve (including impact of development). The applicant did not proceed with the development as, apparently, he found the conditions too onerous to comply with and argued with the respondent about them.

In early July 2009, the applicant purportedly made a claim for compensation of \$2.2 million pursuant to section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA. The respondent refused the claim on the ground that it did not relate to an error in a Planning and Development Certificate issued by the respondent.

In February 2011, the applicant renewed his purported claim for compensation on the ground that conditions in the decision notice were erroneous and the respondent failed to amend the conditions causing major losses. The respondent rejected the applicant's renewed claim again noting that amongst other things the applicant received a development approval not a development certificate.

In July 2011, the applicant commenced an appeal in the P&E Court (**the P&E Court appeal**) against the respondent's decision to deny his claim for compensation and sought relief from the P&E Court to uphold his claim.

Summary dismissal

The respondent applied to have the applicant's appeal in the P&E Court dismissed summarily on the ground that an essential pre-condition to the right to claim compensation did not exist.

His Honour Judge Griffin held that the statutory remedy provided for in section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA would only be available in circumstances where there was in existence a planning and development certificate. However, on the evidence available, there was a development approval given subject to conditions and there was no and there had never been in existence, a certificate of the type contemplated by section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA. His Honour therefore accepted the respondent's arguments and dismissed the applicant's appeal.

Decision

In the Court of Appeal, His Honour Justice Chesterman (with which Justices Muir and Lyons agreed), refused the applicant's application for leave to appeal against the summary dismissal of the P&E Court appeal.

His Honour noted that a claim for compensation under section 5.4.5 (Compensation for erroneous planning and development certificates) of the IPA arose where:

- a local government had issued one of the three types of certificate identified in Chapter 5 (Miscellaneous) Part 7C Division 3 (Planning and development certificates) of the IPA;
- the certificate contained a wrong statement of fact, or omitted something the IPA required it to state; and
- the applicant for the certificate had suffered financial loss because of the error or omission.

With respect to the first prerequisite the Court of Appeal considered whether the decision notice issued to the applicant constituted a Planning and Development Certificate under the IPA. The court noted that although certain types of planning certificates were required to reproduce the decision notice, limited certificates required only a summary of relevant planning scheme and infrastructure charges provisions. The court also placed emphasis on the different functions of decision notices and planning certificates noting that the former authorises the applicant to undertake development while the latter provides information about the planning status of the land. On the basis of this reasoning the court concluded that the applicant had not been issued a planning certificate.

In relation to the second prerequisite, the court noted that the conditions complained of did not contain any inaccurate information aside from a minor error in the decision notice incorrectly describing a Jacaranda tree as a Poinciana. The approval accurately set out the conditions upon which the respondent was willing to allow the development to proceed. Irrespective of whether the conditions may have been amenable to challenge they did not constitute an error or omission.

Similarly the Court of Appeal held that the alleged loss of profits was not caused by any error in the information but was caused by the inability to proceed with the proposed development, because he could not comply with the identified conditions.

The Court of Appeal also dismissed the applicant's contention that he had been denied a fair hearing.

Held

Leave to appeal was refused.

To be legally effective does a development application have to be properly made?

Samantha Hall | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mahaside Pty Ltd v Sunshine Coast Regional Council & Anor* [2012] QPEC 41 heard before Long SC DCJ

November 2012

Executive Summary

Mahaside Pty Ltd (**applicant**) lodged an application with the Planning and Environment Court (**P&E Court**), seeking declarations and orders that the development application it lodged with the Sunshine Coast Regional Council (**first respondent**) for a reconfiguration of land at Collins and Waterfall Road, Yandina and subsequently changed to remove the requirement to provide evidence of a State resource entitlement as required by section 3.2.1(5) (Applying for development approval) of the now repealed *Integrated Planning Act 1997* (**IPA**), was a properly made application, and could therefore be changed pursuant to section 802 (Development applications under repealed IPA) of the *Sustainable Planning Act 2009* (**SPA**).

Ultimately, the P&E Court found that since the development application was not one that was capable of being dealt with in some legally effective way at the commencement of the SPA and the repeal of the IPA, it could not be changed pursuant to section 802 (Development applications under repealed IPA) of the SPA to remove the requirement to provide evidence of a State resource entitlement as required by section 3.2.1(5) (Applying for development approval) of the IPA. Accordingly, the application was dismissed by the P&E Court.

Case

This was an application for declarations that the applicant's development application was one made under the IPA, but not decided, before the commencement of the SPA for the purposes of section 802 (Development applications under repealed IPA) of the SPA and that the development application as amended was a properly made application under the IPA.

The applicant also applied to the P&E Court for orders that the first respondent receive and accept the development application as a properly made application under the IPA and deal with and decide the application under the IPA as though the SPA had not commenced, pursuant to section 802 (Development applications under the repealed IPA) of the SPA.

Facts

The declarations and orders sought by the applicant are in respect of the same development application which was the subject of a previous decision of the P&E Court in *Mahaside Pty Ltd v Sunshine Coast Regional Council & Ors* (2010) QPELR 43 (**prior application**), which has been summarised in a prior case note entitled "No excusal for non-compliance with IPA".

Previous Application

On 11 October 2004 the applicant applied to the former Maroochy Shire Council, now the first respondent, for a reconfiguration of land at Collins and Waterfall Road, Yandina. The development application was impact assessable and sought approval for a 74 lot, 3 residential sub-division and park.

The first respondent accepted the application as properly made but then subsequently refused it on 11 April 2007. The former Department of Natural Resources and Mines, as a concurrence agency, directed the first respondent to refuse the application, although the first respondent had also formulated its own independent reasons for refusal. The applicant subsequently lodged an appeal against the refusal.

However, before the appeal could be heard, the prior application was heard in the P&E Court to decide whether the Applicant had failed to comply with section 3.2.1(5) (Applying for development approval) of the IPA and accordingly whether the development application was a properly made application within the meaning of section 3.2.1(7)(e) (Applying for development approval) of the IPA.

The prior application proceeded on the basis that the development application involved unallocated State land, which was a "State resource prescribed under a regulation", pursuant to item 12 of schedule 10 of the *Integrated Planning Regulation 1998* and that the specifically prescribed evidence had not been obtained in order to satisfy section 3.2.1(5) (Applying for development approval) of the IPA.

Due to the non-compliance with section 3.2.1(5) (Applying for development approval) of the IPA, the applicant applied to the P&E Court for declarations that the applicant's development application was a properly made application for the purposes of section 3.2.1 (Applying for development approval) of the IPA and that the first respondent's decision notice dated 11 April 2007 was valid and in the alternative, orders under section 820 (Proceedings for particular declarations and appeals) of the SPA excusing the non-compliance, if any, with section 3.2.1 (applying for development approvals) of the IPA.

Ultimately, the declarations and orders sought by the applicant were refused and the prior application and the appeal were accordingly dismissed.

Current Application

On 20 May 2011, the applicant gave notice to the first respondent of a change to the applicant's development application pursuant to section 3.2.9 (Changing an application) of the IPA. The applicant sought to remove the road connection through the unallocated State land, therefore eliminating any issue of taking or interfering with any State resource and thereby changing the development application, the subject of the prior application to one that was "properly made".

Decision

His Honour Judge Long SC DCJ, noted that the success of the current application depended on a conclusion that it was open to the applicant to amend the existing development application and therefore convert it into a properly made application.

The applicant relied on section 3.2.9 (Changing an application) of the IPA and the decision in *Stockland Property Management Pty Ltd v Cairns City Council* (2011) 1 Qd R 77, to show that section 3.2.9 (Changing an application) of the IPA may be engaged so as to rectify deficiency or non-compliance which may not be excused by acceptance of an application pursuant to section 3.2.1(9) (Applying for development approval) of the IPA and thereby change an application which was not properly made, into a properly made one.

The applicant acknowledged that Stockland was decided before the repeal of the IPA and the commencement of the SPA and that because, in this case, the problem which is sought to be remedied was not exposed until after that occurred, it must bring the application in reliance upon section 802(1) (Development applications under repealed IPA) of the SPA.

The applicant's argument was that as the development application was made but not decided under the IPA and before the commencement of the SPA, it was therefore a development application within the contemplation of section 802(1) (Development applications under repealed IPA) of the SPA. To support this contention the applicant submitted that for a development application to be "made" before the commencement of the SPA it need not be a properly made one under the IPA, provided that it had been lodged and was capable of being dealt with in some legally effective way.

The first respondent, however, contended that the development application was not "made" before the commencement of the SPA pursuant to section 802(1) (Development applications under repealed IPA) of the SPA and relied particularly on the decision in *Metricon Innisfail Pty Ltd v Cassowary Coast Regional Council* (2011) 1 QD R 226.

The decision in Metricon was concerned with whether a development application submitted to an assessment manager, but which was not supported by the evidence required under section 3.2.1(5) (Applying for development approval) of the IPA, was a development application that was made before the commencement of the draft State Planning Regulatory provisions.

Relevantly, the P&E Court observed the Court of Appeal in Metricon indicated that due to the non-compliance with section 3.2.1(5) (Applying for development approval) of the IPA of failing to include the necessary resource entitlement evidence, the development application was incapable of being the subject of any approval under the IPA and as such the development application could not be viewed as a properly made application. The P&E Court also observed the Court of Appeal's finding that the failure to provide the necessary resource entitlement evidence was one of a number of limited flaws that pursuant to section 3.2.1(10) (Applying for development approval) of the IPA had a "stultifying effect" not afforded to any other non-compliance which might render an application as "not properly made" but nevertheless capable of being deemed so by acceptance pursuant to section 3.2.1(9) (Applying for development approval) of the IPA.

In line with this reasoning, His Honour found that the applicant's failure to comply with section 3.2.1(5) (Applying for development approval) of the IPA was fundamentally critical and that having regard to section 3.2.1(10) (Applying for development approval) of the IPA, the development application was not one that could have been accepted under section 3.2.1(9) (Applying for development approval) of the IPA. His Honour also found that the development application was not, up to and including the commencement of the SPA and repeal of the IPA, in a State where it was capable of being dealt with in some legally effective way.

Ultimately, the P&E Court decided that in accordance with his finding that the development application was not capable of being dealt with in some legally effective way at the commencement of the SPA and repeal of the IPA, section 802(1) (Development applications under repealed IPA) of the SPA was not available to the applicant to allow it to change the development application pursuant to section 3.2.1(9) (Applying for development approval) of the IPA.

Held

The application was refused.



Changed costs provisions reframe strategic considerations for development applications

Samantha Hall | Jamon Phelan-Badgery

This article discusses the amendments that were made to the cost provisions under the *Sustainable Planning Act 2009* by the *Sustainable Planning & Other Legislation Amendment Act 2012* passed on 13 November 2013

November 2012

Executive Summary

The *Sustainable Planning and Other Legislation Bill 2012* (Qld) (**SPOLAB**) was introduced to the Queensland Parliament on 13 September 2012, proposing changes to a number of provisions within the *Sustainable Planning Act 2009* (**SPA**), including those with respect to the costs of a proceeding in the Planning and Environment Court.

Previously, the SPA provided that each party bore its own costs of a proceeding except in limited circumstances relating to frivolous or vexatious conduct. It was proposed in the SPOLAB that costs be at the discretion of the court, but follow the event unless the court orders otherwise. This compensatory approach would mean that generally the unsuccessful party would be required to compensate the successful party in relation to costs.

Amendments

After public consultation, Report No 13 of the State Development Infrastructure and Industry Committee recommended (among other recommendations) that further work would be done to clarify the issue of costs and to address the legitimate concerns raised in public submissions in respect of the SPOLAB.

Consequently, the costs provisions were amended and the *Sustainable Planning and Other Legislation Amendment Act 2012* (**SPOLAA**) was passed on 13 November 2012, with an amended approach to costs. The amended approach provides that costs are at the discretion of the court (removing the proposed default position that costs follow the event) and section 457(2) of the SPA sets out numerous matters the court may have regard to in making an order for costs (without limiting the matters to which the court may have regard).

The following provisions of section 457(2) of the SPA are notable as they will require consideration by parties of a number of matters when commencing or participating in court proceedings:

Section 457(2)(a)

The relative success of the parties in the proceeding.

Comment: The court has the discretion to decide that costs ought to follow the event, with an unsuccessful party bearing the costs burden.

Section 457(2)(b)

The commercial interests of the parties in the proceeding.

Comment: Where a party engages in litigation against a commercial competitor it may be vulnerable to an adverse costs order.

Section 457(2)(c)

Whether a party commenced or participated in the proceeding for an improper purpose.

Comment: A party participating in a proceeding for an improper purpose may be penalised with an adverse costs order.

Section 457(2)(d)

Whether a party commenced or participated in the proceeding without reasonable prospects of success.

Comment: If a party has no reasonable prospects of success in a proceeding it may be penalised with an adverse costs order.

Section 457(2)(e)

If the proceeding is an appeal against a decision on a development application and the court decides the decision conflicts with a relevant instrument as defined under section 326(2) or 329(2), whether the matters mentioned in section 326(1) or 329(1) have been satisfied.

Comment: A party may be subject to an adverse costs order if it appeals against a decision on a development application and the court decides the decision conflicts with a relevant instrument and the matters in sections 326(1) or 329(1) are not satisfied.

Section 457(2)(f)

If the proceeding is an appeal to which section 495(2) applies and there is a change to the application on which the decision being appealed was made, the circumstances relating to making the change and its effect on the proceeding.

Comment: The court may consider that the circumstances of the change or its effect on the proceeding warrant a particular costs order. For example, if the parties negotiate a change to the development application which satisfies both their concerns, it may be appropriate to order that each party bear its own costs.

Section 457(2)(g)

Whether the proceeding involves an issue that affects, or may affect, a matter of public interest, in addition to any personal right or interest of a party to the proceeding.

Comment: If an issue in the public interest is to be affected, the court may consider it appropriate to ensure one or more parties are not penalised through an adverse costs order, to encourage litigants to pursue matters for the benefit of the public.

Section 457(2)(h)

Whether a party has acted unreasonably leading up to the proceeding, including, for example, if the proceeding is an appeal against a decision on a development application, the party did not, in responding to an information request, give all the information reasonably requested before the decision was made.

Comment: If an applicant for a development application, an assessment manager or another stakeholder can be shown to have acted unreasonably, that party may be subject to an adverse costs order. Therefore all parties will need to carefully consider their conduct and that of other stakeholders to try to avoid a costs disadvantage if the matter proceeds to appeal.

Section 457(2)(i)

Whether a party has acted unreasonably in the conduct of the proceeding, including, for example:

- by not giving another party reasonable notice of the party's intention to apply for an adjournment of the proceeding; or
- by causing an adjournment of the proceeding because of the conduct of the party.

Comment: This provision requires parties to take a diligent approach to the conduct of their proceedings, with the risk being that unreasonable conduct will be penalised with an adverse costs order.

Section 457(2)(j)

Whether a party has incurred costs because another party has introduced, or sought to introduce, new material.

Comment: This provision also requires parties to take a diligent approach to the conduct of their proceedings, identifying material early and transparently and without imposing a financial burden on other parties.

Section 457(2)(k)

Whether a party has incurred costs because another party has not complied with, or has not fully complied with, a provision of this Act or another Act relating to a matter the subject of the proceeding.

Comment: If a party's development is the subject of an enforcement order under the SPA, or some other noncompliance with an Act, thereby imposing a financial burden on other parties, there may be costs consequences.

Section 457(2)(l)

Whether a party has incurred costs because another party has defaulted in the court's procedural requirements.

Comment: If a party's default in procedural requirements, such as failing to comply with a timeframe in a practice direction or directions order, causes a financial burden on another party, costs consequences may result.

Section 457(2)(m)

Whether a party should have taken a more active part in a proceeding and did not do so.

Comment: This provision suggests that a party whose input would increase the efficiency of a proceeding is required to participate as fully as is appropriate at the risk of an adverse costs order.

Summary

The provisions of section 457(4) (Costs) of the SPA preserve the position that each party bears its own costs, unless the court orders otherwise, if early resolution is achieved through a dispute resolution process under the ADR provisions of the SPA or the *Planning and Environment Court Rules 2010*. This provides further encouragement to parties to negotiate in good faith and resolve disputes where possible.

For the parties to a proceeding, strategies to avoid adverse costs orders and pursue beneficial costs orders will now need to be employed, even during the early stages of the IDAS process, far before the matter has even reached the court.

Given that the application of the provisions of section 457(2) of the SPA covers a broad range of circumstances, and such provisions have not been traditionally tested in the Planning and Environment Court, we foresee that a period of adjustment will ensue, with parties being careful to obtain legal advice as to the potential costs consequences of the conduct of proceedings.

In our view, the opportunity exists for parties to make aggressive arguments for adverse costs orders against their opponents. The court's response to such a strategy will be of interest given the long history of the Planning and Environment Court's role as a public interest court, and this new broad costs discretion introduced by the SPOLAB to impose costs orders.



Reform of directors' and managers' liability for environmental offences in NSW

Maysaa Parrino

This article explores the reform of directors' and managers' liability for environmental offences being introduced in all Australian jurisdictions, in particular the NSW reforms

November 2012

Executive Summary

Following the introduction of the *Miscellaneous Acts Amendment (Directors' Liability) Bill 2012* (NSW), directors and managers are no longer automatically taken to be criminally liable for an offence committed by a corporation under most environmental legislation in NSW, unless they are an accessory to a criminal offence. Similar reforms are progressively being made in all jurisdictions in Australia following guidelines received from the Council of Australian Governments.

Former reverse burden of proof on directors and managers for environmental offences

A reverse onus of proof used to apply to directors and managers under most environmental legislation. Accordingly, by default, if a corporation had committed an offence, they had also personally committed an offence, unless they could prove their innocence by showing that they were not in a position to influence the corporation, or they had used all due diligence to prevent an offence from occurring. This resulted in undue complexity and a lack of clarity about what measures were required to be implemented by directors and managers.

New directors' and managers' accessorial liability for environmental offences

The following new concepts have been introduced by the bill:

- a director or manager of a corporation is not criminally responsible for an offence committed by a corporation, unless a separate statutory provision exists establishing liability; and
- a person (including a director or manager) can be prosecuted as an accessory to the commission of an offence by a corporation (for example, by aiding and abetting its commission).

Most environmental legislation in NSW will now incorporate these concepts. For most offences, this will mean that a prosecuting authority will be required to prove that a director or manager has aided, abetted, induced, conspired in, or is knowingly concerned in the commission of an offence by a corporation.

New directors' and managers' executive liability for environmental offences

Despite the above, changes have been made to particular acts imposing "executive liability" for directors and managers for certain offences committed by a corporation. "Executive liability" is tied to the concept of directors and managers being required to take "reasonable steps" (previously referred to as due diligence) to prevent these types of offences occurring.

There are three types of executive liability:

- **Type 1 executive liability:** For this type of liability, a prosecuting authority must prove every element of the offence alleged, including that a director or manager failed to take all reasonable steps to stop the commission of the offence by the corporation (known as the "responsibility element.") The onus associated with the offence has therefore shifted from directors and managers to the prosecution. Type 1 executive liability has been introduced in the *Contaminated Land Management Act 1997* (NSW), the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) and in other legislation for certain types of offences.
- **Type 2 executive liability:** For this type of liability, the responsibility element is presumed without the need for further proof, unless a director or manager can show evidence that suggests a reasonable possibility that there was no such failure to take reasonable steps. Type 2 executive liability has not yet been introduced by the bill, but we expect it will be for some offences.

- **Type 3 executive liability:** This is the most serious type of liability. The responsibility element is presumed without the need for further proof, and the director or manager bears the onus of proving, on the balance of probabilities, that there was no failure to take reasonable steps to prevent or stop the commission of the offence by the corporation. Type 3 executive liability has not yet been introduced by the bill, but former provisions in the POEO Act establishing similar liability have been preserved by the bill for more serious environmental offences. Again, we expect to see more Type 3 executive liability offences in future.

Environmental legislation that will be amended

Offences in the following legislation have been amended:

- *Contaminated Land Management Act 1997* (NSW)
- *Environmentally Hazardous Chemicals Act 1985* (NSW)
- *Forestry Act 1916* (NSW)
- *Heritage Act 1977* (NSW)
- *Mining Act 1992* (NSW)
- *National Parks and Wildlife Act 1974* (NSW)
- *Native Vegetation Act 2003* (NSW)
- *Pesticides Act 1999* (NSW)
- *Protection of the Environment Operations Act 1997* (NSW)
- *Sydney Water Catchment Management Act 1998* (NSW)
- *Threatened Species Conservation Act 1995* (NSW)
- *Water Industry Competition Act 2006* (NSW)

Directors and managers should be aware of legislative changes related to environmental offences

Directors and managers should be aware of the following:

- There will now be differing grades of personal liability, and onuses of proof, for directors and managers under environmental legislation for offences that are also committed by corporations, depending upon the type of legislation that applies. As a result, directors and managers will need to pay closer attention to the legislative changes and differing types of liability.
- The introduction of accessorial liability offences is good news for directors and managers who will no longer have automatic liability for failing to perform due diligence.
- For Type 1 executive liability offences, a prosecuting authority will now bear the burden of proving the elements of the offence. We expect that this will result in changes in the way that matters are run in the Local Court and in the Land and Environment Court by prosecuting authorities, as more evidence will be required to be provided to directors and managers and to the Court prior to such offences being established.
- More serious executive liability offences have been retained under the POEO Act (for example, failing to comply with a condition of an environmental protection licence). It is important for directors and managers therefore to be familiar with the more serious offences under the POEO Act and their potential personal liability under that Act.

Proposed changes to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP)

Maysaa Parrino

This article discusses the proposed changes to the NSW State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 to allow a wider range of development to be deemed exempt or complying development

November 2012

Executive Summary

The NSW government is proposing to allow a wider range of commercial, retail, industrial and residential development to be considered as either exempt or complying development under the Codes SEPP, to enable home and business owners to obtain faster and more cost effective approvals. The proposed changes are a significant step forward to a code based system of planning in NSW.

Covenants, environmentally sensitive areas and heritage items

Exempt and complying development will now be permitted regardless of most covenants registered on title that may restrict development at a site. Exempt development will also be permitted in environmentally sensitive areas where it is ancillary to other buildings or uses already on a site. Some limited changes are proposed to allow exempt and complying development on certain sites that contain heritage items.

Proposed exempt development changes

New types of exempt development have been introduced including advertising and signage, temporary uses and structures, expanded changes of use, outdoor footpath dining, mobile food and drink outlets and waterways structures. Changes have also been made regarding extension of hours during the Christmas period for commercial premises and for licensed premises at specified times.

New approvals required prior to issue of complying development certificates (CDCs)

The following new approvals are now required prior to the issue of CDCs:

- by Roads and Maritime Services where a new building or additions over 5000m² are proposed on, or adjacent to, a classified road;
- by a qualified person where a new building or change of use is proposed on land requiring remediation;
- an independent report on fire safety upgrades of existing commercial and industrial buildings, for alterations and additions to buildings constructed before 1993.

Changes for retail, industrial and commercial premises

Businesses will be able to change the use of some commercial, retail and industrial buildings and spaces as complying development. For example, a change from an accountant's office to a medical office, or a light industrial building to a self storage building, will be considered complying development, provided that certain development standards are met.

Additionally, individual shops and offices in a commercial building shell that have already been approved by council without any specific tenant types may be approved as complying development, provided that the new use meets the conditions in an original council approval.

The following development types are proposed as complying development:

- new industrial buildings up to 20,000m² in size on industrial zoned land (excluding heavy or hazardous industry);
- additions to existing shops of up to 50% of the existing floor area or 1000m², whichever is the lesser, subject to certain development standards;
- additions to commercial offices of up to 50% of the existing floor area or 2,500m², whichever is the lesser, subject to certain development standards.

Development standards for residential buildings

Upgrades for safety and disability access to most residential buildings, including strata buildings, will be permitted as complying development. Internal refurbishments to residential premises will also be permitted as complying development (including common areas in strata buildings).

Changes have also been made to construction of dwelling houses on boundaries, and detached studios of either 20m² or 40m² in back yards, depending on the size of the lot. Further changes have been made to refine development standards for basements, excavation depths, setbacks for corner blocks and privacy screens on some windows as complying development.

Notification requirements to neighbours for complying development

Feedback is being sought from the Department of Planning and Infrastructure regarding a proposal that residential neighbours within 50m be notified five days before an application for a CDC is approved, if the development is:

- a new dwelling house being demolished or built, or an addition is made to an existing dwelling, or
- the demolition and building of industrial buildings or extensions to existing commercial and industrial buildings.

Proposed new fire safety code as complying development

A new fire safety code allows changes to some building fire safety systems as complying development, including alterations to hydraulic safety systems and changes to fire alarm communications links such as fire hose reels, sprinkler systems and water tanks.

Radical changes to the role of Development Control Plans (DCPs) in NSW

Maysaa Parrino

This article discusses the role of Development Control Plans in the assessment process in NSW as a result of legislative reform

November 2012

Executive Summary

On 24 October 2012 the NSW Government introduced the *Environmental Planning and Assessment Amendment Bill 2012* (NSW), which will result in sweeping reforms across the state to the role of DCPs in the development assessment process. The bill was passed by both houses of parliament on 15 November 2012. The effect on all new development applications in NSW will be significant. DCPs will be given less weight and significance and will be applied flexibly.

What is a Development Control Plan?

DCPs are detailed planning documents that set out a consent authority's expectations for local government areas. Typically the consent authority is a local council. DCPs must presently be taken into consideration in the development assessment process, but they are not an "environmental planning instrument" (EPI). An EPI is a planning instrument that is legally binding under the *Environmental Planning and Assessment Act 1979* (NSW), such as a State environmental planning policy or a local environment plan.

However, the courts have traditionally held that where DCPs set out standards that are directly relevant to a development application, they may be given significant weight during the development assessment process.

Less weight and significance to be given to DCPs

There has been a considerable amount of controversy over DCPs for some time, as they can be quite detailed, impracticable and onerous. They are also usually not subject to the direct scrutiny of the NSW Department of Planning when they are made. In some instances they have been known to be at odds with the nature and intention of other EPIs that apply to the same land.

The new role of DCPs

The bill introduces the following amendments.

Facilitating the objectives of existing EPIs

The principal purpose of a DCP will now be to provide guidance on the following matters:

- giving effect to the aims of an EPI that applies to development;
- facilitating development that is permissible under any such EPI;
- achieving the objectives of land use zones under any such EPI.

The bill also states that the provisions of a DCP made for that purpose are not statutory requirements.

Where DCPs have no force or effect

Additionally, DCP provisions will have no force or effect to the extent that they:

- are the same, or substantially the same, as a provision of an EPI applying to the same land; or
- are inconsistent or incompatible with a provision of any such EPI; or
- have the practical effect of preventing or unreasonably restricting development that is otherwise permissible under any such EPI and that complies with the development standards in any such EPI.

Interestingly, the words "preventing" or "unreasonably restricting" have not been defined by parliament in the new bill, so it will be up to the courts to interpret and determine what those words mean.

How consent authorities will be required to apply DCPs

A new section in the bill will provide that if a DCP contains provisions that relate to the development that is the subject of a development application, a consent authority is to give those provisions less weight and significance than is given to EPIs.

If an application complies with DCP provisions relating to an aspect of development, the consent authority cannot require more onerous standards. Where the application does not comply, the consent authority is required to be flexible in applying those provisions and to allow alternative solutions to deal with those aspects of the development.

The consent authority may consider DCP provisions only in connection with the assessment of that development application. It is not to have regard to how those provisions have been applied previously or might be applied in future.

New flexibility is good news for property developers and owners

One of the most important changes is the "flexibility" provision. This mandates that consent authorities are required to have a softer approach and to move away from rigidly applying DCPs, which is excellent news for property owners and developers. It will mean that there will be more options in terms of how, and the extent to which, DCP provisions are applied.

Also, consent authorities can no longer rely upon the application of DCP provisions to previous determinations for similar development applications when undertaking individual merit assessment of any development application.

Should you consider delaying your development application?

If you have a development application on foot, you may want to consider withdrawing your application and re-lodging it at the time the statutory amendments have been made.

That way the consent authority will be required to flexibly apply any DCP provisions in the assessment process, and to allow DCPs to be given less weight during the development assessment process. We anticipate that the legislation will be passed shortly.

DCPs which "prevent" or "unreasonably restrict" development in future

It will remain to be seen, and up to the court to determine, in what scenarios DCP provisions will have no force or effect, as a result of "preventing" or "unreasonably restricting" development.

Based on previous case law, we expect that the courts will have a practical interpretation of this new terminology.

New proposed standards for the Building Code of Australia (BCA) 2013

Maysaa Parrino

This article discusses the proposed changes to the Building Code of Australia designed to prevent tragic incidents

November 2012

Executive Summary

The *Australian Building Codes Board* has released the draft of the BCA proposed to commence in May 2013. The amendments relate to safe access and movement. BCA 2013 includes new provisions for openable windows and horizontal balustrades to reduce the risk of slips, trips and falls.

The proposed changes are in response to several tragic incidents in Sydney where children have fallen from windows.

Openable windows to be fitted with screens or locks

Barriers or locks are required to be fitted on openable windows in early childhood centres and in habitable rooms of residential buildings (including apartments and multi-storey homes) where windows are more than two metres above the ground.

Openable windows will be required to be fitted with a screen, or the window opening will be required to be limited to 125 millimetres to prevent children from falling from heights. The Australian Building Codes Board estimates that 80 per cent of windows will be fitted with locks and the remaining 20 per cent with screens.

Balustrades designed to prevent children from climbing

Where the floor of a veranda, mezzanine or the like is more than two metres above the ground (rather than the current standard of four metres), balustrades are required to be non-climbable. Therefore, any horizontal elements between 150 millimetres and 760 millimetres above the floor must not facilitate climbing.

A concession is proposed to be given for balustrades between two and four metres above the floor so that the handrail may be kinked inwards by not less than 150 millimetres, making it difficult for children to climb the balustrade.

Degree of slip resistance of pedestrian surfaces to be specified

Presently the BCA requires stair treads to have a slip resistant finish or a non-skid strip near edges, however, the level of slip resistance required is not specified. Slip resistance values in AS/NZS 4586 *Slip resistance classification of new pedestrian surface materials* are proposed to be adopted.

Buildings constructed in flood prone areas must resist flotation, collapse and movement

New standards are proposed in the BCA 2013 for construction of new buildings and alterations and additions to existing buildings in flood prone areas. The changes are specific to classes of buildings where people may sleep, reflecting the life safety purpose of the changes.

There is a new BCA 2013 standard entitled "Standard for Construction of Buildings in Flood Hazard Areas" together with an explanatory book. Buildings must be designed and constructed to resist flotation, collapse or significant permanent movement as a result of flooding. There are also new BCA definitions for defined flood events and flood levels, flood hazard areas and flood hazard levels.

This article is only short summary of the proposed BCA changes and further changes are proposed.

New proposals for changes can be submitted by 1 February 2013 for consideration as part of future BCA editions.

Independent review of rezoning decisions and powers given to councils to make Local Environmental Plans (LEPs)

Maysaa Parrino

This article discusses the new review mechanisms to be introduced in NSW for developers and landowners to seek a review of a rezoning decision in a local government

November 2012

Executive Summary

From 2 November 2012, if you are a developer or landowner and you have made a request for rezoning to council, you now have the right to request a review of council's decision at an independent level. Two review mechanisms have been introduced, known as "pre-gateway reviews" and "post-gateway reviews".

The changes are a significant step forward and will introduce more transparency and accountability in the rezoning process in NSW. Councils also now have powers to make some LEPs.

Reviews of proposed amendments to LEPs

If you are a developer or landowner and you have requested that council prepares a planning proposal for amending a LEP, you may ask for a review if:

- Council has notified you that your request is not supported. Councils are now required to notify you when they have determined this. You then have 40 days to make an application for review.
- Council has failed to indicate its support for your request 90 days after you have submitted the request. You may then make an application for review any time after the 90 days has elapsed.

How do you request a review of a planning proposal for amending a LEP?

A review application will be required to be made in writing to the NSW Department of Planning and Infrastructure (DoP). DoP will then undertake an assessment as to whether the review application has "strategic merit" or has "site-specific merit and is compatible with surrounding land uses" based on certain criteria set out in *A guide to preparing local environmental plans*, an online publication issued by DoP.

If your planning proposal meets the relevant criteria, it will be referred on to a Joint Regional Planning Panel (JRPP) or the Planning Assessment Commission (PAC). The JRPP or PAC will advise on whether it recommends to the Minister that the proposed LEP should proceed to a gateway determination. The Minister's final decision on the matter is based on the JRPP or PAC's advice.

For planning proposals submitted prior to November 2012, you may seek a review if the supporting documentation for your planning proposal is still current, but the request will generally need to be less than two years old to be considered.

Gateway reviews of proposed amendments to LEPs

If you are a council, developer or landowner and a gateway decision has been made in relation to a proposed LEP that you are not happy with, you may request that the Minister alters that determination when a decision is made that:

- it should not proceed. You have 40 days after notification by DoP to request a review; or
- it should be resubmitted. You have 40 days after notification by DoP to request a review; or
- requirements are imposed or variations are made that you think should be reconsidered. You have 14 days from being notified to indicate your intent to request a review, and then 40 days to apply formally for a gateway review.

These reviews only apply to original determinations made by a delegate of the Minister (and not councils).

Powers given to councils to amend certain types of LEPs

The making of some LEPs will now be delegated to councils, including LEPs which make mapping alterations, reclassifications of land, amendments to specific heritage items and spot rezoning consistent with an endorsed strategy and/or surrounding zones, and other matters of local significance. In turn, councils will be required to report to DoP on processing times for making those delegated LEPs.

Positive changes for developers and landowners

Overall, we expect that the removal of multiple stages in the making of some LEPs, and the right for developers or landowners to request a review of rezoning decisions, is a significant step forward in providing more certainty and transparency for development in NSW.

Meaning of "commercial fishing operators"

Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Falzon v Gladstone Ports Corporation & Anor* [2012] QPEC 50 heard before Searles DCJ

December 2012

Executive Summary

This case concerned an application in pending proceeding by Gladstone Ports Corporation (**GPC**) to strike out the applicant's further amended originating application. The further amended application sought declarations and orders on the basis that the applicant and the parties represented by the applicant were class members under the term "commercial fishing operators". The applicant argued an expansive interpretation of that term which extended, for example, to seafood wholesalers and retailers of fishing equipment. The respondent argued that the term was unambiguous and referred to an existing commercial operator who actually engaged in the activity of fishing, including crabbing.

The Planning and Environment Court (**P&E Court**) found that the GPC's definition was to be preferred based on the plain meaning of the term. Furthermore, as the relief sought by the applicant rested squarely on a meaning of the term "commercial fishing operators" which had been rejected, the pleading was to be struck out for not disclosing a cause of action, having a tendency to prejudice or delay a fair trial and being frivolous and vexatious.

Case

On 30 January 2012 the applicant filed an originating application seeking various declarations and orders on the basis that the applicant and the parties represented by the applicant were class members under the term "commercial fishing operators". On 3 April 2012 the applicant filed an amended originating application. By an application in pending proceeding, GPC sought to have the amended application struck out. The second respondent, the former Department of Employment, Economic Development and Innovation (**DEEDI**) also filed an application seeking an order that the proceedings commenced against it by the applicant be dismissed. GPC filed a further application seeking its costs thrown away on the amendments to the original application. Subsequently the amended application was further amended so that all applications before the court proceeded on the basis that the pleading under attack was the further amended application filed 26 April 2012.

Facts

Background

The respondent to the main proceedings, GPC, was the proponent of the Western Basin Dredging Project, which under section 26 (Declaration of significant project) of the *State Development and Public Works Organisation Act 1971 (Act)* had been declared a significant project with the result that an environmental impact statement (**EIS**) was required. Pursuant to section 35(3) (Coordinator-General evaluates EIS, submissions, other material and prepares report) of the Act, the Coordinator-General prepared a report evaluating the EIS and imposing conditions on the proponent. Two such conditions were relevant, Conditions 20 and 21, which provided:

Condition 20 — "GPC must mitigate all reasonable financial losses to existing commercial fishing operators attributable to the Maritime development in the Western Basin of the Port of Gladstone. That is to cover temporary and permanent loss of access to fishing areas and marine fish habitat".

Condition 21 — "GPC must meet any costs associated with the investigation, negotiation and administration of any compensation package, including all costs incurred by DEEDI in the management of development or (sic) any compensation package".

The Chief Executive Officer of DEEDI was the nominated entity with jurisdiction for these conditions.

Main proceedings

In the main proceedings, the applicant, Falzon, represented himself and 58 individuals, some of which were said to be class members. Those classes were said to exist on the basis that the term "commercial fishing operators" in Condition 20 at all material times included:

- Commercial fishermen, including trawlers and live trout fishermen;
- Commercial crab netters;
- Seafood wholesalers and processors;

- Suppliers of bait, tackle, parts, services and marine craft;
- Retailers and suppliers of marine craft, bait, tackle and parts; and/or
- Charter boat operators,

who operated a business that was engaged in, was reliant upon other businesses engaged in, or enabled other business to engage in, the catching of fish or other seafood from the Gladstone Harbour.

The applicant sought a declaration pursuant to section 54G(3) (Declaration-making powers) of the Act that there had not been substantial compliance by GPC with Condition 20, in that it had failed to mitigate the reasonable financial losses to existing commercial fishing operators attributed to dredging in the western basin by failing to investigate whether signs or symptoms of disease in fish and other seafood was attributable to the dredging activities of the project and also for failing to negotiate with some of the classes listed above. The applicant sought orders, pursuant to section 54G(4) (Declaration-making powers) of the Act, that GPC:

- conduct a monitoring programme to monitor the levels of pH, acid sulphate soils, organic chemicals, mercury and tributyltin, heavy metals and oxygen in the waters within 100 metres of all dredging activities;
- take any other steps necessary to determine as conclusively as possible whether the emergence of signs or symptoms of disease in fish, crabs, prawns and sharks fished in the waterways of the Gladstone Harbour were attributable to the dredging activities;
- provide the results of the above monitoring programme and any other investigations to the applicant and the above class members within two business days of the receipt of those results; and
- pay the legal fees and outlays incurred by the applicant and the class members incurred to obtain the above orders.

Finally, the applicant sought an order that GPC and DEEDI negotiate a compensation package with Falzon and the class members.

Application in Pending Proceeding

GPC relied upon four grounds to support its application to strike out the pleading in that it:

- was founded on an erroneous construction of the term "existing commercial fishing operators" in Condition 20;
- failed to properly plead necessary standing of Falzon and the 58 parties he purported to represent;
- was not a proceeding about whether there had been substantial compliance with an imposed condition within section 54G(2) (Declaration-making powers) of the Act; and
- was premature because, even assuming the interpretation argued by Falzon, the time for compliance with Condition 20 had not yet arrived.

In relation to the first ground, GPC submitted that the term "existing commercial fishing operators" was neither ambiguous nor uncertain and referred to an existing commercial operator who actually engages in the activity of fishing, including crabbing. Further, GPC submitted that to expand the term to all the other categories contended for by Falzon would involve the term extending to people not engaged in the activity of fishing, would create difficulties in determining the parameters of the classes of such persons and would lead to uncertainty in its operation and absurdity in its consequences.

Falzon, in response, argued that the term "commercial fishing operators" referred to all operators of businesses that form part of the fishing industry or the fishery at Gladstone Harbour. Falzon argued his wider interpretation of the term should be accepted because it was consistent with the plain meaning of all sentences in Condition 20 and the context in which Condition 20 was imposed, and because two principles of interpretation favoured it, namely, the principle that a development consent is to be construed liberally (*Weston Aluminium Pty Ltd v Environment Protection Authority* (2007) 82 ALJR 74 relied upon) and the principle that, where two interpretations of the term "commercial fishing operators" are open, the court should interpret Condition 20 favourably to the businesses that in the fishing industry at Gladstone Harbour had a vested right that the fishing zones in the Harbour would be maintained prior to the commencement of the Project (paragraph 28 of *Newman v Brisbane City Council* [2001] QPEC 287 relied upon).

Decision

Meaning of existing commercial fishing operators

The P&E Court found that the meaning of existing commercial fishing operators argued by GPC was to be preferred to that argued by Falzon. This was based on the plain meaning of commercial fishing operators, which refers to fishers who carry out that occupation to derive income as opposed to recreational fishers. The P&E Court referred to the Oxford English Dictionary meaning of the term "fishery" as "the business, occupation or industry of catching fish, or of taking other products of the sea or rivers from the water." The P&E Court further cited the individual definitions of "commercial", "fishing" and "operator" and came to the conclusion that the combination of those definitions disclosed the common sense definition of a "commercial fishing operator" as one who engages in the business of catching fish.

The P&E Court found that the relief sought rested squarely on the meaning of existing commercial fishing operators, which he had rejected and therefore the pleading was one which satisfied subcategories (a), (b) and (d) of rule 171(1) (Striking out pleadings) of the *Uniform Civil Procedure Rules 1999* in that it did not disclose a cause of action by the applicants, had a tendency to prejudice or delay a fair trial and was frivolous and vexatious.

Costs

In considering the costs of GPC thrown away by reason of the amendment of the original application, the P&E Court noted that the solicitors for GPC wrote to Falzon's solicitors in February 2012 detailing its concerns in relation to the original application including the meaning of commercial fishing operators in Condition 20. That letter told Falzon of the risk of a strike out application and notified him that GPC reserved its right to make such an application.

The P&E Court concluded that it had power under section 457 (Costs) of the *Sustainable Planning Act 2009* to order costs in circumstances where it considered the proceedings to be frivolous or vexatious, which in this case it considered to be so. Although DEEDI did not seek a similar order as GPC for costs, he believed they were equally entitled to costs if they so sought.

Held

The P&E Court ordered that:

1. The further amended application be struck out.
2. The applicant (Falzon) pay the costs of GPC in relation to amendments to the original application.
3. The second respondent (DEEDI) have liberty to apply for costs in relation to the amendments to the original application.



Perils of related approvals to prevent original approvals lapsing

Samatha Hall

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Maher & Anor v Fraser Coast Regional Council* [2012] QPEC 67 heard before Andrews SC DCJ

December 2012

Executive Summary

The Planning and Environment Court (**P&E Court**) considered an application seeking relief to revive a lapsed development approval where a subsequent development application was made 24 days too late to convert the relevant approval into a "related approval" in order to avoid the original approval lapsing. In this case, the failure to make a subsequent development application on time significantly impacted on the feasibility of the project where planning controls had changed the desired planning outcome in the area.

Case

This case concerned an application brought by Peter Maher and Sofia Maher to the court to seek an order to treat a development application for operational work for vegetation clearing as if it were made within 2 years of a development permit for a material change of use (**MCU approval**) taking effect such that the development approval for the operational work for vegetation clearing was a 'related approval', which would result in the MCU approval not lapsing.

The Fraser Coast Regional Council was the respondent for the application.

Facts

Circumstances surrounding lapse of MCU approval

On 24 November 2006, the Mahers obtained a judgment in their favour in respect of an appeal against the council's refusal of a development application for a development permit for a material change of use for multiple units in excess of two storeys, which led to the MCU approval taking effect. The MCU approval lapsed, as the Mahers failed to commence a change of use prior to 24 November 2010.

The date on which the MCU approval lapsed could have been extended if a related approval had been applied for in accordance with section 3.5.21(4) (When approval lapses if development not started) of the repealed *Integrated Planning Act 1997 (IPA)* by 24 November 2008.

On 16 December 2008, the Mahers' town planning consultant made a development application for operational work for vegetation clearing to the council, which was approved on 18 March 2009. If that development application had been made by 24 November 2008, it would have fallen within the definition of a 'related approval' for the MCU approval under section 3.5.21(7) (When approval lapses if development not started) of the repealed IPA.

Alternatively, the Mahers could have applied to the council for an extension of the four year period for the MCU approval prior to the lapse occurring on 24 November 2010.

Mahers' application to the court

The Mahers sought to revive the lapsed MCU approval by changing the status of the development application for operational work so that it would become a "related approval" for the MCU approval such that the MCU approval would not lapse by applying to the court to exercise its discretion under section 820 (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009 (SPA)* to grant the following:

- a finding or declaration that there was a failure to comply with section 3.5.21(7) (When approval lapses if development not started) of the repealed IPA;
- an order that the time for making the first development application for a "related approval" be extended to 16 December 2008.

The Mahers argued that the power in section 820 of the SPA was enlivened as approval lapses if development not started) of the repealed IPA.

The council argued that the Mahers had not identified a non-compliance with section 3.5.21(7) (When approval lapses if development not started) of the repealed IPA; rather the Mahers had identified that the operational work approval did not satisfy the definition of a "related approval".

Decision

It was necessary for the court to consider the following:

- first, whether section 820(1) (Proceedings for particular declarations and appeals) of the SPA was enlivened in the circumstances; and
- second, whether the circumstances warranted the exercise of discretion to grant the relief sought.

Was there non-compliance such that section 820 was enlivened?

The issue turned on the meaning of the words in section 820 of the SPA, "*a provision of repealed IPA ... has not been complied with or has not been fully complied with*". The court found that the words of section 820 were not "ambiguous or obscure" and section 14B(1)(b) (Use of extrinsic material in interpretation) of the *Acts Interpretation Act 1954* did not operate to allow the use of extrinsic material in the proceeding. As such, the question was whether section 3.5.21(7) of the repealed IPA had not been complied with or had not been fully complied with by the Mahers.

The Mahers relied on three cases where development approvals lapsed and the court granted relief using the broad powers of section 820(1) of the SPA: *Tremellen v Southern Downs Regional Council* (2011) QPELR 56; *Devy v Logan City Council* (2011) QPELR 207; and *Larrell Pty Ltd v Brisbane City Council* (2012) QPELR 66.

Considering the factual circumstances and relief sought in those cases as compared to the circumstances surrounding the Mahers' approvals, the court rejected the Mahers' submission that by failing to lodge a development application for operational work by 24 November 2008 they failed to comply with section 3.5.21(7) (When approval lapses if development not started) of repealed IPA.

Exercise of discretion to grant relief

As a consequence of the finding that the Mahers had not failed to comply with section 3.5.21(7), the court did not accept that it had a power to consider the exercise of the court's discretion to grant relief, however it did proceed to consider the factors relevant to its exercising its discretion in favour of the Mahers.

Significantly, a relevant reason for refusing relief was the fact that having regard to planning controls at the time the appeal was decided, any new development application would have been limited to 2-3 storeys as opposed to 6 storeys, creating a loss in yield and impacting on the viability of the project. Whilst the impact on the Mahers' interests were relevant, the interests of the council and the community were also relevant given the current planning controls had changed the desired planning outcome for the area.

Furthermore, if the Mahers had applied to the council to extend the life of the MCU approval, the matters the council would have been obliged to consider under section 388 (Deciding request) of the SPA would have created significant obstacles to success, particularly given the change in planning controls, the lack of community awareness about the MCU approval in light of its age and the fact that if a new application were made it would be likely to draw submissions.

Held

The court held that there were not sufficient reasons to grant the relief sought and in the event that the court did have a power to exercise its discretion, it would refuse to exercise it.

Lost opportunity to impose condition

Samantha Hall | Jamon Phelan-Badger

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Transpacific Industries Group (ACN 105 155 221) v Ipswich City Council* [2012] QPEC 69 heard before Robin QC DCJ

December 2012

Executive Summary

This case was an application to the Planning and Environment Court for a declaration as to the interpretation of a development approval for a waste disposal facility, for which operations had increased over time with consequent effects upon the Ipswich City Council's road networks.

The court held that the proper construction of the development approval was that it incorporated certain documents comprising the development application; however, there was nothing in the development application which confined the quantities of waste able to be disposed.

Case

The issues for the court's determination were, in the absence of a stated limit to the rate of waste disposal in the development approval, whether documents comprising the development application were incorporated into the approval and if they were, whether the development application indicated that the consent limited the permitted rate of waste to 50,000 tonnes per annum.

Facts

The applicant, Transpacific Industries Group, operated the waste disposal facility pursuant to a town planning consent permit issued on 4 February 1999 under the repealed *Local Government (Planning and Environment) Act 1990*.

This approval was subject to conditions, but none of the conditions expressly limited the rate per annum of waste able to be disposed of as part of the use. The conditions did however, restrict the types of waste which could be received at the facility.

The approval did refer to other documents such as correspondence and reports contained in the development application, which in various ways gave the impression that the facility was expected to operate at a rate of 20,000 to 50,000 tonnes per annum, at least for a time.

The use was also an environmentally relevant activity (**ERA**) under the *Environmental Protection Act 1994* for operating a facility for disposing of general waste for which a licence was obtained. The town planning report comprising the development application expressed the intention that the proposed development would align the operation of the landfill with the ERA licence in effect at the time. However, the ERA licence did not specify a limitation on the rate of waste able to be disposed at the facility.

A further development application was made in or about late 2000 or early 2001 for a development permit for a material change of use (**MCU**) relating to the upgrade of the relevant ERA licence to encompass a higher rate of waste receipt. Correspondence at that time suggested that the council had determined that a MCU approval was not required to increase the operating capacity of the facility under the ERA licence from the State. Before the court, the council contended that the approval capped the disposal rate to 50,000 tonnes per annum. Whilst the parties had both taken inconsistent positions in the history of the matter, it was not contended that either was estopped from arguing a changed position before the court.

Decision

The court accepted that a development approval may incorporate other documents by reference, and that certain documents had been incorporated in this case.

Reasoning in the case of *Ryde Municipal Council v The Royal Ryde Homes* (1970) 19 LGRA 321 at [323-324] was applied in the circumstances, namely that "*the mere approval of an application does not...necessarily have the effect of incorporating all the matters stated in the application*". And rather, because a planning approval attaches to the land and binds future owners and occupiers, "*the legal qualities a consent possesses, or which flow from a consent, are so important that care should be taken to ensure that consents are framed in clear terms and conditions are specified with certainty*".

Given these points, the court was not convinced that any of the references to the rate of waste disposal in the documents that were incorporated into the development approval placed a clear limitation on the rate of waste to be received by the facility.

It was noted that the council could have imposed an explicit condition on the approval which limited the rate of waste to be received by the facility, but did not do so. Further, the court stated that if it was *"established that the Council lacks any ability to regulate quantities, the best it can do is to persuade the State authorities licensing the ERA that their brief extends to imposing conditions of the kind the Council may think necessary to protect the public interest"*.

Held

The declaration sought should be made, that is, that the approval is not subject to an annual limit on the amount of waste received per year.



Development in a flood plain: the importance of alternative solutions

Edith Graveson

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *The Arora Construction Pty Ltd & Anor v Gold Coast City Council & Anor* [2012] WPEC 052 heard before Rackemann DCJ

December 2012

Executive Summary

In this case, the Planning and Environment Court heard an appeal against the refusal of a development permit for a material change of use by the Gold Coast City Council. The key issue in dispute was whether the proposed development, which was located within a flood plain was in conflict with the planning scheme and if so, whether there were sufficient grounds to overcome any such conflict.

The court held that whilst any development within the boundary of a flood plain carries some inherent risk, the proposal did not conflict with the higher-order provisions of the planning scheme. Further, the court was satisfied that even where there was a conflict or potential conflicts, there were sufficient grounds to justify approval.

Case

This case involved an appeal by Arora Construction Pty Ltd and Jans Construction Pty Ltd against the decision of the Gold Coast City Council to refuse a development permit for a material change of use.

On appeal the issues were narrowed to focus on conflicts between the appellants' development and the provisions of the relevant planning instruments restricting development in flood affected areas.

Facts

The development application related to land situated on Nerang-Broadbeach Road, Carrara, within the boundary of the Guragunbah flood plain.

The appellants applied for a development approval for the construction of 7 buildings, ranging from 3 to 7 stories in height that would house 270 apartments, together with a 220m² restaurant. The built portion of the development was to be restricted to 30 per cent of the site towards its southern end with the balance to be used for recreation and ephemeral wetlands flood storage.

The council's planning scheme contemplated residential development in the flood plain but required inter alia that:

- the hydraulic function of the flood plain is maintained;
- people and property in the flood plain are not exposed to an unreasonable level of risk; and
- the openness of the flood plain is maintained.

The court noted that the proposed development would not impact the hydraulic function or openness of the flood plain and would not cause any risk to property.

Thus, the issue to be determined by the court was whether the appellants' development ought to be refused because it would expose occupants to an unreasonable level of risk particularly because of the extent to which access to the property via Nerang-Broadbeach Road would be affected by flood.

The planning scheme provisions

Reference was made to the Guragunbah Local Area Plan (LAP) statement of intent that:

The development will need to ensure that the level of risk to occupants is acceptable during flood events and that appropriate emergency response can be facilitated.

Performance Criteria 20 for the LAP requires that users of the land should reasonably expect to be able to evacuate to a place of refuge. Moreover, the Acceptable Solution for the Performance Criteria contemplates road access during a Q100 flood event. The proposed development, however could not achieve this.

In addition, the applicable Flood Affected Constraint Code (**FACC**), which was also relevant to the site stated that development proposals will be fully evaluated against:

Whether the risks associated with the development are fully known, quantifiable and capable of being dealt with to Council's satisfaction, without any uncertainties.

Performance Criteria 10 for the FACC requires that all proposed development must demonstrate that sufficient access will be available to enable evacuation during a range of floods. The proposed development however, cannot achieve Acceptable Solution AS10.1 because the development must rely on Broadbeach-Nerang Road, a road which is below the level of the designated flood and is the sole access route to the site.

Alternative solutions

Despite the fact that its proposal departed from the Acceptable Solutions of the relevant Performance Criteria, the appellants asserted that:

- its alternative solutions would satisfy the performance criteria; and/or
- there were sufficient grounds to warrant approval notwithstanding any conflict.

The appellants proposed a number of alternative solutions that would obviate reliance on access via Nerang-Broadbeach Road access during floods beyond a Q20 event.

The appellants' primary alternative solution proposed a number of measures to convert the site into a safe haven so that occupants could safely reside on the site during a flood event. Measures included building specifications, which would provide a greater than ARI 500 year flood immunity, internal access roads trafficable in a ARI 1000 year event, temporary flood barriers, an onsite emergency centre, submersible pumps to remove seepage, an onsite safe water supply, onsite generated power, emergency food rations, provision for satellite communications and a pharmaceutical notification supply scheme. The appellants' alternative solution also incorporated measures for individual emergency evacuations.

The appellants' subsidiary alternative solution was a voluntary early evacuation system wherein residents could safely evacuate while the Nerang-Broadbeach Road remained trafficable by sedan. The early evacuation would be triggered by an onsite automatic water level monitoring station and managed by the body corporate to avoid diverting resources from emergency services.

Decision

With respect to the safe haven Alternative Solution, the court held that the measures proposed would reduce risk to an acceptable level and provide viable alternatives to the council's Acceptable Solutions.

With respect to the early evacuation system, the court noted that a safe haven was recognised as a viable alternative to evacuation in both the Gold Coast City Local Disaster Management Plan and the Queensland Evacuation Guidelines for Disaster Management Groups. The court held that it was satisfied that the system would provide sufficient opportunity for safe evacuation and for residents outside the area to return home before the road became untrafficable.

On the basis of the above, the court noted that the development substantially satisfied the requirements of the planning scheme provisions. The court also noted that the proposal had substantial overall merit in advancing the goal of optimising opportunities for urban development while minimising flooding concerns.

Held

Appeal allowed subject to the finalisation of an appropriate management plan and the imposition of appropriate conditions.



The perils of inadequate searches when purchasing property

Samantha Hall | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Montrose Creek Pty Ltd and Manningtree (Qld) Pty Ltd v Brisbane City Council; Brisbane City Council v Manningtree (Qld) Pty Ltd and Montrose Creek Pty Ltd* [2012] QPEC 65 heard before Durward SC DCJ

December 2012

Executive Summary

The Planning and Environment Court was required to consider whether the non-payment of infrastructure contributions for water supply and sewerage under a development approval by the subsequent owners of land subject to the approval was a development offence contrary to section 580 (Compliance with development approval) of the *Sustainable Planning Act 2009* (SPA) and whether the subsequent owners were required to pay the unpaid infrastructure contributions.

Case

This case concerned four separate proceedings which were dealt with together. Two were appeals by Manningtree (Qld) Pty Ltd and Montrose Creek Pty Ltd against enforcement notices issued by the Brisbane City Council with respect to the non-payment of infrastructure contributions. The other two were originating applications for declarations made by the council against Manningtree and Montrose alleging that a development offence had been committed and seeking enforcement orders against each of them for payment of the infrastructure contributions.

Facts

On 24 October 2005 the council issued a development permit for a material change of use—modification (retail, restaurant and child care facility) and a preliminary approval for carrying out building work for land at 3/161 and 4/161 Dawson Parade, Keperra more particularly described as Lots 3 and 4 on SP197357, Parish of Enoggera. Opal Wing was the original owner of the land.

The approval was subject to conditions requiring the payment of infrastructure contributions for parks, water supply and sewerage. The original owner paid the parks contributions in full but only partly paid the other contributions. On 7 February 2008, a Community Management Statement was endorsed by the council.

On 19 December 2008, Manningtree and Montrose entered into contracts for the purchase of the land from the original owner. Prior to the settlement of the contracts for purchase, the lawyers for Manningtree and Montrose obtained a limited planning and development certificate and indicated that their instructions were not to obtain a full planning and development certificate.

Around September 2010 the council realised that some of the infrastructure contributions in relation to the land had not been paid. The council pursued the original owner for payment but before the council could obtain payment the original owner entered into voluntary liquidation.

On 31 August 2011, the council issued a show cause notice pursuant to section 588 (Giving show cause notice) of the SPA to Manningtree and Montrose asserting that both companies had committed a development offence contrary to section 580 (Compliance with development approval) of the SPA. Then on 6 October 2011, the council issued an enforcement notice pursuant to section 590 (Giving enforcement notice) of the SPA, requiring Manningtree and Montrose to pay to it \$304,665.90 for sewerage headworks and \$119,058.84 for water supply headworks.

Submissions

Manningtree and Montrose submitted that since the timing requirement specified in the relevant conditions of the approval stated that the payment must be made "Prior to the commencement of the use or prior to endorsement of a community management statement, whichever is sooner" no development offence was committed because the non-payment of infrastructure contributions was properly categorised as a 'once and for all' breach as opposed to a 'continuing breach' which meant that the breach occurred when the land was owned by the original owner and therefore the only avenue left to the council was to pursue the original owner for the unpaid infrastructure contributions.

On the other hand, the council submitted that the requirement to pay the unpaid infrastructure contributions was a continuing obligation and therefore the breach of those conditions was a continuing offence. The council also submitted that the timing specified in the condition simply crystallised the date from which an offence had been committed, as to construe the condition otherwise would permit a use that contravened the conditions of the approval.

Decision

The court made reference to *Sunshine Coast Regional Council v Recora P/L & Anor* [2012] QPEC 8 where Robertson DCJ in a case regarding unpaid infrastructure contributions under a development approval wrote:

... The condition sets a deadline to pay which had passed by the time Recora assumed the benefit of the approval. The failure to pay in a timely way does not discharge the responsibility to pay the contributions nor does it sever the condition from the approval... The condition still binds Recora and is one that was, and still is, breached by non-performance.

As to whether the non-payment of the infrastructure contributions required under the conditions of the approval constituted a continuing offence, the court in the present case agreed with the statement of Smart JA in *Environment Protection Authority v Alkem Drums Pty Ltd* (2000) 113 LGERA 130 where it was decided that "the absence of a provision for a daily penalty does not mean that the offence is not a continuing one".

The court agreed with the council in that the non-payment by Manningtree and Montrose by the time specified in the Approval crystallised the date from which a development offence had been committed and not the date of the cessation of a liability. The court pointed out that to contend otherwise would result in an unsustainable situation where the person benefitting from a development approval would not pay its share of the demand on infrastructure created by the development.

In a bid to convince the court not to grant the declaratory relief and orders sought by the council, Manningtree and Montrose made submissions to the court that the limited planning and development certificate they obtained before settlement did not indicate that there were any outstanding infrastructure contributions applicable to the land and therefore they had no knowledge of the unpaid infrastructure contributions. In reply the court noted that whilst a limited planning and development certificate would specify any infrastructure charges schedule or regulated infrastructure charges schedule applicable to the land it would not specify infrastructure contributions payable under the conditions of a development approval. To obtain this information, Manningtree and Montrose were required to obtain a full planning and development certificate, which they chose not to do.

Ultimately the court agreed with the views expressed by Judge Robertson in *Recora* and stated that the obligation to pay infrastructure charges attaches to the land pursuant to section 245 (Development approval attaches to land) of the SPA and binds the owner and any successors in title which included Manningtree and Montrose. The court went on to add that the failure by Manningtree and Montrose to pay the infrastructure charges required under the conditions of the approval constituted a development offence contrary to section 580 (Compliance with development approval) of the SPA.

Held

The court held that the appeals by Manningtree and Montrose should be dismissed and the applications by the council should be granted. The court made the declarations and orders sought by the council which included the payment of the outstanding infrastructure contributions for water supply and sewerage at the rate prevailing at the time of making the order.

EPA unsuccessful in prosecution for transport of building materials as "waste"

Maysaa Parrino

This article discusses the common sense approach to defining "waste" as a result of a recent NSW court decision

December 2012

Executive Summary

In the recent decision of *Environment Protection Authority v Terrace Earthmoving Pty Ltd & Page* [2012] NSWLEC 216, the Land and Environment Court has taken a common sense approach to the interpretation of the definition of "waste" under the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act).

Terrace Earthmoving engaged to excavate and place fill material for road

In approximately November 2005, the owner of land at Williamstown NSW engaged the services of Terrace to construct a road at his property, which involved excavation and placement of fill material into the proposed road area. Fill material was obtained from sites at which Terrace was carrying out demolition or excavation works and was generally comprised of broken concrete, bricks, tiles, soil and rock.

Terrace was charged by the Environment Protection Authority (EPA) with two offences under section 143(1)(a) of the POEO Act for the alleged unlawful transport of waste to the property. The director of Terrace was also charged with an identical offence under the POEO Act. Each of the parties pleaded not guilty to the charges.

Two different definitions of "waste" due to legislative amendment

The court held that "transport" of waste in section 143 of the POEO Act means to take or carry from one place to another. The first element of the offence, being the transportation of a substance is complete when it is transported to and arrives at a "place". Secondly, the substance transported must be categorised as "waste" within the POEO Act at the time of transportation.

Section 143 of the POEO Act was amended on 1 May 2006 which meant that there were two different definitions of "waste" before and after 1 May 2006 which applied to Terrace.

Was the material categorised as waste before 1 May 2006?

Up until 1 May 2006, "waste" had two different meanings in section 143 and the Dictionary of the POEO Act. The court found that the definition within section 143 applied, which meant that waste included "any unwanted or surplus substance (whether solid, liquid or gaseous)" and that "a substance is not precluded from being waste merely because it may be reprocessed, reused or recycled".

Having regard to this definition, and the definition in the Macquarie Dictionary of "waste", the factors relevant for consideration were:

- the nature of the substance;
- whether there is an identified demand for that substance;
- circumstances in which the substance is obtained and removed from its source;
- whether the substance is being transported to a place at which it is intended to be used for the purpose for which demand for the substance has been shown;
- the period of time that elapses or is expected to elapse after the substance is transported to the place of its intended use before it is put to that use.

Applying the above, the court was not satisfied on the facts that the material at the time of transportation was "waste" within the meaning of the POEO Act. This was for various reasons, including that the materials were identified as having a construction function and were set aside at their site of origin, loaded separately for transport, were wanted and used for the purpose for which they were in fact used, they were good and reusable sale items and excellent for a road base.

Was the transported material waste after 2 May 2006?

After 1 May 2006, "waste" was defined differently in the Dictionary of the POEO Act, including:

(a) any substance (whether solid, liquid or gaseous) that is discharged, emitted or deposited in the environment in such volume, consistency or manner as to cause an alteration in the environment, or (b) any discarded, rejected, unwanted, surplus or abandoned substance.

The court found that an "alteration to the environment" was directed at an action taken in respect of material, such as discharge or emission. As the offence involved the transportation of "waste" from its source to its destination, it did not involve the discharge, emission or deposition of material at the property. Secondly, as there were similarities in the definition at (b) above with the former definition of waste in the POEO Act, the court confirmed its view that the material was not waste.

EPA did not prove beyond reasonable doubt that the transported material was waste

As the EPA did not prove beyond reasonable doubt that the material transported during each charge period was "waste" within the POEO Act, a verdict of not guilty was required. The EPA requested that the court refrain from entering formal verdicts in the proceedings, so that it could exercise its right to submit any question of law to the New South Wales Court of Criminal Appeal.

As a result, the proceedings have been stood over to enable the prosecutor to make any such application, failing which, the court held that verdicts of not guilty would be required to be entered in all four proceedings. No formal orders have yet been made, but the court's interpretation of the events and the appropriate consequences would appear to represent a triumph of logic over legalism.

EPA less likely to succeed in prosecutions for transport waste offences involving common building materials

The case is significant as it clarifies that not all materials will be considered as "waste".

This is important for land owners, business and industry because it means that depending upon the factors relevant for consideration listed above, the EPA is less likely to be able to charge parties for waste offences involving common building materials including broken concrete, bricks, tiles, soil and rock, particularly if those materials are used for a purpose such as fill in a road.

If you are potentially liable under the POEO Act for any offences involving "waste" and there is ambiguity as to whether the materials involved constitute "waste", then we recommend that you seek legal advice.

Determining the "effective height" of a building for the purposes of the Building Code of Australia

Maysaa Parrino

This article highlights the recent interpretation of "effective height" under the Building Code of Australia and the implications for owners, builders and developers

January 2013

Executive Summary

In *The Owners - Strata Plan No. 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance* [2012] NSWSC 1244, the Supreme Court has interpreted the definition of "effective height" in the Building Code of Australia (BCA). This is important because particular buildings have different requirements for fire controls and safety features and systems, depending upon the effective height of a building, as defined in the BCA.

Definition of the effective height of a building

It was agreed by the parties that under the BCA, a proposed building with an effective height over 25 metres had more onerous fire safety regulatory requirements. Between January-October 2001 (when the consent and construction certificate had been issued for the proposed building), the definition of effective height in the BCA was "the height of the floor of the topmost storey... from the floor of the lowest storey providing direct egress to a road or open space."

Was the lowest story the lower ground level or the upper ground level?

The court looked at whether "the floor of the lowest storey providing direct egress to a road or open space" of the proposed building was, on the facts:

- the upper ground level, which was the pedestrian entrance to, and exit from, the proposed building (contended by the defendants), giving the proposed building an effective height of 25 metres; or
- the lower ground level, which was the vehicular entrance to, and exit from, the proposed building (contended by the plaintiff), giving the proposed building an effective height of 26 metres.

The court found that the internal configuration of the proposed building did not determine "effective height", and that the distance between the topmost storey of the building and the points of egress (exit) applied to the definition.

"Egress" defined as point of exit, rather than escape route

The word "egress" implied:

- at least one, and possibly more than one, point at which occupants of the proposed building could exit to a road or open space; and
- the existence within the proposed building of a pathway reasonably accessible from the point of egress to the whole of the building or, at least, a substantial part of it.

As a result, the court found that the word "egress" was a point of exit, rather than an escape route.

Lower ground level the lowest storey providing direct egress

Based on the facts, the lower ground level of the proposed building was the "lowest storey providing direct egress to a road or open space", because of the definition of "storey" in the BCA. It provided space for parking in excess of three vehicles and it had direct egress to the street.

The upper ground level was not the preferred storey for various reasons, including the fact that the pedestrian entrance to the level was via doors that divided a foyer area from a covered verandah and was several steps up from the footpath on the street. A person was required to pass through the verandah area and down steps before reaching the footpath.

Notwithstanding the above, the court still found that the upper ground level could reasonably have been characterised as "a storey providing direct egress to a road or open space" within the definition of "effective height" within the BCA. The BCA definition of "effective height" was not inconsistent with a building having points of egress at more than one level.

BCA Guide definition not relevant

The court held that the BCA Guide was not relevant to the proper determination of the definitions in the BCA, as the text of the BCA itself is clear and capable of ready, reasonable application.

Effective height of the building was 26 metres

On the facts, the lower ground level was "the lowest storey providing direct egress to a road or open space" of the proposed building. Accordingly, the "effective height" of the proposed building was 26 metres.

Implications for owners, builders and developers

The case has significant implications for owners, builders and developers. It provides a further guide as to how the court will interpret "effective height", which may have significant consequences in terms of regulatory compliance with fire controls and safety measures.

Sufficient grounds despite a conflict with the planning scheme?

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Szylkarski & Ors v Brisbane City Council & Anor* [2012] QPEC 80 before Robin QC DCJ

January 2013

Executive Summary

In this case the Planning and Environment Court was required to consider whether the proposed development on the only vacant parcel in a street overwhelmingly characterised by smaller pre-1946 character houses was in conflict with the performance criterion that "development size and bulk must be consistent with the low to medium density of the locality" in the Residential Design – Low Density, Character and Low – Medium Density Code in the Brisbane's Planning Scheme *City Plan 2000* and whether there were sufficient grounds to overcome conflict.

Case

This case involved a submitter appeal by local residents against an approval of a development application made by Specialist Developments Pty Ltd as agent for Corneliu Robert Telegaru and Cornelia Telegaru, seeking a development permit for a material change of use for a multi-unit dwelling and for a preliminary approval to carry out building work given by Brisbane City Council in respect of land located at 22 Goodwin Terrace, Moorooka.

Facts

The land was a 607m² vacant parcel, with a frontage to Goodwin Terrace of approximately 15.088m in length. In the past a house constructed after 1946 stood on the land. In the City Plan, the land was located in the Low-Medium Density Residential Zone and was also within a Demolition Control Precinct (DCP) and the Moorooka District Local Plan, which did not recognise Goodwin Terrace in the way that some other localities were recognised, such as the Clifton Hill War Service Homes Estate. The land was located within a close vicinity to the Moorvale Shopping Centre, a large multi-purpose centre at a MP3 Level within the City Plan, coming next in the hierarchy after the Brisbane CBD and higher order centres such as those at Chermside, Mt Gravatt and Indooroopilly. The DCP, based on substantially intact pockets of pre-1946 housing effectively surrounded the MP3 Centre, including every parcel across Goodwin Terrace.

In 2008, there was a development approval resulting from a code assessable development application, which authorised the construction of a large two storey residence, with a gross floor area exceeding 300m² on the land and the relevant period for this previous approval lapsed on 31 [sic] November 2012. While section 3.5.5(3)(d) (Impact Assessment) of the *Integrated Planning Act 1997* might not have required much weight be given to the previous approval, the council and the co-respondents made much of the potential for a similar sized (ie larger sized) residential building to be constructed on the land.

The proposed development was for five units in a single building, which was so articulated that it presented as three. Unit 1 being located at the front and was a two-level unit facing the street frontage and consistently with the terrain (as the land falling away to the east from Goodwin Terrace) had its ground floor slightly lower. The street frontage exhibited pre-1946 features, such as multiple gables and finishes having the appearance of chamferboard and natural timber. Behind unit 1, at ground level was the covered parking for six vehicles, being one for each unit and one for visitors. Immediately behind unit 1, above the parking and approximately half a floor higher was unit 2. Unit 2 was a small one bedroom unit of two levels, one of which was described as a mezzanine.

Unit 3 located at the same level as unit 2 and immediately abutting it, was a single storey unit, above parking. Units 4 and 5 were two storey units and shared what presented as a single semi-detached structure adjoining unit 3 and representing the widest part of the built form with a minimum setback of 2m on each side. This build form was divided north-south, as opposed to east-west and the falling terrain meant that the upper levels of units 4 and 5 continued the floor level of unit 3 with the balance of living areas being underneath.

Submissions

The premise of the appeal by the local residents was that the proposed development was too big, its size and bulk was inconsistent with the "low to medium density" of the locality contrary to performance criterion P1 in section 4.3 of the Residential Design-Low Density, Character and Low-Medium Density Code in the City Plan and that the proposed development was excessive in gross floor area and fell short in the frontage and rear boundary setback.

The appellant's town planning expert contended that the proposed development was simply too big and was trying to shoehorn too much onto the land, in a way that was inevitably out of scale with the surrounding development that was likely to remain in place in the long term.

The council and Specialist Developments' position was that there was no conflict whatsoever with the City Plan and in the event there was, it was "textual only and of no consequence". Further, it was submitted that there were sufficient grounds to justify an approval of the proposed development.

Decision

The court considered the crux of the appeal was whether the proposed development satisfied the relevant performance criteria in the City Plan. If it did not, the proposed development would be in conflict with the council's planning scheme and the court would then be required to determine whether there were sufficient grounds, within the ambit of section 326 (Other decision rules) of the *Sustainable Planning Act 2009 (SPA)* to justify an approval of the proposed development despite the conflict.

To this end, the court assessed the proposed development against the relevant sections of the City Plan, including:

- the Desired Environmental Outcomes;
- the Assessment guidance – explanation of traditional character in relation to:
 - building form and scale;
 - street context;
 - materials and detailing; and
 - setting.
- Compliance with the Residential Design – Low Density, Character and Low – Medium Density Code, including the:
 - Intent;
 - Purpose;
 - Performance Criteria and Acceptable Solutions.

Ultimately, the court considered that the proposed development did not comply with section 4.3 of the Residential Design-Low Density, Character and Low-Medium Density Code in the City Plan including:

- P1 regarding gross floor area; and
- P13 and in particular A13.3 regarding the minimum rear boundary setback of 6m.

The court then looked at whether there were sufficient grounds to justify approval of the proposed development despite the conflict.

In the process of doing so, the court acknowledged that the proposed development was in a category of "generally appropriate" development and that the planning objectives of the council's planning scheme and its desire environmental outcomes would be promoted by the proposed development, being: housing choice and diversity, reducing urban sprawl, encouraging use of public transport and land use integration in this particular location.

The court noted that a finding of conflict might have been avoidable if the conflict was related to the dimensions of the land, in particular the frontage, which the co-respondents could not have done anything about.

However, the court considered that there was no need for the "strict" gross floor area limit stated in terms of the percentage of the land area involved, to be exceeded, or to build within the standard rear setback.

While the co-respondents provided a clever design, they failed to comply with P1 and P13 of section 4.3 of the Residential Design – Low Density, Character and Low – Medium Density Code in the council's planning scheme and such failure resulted in a conflict with the council's planning scheme. Consequently, the court found that although valid grounds (as submitted by the council and the co-respondents) existed justifying approval of the proposed development, such grounds were not sufficient to overcome the conflict.

Held

The appeal be allowed and the development application be refused.

Failure to overcome conflict with the planning scheme

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Serafini v Gladstone Regional Council & Anor* [2012] QPEC 83 before Jones SR DCJ

January 2013

Executive Summary

This case involved an appeal to the Planning and Environment Court against a decision of the Gladstone Regional Council to refuse a development application seeking a development permit for the reconfiguration of one large rural lot in 16 lots. The court ordered that the appeal be dismissed.

Case

This case involved an appeal to the court against a decision of the council to refuse a development application seeking a development permit for the reconfiguration of one large lot into 16 lots. The land the subject of the council's decision was located 46 kilometres south of the regional port city of Gladstone, more particularly described as Lot 2 on RP 612473 and comprised of an area just under 935 hectares.

Facts

On 6 August 2004, Mr Serafini lodged a development application with the council to subdivide the land into 16 lots, varying in size from about 25 hectares through to 68 hectares and in two stages, comprising, stage 1: Lots 1 to 6 and 13 to 16 and stage 2: Lots 7 to 12.

The development was proposed to include the construction of a new road traversing the property in a north-west direction, buffer area for the protection of erosion prone land, building restrictions on the proposed lots and the dedication of a 20 metre public reserve following the creek and inlet frontages.

The council resolved to refuse the development application on 10 February 2009. The grounds for refusal covered a broad range of issues, many of which were not considered in the appeal as it was acknowledged that they would not warrant a refusal of the development application, but would be the subject of conditions of approval.

Issues in the appeal

The issues which the court was asked to determine were as follows:

- Was the proposed development in conflict with the State Planning Policy 1/92 (Development and the Conservation of Agriculture Land) (**SPP**), dealing with Good Quality Agricultural Land (**GQAL**) and the fragmentation of GQAL?
- Was there a need for the proposed development?
- Was the proposed development in conflict with the council's Transitional Planning Scheme 1999 and in conflict with the council's *Integrated Planning Act 1997* Planning Scheme (**IPA Scheme**)?
- Were there any grounds to justify approval of the development application in the event of conflict with the council's planning regimes?

Conflict with the SPP

In respect of the alleged conflict with the SPP, the court relied on the evidence provided by Mr Napier (for the appellant) and Mr Waker (for the council) in determining whether the land could be described as "better quality Class C land" or "land suitable for improved or high quality native pasture".

Based on the evidence, the court concluded that the land could not reasonably be described as "better quality Class C Land" or "land suitable for improved or high quality native pasture" and therefore, the land was not GQAL. Accordingly, the proposed development was not in conflict with the SPP or the council's planning schemes insofar as it related to the protection of GQAL.

Need

In determining whether there was a need for the proposed development, the court relied upon the evidence provided by Ms Bonwick (for the appellant) and Mr Leyshon (for the council). The experts identified two areas for investigation, being:

- the need for rural living in the council area; and
- the need for rural living in the locality of the land.

Having heard the evidence of both experts, the court did not consider the facts and circumstances relied upon by Ms Bonwick justified her conclusions concerning need and favoured Mr Leyshon's evidence that any need in the location for the proposed development was "low level" or "weak".

Conflicts with the planning schemes

In considering whether the proposed development was in conflict with the council's planning regimes, the court noted the deliberate and legitimate strategy of the council's transitional planning scheme was to preserve rural land for rural activities and further, its general opposition to the fragmentation of larger parcels of land in rural areas. It was noted that the IPA Scheme was, insofar as was relevant to the appeal, "effectively mirror" and consistent with the transitional scheme. The court accepted that, while the land was not GQAL, it was productive rural land currently grazing 100 head of cattle and capable of grazing up to 160 head. Although, as a stand-alone entity, the commercial viability of the current grazing enterprise was questionable, the court observed that, under the transitional scheme, commercial viability was not determinative, which appeared to further reinforce the council's commitment to protect rural land from unwarranted fragmentation.

The court found that any need for the lots produced by the proposed development was at a low to very low level and that such a low level of need was not sufficient to displace the clear planning objective and intention of protecting agriculturally productive rural land from fragmentation. The court therefore concluded that the proposed development was in genuine conflict with the transitional scheme (and the IPA Scheme) and the conflict was significant, not technical or minor.

Sufficient grounds to justify approval

In considering the sufficient grounds submitted by the appellant, the court did not find them to be sufficient to overcome the conflict and concluded that "while the proposal would add to the choices available to purchasers, the positive impact might be considered insignificant."

Decision

The court noted that as the development application was lodged under the transitional scheme it was required to be assessed and decided under sections 6.1.29 (Assessing applications (other than against the building assessment provisions)) and 6.1.30 (Deciding applications (other than against the building assessment provisions)) of the *Integrated Planning Act 1997* and, accordingly, the development application was required to be refused if:

- it conflicted with any relevant strategic plan or development control plan; and
- there were not sufficient planning grounds to justify approving the development application despite the conflict.

Held

The appeal be dismissed.

Overwhelming community interest in the future of planning in NSW

Claire Parsons

This article explores the key themes identified through community feedback on the NSW Government's Green Paper on planning reform

January 2013

Executive Summary

On 21 December 2012, the NSW government released the Green Paper Feedback Summary, which summarises the main community and stakeholder feedback on the reform areas proposed in the Green Paper. These reform areas were identified and discussed in our July 2012 article *Green Paper on planning reform in NSW released by government*.

The completion of this review process signifies the final step before the release of the White Paper, which will respond to this feedback and set out the details of how the new planning system will be implemented.

Enormous interest within the community in the future of planning

The government received a total of 1,220 submissions during the Green Paper exhibition period. The overwhelming majority (61%) were received from the community, 11% from community organisations and 9% from local government, highlighting the importance to the community of the future of planning in NSW.

Key feedback themes identified

- There is a need to provide adequate resourcing and new methodologies for community engagement at strategic level.
- The shift towards focusing on strategic planning requires appropriate resourcing and a legible policy and legislation framework.
- Streamlined decision making needs to occur at the development assessment level. By planning strategically upfront, with community input, development assessment can be smarter and more timely adopting a risk based approach.
- Integration of land use with infrastructure is imperative and the funding for infrastructure provision and delivery needs to be addressed.
- The Department of Planning and Infrastructure needs to take a leadership role to empower planners to have a 'can do' attitude to execute decisions, and encourage collaboration between all stakeholders.

Importance of ecologically sustainable development

Many submissions called for the expansion of the objectives of the new planning system to balance development with social and environmental considerations, a concept seemingly lacking in the Green Paper.

The concept of ecologically sustainable development has been identified by a diverse range of stakeholder groups as a necessary overarching objective of the new planning system, to ensure the delivery of long term beneficial outcomes.

Implementation of the new planning system

The establishment of the planning bodies and the preparation of the suite of planning instruments proposed in the Green Paper will be a process that may take a number of years. Just how the government will deal with the transitional arrangements to facilitate the implementation of the new planning system was an issue raised in many of the submissions received.

It is anticipated that the White Paper will respond to these concerns and address issues such as how long the transition period will last and the interim measures to be implemented to ensure consistency in outcomes from this point into the future.

White Paper due to be released shortly

The White Paper and "draft exposure bill" are due for release shortly, at which time the true extent of the proposed reforms can be assessed. It is anticipated that many of the key feedback themes identified will be addressed in the draft legislation. However, the ideological shift called for may require more time and further consultation by the government.

Integration of commercial and residential uses

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Stockland Development Pty Ltd v Townsville City Council & Ors* [2012] QPEC 84 heard before Robin QC

February 2013

Executive Summary

This case involved a submitter appeal to the Planning and Environment Court by Stockland Development Pty Ltd against the Townsville City Council's decision to approve a development application for an extension to an existing shopping centre known as the 'Willows' and a preliminary approval for building work lodged by Dexu Wholesale Property Limited in respect of land located at 13 Hervey Range Road, Thuringowa Central.

Case

This case involved a submitter appeal to the court by the appellant against the council's decision to approve the development application lodged by Dexu Wholesale Property in respect of the land. The court had to determine whether the proposed development was in conflict with the City of Thuringowa Planning Scheme and if conflict did exist, whether there were sufficient grounds to justify an approval despite the conflict.

Facts

In November 2010, Dexu Wholesale Property lodged with the council the development application in respect of the land.

The development application was subject to impact assessment and therefore, was publicly notified. The appellant, which owns and operates another shopping centre close to the land, made a properly made submission to the council objecting to the proposed development.

In February 2012, the council resolved to approve the development application and issued Dexu Wholesale Property with a negotiated decision notice. The appellant commenced an appeal in the court against the decision of the council to approve the development application.

The issues

The main issue in the appeal was the appropriateness of the location and scale of the largest element of the proposed development, being the proposed expansion of the supermarket under the council's planning scheme.

The land was located within the Commercial 3 (City Centre Support) sub-area under the council's planning scheme, the intent of which was to support *"development that has an integrated commercial and residential focus"*.

This was in contrast to the existing 'Willows' shopping centre, which was located within the Commercial 1 (City Centre Core) sub-area of the council's planning scheme. That particular sub-area supported development, which had a 'dominant commercial focus'.

Appellant's position

The appellant asserted that the proposed expansion was inconsistent with the intent of Commercial 3 (City Centre Support) sub-area under the council's planning scheme in that no residential component was proposed and Commercial 3 (City Centre Support) sub-area was subordinate to the Commercial 1 (City Centre Core) sub-area and there were no sufficient grounds to justify an approval of the development application despite the conflict (**Issue 1**).

The appellant also asserted that there was no necessity for the proposed expansion to be located on the land, as it could appropriately be located on the land, which contained the existing shopping centre and was located within the Commercial 1 (City Centre Core) sub-area of the council's planning scheme (**Issue 2**).

Co-respondent and councils' position

Dexu Wholesale Property (supported by the council) submitted that the proposed expansion was not in conflict with the council's planning scheme and if conflict was found to exist, there were sufficient grounds to warrant an approval despite the conflict.

Decision

The court noted that whilst it was for the co-respondent to persuade the court that the appellant's appeal should be dismissed, typically, the appellant being the submitter would identify the relevant issues and important points for consideration.

In addressing Issue 1, the court, by reference to the decision of *Atkinson v Ipswich City Council* (2006) QPELR 550, noted the general principle that a location that was expressly designed to provide support to another area or for some desired outcome should not be overtaken or supplanted by future development. However, the court did not consider the proposed development offended the general principle. Further, when applying a broad interpretation of the council's planning scheme, the court found that:

- it was unlikely that the intention of the council was to require all future development of land within the Commercial 3 (City Centre Support) sub-area to comprise of both commercial and residential components;
- commercial and residential developments/uses in the Commercial 3 (City Centre Support) sub-area were expected to complement one another and operated harmoniously together;
- the Commercial 3 (City Centre Support) sub-area presently contained both commercial and residential developments;
- the proposed development would not adversely affect the residential and commercial developments currently in the Commercial 3 (City Centre Support) sub-area;
- the proposed development was respectful of the streetscape and the residential uses opposite to it and, to a certain degree, would improve the amenity of the area.

The court therefore found that the proposed development was not in conflict with the council's planning scheme.

In the event that any conflict asserted by the appellant did exist, the court's view was that there were sufficient grounds to warrant the approval of the development application.

The court therefore found that the proposed development was not in conflict with the council's planning scheme.

In light of this finding in respect of Issue 1, no consideration, in a significant way, was given to the matters raised as part of Issue 2.

Held

The court held that the appeal be dismissed.

Can cultural heritage significance be debated?

Ronald Yuen | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cowan v Brisbane City Council & Ors* [2012] QPEC 81 before Rackemann DCJ

February 2013

Executive Summary

The Planning and Environment Court heard an appeal against the Brisbane City Council's decision to refuse an application for a development permit to facilitate the demolition of a residential building which was listed in the Council's Register of Heritage Places and Precincts in schedule 1 of the Heritage Register Planning Scheme Policy. The court was required to consider whether the proposed development was in conflict with the provisions of the Heritage Place Code of the *Brisbane City Plan 2000*.

Case

This case concerned an appeal initiated by Ben Cowan as trustee for the Prates-Cowan Family Trust against the council's refusal of an application for a development permit to facilitate the demolition of a residential building, known as "Gwandoben", located at 42 Maxwell Street, New Farm.

Facts

Gwandoben was first constructed as a two-storey 1930's mock Tudor style residence. It was designed by the architect James Collin for a local businessman, Mr Mervyn Dodwell. The residence was extended only a few years after its initial construction. The extension was well integrated with the initial construction.

In the mid-1940s, after the Dodwells departed, the building was converted into flats. In the 1960s, a three-storey extension for flats was attached to the south-eastern side of the building. Both the original residence and the later extension had been used as residential units.

The proposed demolition was impact assessable development (generally inappropriate), due to Gwandoben being entered on the heritage register. The proposed demolition attracted a large number of objections and a large proportion of the submitters elected to join the appeal as co-respondents.

The Heritage Place Code was applicable in assessing proposed building work (including demolition) on premises that included a heritage place and therefore, it relevantly applied to the assessment of the proposed demolition.

Decision

Could cultural heritage significance be debated?

The court noted that the appellant's case rested, not on the basis of respectful and sympathetic redevelopment of a heritage place, but rather on the assertion that Gwandoben had no cultural heritage significance for the purpose of the Heritage Place Code. On that basis, the appellant contended that either the proposed demolition was not in conflict with the Heritage Place Code (since it only sought to protect cultural heritage significance) or any conflict was "textual" only and that the lack of cultural heritage significance, in fact, provided a sufficient ground to warrant approval notwithstanding any residual conflict.

The co-respondents submitted that it was not appropriate for the court to permit the appellant to use the appeal as a de-facto merits review of council's much earlier decision to enter Gwandoben on the heritage register. They argued that the heritage register should be accepted and that in the absence of any subsequent event which might have reduced, extinguished or lessened the cultural heritage significance applicable to Gwandoben, the application for the proposed demolition should be refused.

The appellant pointed out that the council's planning scheme acknowledged that the heritage register was fallible, in that once an application was lodged over a site listed in the heritage register, the council would prepare a report, to assist in the assessment of the proposal against the Heritage Place Code, which might "demonstrate that the site is not worthy of retention on the Register". If that occurred, the council would initiate the process of removing the site from the heritage register. However, the report would not override the need for addressing the Heritage Place Code as part of the proposal. Whilst the court supported the appellant's assertion regarding the fallibility of the heritage register, the court noted that the Heritage Place Code did not expressly contemplate approval of an application to entirely demolish a place on the heritage register.

The court further noted that whilst the entry of Gwandoben in the heritage register triggered the requirement for an application for demolition, it did not provide conclusive evidence that Gwandoben did indeed have cultural heritage significance, or that the content of any significance accorded with the citation in support of the listing. The court therefore accepted that it was appropriate for the appellant to call into question whether Gwandoben currently possessed the cultural heritage significance.

In that regard, the court observed that, if the evidence established that Gwandoben had no cultural heritage significance, there would be no conflict with the council's planning scheme or that any remaining conflict with the council's planning scheme would be "textual" rather than substantive and there would be a sufficient basis to grant an approval for the application for the proposed demolition.

The criteria for significance

The following criteria in section 2.1 of the Policy, according to the council's citation, were identified as relevant for the entry of Gwandoben on the heritage register by virtue of its cultural heritage significance for the purpose of the Heritage Place Code:

It is important in demonstrating the evolution or pattern of the City's or local area's history;

It demonstrates rare, uncommon or endangered aspects of the City's or local area's cultural heritage;

It is important because of aesthetic significance;

It has special association with the life or work of a particular person, group or organisation of importance in the City's or local area's history.

In addition to the particulars relied upon in the earlier citation in respect of the fourth criterion, the council submitted that, as well as the association with Mr James Collin, it relied on Gwandoben's "special association" with the Dodwells as an aspect of its cultural heritage significance.

Was Gwandoben important in demonstrating the evolution or pattern of the city's or local area's history?

After considering the history of Gwandoben and the parties' experts' opinions, His Honour preferred the evidence of the council's expert and concluded that, whilst it might appear that Gwandoben was neither an intact 1930s large residence nor a post-war purpose-built flat, the 1930s core of the building was readily recognisable, despite the alteration and extension, such that it continued to demonstrate that part of the evolution or pattern of New Farm's history and, to the extent it related to the 1960s extension, the extension exemplified the built-form in the 20th Century in New Farm, which included the adaptive conversion and extension of existing houses to facilitate multiple occupancies both before and after World War II.

The court found that the components of Gwandoben had importance in showing the evolution or pattern of New Farm's history and therefore, it was demonstrative of, as opposed to merely a part of, the local history. Accordingly, the court held that the appellant had not demonstrated that Gwandoben failed this criterion.

Did Gwandoben demonstrate rare, uncommon or endangered aspects of the city's or local area's cultural heritage?

Based on the court's earlier observation that the 1930s part of Gwandoben was readily recognisable, it rejected the appellant's contention that the extensions and alterations destroyed the 1930s part of the building, being the Tudor style, which contributed to Gwandoben demonstrating an uncommon aspect of New Farm's cultural heritage.

The appellant further contended the rarity or uncommonness of Gwandoben could not have been demonstrated given a reasonable number of intact examples remained across Brisbane. Whilst the court accepted that it had not been demonstrated that the type of house like Gwandoben was uncommon on a city-wide basis, the criterion was satisfied if the building demonstrated uncommon aspects of the local area's cultural heritage, which it concluded it did.

The court therefore held that the appellant had not demonstrated that Gwandoben failed this criterion.

Was Gwandoben important because of its aesthetic significance?

The court observed that the relevant test was whether Gwandoben was important because of its aesthetic significance. A relevant factor in assessing the importance of Gwandoben because of its aesthetic significance (if any) was the extent to which the appearance of the building could be appreciated.

The court noted the vantage point for viewing Gwandoben was from the west, including from the Brisbane River and Kangaroo Point, and agreed with the council's expert that the view provided a "pleasing appearance" to observers. The court further noted that the pleasing nature of its appearance was appreciated in the context of a historical development of a type which was now uncommon, and stood in visual contrast to what otherwise prevailed in the area. Accordingly, whilst it was a marginal case, in its context, Gwandoben did possess some importance in respect of aesthetic significance. The court therefore held that the appellant had fallen short of demonstrating that Gwandoben failed this criterion.

Did Gwandoben have a special association with the life or work of a particular person, group or organisation of importance in the city's or local area's history?

The court observed that, in this case, the criterion required the identification of the relevant person of importance in either the city's history or the local area's history and, further, a "special association" between the heritage place and either the life or work of that person.

The court first examined whether the architect of Gwandoben, Mr James Collin, was a person of importance in the city's or local area's history. Whilst the court did not accept the appellant's contention that Mr Collin was merely a "minor architect", the court, having regard to Mr Collin's involvement and contributions during his time as a notable architect, did not find Mr Collin to be satisfied as a person of importance in the history of Brisbane or in particular, New Farm.

The court then examined whether Gwandoben had a special association with the Dodwell family. In reaching his conclusion that no special association existed, the court observed that whilst the original owner's father, Mr Alexander Dodwell, could be said to be a person of importance, he lacked the requisite "special association" with Gwandoben, as it was the house of his son, Mr Mervyn Dodwell and daughter-in-law. Conversely, the court found that Mr Mervyn Dodwell might have a special association with Gwandoben but he was not a person of importance in Brisbane's or New Farm's history.

Accordingly, the court was satisfied that Gwandoben failed this criterion.

Held

The court held that the appeal be dismissed.

Development in critical habitat?

Ronald Yuen | Elton Morais

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Traspunt No. 4 Pty Ltd v Moreton Bay Regional Council* [2012] QPEC 70 heard before Andrews SC DCJ

February 2013

Executive Summary

This case involved an application filed in the Planning and Environment Court by Traspunt No. 4 Pty Ltd seeking a declaration that its development application for the clearing of vegetation (tree clearing for essential infrastructure) on land located in Rothwell lodged with the Moreton Bay Regional Council was deemed approved, as the council had failed to decide the matter in accordance with the required timeframes set out under the *Sustainable Planning Act 2009* (SPA).

Facts

On 6 February 2012, the applicant lodged the development application with the council.

On 23 May 2012, council advised the applicant by written notice that it had extended the decision making period by 20 business days to 21 June 2012, in accordance with section 318(2) (Decision-making period – generally) of the SPA.

On 20 June 2012, the council requested a second extension to its decision making period pursuant to section 318(4) (Decision-making period – generally) of the SPA. That request was not granted by the applicant. As a result, the decision making period for the development application expired on 21 June 2012.

On 28 June 2012, the applicant sent a deemed approval notice to the council in accordance with section 331(1) (Deemed approval of applications) of the SPA.

The applicant sought a declaration that the development application was the subject of a deemed approval by the council.

Issues

The issue was whether the applicant had discharged its onus of proof to establish that the development application was not one of the following exceptions (relied upon by the council, in its submissions):

- an application for development in "critical habitat" under the *Nature Conservation Act 1992* (NCA) (**Issue 1**);
- an application for development in "an area of major interest" under the NCA (**Issue 2**);
- a vegetation clearing application under the *Vegetation Management Act 1999* (VMA) (**Issue 3**)

If the applicant established that the development application did not fall within one of the exceptions, then the applicant would be entitled to the declaration sought that there was a deemed approval.

Decision

In regard to Issue 1, the applicant submitted that:

- land falling within the meaning of "critical habitat" as defined in the NCA was not a "critical habitat" for the purpose of the NCA unless and until it was registered;
- the subject land did not meet the criteria for "critical habitat" set out under the NCA, as:
 - the land was not 'essential for the conservation of a viable population of protected wildlife or community of native wildlife', by way of affidavit evidence;
 - the mapping relied upon by the council was made under the VMA (rather than the NCA) and therefore, did not operate as a map for the purposes of the NCA in that designations of vegetation made under the VMA were for conservation of vegetation and not for conservation of vegetation for the benefit of a particular animal despite it specifically relating to koalas.

The court noted that:

- the absence of any entry on the register showing any land to be "critical habitat" did not necessarily mean that all land in Queensland lacked the qualities of "critical habitat" and that the subject land lacked the qualities of "critical habitat";

- the applicant did not place before the court any positive evidence to suggest the subject land lacked the qualities, which would meet the criteria for a "critical habitat" area under the NCA.

In the circumstances, the court found that the applicant had failed to discharge its onus that the subject land did not meet the criterion for "critical habitat" under the NCA.

In regard to Issue 2, the applicant relied on a similar argument as Issue 1 and led no evidence to demonstrate the subject land did not meet the criterion for "an area of major interest" under the NCA. The court noted it was unnecessary to consider this issue about which the applicant carried the onus.

In regard to Issue 3, given the nature of the development application and the mapping of the subject land under the VMA, the court considered it was unnecessary to resolve the applicant's arguments relating to this issue.

Held

The application was dismissed.

Is it a properly made development application?

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Newcomb & Ors v Brisbane City Council & Anor* [2010] QPEC 71 heard before Searles DCJ

February 2013

Executive Summary

This case involved an appeal to the Planning and Environment Court against a decision of the Brisbane City Council to approve a development application by Aspect Property Group Australia Pty Ltd. One of the grounds of the appeal was that the development application was not a properly made application under the *Sustainable Planning Act 2009* (SPA). By order of the court, this issue was ordered to be determined as a preliminary point, which was ultimately dismissed.

Case

This case involved an appeal to the Planning and Environment Court by Simon Newcomb, Jenny Newcomb, Richard Steinberg, Pip Ochre, Camille Smith-Watkins, Barry O'Sullivan and Lara Harland against a decision of the Brisbane City Council to approve a development application by Aspect Property Group Australia Pty Ltd.

One of the grounds of the appeal was that the development application was not a properly made application under the SPA. This issue was ordered by the court to be determined as a preliminary point.

Facts

On 6 December 2011, JFP Urban Consultants Pty Ltd lodged on behalf of the Aspect Property Group a development application for a development permit for a material change of use, reconfiguration of a lot and preliminary approval for building work in relation to the erection of a new multi-unit dwelling and shop/office/restaurant over land located at 28-32 Morrow Street and 2 Harrys Road, Taringa, more particularly described as Lots 1 and 2 on RP54864 and Lot 36 on SP159242.

The land was within the Medium Density Residential Zone in the *Brisbane City Plan 2000*.

The council approved the development application on 4 July 2012.

The appellants alleged that the development application was not a properly made application under the SPA on the following grounds:

1. The development application failed to address the *Medium Density Residential Code* of the City Plan, in that:
 - (a) section 260(1)(c) (Applying for development approval) of the SPA was breached as the development application was not accompanied by mandatory reporting information in relation to the Code;
 - (b) section 260(3) (Applying for development approval) of the SPA was breached due to the failure to provide that information and because what was provided, being an assessment against the *Residential Design – High Density Code*, was materially incorrect and in breach of the Aspect Property Group's declaration of compliance.
2. The development application and supporting documents incorrectly described the height of the proposed development.
3. The development application and supporting documents did not include the heights of the retaining walls within the proposed development.
4. The acoustic report accompanying the development application was not adequate in that it failed to comply with the *Code of Practice – Railway Noise Management, Guide for development in a Railway environment and QLD Development Code Mandatory Part 4.4*.
5. The development application and supporting documents did not reference nor did it address the proposed development's compliance with the *Toowong Indooroopilly Local Plan*.

Decision

Ground 1

In addressing the issues raised in ground 1, the court noted the following:

- It was clear from the development application, in particular the omission of the reference to the Code, that the co-respondent, Aspect Property Group, considered the High Density Code was applicable given the existence of the draft Taringa-St Lucia Renewal Strategy;
- The council however, was of a different view and sought further information in respect of the Code;
- By letter dated 28 February 2012, JFP Urban Consultants responded to the information request and dealt with the Code in detail. However, due to an oversight, the enclosure of a code assessment checklist addressing the provisions of the relevant code was not included in the letter to the council. The checklist was later sent to the council on 21 March 2012, being the last day of public notification of the development application, but was not posted on the council's website until the following day, which as asserted by the appellants denied potential submitters' access to the checklist.

The court agreed that potential submitters were denied access to the checklist but were not denied access to the development application, the council's information request and the co-respondent's response to the request. However, the court noted that given the contents of those documents, it could not be said that the assessment manager or any prospective submitter was denied access to sufficient information to allow an informed decision to be made as to the approval of the development application or whether or not to lodge a submission such that the development application could not be said to be properly made. The court also noted that the co-respondent had no obligation to provide the checklist.

The court further observed that no reasonably intelligent and diligent prospective submitter could have been under any misapprehension that the Code was, from and after the council's information request, to be regarded as the relevant code in the assessment exercise.

In respect of the alleged breach of the declaration of compliance made by the co-respondent, the court found that the declaration was not one that purported to declare that all mandatory supporting information therein set out did, in fact, accompany the development application, but rather only that what was provided was true and correct. Therefore, there was no breach of the declaration.

The court therefore found that the appellants failed on this ground.

Remaining grounds

Whilst it was not strictly necessary to deal with the remaining grounds (as conceded by the appellants, they would not in effect have allowed the application), the court dealt with them for the sake of completeness.

Ground 2

The court noted that the question of the proposed building height turned on ones interpretation of the term "storey".

The court found that differing views or interpretations as to the appropriate characterisation of the number of storeys would not render the development application not properly made.

Ground 3

The court found that the plans accompanying the development application (at 1:100 scale at A1) showed all of the development sought, including the location and height of any proposed retaining walls. The height was further clarified by the town planning report which accompanied the development application.

Ground 4

The court found that the non-compliance issues raised by the appellants in relation to the acoustic report were not mandatory requirements in the approved form, and consequently not matters that went to whether the development application was properly made.

Ground 5

The court found that, given the land was not within any precinct of the Local Plan, any failure to address the Local Plan in great detail was of practically no relevance to the assessment, and would not preclude a prospective submitter from assessing the information needed to lodge a submission.

Held

The application was dismissed.

Deemed refusal upheld by the court

Ronald Yuen | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Shardlow & Ors v Moreton Bay Regional Council* [2012] QPEC 82 heard before Robin QC DCJ

March 2013

Executive Summary

This case was an appeal to the Planning and Environment Court against the deemed refusal by the Moreton Bay Regional Council of a preliminary approval varying the effect of the *Pine Rivers Planning Scheme 2006* pursuant to section 3.1.6 (preliminary approval may override a local planning instrument) of the *Integrated Planning Act 1997 (IPA)* for a "proposed Residential Estate (consistent with the Residential A zone)" relating to a proposal in Samford Village.

The court held that the planning arguments of the appellants, Ross Wayne Shardlow, Judy Mary, Francis Leonard Lippett and Frances Noela Lippett for the proposal, which would allow residential development to occur in a park residential area did not justify the approval of the development application.

Case

The court was required to determine the development application under section 3.5.14A (decision if application under s3.1.6 requires assessment) of the IPA. This relevantly included a consideration of the planning merits of the proposal, including issues of character and amenity, need, compromising of future planning for the area, efficient infrastructure provision, the effect of the *South East Queensland Regional Plan 2009 - 2031 (SEQRP)* and consistency with the planning scheme.

Facts

General

The appellants owned two parcels of land totalling approximately 17,000m² in area, and sought a preliminary approval allowing them to potentially create 20 residential lots. The council did not decide the development application within the prescribed timeframe, placing the appellants in a position to commence the appeal against a deemed refusal.

It was noted that the level of assessment for the uses (being detached house, associated unit and home business) for which the preliminary approval was sought on the use codes was not varied (as those uses would be consistent uses if compliant with the applicable codes in the Park Residential Zone, the Residential A Zone and the Special Residential Zone and self-assessable, code assessable or impact assessable in the relevant zone according to the same criteria and irrespective of the zoning the same use code). However, whilst the uses of the subject site might be unchanged there was a very considerable difference between a total of two detached dwellings exploiting the use.

The court noted that the respondent's inability to determine the application, perhaps due to the weight of submissions, had led to its firm opposition to the development in the appeal.

Unitywater was the authority responsible for water supply and sewerage services for the area, and was inclined to support the proposal as:

- insofar as water supply was concerned, water mains would be upgraded at the appellants' expense;
- insofar as sewerage was concerned, the actual experience in the relevant catchment indicated that the proposal could be accommodated despite the existing sewerage infrastructure, having already reached its theoretical capacity.

The prematurity of the application, and its impact on future planning for the area was considered by the court at [13]:

Although the outcome here will not, as a matter of law, constitute a precedent, in practical terms, as was conceded, approval of the proposal will open the way for similar development throughout the enclave...The present situation is one in which, effectively, the planning future of the entire enclave, which would logically be considered as a whole, is up for determination.

The question of need for residential A-type allotments in the small community of Samford Village, where land was limited and the character of the village could be compromised by large numbers of new allotments, was considered in context, with the court stating at 20 that *"this may be a case of a need which simply cannot be satisfied from the constrained resource available without unacceptable harm to that resource"*.

Decision under section 3.5.14A of the IPA

In working through section 3.5.14A(2) (decision if application under s3.1.6 requires assessment) of the IPA, the court discussed the following:

- Whether any desired environmental outcomes were compromised by the proposal, with the court preferring the respondents' arguments that the DEOs concerning amenity and community identity were at risk in the enclave if the proposal was carried out.
- Whether it was necessary to compromise the achievement of any DEOs in order to further the outcomes of the SEQRP, which was not reflected in the planning scheme. The SEQRP was not considered to contain any outcomes which justified overriding the relevant DEOs. In discussion of the SEQRP, the court noted that the relevant provisions of the SEQRP were not opposed to the development proposal, but rather that they left the establishment and refinement of urban planning to local government planning schemes.

The court also considered it necessary to identify whether there were other conflicts with the planning scheme, which it accepted that there were, mostly due to the urban density and scale of the development.

The court also accepted the following point regarding the status of the planning scheme made in the planners' joint expert report, quoted at [23] that *"if the current properly held policy of the planning authorities is to be altered this should be the result of an appropriate planning process that may form part of the planning scheme review...there is no need to deviate from the current planning policies prior to the completion of those processes"*.

Decision

The court expressed some concern about the capacity for infrastructure servicing, noting that the reason why further capacity seemed to exist despite theoretically being reached was somewhat unexplained. In any event, the court considered that the restrictions on capacity would exacerbate the issue of prejudicing the planning for the Samford Village.

On balance, the prejudicial effect on planning, along with the adverse impacts on character and amenity, conflict with the planning scheme, and a lack of sufficient grounds to justify the development application were determinative for the court.

Held

The appeal should be dismissed.

Can non-compliance with public notification be excused?

Ronald Yuen | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Multus v Rockhampton Regional Council & Ors* [2012] QPEC 85 heard before Long SC DCJ

March 2013

Executive Summary

This case involved the Planning and Environment Court hearing the application commenced by Multus Pty Ltd as trustee for the Multus Trust trading as Maxime in respect of a development application lodged with the Rockhampton Regional Council seeking various declarations and orders excusing the non-compliance with the public notification process under the *Integrated Planning Act 1997 (IPA)*. The court determined to excuse the non-compliance.

Facts

On 9 October 2012 the applicant, Multus Pty Ltd, filed an application in the court seeking various declarations and orders which included:

- a declaration that the Chief Executive of the transmission entity Queensland Electricity Transmission Corporation Limited trading as Powerlink Queensland, was not a referral agency for the development application;
- an order that the applicant's failure to notify the development application for the required notification period of 30 business days be excused;
- an order that the applicant's premature commencement of the notification stage be excused.

On 16 October 2012, the court ordered that the application and the merits appeal (no. D178/2011) in respect of the applicant's proposed development be heard together as the orders sought in the application were necessary in order to make the merits appeal competent.

The council and the Chief Executive of Department of Transport and Main Roads were the only parties which appeared at the hearing of the application and neither of them sought to actively oppose it.

The court summarised the following aspects of non-compliance to which the orders sought on the application were directed:

1. *public notification of the development application commenced prior to the start of the notification stage of IDAS. That is, the applicant had not completed its responses to Information Requests, or had not provided copies of those responses, to council prior to commencement of public notification;*
2. *public notification was not carried out for the required 30 business day period;*
3. *the development application lapsed as a consequence of non-compliance with notification requirements;*
4. *signage on the land identified (for a brief period) different dates for the closing of submissions;*
5. *material which was available for the public to inspect at council during the notification period was incomplete, as it did not include all of the referral agencies' Information Requests, and the applicant's responses to them; and*
6. *the development application required referral to Powerlink as an advice agency, but was not referred to that entity.*

Decision

The excusal power

The court noted the power to excuse non-compliance with a provision of the IPA was found in section 820 (Proceedings for particular declarations and appeals) of the *Sustainable Planning Act 2009 (SPA)*, as the development application was lodged prior to the commencement of the SPA, the merits appeal being required to

be heard and decided under IPA. The court, by reference to the decision in *Maryborough Investments v Fraser Coast Regional Council* [2010] QPEC 113, noted the discretionary power under section 820 (Proceedings for particular declarations and appeals) of the SPA was "broad and untrammelled" and that the explanatory notes of the SPA made express reference to "preserving rights to hearings notwithstanding technicalities concerning processes".

The court further noted that, if a non-compliance was not excused, a development would need to be renewed at significant cost, delay and inconvenience to the parties and that where the non-compliance was in reality an administrative error which, in the end, no party was prejudiced by it and was of the nature of technical oversight, the exercise of discretion relieving non-compliance would be appropriate.

Premature commencement of public notification

The court first noted that the "notification period" to which sections 3.4.3(3) (When can notification stage start) and 3.4.5(a) (Notification period for applications) of the IPA commenced on 5 February 2010.

However, due to an oversight, the Chief Executive of the Department of Transport and Main Roads was not included as a concurrence agency for the development application until 16 February 2010. The department subsequently made an information request on 19 February 2010 and a response was provided on 5 September 2010.

As the information and referral stage had not ended in accordance with section 3.3.20 (When does information and referral stage end) of the IPA, the public notification of the development application commenced earlier than stipulated by section 3.4.3(3) (When can notification stage start) of the IPA. Further, the material which was available for the public to inspect during the publication notification of the development application was not complete as it did not include the department's information request or the applicant's response.

The court determined to exercise the discretion to excuse this aspect of non-compliance, having regard to the following:

- the information request from the council and other referral agencies, except the department and the applicant's responses were all available on the council's file during the public notification period of the development application;
- the material which was available to potential submitters included a traffic engineering report forming part of the applicant's response to the respondent's information request;
- the department approved the development application subject to conditions;
- the non-compliance did not appear to have an adverse effect on the referral agencies or the council's decision-making role;
- traffic engineering issues were raised by submitters and parties in the appeal had an entitlement to raise traffic engineering issues if it proceeded to the merits appeal.

Shorter notification period

As the subject land contained or shared a common boundary with a "wetland" at its western boundary, the development application triggered a 30 business day notification period. However, the public notification of the development application only went for 14 business days.

The court determined to exercise the discretion to excuse this aspect of non-compliance, having regard to a range of matters, which included:

- any person sufficiently interested in the proposed development, or the wetland, was unlikely to have been misled, given the existence of the wetland was identified in the development application material as well as the Department of Environment and Resource Management's (**DERM**) information request;
- submissions lodged with the respondent expressly referred to concerns about impacts on the adjoining creek;
- there was no evidence of any unacceptable impact of the proposed development on the wetland and DERM provided suggested conditions of approval as part of its agency response;
- neither the respondent nor the referral agencies had been adversely affected by the non-compliance.

Alleged lapse of the development application

It was contended by the council that, had the referral to the department been taken into consideration, the development application lapsed on or about 7 October 2010 as public notification of the development application should have commenced within 20 business days after the applicant's response to the department's information request.

The court noted that this aspect of non-compliance arose from the non-compliance relating to the referral to the department and concluded that this aspect of non-compliance was merely technical and considered it appropriate that it be excused.

Different dates for the closing of submissions on notices on the land

It was submitted by the council that the notice on the subject land contained different dates for the closing of submissions. The notice initially identified the closing date for submissions as 17 February 2010 but was subsequently amended to read 24 February 2010, to align with the closing date identified in the notice in the newspaper and the notice on the subject land remained in that condition until removed on 26 February 2010.

The court did not consider, to the extent that it might amount to non-compliance, any person could have been materially affected by it. Further, given the determination on the non-compliance relating to the "shortened" notification period, the court believed excusal for any non-compliance on this account would be appropriate.

Powerlink as an advice agency

The council contended that the development application required referral to Powerlink as an advice agency, but the development application was not referred to that entity.

The court noted that it was not necessary or in fact possible on the materials to categorically resolve the issue on whether a referral to Powerlink was required. However, the court observed that Powerlink corresponded with the council by letter dated 12 February 2010, noting that its letter be treated as a properly made submission and that it did not oppose the proposed development based on conditions identified by it.

The court accepted the solution proposed by the applicant being that this issue be corrected by declaration that Powerlink be treated as a submitter, with the necessary consequential orders to enable protection of Powerlink's rights of participation in the appeal.

Discretionary considerations

The court observed that, when considering whether relief should be granted, the excusatory power under section 820 (Proceedings for particular declarations and appeals) of the SPA was considerably broader than that which previously applied under section 4.1.5A (How court may deal with matters involving substantial compliance) of the IPA.

Whilst there were various aspects of non-compliance, the court noted that many of them were technical in nature and some arose as a consequence of some other non-compliance and amongst all, the most significant aspect was the shortened notification period.

Relevant to the issue of public notification, His Honour noted that the proposed development was the subject of a "high degree of community awareness". In light of this and in the absence of any evidence of prejudice to any interest, the court considered it appropriate to grant the relief, subject to further determination of the precise form of the orders.

Held

The application was allowed.

Costs, natural justice and cartel provisions

Ronald Yuen | Edith Graveson

This article discusses the decision of the Queensland Court of Appeal in the matter of *Littleford v Gold Coast City Council & Anor; Moon v Gold Coast City Council & Anor* [2013] QCA 4 heard before Fraser and White JJA and Douglas J

March 2013

Executive Summary

This case involved applications for leave to appeal against orders made in the Planning and Environment Court (**P&E Court**) directing that costs ordered against Brian Littleford and Bruce Moon (**applicants**) respectively be assessed by a court appointed costs assessor on the grounds of natural justice and price fixing (and a cartel arrangement). The applicants also applied for an extension of time for filing the applications for leave to appeal. The Court of Appeal determined to refuse the applicants' applications.

Case

This case involved two jointly heard applications for leave to appeal against orders made by the P&E Court directing that costs ordered against each of the applicants be assessed by a court appointed costs assessor. The applicants also applied for an extension of time for filing the applications for leave to appeal.

Facts

In March 2010, a costs order was made by the P&E Court in favour of the Gold Coast City Council and National Trust, Queensland (trading as Currumbin Wildlife Sanctuary) against each of the applicants in the court appeal (no. 71/08 and 186/08).

In late September 2010, the applicants filed a notice of objection to the council's cost statement served on each of them in early September pursuant to rule 706 (1) of the *Uniform Civil Procedure Rules 1999 (UCPR)*, but the objection was incomplete.

In December 2010, the council applied for orders appointing a costs assessor and for the costs assessor to undertake the costs assessment pursuant to rules 710 and 713 of the UCPR. The council's application was heard by the P&E Court on 28 January 2011 where the applicants sought and were granted an extension of time to complete their objections to 30 April 2011.

In January 2011, the council served costs statements on the applicants. In early February 2011, the applicants served a notice of objection in relation to two of the four costs statements.

In May 2011, the council sought the applicants' agreement to the appointment of a costs assessor. The applicants responded in early June 2011 indicating that it was premature to appoint a costs assessor.

In late June 2011, the council applied for orders appointing a costs assessor and that its costs against the applicants be assessed.

Both of the council's and Currumbin Wildlife Sanctuary's applications for costs assessment were heard by the P&E Court on 29 July 2011 and 7 November 2011 where on each occasion, the applicants repeatedly sought an extension of time to complete their objections and were granted an extension.

On 14 December 2011, the council's and Currumbin Wildlife Sanctuary's applications were again heard by the P&E Court. The applicants' objections were not completed at that time and affidavit material was relied upon, which provided that *"it would not be before August 2012 that he would be in a position to complete the assessment in full and make an offer to each party"*.

The primary judge in the P&E Court heard the arguments about the reasons for the delay and noted that *"he was 'going to put a stop to it' that 'we've been having this argument back and forwards for a year now' and 'we're no further advanced', and that 'I have no confidence that it'd be resolved... were I to give you another couple of months'"*. The primary judge further explained that *"little would be achieved by giving the appellants further time to specify their objections"* and therefore, ordered that the council's and Currumbin Wildlife Sanctuary's costs be assessed and that the nominated costs assessor carry out the costs assessment. In addition, the primary judge made orders to the effect that the applicants be afforded an opportunity of making further objections to the costs statements.

The applicants made an application to the Court of Appeal for leave to appeal against the orders made by the primary judge in the P&E Court on the following grounds:

- the applicants were denied natural justice by the orders of the P&E Court on 14 December 2011 (**First Ground**);
- the orders for the costs assessment and the appointment of a costs assessor "erred by endorsing price fixing and a cartel arrangement in contradiction of" the *Competition Policy Reform (Queensland) Act 1996* (**Second Ground**).

The applicants also applied for an extension of time for filing the applications for leave to appeal.

Decision

Denial of natural justice

In respect of the First Ground, the applicants contended that the order for costs assessment made by the primary judge in the P&E Court was contrary to their reasonable expectation, based on representations purportedly made by the primary judge, particularly those at the hearing on 7 November 2011, that such an order would not be made without further notice and the making of the order denied them an adequate opportunity to respond.

The Court of Appeal noted that *"the primary judge's orders allowing successive adjournments and the order extending the time yet further at the last hearing were generous to the Applicants"*.

The Court of Appeal further noted that ample opportunity was given to the applicants to argue the orders sought by the council and Currumbin Wildlife Sanctuary.

Accordingly, it was determined that the applicants were not denied natural justice by the making of the order by the primary judge on 14 December 2011 and the First Ground could not succeed.

Contrary to the Competition Act

In respect of the Second Ground, the applicants contended that:

- schedule 2 to the UCPR, which fixed costs for specific items of work in relation to litigation in the District Court, was a cartel provision within the meaning of section 44ZZRD of the Competition Code as *"it was an arrangement or understanding made between the Court and solicitors whose clients' entitlement to recover costs were affected by Sch 2 of UCPR which had the purpose or effect of fixing, controlling or maintaining prices"*;
- schedule 2 was also prohibited by sections 45 and 45A of the Competition Code.

The Court of Appeal rejected the applicants' contention that schedule 2 to the UCPR constituted *"an anti-competitive arrangement or understanding between the Court and solicitors"*. The Court of Appeal further noted that there was no provision in schedule 2 which would suggest a purpose or effect of limiting competition between legal practitioners for litigious work. Instead, in the context of orders for costs assessment, schedule 2 would operate to limit the amount of money a beneficiary of an order, by way of a partial indemnity against the beneficiary's liability to pay costs to its lawyer, could recover from the other party.

The Court of Appeal also observed that the applicants raised the matters associated with the Second Ground for the first time. Accordingly, it was determined that the Second Ground could not succeed.

Whilst it was not necessary to decide the question, which was disputed, whether an extension of time was required for the applicants' applications for leave to appeal, given the refusal of both the First Ground and Second Ground, it was determined that this part of the applicants' applications should also be refused.

Held

1. The applications for an extension of time for filing the applications for leave to appeal be refused.
2. The applications for leave to appeal be refused.
3. The applicants pay the council's and the Currumbin Wildlife Sanctuary's costs of the applications on the standard basis.

Minor change of development application

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Canungra Commercial Pty Ltd v Scenic Rim Regional Council & Ors* [2013] QPEC 1 heard before Andrews SC DCJ

April 2013

Executive Summary

In this case the Planning and Environment Court was required to consider whether the proposed change involving a new parcel of land not in the original development application was a minor change.

Case

This hearing involved two proceedings being:

1. An appeal by the applicant, Canungra Commercial Pty Ltd against conditions imposed on a development approval for a material change of use for a shopping centre (business use) issued by Scenic Rim Regional Council which included submitters, being Tuan Nguyen, Anne Nguyen, and Canungra Foodworks Pty Ltd; and
2. An appeal by Tuan Nguyen, Anne Nyugen, Sien Van Nguyen and Thao Phuong Thi Pham against an approval for a material change of use for a shopping centre (business use) issued by the council,

in respect of land located at 10-16 Finch Road, Canungra.

Facts

On 27 August 2009, the appellant's consultants lodged a development application for a material change of use for a shopping centre (business use).

On 27 July 2010, the council approved the application subject to conditions.

Consequently, the appellant commenced the conditions appeal (Appeal No. 2465 of 2010) and the submitters commenced the submitter appeal (Appeal No. 813 of 2011).

On 17 June 2011, the court ordered both appeals be heard together.

The appellant, after discussions with the council, wished to amend the original proposal which involved the inclusion of a 3 metre wide footpath providing additional pedestrian access from the proposed development to Christie Street. The footpath would be on property which had not been part of the land and more properly described as Lot 8 on RP231328.

Lot 8 at the relevant time carried overland flow from the upstream catchment on the southern side of Christie Street, which passed through culverts under Christie Street. It was proposed that 3 x 1350mm underground pipes be constructed to carry water from the Christie Street culverts through Lot 8 to the pipes proposed under the shopping centre on the land and then to discharge to the north into Canungra Creek. The 3 proposed pipes under Lot 8 would be accompanied by infilling of an open grassed drainage channel on Lot 8 and the construction of the footpath with landscaping.

The appellant, with the support of the council, sought declarations from the court that the proposed change was a minor change within the meaning of section 350 (Meaning of *minor change*) of the *Sustainable Planning Act 2009* (SPA).

The issue for consideration by the court was whether the proposed change would result in a "*substantially different development*", having regard to whether the change "*introduce[d] new impacts or increase[d] the severity of known impacts*" and the fact that it applied to a new parcel of land.

The submitters submitted that the proposed change caused traffic impact and loss of car parks, loss of sensitive vegetation, pedestrian security issue, pedestrian safety issue from stormwater on the proposed footpath and tailwater impact.

Decision

The court noted, in the context of determining whether a change to development application resulted in a "*substantially different development*", it would be appropriate to have regard to the Statutory Guideline 06/09 (Substantially different development when changing applications and approvals).

However, the court, by reference to *Heritage Properties Pty Ltd v Redland City Council* (2010) QPELR 510 noted that:

... the list provided in the guideline is a list of those changes which "may" result in a substantially different development. It is not the case that a change of the kind there listed is necessarily to be judged to be substantially different. It may also be noted that the list is not intended to be exhaustive. There may be other changes not listed in the guideline which, in a particular case, can be judged to be more than minor, in that it involves a substantially different development. It may also be noted that the focus of the list in the guideline is, in some respects, on changes that would involve new, additional or increased impacts, rather than on changes which tend to ameliorate impacts... It has often been said that the question of whether a development constitutes a minor change ought to be considered broadly and fairly. In my view, that same approach is still appropriate under the definition in the SPA.

After having heard the evidence of the experts (some of which involved lengthy cross-examination) and a member of the owner of Lot 8, the court's findings in respect of the issues raised by the Submitters were as follows:

- traffic impact and loss of car parks – the new access point and loss of car parks would not create an adverse impact of any significance;
- loss of sensitive vegetation – the proposed change would not create an adverse impact of any significance with respect to vegetation;
- pedestrian security – there was insufficient security impact from the pedestrian use of the proposed footpath to result in a substantially different development;
- pedestrian safety from stormwater on the proposed footpath – there was insufficient risk to pedestrian safety from the risk of overland flow velocities on the proposed footpath to result in a substantially different development;
- tailwater impact – the proposed change would not create any material adverse impact from changed water flows.

The court held that the issue in question was whether the proposed change would result in a substantially different development and not whether there would be a consequence which had significance (such as its impact on Lot 8).

Given that the proposed change did not create adverse traffic, vegetation, pedestrian safety or stormwater impacts and further, the appellant still proposed to develop a shopping centre of the same scale, gross floor area, retail offering and style and did not propose to add new uses or new shopping facilities or offerings, by looking at it broadly and fairly, the proposed change would not result in a "substantially different development".

Held

1. It was declared that the proposed change was only a minor change within the meaning of the term as used in section 350 (Meaning of *minor change*) of the SPA.
2. The appeals be heard and determined on the basis of the amended plan the subject of the proposed change.
3. Costs be reserved.

Excusal of non-compliance with statutory requirements

Ronald Yuen | Elton Morais

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Morgan & Griffin Pty Ltd v Fraser Coast Regional Council & Parmac Investment Pty Ltd* [2013] QPEC 2 heard before Jones DCJ

April 2013

Executive Summary

This case involved the Planning and Environment Court hearing an application commenced by a commercial competitor Morgan & Griffin Pty Ltd challenging the lawfulness of a preliminary approval granted by the Fraser Coast Regional Council in favour of Parmac Investments Pty Ltd and the status of, and level of assessment for, a related development application lodged by Parmac Investments. The court determined to refuse the application.

Case

This case involved the court hearing an application commenced by the applicant challenging the lawfulness of a preliminary approval granted by the council in favour of Parmac Investments and the status of, and level of assessment for, a related development application lodged by Parmac Investments.

Facts

On 13 July 2011, Parmac Investments lodged a development application with the council for a preliminary approval for material change of use overriding the council's planning scheme for "commercial uses" on land located at Torquay. On 13 February 2012, the council issued a decision notice approving the development application.

On 21 August 2012, Parmac Investments lodged a related development application with the council for a development permit for a material change of use for a shopping centre on the land.

On 23 August 2012, the council issued an acknowledgement notice stating that the related development application was code assessable and that the Department of Transport and Main Roads was a concurrence agency. On 14 December 2012, the council issued a decision notice approving the related development application.

On 11 September 2012 (some three months prior to approving the related development application) the applicant filed an application in the court and commenced these proceedings.

Issues

The applicant raised three separate issues in respect of the preliminary approval and two associated issues in respect of the related development application.

In respect of the issues associated with the preliminary approval, the court summarised them as follows:

- "whether the first respondent had the power to approve the application for a preliminary approval given the failure to refer it to the relevant administering authority under the Environmental Protection Act 1994 (EPA) as a concurrence agency, namely the Department of Environment and Heritage Protection (DEHP)";
- "whether the preliminary approval exceeded the scope of the application by approving a shopping centre in circumstances where, on the face of the application, the Parmac Investments sought approval for "commercial uses"; and
- "whether there was a failure on the part of the Parmac Investments to provide sufficient public notification of the application".

In relation to the two issues associated with the related development application, one was not pursued by the applicant and the other one was decided against the applicant (but the court did not set out any reasons).

Decision

Referral issue

The applicant contended that the preliminary approval was invalid and of no effect as Parmac Investments:

- failed to refer the development application to the Department of Environment and Heritage Protection (**DEHP**) in accordance with section 272 (Applicant gives material to referral agency) of the *Sustainable Planning Act 2009 (SPA)*;
- did not avail itself of any of the opportunities provided under SPA to rectify the non-compliance and therefore the development application had lapsed pursuant to section 273(1) (Lapsing of application if material not given) of the SPA.

The court was of the view that, on a proper construction, the development application was required to be referred to the DEHP and therefore, concluded that the development application had lapsed.

Consequently, the relevant question was whether the non-compliance could be excused by the court pursuant to section 440 (How court may deal with matters involving non-compliance) of the SPA.

In essence, the applicant submitted that, by reference to the High Court decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 and other authorities including *Queensland Cement Queensland v United Global Cement Pty Ltd & Ors* (1999) QPELR 167, in circumstances where the court was concerned with a decision made beyond power (such as the decision of the council giving the preliminary approval), the discretionary powers of the court pursuant to sections 440 (How court may deal with matters involving non-compliance) and 456 (Court may make declarations and orders) of the SPA should be exercised strictly or narrowly.

In considering the applicant's proposition, the court had regard to a number of decisions given after *Queensland Cement* in the context of the operation of section 4.1.5A (How court may deal with matters involving substantial compliance) of the *Integrated Planning Act 1997 (IPA)* and the circumstances in which it might be exercised.

The court noted the remarks by Senior Judge Skoien in *Metrostar Pty Ltd v Gold Coast City Council* (2007) 2 Qd R 45 that:

Section 4.1.5A should be given a wide interpretation, not for the purposes of driving a horse and cart through the requirements of IPA, but for the purpose of allowing reason to prevail when IPA or another relevant Act has been breached. To put the matter very broadly initially one asks, 'what was the breach?' then, most importantly, 'what are the consequences of the breach?' and because the law should not allow the deceitful or the greedy to profit from a breach, it is relevant to ask whether it was a wilful breach, why it was done, whether there would be a material profit from the breach, whether there has been any pain suffered by the developer because of the breach and, of course, would the exercise of the discretion in favour of the developer be likely to shut out some submitter with a legitimate case to put.

The court further noted that:

...in cases such as these involving referral/concurrence agencies, it would also be necessary to enquire whether the broader public interests might have been prejudiced by the non-compliance.

By reference to some of the important statements in *Stevenson Group Investments Pty Ltd v Nunn & Ors* [2012] QCA 351 (a decision of which was heavily relied upon by Parmac Investments) and having regard to excusatory powers of the court under section 440 (How court may deal with matters involving non-compliance) of the SPA (which the court noted were even wider than they were under the IPA), the court concluded that it was not a purpose of the SPA that a breach such as the non-compliance would necessarily result in invalidity.

The court was satisfied that it was appropriate to exercise its discretion given under section 440 (How court may deal with matters involving non-compliance) to excuse the non-compliance, particularly where:

- Parmac Investments had not acted in a deceitful or even reckless manner;
- the development application was supported by the council who was responsible for orderly development within its local government area;
- no genuine prejudice had been caused to the applicant and there was no evidence of prejudice to DEHP or the public;
- had the non-compliance not been excused the development application would have to start again in which case, it would unnecessarily cause Parmac Investments additional costs and further delay in the provision of services and amenities for which a demonstrated need had been shown to exist.

Use Issue

The applicant contended that the council exceeded its jurisdiction under section 324(1) (Decisions generally) of the SPA in granting the preliminary approval which included an approval of a shopping centre which was not applied for.

Whilst, as the court observed, the public notices and the development application could have been couched in clearer terms, the court dismissed the applicant's contention, in particular having regard to the following matters:

- given the term 'shopping centre' was not a defined use in the council's planning scheme, Parmac Investments used 'commercial uses' in the development application, which was an identified use under the scheme; and
- there could be no doubt that the development application was for a shopping centre on any objective reading of the development application (comprising the relevant IDAS forms and accompanying planning report).

Public notification issue

The applicant contended that the public notification process was deficient for two reasons being that it did not:

- identify the nature, scale and density of the development the subject of the development application; and
- properly identify the eventual use of the land as a shopping centre, by its failure to use the words "shopping centre" to describe the development.

The court acknowledged that the public notices did not specifically refer to the land being developed as a shopping centre. However, the court, by reference to *Rathera Pty Ltd v Gold Coast City Council & Ors* [2000] QCA 506, dismissed the applicant's contention having regard to a number of matters which included:

- it was made clear that a large commercial development was proposed which would cover a significant portion of the land;
- the development application was made available for inspection at the council's office and the details of the development could be learnt from an inspection of the development application;
- details of the development in terms of its nature, scale and intensity were identified in the planning report accompanying the development application and any objective reading of the report would make it abundantly clear that the proposed development was for a shopping centre designed to accommodate numerous and a variety of commercial/retail activities;
- the public notices provided sufficient opportunity for interested members of the public to make submissions and the opportunity to secure the right to appeal against the council's decision;
- as submitted by Parmac Investments, it was highly unlikely that the applicant, who was a commercial competitor, would have been confused or misled by the public notices.

Held

1. The application be refused.
2. Any application for costs be made on or before 13 March 2013 and be accompanied by the applicant's written submissions on costs.
3. Any submissions in reply be delivered on or before 27 March 2013.



Blow torch applied to land valuation system in NSW

Anthony Perkins

This article explores the systemic failure to provide transparency in land valuation methodologies in NSW, identified through a parliamentary inquiry

May 2013

Executive Summary

Submissions received by the Parliamentary Land Valuation Inquiry have highlighted a systemic failure to provide transparency around land valuation methodologies and to treat landholders with respect, dignity and fairness.

Inquiry's intention to conduct comprehensive overhaul of land valuation system

The chairman of the NSW land valuation system inquiry, Mr Matt Kean MP, was reported in January 2013 to have said: "I am determined to apply the blow torch to the entire [valuation] process in order to safeguard the public's confidence." (See *Millions may have overpaid land tax, rates*, Sean Nicholls, Sydney Morning Herald, 28 January 2013).

Mr Kean has now well and truly delivered on that promise.

The final report in the inquiry was tabled in Parliament on 2 May 2013 after the inquiry considered more than 130 submissions including a submission made by Colin Biggers & Paisley. (Please see the executive summary and recommendations of the inquiry report for more information.)

Some of the "blow torch" changes recommended in the report might be considered radical, given the perhaps natural reluctance of Parliament to tinker with the basis on which land tax and council rates are assessed.

Key recommendations of the Land Valuation Inquiry

Some of the key recommendations of the Land Valuation Inquiry are summarised below.

- The office of the Valuer General of NSW should be abolished and a new independent Valuation Commission (with three Valuation Commissioners) established.
- The new Valuation Commission should adopt a rules based approach including, importantly, issuing public guidelines on appropriate valuation methodologies to be applied by valuers for different types of land.
- The circumstances in which landowners can seek a review of land values should be expanded and should include the ability to seek a review of a Valuation Commissioner's decision from the Administrative Decisions Tribunal (to be renamed the NSW Civil and Administrative Tribunal from 1 January 2014), in addition to the Land & Environment Court.
- A new valuation review mechanism and compulsory acquisition value process should be introduced. There are various recommendations made to improve the fairness of those processes to landowners.
- Council rates should be determined on the average of the last three years' land valuations to dampen fluctuations in land values, in a similar way to the current averaging mechanism used to calculate land tax.
- In response to a specific submission made by Colin Biggers & Paisley, the Attorney General should consider whether the Land & Environment Court should be vested with jurisdiction to grant administrative law remedies in land valuation appeals, particularly in light of the decision in *Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v The Valuer General (No. 2)* [2011] NSWLEC 34.

It is expected that Parliament will consider the report shortly in the context of the introduction of a new land value based fire and emergency services levy.

Filling in the watercourse

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Logan City Council v Poh & Anor* [2013] QPEC 003 heard before Searles DCJ

May 2013

Executive Summary

This case involved an application by the Logan City Council to the Planning and Environment Court for a declaration that Kim Quan Poh and Maria Ellen Poh have carried out development (filling and excavation) in excess of the prescribed amount under the *Beaudesert Shire Planning Scheme 2007*, without a development permit. The Planning and Environment Court held that a development offence had occurred and ordered remedial and rehabilitation works be undertaken.

Facts

The council contended that between 2010 and 2012, the respondents carried out filling and excavation works, without obtaining the necessary development permit for operational work on land located at 2397–2407 Waterford Tamborine Road, Tamborine and more particularly described as Lot 6 on RP 135397.

The council called expert evidence from Mr Neil Collins, a hydraulic engineer. Mr Collins analysed council's aerial laser survey data from 2009 against the site survey data from December 2012 and determined that an amount of 2,790m³ of fill had been imported onto the land. Mr Collins concluded that the filling represented a significant loss of floodplain storage but that the filling on the land was unlikely to have a significant adverse impact of flooding beyond the land. However, Mr Collins recognised the cumulative potential to adversely impact on flooding elsewhere in the floodplain.

The respondents put forward the following defences to the council's contention:

- that Mr Poh honestly believed that the filling undertaken by him on the land was covered by a Riverine Protection Permit issued by the State;
- the filling and excavation was carried out in the watercourse and was beyond the jurisdiction of the council to regulate;
- the filling and excavation was lawful because it was associated with an existing lawful use, namely agriculture;
- the filling and excavation was protected by schedule 4 (Development that cannot be declared to be development of a particular type – Act, section 232(2)) of the *Sustainable Planning Regulation 2009*, being exempt from being made assessable by a Planning Scheme;
- that the respondents would suffer potential financial hardship if the orders sought by the council were made.

Decision

Development offence

Firstly, the court accepted:

- that the carrying out of the filling and excavation by the respondents was assessable development;
- the evidence of the council's expert, Mr Collins and in particular, recognising the potential cumulative adverse impact and the importance of having balanced cut and fill which would maintain floodplain storage.

Secondly, the court accepted the council's arguments against the respondents contentions in respect of the necessity for the respondents to obtain a development permit prior to carrying out the filling or excavation, which included:

- The alleged honest belief held by the respondents that the Riverine Protection Permit dated 13 February 2002 authorised the filling or excavation constituted a mistake as to the law and not as to a fact. As any defence under section 24 (Mistake of fact) of the *Criminal Code Act 1899* was only available for a mistake of fact, the respondents would not be able to rely on it as a defence for this action.
- The respondents bore the onus of establishing any asserted existing lawful use which if demonstrated, would negate the necessity for a development permit for the filling and excavation work undertaken. However, the respondents failed to prove the existence of any lawful use.

- The council was the appropriate *assessment manager* for development applications in respect of the filling and excavation work undertaken, including the work within the watercourse of Clutha Creek. As indicated above, given that the work was assessable development, the respondents were obliged to submit a development application to the council and obtain an approval, but failed to do so.

Enforcement order sought by the council

In exercising his discretion when determining whether an enforcement order should be made:

- The court dismissed the respondent's contention that an honest belief was held that the filling of the land was authorised by law, particularly having regard to the number of repeated warnings given to the respondents by the council in relation to the filling and excavation work;
- The court recognised the importance of community interest in ensuring compliance with the law and did not consider the potential financial hardship on the respondents would outweigh such importance.

The court further noted that the respondents blatantly breached the law despite being given numerous opportunities to correct their misconduct.

Held

The court made the following orders:

1. A declaration that the respondents had committed a development offence pursuant to section 578 (Carrying out assessable development without permit) of the SPA, in that they have undertaken or caused to be undertaken, operational work, namely filling or excavation on the land without an effective development permit.
2. An enforcement order pursuant to section 604 (Making enforcement order) of the SPA that the respondents, by themselves, their servants or agents:
 - (a) cease all filling and excavation work on the land;
 - (b) be restrained from bringing onto the land soil and other materials used for the purpose of filling or excavating the land, without an effective development permit;
 - (c) remove all fill that was introduced, for which there was no effective development permit;
 - (d) carry out such remediation and rehabilitation works as necessary to restore the land as close as practicable to the condition it was in immediately prior to the filling or excavation taking place.

Fetter on future exercise of council's discretion

Ronald Yuen | Phoebe Bishop

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *BM Carr Holdings atf The Carr Farming Trust v Southern Downs Regional Council & Anor* [2013] QPEC 4 heard before Judge Searles DCJ

May 2013

Executive Summary

This case involved two applications by BM Carr Holdings Pty Ltd as trustee for the Carr Farming Trust following on from judgment delivered on 14 November 2012 for orders that (a) a condition, from the otherwise agreed conditions package with the Southern Downs Regional Council be deleted on the basis that it was void and of no effect as constituting a fetter on the future exercise of the council's discretion, and that (b) certain reserved costs be paid by the council. The Planning and Environment Court found that the condition in its entirety was void as a fetter on the future exercise of the council's discretion and invited the parties to accept an alternative wording of the condition. As to the application for costs, the court ordered the council to pay the appellant's costs on a standard basis of its appearances at three of the four directions hearings.

Case

The issues before the court were whether a condition of approval was void and of no effect as constituting a fetter on the future exercise of the council's discretion and whether the council should pay the appellant's costs of and incidental to its appearances at several directions hearings.

Facts

The appellant brought two applications before the court following on from judgment delivered on 14 November 2012 and sought the following orders:

- Condition 4 of the conditions package otherwise agreed by the appellant and the council be deleted on the basis that it was void and of no effect as constituting a fetter on the future exercise of the council's discretion; and
- the appellant's costs of and incidental to its appearances at directions hearings on 21 September 2012, 26 September 2012, 3 October 2012 and 20 December 2012 be paid by the council.

Condition 4 of the conditions package provided:

Those parts of lots 1 and 2 on RP 36824, Lot 1238 on CP M34534 and Lot 1 on SP 214513 within the 2.5 odour unit contour as shown on Figure 8 of the Second Joint Report of the Air Quality Experts dated 7 September 2012 (all within a 2.5 odour unit contour determined from time to time in accordance with the Queensland Government Guideline Odour Impact Assessment from Developments as amended or any subsequent document prepared for a similar purpose) are to be maintained as buffers to the approved development on pads 1, 4 and 5 ("the Development Buffer"). No dwelling other than a caretaker residence is to be developed in the Development Buffer.

The appellant argued that the condition was void and of no effect because it would place an unlawful fetter on the council's discretion with respect to all future development applications for the lots listed in the condition. In support of its argument the appellant relied upon *Hall-Bowden v Pine River Shire Council* (2006) QPELR 546 and *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth of Australia & Ors* (1977) 139 CLR 50 which evidenced the well-established principle making unlawful any attempt to fetter future exercise of discretion by a decision maker.

The council in response argued that the condition would not fetter the council's discretion in its consideration of any future application, in particular, given that:

- sections 313 (Code assessment – generally) and 314 (Impact assessment – generally) of the *Sustainable Planning Act 2009 (SPA)* set the parameters for the exercise of the assessment manager's discretion when considering an application in which discretion was not at large;
- the assessment manager was required to take into account any existing development approval which included any conditions attaching to it (see section 244 (Development approval includes conditions) of the SPA);

- a condition on any such extant approval operated as a fetter on the future discretion of the assessment manager, but that such a fetter was lawful and formed part of the terms on which the discretion was granted in sections 313 (Code assessment – generally) and 314 (Impact assessment – generally) of the SPA; and
- the relevant decision rules did not require the council to form a particular view about any future development application merely because of the existence of the condition under consideration but rather the condition would merely be a factor to be considered, albeit an important one.

Decision

Condition 4

The court accepted that sections 313 (Code assessment – generally) and 314 (Impact assessment – generally) of the SPA operated upon the discretion to be exercised by the assessment manager in the consideration of any development application, and any extant approval was but one of the matters to be taken into account in the consideration of a later application. However, the court noted that nothing in those sections or other provisions of the SPA had the effect of elevating an otherwise unlawful condition to a lawful one so as to entitle it to be properly taken into consideration in the exercise of the relevant discretion. The court further noted that, an unlawful condition of approval, to which the assessment manager must have regard in its assessment of a future application, could not be taken in consideration by the assessment manager in arriving at a lawful decision.

The court went on to observe that, under both sections, the assessment manager was obliged to assess a development application "having regard to" any development approval.

As part of the court's consideration of whether a provision in a statute was to attract the designation of "fundamental element", "focal point" or something of a similar kind, the court referred to *Zhang v Canterbury City Council* (2001) NSWCA 167; *R v Hunt ex parte Sean Investments* (1979) 180 CLR 322 and *Evans v Marmont* (1997) 42 NSWLR 70 and observed that, as each of those cases demonstrated "...before a particular provision in a statute is to attract the appellation of "fundamental element", "focal point" or any other synonym, the context must allow of it".

Whilst the court did not find it necessary to determine the point in relation to sections 313 (Code assessment – generally) and 314 (impact assessment – generally) of the SPA, the court doubted whether the requirement "to have regard to a development approval" could be said to be a "fundamental element" or a "focal point" in the decision making process of the assessment manager in any future development application.

The court considered that it was one of several matters to be taken into account and any extant development approval would not be determinative of any future application. In any case, the court did not believe it altered the fact that the decision of any future decision-maker would be at risk of being miscarried if consideration was given to an unlawful condition.

Having considered the definition of "buffer" in the *Southern Downs Regional Planning Scheme* and that the imposition of a buffer did not prohibit future development within the buffer zone, the court found that the final sentence of Condition 4 caused it to be void. More specifically it, in effect, prohibited residential development other than a caretaker's cottage and consequently, fettered the council's later discretion to decide a future application. Recognising the concern of protecting the amenity of any future sensitive receptors, the court agreed that the alternative condition proposed by the appellant would be appropriate and lawful if the prohibitory final sentence of Condition 4 were deleted.

Costs

The appellant sought orders that the council pay its costs of and incidental to its appearances at directions hearings on 21 September 2012, 26 September 2012, 3 October 2012 and 20 December 2012.

The court considered the circumstances giving rise to each of the directions hearings and found that the first three directions hearings were reasonable or necessary due to the council's failure to meet various obligations under the court orders. It was therefore appropriate, that the council pay the appellant's costs on a standard basis for its appearances on the first three hearings.

As to the directions hearing on 20 December 2012, despite the appellant's contention that the council should have been in a position on 19 December 2012 to sign off on the site based management plan, the court agreed, as submitted by the council, the timeframe was too short to allow it to do justice to the necessary requirement of checking all documents prior to the final sign off with the appellant. The court therefore was not persuaded that the appellant was entitled to its costs in relation to the 20 December 2012 appearance.

Held

It was held that:

1. Condition 4 as proposed by the council was void as a fetter on the future exercise of the council's discretion, and was deleted from the otherwise agreed conditions package.

2. Judgment in accordance with the draft judgment submitted on behalf of the appellant at hearing, with the insertion in the otherwise agreed conditions package of Condition 4 set out hereunder unless within seven days of today, the parties either notify agreement on an alternative Clause 4 or either party notifies the court that it wishes to make further submissions on an appropriate alternative Clause 4:

Those parts of Lots 1 and 2 on RP 36824, Lot 1238 on CP M34534 and Lot 1 on SP 214513 within the 2.5 odour unit contour as shown on Figure 8 of the Second Joint Report of the Air Quality Experts dated 7 September 2012 (or within a 2.5 odour unit contour determined from time to time in accordance with the Queensland Government Guideline Odour Impact Assessment from Developments as amended or any subsequent document prepared for a similar purpose) are to be maintained as buffers to dwellings from the approved development on pads 1, 4 and 5 ('the Development Buffer').

3. The appellant's costs on a standard basis of its appearances on 21 September 2012, 26 September 2012, and 3 October 2012 be paid by the council.



Court's powers to extend the relevant period of a development approval

Ronald Yuen | Edith Graveson

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cleveland Power Pty Ltd v Redland Shire Council* [2013] QPEC 9 heard before Andrews SC DCJ

May 2013

Executive Summary

This case involved an appeal by Cleveland Power Pty Ltd against the Redland Shire Council's decision to refuse its request to extend the relevant period of a development approval.

The Planning and Environment Court was required to consider the operation of section 388(1) (Deciding request) of the *Sustainable Planning Act 2009* (Qld) (SPA) where the council withdrew its opposition to the extension in the appeal.

The court concluded that, despite the council's position in the appeal, the court must have regard to the matters identified in section 388 (Deciding request) of the SPA but ultimately allowed the appeal and extended the period of the development approval.

Case

The court had to determine whether it needed to consider the matters identified in section 388 (Deciding request) of the SPA in circumstances where the council withdrew its opposition to the extension in the appeal. The court also had to consider the relevance of the council not opposing the proposed extension in the appeal and whether it was appropriate to allow the appeal and extend the relevant period of the development approval.

Facts

The development the subject of the appeal was a bio-mass power plant proposed to be built on land at Mount Cotton. The appellant applied for a development approval for a material change of use and a related environmental approval for Environmentally Relevant Activity No 17 which was subject to impact assessment.

More than 300 submissions were made opposing the development. The development application was approved by the council and a submitter appeal was commenced in relation to the council's decision to approve the development application.

The submitter appeal was resolved between the parties and the court made orders granting a development approval on 7 November 2007. The relevant period of the development approval was four years.

On 7 November 2011, the appellant lodged a request with the council pursuant to section 383 (Request to extend period in s 241) of the SPA requesting an extension of the relevant period of the development approval. The council refused the appellant's request and the appellant lodged an appeal against that refusal. At a review, the appellant sought an order with a provision for allowing the appeal and extending the relevant period of the development approval. The council did not oppose the order.

The court identified the issues in the appeal as follows:

- whether the court was required to have regard to the matters identified in section 388 (Deciding request) of the SPA where the council had withdrawn its opposition to the extension for the relevant period of the development approval (**First Issue**);
- the relevance of the council not opposing to the order allowing the appeal and extending the relevant period of the development approval (**Second Issue**); and
- whether it was appropriate to allow the appeal and extend the relevant period of the development approval, where further rights to make submissions would be available if a further development application was lodged and such rights were likely to be exercised by members of the public (**Third Issue**).

Decision

First Issue

The appellant contended that the matters in section 388 (Deciding request) of the SPA did not need to be established in order for the court to hear the appeal in circumstances where the council did not oppose the order allowing the appeal.

The court accepted that the matters in section 388 (Deciding request) of the SPA did not need to be satisfied in order for the court to hear the appeal, but the court was still required to consider the matters in section 388 (Deciding request) of the SPA.

Second Issue

The appellant contended that it was relevant that the council did not oppose the order and that its decision not to oppose should be given more weight as the council acted to protect public rights.

In considering the appellant's submissions, the court noted that it seemed sensible that the court should have regard to the fact that the council no longer opposed the extension of the relevant period of the development approval.

However, the court emphasised that in its capacity as the assessment manager under section 388 (Deciding request) of the SPA, the court "must only have regard to" the matters identified in that section. None of the matters in section 388(1) (Deciding request) of the SPA required the court to have regard to the "views" of the council (where it was not a concurrence agency).

Accordingly, the court concluded that the council's "views" in the appeal were not a matter to which the court could have had regard.

Third Issue

Having regard to the following matters, the court believed it was appropriate to allow the appeal:

- the development approval was consistent with current laws and policies;
- given that the public notification process for the development application attracted more than 300 submissions, any submission made in response to the development application, if remade, was unlikely to raise any new issue not already raised by submissions in the initial application process;
- whilst there could be new residents arriving after the public notification of the development application, given that the development approval was consistent with the planning documents, those residents should have a reasonable expectation that development as proposed could occur in the area.

Accordingly, the court found that:

there would be little utility in forcing the developer to undergo an extensive impact assessment process for the purpose of obtaining a development approval that would be, for all intents and purposes, consistent with the existing development approval and which would be unlikely to provoke a public submission that would raise any new issue for consideration.

Held

1. The appeal be allowed.
2. The relevant period of the development approval be extended for two years from the date of judgment.

Permissible change allowed despite likelihood of submissions

Ronald Yuen | Jamon Phelan-Badgery

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Cleveland Power Pty Ltd v Redland City Council & Ors* [2013] QPEC 7 heard before Jones DCJ

May 2013

Executive Summary

In a permissible change application regarding a development approval for a biomass power plant, the Planning and Environment Court accepted that the proposed changes did not result in a substantially different development, and whilst submissions were likely to be received given the controversial nature of the development itself, no new facts, matters or circumstances would result from the proposed changes.

In a related application by a third party seeking to be joined in the permissible change application, the court was not satisfied that the party was a necessary party nor, would it be desirable and just to enable the court to adjudicate effectively and completely on the matters in the issue, given that the central concern of the third party was whether or not the biomass power plant should have been approved in the first place, which was largely irrelevant for the permissible change application.

Case

This case was concerned with two applications. The first application was a permissible change application under section 367 (What is a *permissible change* for a development approval) of the *Sustainable Planning Act 2009* (SPA) which was brought by Cleveland Power Pty Ltd. The second related application was brought by the Birkdale Progress Association Inc (BPAI) who sought to be joined as a party to the permissible change application.

Facts

On 7 November 2007, the court granted an approval for a material change of use and an environmentally relevant activity for a biomass power plant on land situated in Mt Cotton, Queensland.

The approval was subject to a number of conditions, including conditions imposed by the then Environmental Protection Agency as a concurrence agency.

As the power plant would involve the use of significant amounts of sawdust and chicken manure as fuel, the development application attracted a significant amount of negative local attention and opposition. Of particular concern to the submitters were issues of amenity, specifically air quality, noise and visual amenity.

The BPAI was not a submitter in respect of the development application, nor had it sought to be joined as a party at any time prior to the permissible change application.

Decision

The Related Application

The court noted that BPAI's main concern was not whether the proposed changes to the approval constituted a permissible change under section 367 (What is a permissible change for a development approval) of the SPA but that the approval should never have been given in the first place.

Since the subject proceeding was primarily concerned with the permissible change application, the court noted that his jurisdiction was a limited one, namely to decide whether or not the proposed changes should be regarded as permissible changes under the SPA. As such, the court did not have the jurisdiction to go back and revisit the merits as to whether or not the biomass power plant should have been approved in the first place.

Whilst BPAI placed affidavit evidence of an environmental scientist before the court, none of the matters raised were concerned with the proposed changes and, consistent with the underlying concerns of BPAI, they addressed matters which might have been relevant at the development application stage.

Accordingly, the court concluded that due to the limited jurisdiction and having regard to the court's power to enable a party to join a proceeding under rule 61(1)(b) (Application of div 2) of the *Uniform Civil Procedure Rules 1999*, it was unpersuaded that BPAL was either a necessary party or a party which would be desirable, and just to enable the court to adjudicate effectively and completely on the matters in issue and therefore, the related application was refused.

The permissible change application

The proposed changes to the approval were described as falling into three broad categories as follows:

- physical changes by reference to dimensions, areas and heights;
- changes relevant to or necessitated by discrepancies between various design drawings and plans when compared with other plans and particularly, the approved plans;
- changes involving the issues of noise, air quality and wildlife.

The permissible change application was not opposed by the council, nor the Department of Environment and Heritage Protection and a number of changes involved the input of the Department, in particular those involved environmental sensitivity.

Of the requirements set out in section 367(1) (What is a *permissible change* for a development approval) of the SPA, the main concern was whether the changes would result in a substantially different development (see section 367(1)(a) (What is a *permissible change* for a development approval) of the SPA), and whether it would be likely to cause a person to make a properly made submission objecting to the proposed changes (see section 367(1)(c) (What is a *permissible change* for a development approval) of the SPA).

Having considered the applicant's affidavit material, the court noted that the various changes:

- were a consequence of various experts in various fields of expertise coming together to arrive at a superior result;
- if considered in totality, did not result in any material change to the dimensions or bulk of the proposal.

Although there was considerable opposition to the development, the court concluded that *"the changes, either singularly or collectively, do not result in a substantially different development, nor would they be likely to agitate a person, or persons, to make a properly-made submission. Put simply, the changes do not raise new facts, matters or circumstances. They go to addressing those that have already existed, and... by and large overall result in a number of significant improvements"*.

Held

1. The related application be refused.
2. The permissible change application be allowed.

Need for school outweighs loss of good quality agricultural land and conflict with Far North Queensland Regional Plan

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Mulgrave Central Mill Co Ltd v Cairns Regional Council & Anor* [2013] QPEC 6 heard before Everson DCJ

May 2013

Executive Summary

The Planning and Environment Court considered an appeal relating to a development approval for an educational establishment and other uses on a site located outside the urban footprint in the *Far North Queensland Regional Plan 2009-2031* and identified as good quality agricultural land and potential strategic cropping land.

Case

This case concerned an appeal by Mulgrave Central Mill Co Ltd to the Planning and Environment Court in respect of a decision of the Cairns Regional Council to grant the Seventh-Day Adventist School – Northern Australian Conference a preliminary approval for a material change of use pursuant to section 242 (Preliminary approval may affect a local planning instrument) of the *Sustainable Planning Act 2009 (SPA)* which made educational establishment (not exceeding 2,500m² of gross floor area), place of assembly, indoor sport and entertainment and outdoor sport and entertainment uses self-assessable development on land located in the Regional Landscape and Rural Production Area under the *Far North Queensland Regional Plan 2009–2031*, identified as Good Quality Agricultural Land (GQAL) and potential strategic cropping land (SCL) under the *State Planning Policy 1/12 Protection of Queensland's strategic cropping land (SPP 1/12)*. The subject site was located 350 metres outside the Gordonvale town boundary, surrounded by land used for sugar cane production, interspersed with rural lifestyle lots, and immediately opposite a cane railway line. The subject site was a historical cane block used for the production of sugar cane. However, in more recent times, it had been used for the agisting of horses.

Facts

The primary use for which the co-respondent, the Seventh-Day Adventist School, sought a development approval was educational establishment, so that it could establish a new school on the subject site.

The appellant's grounds of appeal related to conflict with the Regional Plan and the planning scheme for the former Cairns City adopted on 25 February 2009 on the basis that the subject site was outside of the urban footprint identified in the Regional Plan and the proposed development would result in the loss and permanent alienation of GQAL and SCL.

The *Far North Queensland Regional Plan 2009–2031 State Planning Regulatory Provisions* applied to the proposed development and provided that a material change of use for an educational facility in the Regional Landscape and Rural Production Area did not require assessment by the referral agency for the Regional Plan where the gross floor area would not exceed 2,500m².

Relevantly, the development approval stated that the gross floor area of the educational establishment must not exceed 2,500m².

Notwithstanding that the co-respondent sought a development approval for other uses in addition to educational establishment, in its submissions to the court during the appeal it sought orders that the appeal be allowed in part, and an approval be granted for lesser uses for a lesser currency period than that granted by the council. It was on this premise that the court approached the assessment of the issues and made its determination.

Decision

The court considered the following matters for determination:

- whether the proposed development would result in the loss and permanent alienation of GQAL, and to the extent relevant, SCL;
- whether the proposed development would be incompatible with, adversely affect, and compromise, surrounding rural uses and in particular, the efficient functioning of cane farming in the area;

- whether the proposed development would have unacceptable traffic impacts, in particular, upon the safe and efficient operation of the adjoining cane railway sidings;
- whether the proposed development conflicted with the Regional Plan and the Regulatory Provisions;
- whether there was conflict with the Cairns Plan and what weight should be given to the draft Mount Peter Structure Plan;
- whether the proposed development conflicted with the SPP 1/12.

QGAL and SCL

On the evidence of an agricultural scientist, it was indicated that whilst the subject site was QGAL class A and met the criteria for SCL, any alienation of QGAL or SCL would be restricted to the developed area and the balance of the subject site could be used for cane farming or other crops. On this basis, the court concluded that the proposed development would result in a minor loss and permanent alienation of QGAL and SCL.

Effect on surrounding rural uses

The court accepted the expert evidence which provided that appropriate conditions could be imposed to satisfactorily buffer the proposed development from surrounding uses and as such, that the proposed educational establishment would not be incompatible with, adversely affect, or compromise, surrounding rural uses.

Traffic impacts

The court took the view that notwithstanding that the cane farms in the vicinity of the proposed school would generate a significant amount of activity at harvest time, including tractors hauling cane bins to the cane rail sidings opposite the subject site, the traffic impacts caused by the proposed development could be satisfactorily addressed by way of conditions.

Regional Plan and Regulatory Provisions

The court found that given that the Regional Plan permitted limited small scale community activities in the Regional Landscape and Rural Production Area, notwithstanding that urban development was not generally encouraged outside the urban footprint, and the Regulatory Provisions contemplated an educational establishment having a gross floor area no greater than 2,500m² in the Regional Landscape and Rural Production Area, an educational establishment on the scale proposed by the co-respondent did not conflict with the Regional Plan or the Regulatory Provisions.

The court went on to indicate that if it was wrong in respect of conflict with the Regional Plan, it was satisfied that there were sufficient grounds to justify the approval of an educational establishment of no more than 2,500m² on the subject site, despite a conflict, given the community need for an educational establishment of the type proposed in the area.

Cairns Plan

Whilst the Regional Plan prevailed over the Cairns Plan, the court considered conflict with the Cairns Plan and the extent of weight to be given to the draft Mount Peter Structure Plan at the Appellant's request. Dealing with the latter issue, the court noted that the draft Mount Peter Structure Plan was still in the early stage of the plan making process and had not been subject to public notification, and as such, had been insufficiently progressed for it to be given any weight. The court noted the conflicts with the Cairns Plan were minor, and despite the minor conflicts, the community need for a school in the area was sufficient to justify the approval of an educational establishment of no more than 2,500m² on the subject site.

SPP 1/12

The court found that as the size of the proposed educational establishment was limited to 2,500m² in gross floor area, the policy outcomes sought by SPP 1/12 would not be compromised by the proposed development.

Held

The appeal be allowed in part that the development approval be limited to an approval for an educational establishment having a gross floor area of no more than 2,500m² and no other uses, with a standard currency period of 4 years.

Unlawful earthworks

Ronald Yuen | Elton Morais

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Kube & Anor* [2013] QPEC 11 heard before Robertson DCJ

June 2013

Executive Summary

This case involved an application commenced by the Sunshine Coast Regional Council in the Planning and Environment Court seeking declarations and enforcement orders for alleged unlawful works carried out by John Kube and Gillian Kube on land located at 76 Wharf Road, Bli Bli.

Facts

The land, at all material times, was within a Rural Precinct under the *Maroochy Plan 2000* and located within a Special Management Area "Flood Prone and Drainage Constraint Areas".

In August 2007, the respondents, John Kube and Gilian Kube, purchased the land (which was vacant at the time) which had previously been used for cane growing for a number of years prior. The respondents, prior to purchasing the land, obtained flood searches, which revealed that the land was flood prone and was the "end of the line" for stormwater flowing, whilst it was "not in a drainage deficient area" (which was later explained during the proceedings that that was not the case).

Shortly after the purchase, the respondents complained about flooding of the land for which the council was blamed, essentially for not properly conditioning upstream developments to mitigate the effects of stormwater flow from those developments within the catchment onto and over the land.

From 2007, the respondents commenced to excavate and fill the land. In association with the excavation and filling works, the respondents carried out significant works on the land which included:

- construction of building pads for the purpose of erecting a house and an industrial shed;
- construction of a driveway into the land;
- raising the levels in and around the dams including the south-east area of the land.

It was not disputed that the earthworks involved more than 50m³ of material. No development approvals were given for the works and there was no creditable evidence which suggested that the works were approved explicitly or implicitly by the council.

In March 2011, the council resolved to address the stormwater run-off issue by compulsorily acquiring drainage easements over 3 properties including the land.

In the subsequent 12 months and probably more extensively in 2012, the respondents carried out extensive earthworks in the northern and north-eastern parts of the land.

In August 2012, the council commenced proceedings against the respondents by way of an originating application, effectively seeking declarations that the earthworks constituted assessable development where no permit had been given and therefore, the respondents had committed development offences.

Decision

Development offence

The court noted that the planning scheme provided that filling activities involving more than 50m³ of fill constituted operational work that was *assessable development* on flood prone land that was within a Special Management Area.

Under both the IPA and SPA regimes, operational work (which included filling activities) associated with "*management practices for the conduct of an agricultural use...*" was, in effect, exempt development. However, despite the respondents' assertions to the contrary, there was no evidence which would support the proposition that any of the works carried out by the respondents were operational works associated with management practices for the conduct of an agricultural use.

The respondents also sought to rely on various propositions to defuse their alleged wrongdoing, which included that:

- they did not know at the time of purchase that the land was subject to the relevant planning controls;
- the council officers failed to advise them if and when approvals were required;
- the council failed to properly condition subdivisional approvals in respect of the upstream properties to provide for drainage of water from those properties that had a "no worsening" effect on downstream properties including the land.

The court, having regard to the evidence, dismissed the respondents' propositions respectively as follows:

- their state of mind at the date of purchase was irrelevant;
- it was incumbent on the landowner to comply with the law;
- the parties' water experts opined that at worst, upstream developments might have contributed an increase of 10% in flows over the land and therefore, any suggestion that the carrying out of the works was to respond to the applicant's failure to properly condition upstream developments which caused flooding on the land could not be accepted.

In light of the above, the court was satisfied that the respondents committed a development offence by undertaking, without a valid development approval, the works associated with the house building platform, the driveway to the house, the excavated dam system down the eastern boundary, the use of spoil for the building platform and to raise levels around the dams, and the earthworks thereafter.

Enforcement orders

The court noted that it was a matter of discretion whether to grant the enforcement orders being sought by the applicant and the leading authority bearing upon the exercise of the discretion was *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335. Such discretion was a broad one, which involved the balancing of matters of both public and private interest.

The court observed that the following matters were relevant to the exercise of discretion:

- the delay in the applicant taking actions against the respondents, particularly in relation to the earlier earthworks (which the applicant made concessions to them at the hearing);
- the notions of enforcement of public duty in the public interest in orderly development and equal justice;
- the flooding and other impacts of the work undertaken by the respondents on the land and adjoining properties;
- the likely expenditures or inconvenience for complying with the enforcement orders being sought by the Applicant.

Taking the above matters into account, the court did not consider there was any justification for undertaking the unlawful works and therefore, the applicant should be entitled to the enforcement orders it sought.

Held

The court ordered that, subject to final submissions upon delivery of judgment as to the form of orders and costs:

- declarations in terms of paragraphs (a) and (c) of the amended application were made;
- the enforcement orders sought in paragraphs (b), (d) and (e) of the amended application were made, save that:
 - the removal of dam spoil around the excavated dams should be limited to spoil around the western and southern side of the southernmost excavated dams; and
 - the requirement to remove the driveway should be stayed, pending the prompt making of, and diligent prosecution of, and determination of a development application seeking a development permit for operational work for the driveway, with the question of the continuation or modification of that requirement then able to be revised following the assessment and decision in respect of that development application.

The application was allowed, with the parties to return back with a final form as to orders and costs.

Construction of a town planning consent permit

Ronald Yuen | Jonathan Evans

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Sunshine Coast Regional Council v Owners of Lots 1-40 on SP115731 at Noosa Lakes Resorts & Anor* [2013] QPEC 13 heard before Robertson DCJ

June 2013

Executive Summary

This case was concerned with an application by the Sunshine Coast Regional Council in which a number of preliminary legal issues arising from a town planning consent permit granted by the former Noosa Shire Council (now the Sunshine Coast Regional Council) for the Noosa Lakes Resort were raised and required the court's determination. The court was generally content with the council's submissions in respect of the preliminary legal issues and granted the orders on terms substantially similar to those sought by the council.

Case

This case was concerned with an application by the council for: a declaration that the use by any lot owner in the Noosa Lakes Resort was unlawful if the ground floor of that lot had kitchen facilities; a declaration which related to classification of the buildings within each lot; and enforcement orders.

A number of preliminary legal issues arising from a town planning permit given by the council in 1998 were identified and the court was asked to determine them as its determination would influence the conduct of the council's application.

The court summarised the preliminary legal issues as follows:

- a. *Whether it is a requirement of the development approval applying to the Lots that the ground floor of each Lot cannot lawfully contain kitchen facilities.*
- b. *Whether the development approval is for;*
 - (i) *94 Lots (each has an additional permitted use, the use of the downstairs area for the accommodation of parties unrelated to the users of the upstairs area); or*
 - (ii) *188 self-contained dwellings.*
- c. *Whether condition 8 of the development approval;*
 - (i) *is relevant and reasonably required within the meaning of the repealed Local Government (Planning and Environment) Act 1990 ("the P&E Act");*
 - (ii) *applies to the whole of the whole of (sic) each Lot or only to the downstairs portion.*

Facts

The initial development application approved by the council in 1997 was for 94 town houses with each town house to be occupied by a single family unit.

Subsequently, the council consented to an amendment to the initial approval in 1998 which allowed separate occupation of the downstairs area and "dual key" entry to each town house so that the downstairs bedrooms could be separately let to people attending the nearby conference centre.

The plans referenced in condition 7 of the current approval allowed for 94 town houses with generally 1 or 2 bedrooms, a living area, a kitchen and ensuite upstairs and 1 bedroom, a living area and an ensuite downstairs. They were built as 24 blocks of 4 town houses each. Each town house had 1 water connection, 1 power connection, a single water meter for upstairs and downstairs, a single waste receptacle located outside, and a shared laundry on the ground floor and bathroom and toilet on each floor.

Since the town houses were completed, owners had either:

- lived-in or let the whole town house as one family unit;
- used the top floor for long term accommodation and let the downstairs area for conference or other short term accommodation use; or
- let the downstairs for use by long term tenants as a place of residence, independently of the upstairs use.

Some of the long term tenants who occupied the downstairs area installed or used cooking facilities and fires had occurred.

Decision

Issue a

The court, by reference to the Macquarie Concise Dictionary definition of "kitchen", observed that the current approval, including the plans referred to in condition 7, when read as a whole, did not provide for kitchens in the downstairs unit while ablution facilities were. Such observation was further reinforced by the court's construction of the approved use as set out below.

Issue b

The court noted that the plans forming part of the current approval clearly provided for 94 town houses with 1 or 2 bedrooms, a kitchen, an ensuite and living area upstairs and 1 bedroom and ensuite and living area downstairs. Having considered the plans and the definitions of "accommodation building", "multiple dwelling", "accommodation unit" and "dwelling unit" in the *Noosa Planning Scheme* in force at the time of the current approval, the court observed that the use provided for in the current approval could not sensibly be construed as relating to 188 dwellings as part of 94 lots. The court believed the approved use should be construed as "*Resort, indoor entertainment/function room (conference centre) and ancillary facilities (94 multiple dwellings each containing an accommodation unit)*".

Issue c

The court observed that condition 8 of the current approval was imposed in response to the dual key arrangement forming part of the amendments to the initial approval, given that the initial approval was for 94 standard Class 1 town houses for use by 1 family unit and did not contemplate separate occupation of the downstairs area. On that basis, the court believed condition 8 was an appropriate planning response and was not in conflict with the *Building Act 1975*.

Held

The court ordered that:

1. It was a requirement of the current approval applying to the lots that the ground floor of each lot could not lawfully contain kitchen facilities, which included any equipment used for the preparation and cooking of food, but did not include facilities usually found in motel room such as tea making equipment, electric jugs and a bar fridge.
2. The current approval for Noosa Lakes Resort was for 94 lots (each having as an additional permitted use, the use of the downstairs area for the accommodation of parties unrelated to the users of the upstairs), and not for 188 self-contained dwellings.
3. Condition 8 of the current approval was relevant and reasonably required within the meaning of the repealed *Local Government (Planning and Environment) Act 1990* and applied to the whole of each lot.

Public need for a proposed development

Ronald Yuen

This article discusses the decision of the Queensland Planning and Environment Court in the matter of *Dexus Wholesale Property Ltd v Townsville City Council & Ors* [2013] QPEC 14 heard before Judge Robin QC DCJ

June 2013

Executive Summary

In this case the Planning and Environment Court was required to consider whether the proposed expansion of the Stockland North Shore Shopping Centre was "too big, too soon" as components of the proposal would not achieve "benchmark" performance levels for several years.

Case

The hearing involved a submitter appeal by Dexus Wholesale Property Ltd, the operator of a shopping centre in the locality known as The Willows against Townsville City Council's decision to approve a large expansion of the Stockland North Shore Shopping Centre at Burdell by Stockland Development Pty Ltd (**co-respondent**). This was another instalment of the Townsville shopping centre wars between rival operators of successful centres.

Facts

Stockland North Shore was initially approved by a decision notice issued for a shopping centre and commercial premises on 14 August 2008 premised on a preliminary approval by way of an order made by the court on 29 March 2007 which incorporated a plan of development. The development application for the preliminary approval was lodged on 23 May 2003, which was before the *City of Thuringowa Planning Scheme 2003* commenced on 20 October 2003 (which was anticipated to be replaced with a new planning scheme by the end of 2013).

On 23 December 2010, the co-respondent applied for a development application for a material change of use for extension to an existing shopping centre and commercial premises (discount department store, mini-major and specialty retail shops) which affected about 6.15 hectares of the overall approximate 1,000 hectares of the plan of development area.

The council approved the application subject to conditions, against which the appellant commenced an appeal. A similar appeal (624/2011) was lodged by Bushland Grove Pty Ltd, a company interested in residential and commercial development at Mount Low, northwest of the subject site, but it elected to withdraw before the hearing commenced. Stockland North Shore at the time of the hearing was a supermarket based centre, which consisted of a supermarket of 3,609m², retail specialities of 1,123m² and non-retail services of 1,047m². Under the approval the gross lettable areas (**GLA**) increased to 4,611m², 4,223m² and 1,544m² respectively, with the addition of a discount department store of 7,189m² and mini-majors (tenancies exceeding 400m²) of 2,479m². This resulted in a total increase of the centre's GLA (retail) from 4,732m² to 18,505m². The issues presented to the court for consideration were mainly related to whether the approval was in conflict with the 2003 planning scheme and the preliminary approval, whether there was any need for the proposal and whether the proposal's prematurity was so gross that the approval should not have been given.

Decision

The court considered the establishment of planning areas by the 2003 planning scheme, including section 3.3 (Centres Planning Area), which established a centres hierarchy in ascending order of scale. As part of the court's consideration, it noted that, whilst the subject site was not mapped as a centre or as part of the centre's planning area in any way, events had led to it being identified as the sub-regional centre in Mount Low-Deeragun, for which it was conceded to be suitable (with which the parties agreed). Notably, the court identified that within section 3.31 (Character Statement) of section 3.3 (Centres Planning Area) reference was made to the "establishment" of centres (be it district or sub-regional centres), particularly in relation to a "sub-regional centre in the Mt Low-Deeragun area". With that in mind, the court was of the view that desired environmental outcome 5, which provided that "economic development in the City is strong, diversified, supports local employment and enhances quality of life" provided support to the co-respondent's proposal.

In light of the appellant's allegation that the proposal could offend the centres hierarchy, the court considered the importance ascribed by it to the preservation of the integrity of planning for centres, which was recognised and apparently endorsed by the Court of Appeal in *Australian Capital Holdings Pty Ltd v Mackay Regional Council* [2008] QCA 157 (*Australian Capital Holdings* case) at [58]:

The importance of the hierarchy of retail shopping centres or precincts established by planning schemes and the necessity of not acting so as to prejudice the viability of the established hierarchy has been recognised in a number of planning decisions.

The court noted that the distinction between that case and this appeal was that the council in this appeal, as the planning authority, supported the proposal rather than opposed it, as was the case in *Australian Capital Holdings* case. It was also noted in terms of the timing of the proposal, given that the 2003 planning scheme was coming to the end of its life, it raised the question of whether any good end would be served by waiting for it to finally go (whilst it was unknown what would replace it). Nonetheless, the court considered, by requiring the co-respondent to go through the stages of neighbourhood centre, district centre etc. as submitted by the appellant, it would be totally pointless and would do no more than condemning all interests affected to avoidable episodes of disruption and inconvenience.

The court believed the relevant question was whether an appropriate "time" had come or loomed, for a small sub-regional centre, to be established. In this regard, it was accepted that the time at which judgments were made of "establishment", was when a centre was up and running, rather than at the time of approval. The court was of the view that, inevitably, there would be a certain amount of delay in the finalisation of designs and constructions and so on, and it was accepted that conditions of approval could impose a longer (or a defined) delay if appropriate. In this regard, the court relevantly noted that the development to which the plan of development and the preliminary approval applied was to be completed within 25 years after the preliminary approval took effect. Accordingly, the court concluded that there was no (or only a purely technical) conflict with the centres hierarchy provisions in the 2003 planning scheme.

The appellant asserted that the proposal conflicted with section 7.6(3) (Purpose of the commercial planning area code) and specific outcomes 15 and 16 of the plan of development, which generally revolved around the question of need for the proposed development. The court dismissed the asserted conflict, while acknowledging that development proposals that were premature should not be approved (see *Adam v Gold Coast City Council* [2007] QPEC 025; (2007) QPELR 379). In the context of the appeal, the court considered it appropriate that the question of prematurity be approached as it was in *Westfield Ltd v Gold Coast City Council* (2002) QPELR 542 (*Westfield* case) and relevantly noted, by reference to the *Westfield* case, that "(p)rematurity is usually only a reason for refusing an application if it involves some substantial public disbenefit" (at para 64) and "(i)n reality a growing population enjoys early benefits if developers are prepared to provide them with facilities sooner rather than waiting for the catchment population to be filled. It is not good planning to allow a population to be created without any facilities..." at [66].

Concerns were raised by the economists for both the appellant and Bushland Grove Pty Ltd that the proposal was premature. The court however, was not persuaded by such concerns (to warrant a refusal), particularly given the lack of adverse impacts, in line with the *Westfield* case, and that the co-respondent was an outfit which knew how to operate shopping centres. The court took some comfort from the co-respondent's proposal that 2015-2016 would be the first full year of operations and that the opening would not occur before December 2015 and believed that any possible prematurity could be overcome by imposing a condition to preclude commencement of operations before December 2015.

The court further considered the economists' forecasts on the anticipated performance of the proposal, taking into account the "benchmark" performance levels and also, the creation of employment by the proposal. On balance, the court was satisfied that the co-respondent had established economic need, and as it related to planning or public need, the proposal would add into the mix or place additional focus on considerations of competition, convenience and choice.

Contrary to the proposition put forward by the appellant, the court found that the proposal was not in conflict with the preliminary approval and to the extent of any conflict with the 2003 planning scheme, the proposal's conformity with the preliminary approval would outweigh such conflict.

The court was more persuaded by the co-respondent's approach that this was simply a conditions appeal. It was ultimately a matter of timing bearing in mind the scale of the proposal, which would be capable of being conditioned in such a way so as to ensure that it satisfied the relevant planning instruments.

Accordingly, the court dismissed the appeal, subject to a condition being included in the approval which delayed the commencement of operations in the proposed development until December 2015 or later.

Held

The appeal be dismissed, subject to imposition of a condition delaying commencement of new uses.



COLIN
BIGGERS
& PAISLEY
LAWYERS

Brisbane Sydney & Melbourne

Level 35, Waterfront Place, 1 Eagle Street
Brisbane Qld 4000
Australia

E law@cbp.com.au

T 61 7 3002 8700
F 61 7 3221 3068

Level 42, 2 Park Street
Sydney NSW 2000
Australia

E law@cbp.com.au

T 61 2 8281 4555
F 61 2 8281 4567

Level 23, 181 William Street
Melbourne Vic 3000
Australia

E law@cbp.com.au

T 61 3 8624 2000
F 61 3 8624 2031